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THE LEGAL STATUS OF FAMILIES AS INSTITUTIONS

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Historically, our legal tradition has seen a fundamental contradiction between the family and the individual, or, to put it differently, has preferred to treat the family as a corporate unit rather than as a collection of isolated individuals. This preference accounted for Blackstone's assertion,

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs every thing. . . . Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage.¹

By the same token, the children born into a family were expected to fall under the authority of its head. The family, in other words, was taken to constitute a unit with a legal personality that transcended and subsumed the individual rights of its constituent members.

The subordination of individual rights within the family was never complete. Husbands were not legally represented as owning their wives or their children—although they were known to sell one or the other. In principle, our tradition insisted upon a difference between family members and slaves, although early advocates of women's rights were wont to emphasize the similarity, arguing that married women, effectively, should be viewed as slaves.² Instructively, southern slaveholders also evoked the similarities between

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¹ 1 WILLIAM BLACKSTONE, *Of the Rights of Persons, in* 1 COMMENTARIES OF THE LAWS OF ENGLAND 430 (Univ. of Chicago Press ed., 1979) (1765) (citations omitted).

² *E.g.*, ANGELINA GRIMKÉ, *Letters to Catherine Beecher, Letter XII, in* THE FEMINIST PAPERS: FROM ADAM TO DE BEAUVOIR 320-22 (Alice S. Rossi ed., 1973). For the general use of the metaphor, see BLANCHE GLASSMAN HERSH, *THE SLAVERY OF SEX: FEMINIST-ABOLITIONISTS IN AMERICA passim* (1978).

family members and slaves, not to protest the subordination of married women, but to emphasize the humanity of slavery as a social relation.³

The conjugal, or nuclear, family of our tradition has always co-existed uneasily with notions of individual rights and responsibilities, but until recently the heavy hand of what Locke called "the Customs or Laws of the Countrey"⁴ obscured the full measure of the conflict. The issue surfaced during the discussion of married women's property rights in New York state during the mid-nineteenth century. Traditionalists opposed such rights on the ground that they would inevitably disrupt Blackstone's vision of the partners to a marriage as embodied in one person—the husband. Advocates of women's rights supported these rights on the ground that married women should indeed be recognized as separate persons—and be properly equipped to protect themselves against their husbands' possible abuse or malfeasance. In the event, reform of married women's property rights primarily resulted from the efforts of a third group, which sought not to further the independence of women, but rather to bring greater consistency to the law of property and to conform that law to the social and economic realities of the developing capitalist economy.⁵

The debates over the property rights of married women foreshadowed a continuing debate over the rights of women as individuals—that is, women's natural rights. Many of those who favored the persisting subordination of women within families did so because they favored a view of the family as an island of traditional hierarchy within a swirling sea of capitalism and individualism. It is, nonetheless, instructive to note that many of those who most staunchly supported the traditional concept of the family came to oppose the persistence of slavery, which many of them perceived as both a moral outrage and a fetter on economic development.

The issue might be seen as a difference over the appropriate composition of families. The emancipation of the slaves effectively ensured the triumph of a very narrow conception of family and, however unintentionally, paved the way for the recognition of the family as little more than a contractual union of free individuals. Intuitively, many of us would insist upon the distinction between wives and children since the former first enter into the union voluntarily

³ For the general use of the metaphor, see ELIZABETH FOX-GENOVESE, *WITHIN THE PLANTATION HOUSEHOLD: BLACK AND WHITE WOMEN OF THE OLD SOUTH* 101 (1988).

⁴ JOHN LOCKE, *The Second Treatise of Government*, in *TWO TREATISES OF GOVERNMENT* § 82 (Cambridge University Press 1960).

⁵ NORMA BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK* (1982).

whereas the latter are born into it and spend many years in a state of physical as well as economic dependence.⁶ But our own times sadly reveal that the tensions between the freedom of individuals fundamental to the market and the family as a corporate unit also affect the status of children.

But questions remain. How should we think about the individual rights and responsibilities of family members? Does the family legally constitute something more than the sum of its constituent parts? To insist upon the family as a moral or social unit will not suffice without a clear—and implicitly corporate—legal status. The arguments against untoward (however untoward is defined) state interference in family affairs normally assume the existence of an intact family. I do not wish to engage such questions as whether parents who are Christian Scientists have the right to deny medical care to a child with leukemia or meningitis. Rather, I wish to raise the question of whether the arguments apply with equal force in cases of divorce or other forms of family disintegration. Are there legal grounds for denying an abused spouse or child recourse against the abuser? Do we not assume that family members have rights as individuals? And, if we do, what legal constraints do we place upon their independent relation to the polity and the market?

The point at issue is whether family members are held accountable for behaving towards other family members as they would be obligated to behave toward any other individual or whether they are held accountable for behaving in certain ways toward other family members because of their special status as family members. Generally, this question has been framed as an inquiry into the power of fathers over other family members. Since the nineteenth century, and at an accelerating rate during the twentieth, the extreme forms of paternal power have come under increasing criticism and legal restriction. But the dismantling of that power has not led to new conceptions of the family as a corporate unit. Thus, the conception of the family as a group of individuals has followed naturally from the rejection of the view that the family's corporate identity was invested in the powers of its head. Tellingly, this rejection has also led to arguments that the concept and legal prerogatives of family relations should be extended to different groupings of individuals.

Until very recently, most people would have considered marital rape a contradiction in terms. If there is marriage, then there cannot be rape—although there may be an unacceptably violent exercise of marital rights. Today, many people assume that individual rights override marital rights—that behavior that is unacceptable if

⁶ For an insightful discussion positing that individual rights for children are "wrong rights," see ELIZABETH WOLGAST, *THE GRAMMAR OF JUSTICE* 28-38 (1987).

two people are not married is also unacceptable if they are married. The same could be said of child abuse. American society has always attributed some rights to members of families. Unlike early Roman society, we have never given fathers the right to kill their offspring with impunity. Even slaveholders were not legally allowed to kill their slaves on a whim.⁷ But we have, at law, and especially in sentiment, granted special rights to the heads of households or families on the premise that their responsibility for family well-being entitled them to broad discretion in the exercise of their authority.

It is difficult, if not impossible, to separate the discussion of the family from the discussion of marriage. The movement for women's political and economic equality with men has primarily targeted women's traditional subordination within the family. In attempting to free women from that subordination, supporters of women's rights, have, however inadvertently, contributed the destruction of the last vestiges of the family's corporate status. But opponents of women's rights and defenders of the family have failed no less woefully by not providing a new conception of the family as a corporate unit. Thus, discussions of women's and children's rights as members of family units invariably focus on what Elizabeth Wolgast has called "wrong rights"—their rights as autonomous individuals.⁸ I would argue that a revitalized view of the family requires a new conception of its corporate identity. Such a conception must simultaneously allow for women's full participation as parents and for both parents' binding economic responsibility to their children.

If we are to defend the rights of families as units, then perhaps we should begin by endowing them with some greater measure of permanence and a more binding mutual responsibility than that granted by a normal contract. Perhaps parents should be denied the right to divorce until their children have attained their majority or are economically self-sufficient. In the case of intolerable unhappiness, a husband and wife could separate but would not be allowed to remarry or to assume economic responsibility for another family. In pre-Revolutionary France such a separation was known as the separation of bed and board.

To be sure the enforcement of a married couple's binding economic responsibilities to each other and their children would require the cooperation of the federal government, but that is another debate. For the moment, permit me to conclude by reasserting that any serious discussion of families and individual responsibilities

⁷ On the law of slavery, see MARK V. TUSHNET, *THE AMERICAN LAW OF SLAVERY: CONSIDERATIONS OF HUMANITY AND INTEREST* (1981) and EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* (1974).

⁸ See *supra* note 6, at 28-38.

must begin with attention to the legal status of the family as an institution. A simple return to fathers of their historical power as heads of families will not suffice.