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# THE SEXUAL INJUSTICE OF THE TRADITIONAL FAMILY

Jane E. Larson†

As our moderator and first speaker pointed out, the premise of the title of this panel—"individual rights and family responsibility"—posits that increased individual rights for family members leads to a decline in family responsibility. We should start by defining the terms "individual rights" and "family responsibility" so that we know what we are talking about when we make that presumption. As Professor Fox-Genovese pointed out, over the last generation, it is largely women who have demanded legal and social recognition as individuals within the family (and not just as mothers and wives), and it is increasingly men who have financially and emotionally abandoned their families. It is these linked developments, largely gender-specific in character, that lead to the modern perception that families are in crisis. In my remarks today, I want to approach the question posed for this panel in a slightly reframed form. My query is, "How is men's irresponsibility to family causally related to women's assertion of individual rights?"

My contention is that the traditional family model was built on the presumption that men could be "roped" into taking emotional and financial responsibility for mothers and children only if fathers were granted virtual dominion as family head. By law and custom, fathers were made small kings in their family fiefdoms with virtually unchecked authority over their dependents. For example, under an ancient rule of family law explained in an 1868 North Carolina case,<sup>1</sup> wife beating was permitted on the ground that "every household has and must have a government of its own, modeled to suit the temper, disposition and condition of its inmates, and we will not intervene or attempt to control it."<sup>2</sup> Another example is that under the "modern" rule of family law still prevailing in many states, we recognize the right of a husband to rape his wife without legal consequence.<sup>3</sup>

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<sup>1</sup> *State v. Rhodes*, 61 N.C. 453 (1868).

<sup>2</sup> *Id.* at 457.

<sup>3</sup> Anne L. Buckborough, *Family Law: Recent Developments in the Law of Marital Rape*, 1989 ANN. SURV. AM. L. 343 (1989).

As women have demanded justice within the family—legal equality with their male partners, shared responsibility for the work necessary to sustain the family community, and meaningful guarantees of economic support the traditional bargain has unraveled. Because women have been compelled to trade away their rights as individuals in order to get men's commitment to their families, when women turn around and claim justice within the family, it appears to be a breach of the traditional contract. Because they view women as having breached the contract, men apparently feel justified in walking away from the "deal," both figuratively and literally.

The notion that women must sacrifice individual rights in a political bargain to gain family rights as mothers sounds profoundly illiberal. I mean "illiberal" in the sense that the Federalist Society uses the term. That is, such a trade-off violates the classically liberal political vision of free and equal individuals as the foundation of society.<sup>4</sup> But in fact, the sexual injustice of the traditional family has roots in classical liberal political theory that can be traced back to Rousseau.

In *Emile*,<sup>5</sup> a tract on the education of young people for citizenship, Rousseau argues that if women refuse to take a subordinate role in the family, men in turn will refuse to be fathers because they will no longer enjoy what they expect to gain from family life.<sup>6</sup> For women to get their children's fathers to support them, Rousseau explains, women must coax men into marriage and then must cater to their needs. Married women recognizing that dependence and subordination within the marriage relationship is necessary, should not seek independent goals, such as careers, or demand equality with the father in family governance, for this creates strife and undermines family unity.<sup>7</sup>

It is either refreshing or grim to note that Rousseau, as well as his modern-day defenders such as Allan Bloom,<sup>8</sup> openly acknowledge that by egalitarian standards, this inequality of women within families is unjust. Yet Bloom<sup>9</sup> and others, including some on this panel, continue to defend this inequality as necessary to the survival of families.

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<sup>4</sup> See, e.g., JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287 (Cambridge University Press 1960) ("[A]ll Men are naturally in . . . a State of perfect Freedom to order their Actions, and dispose of their Possessions, and Persons as they think fit, within the bounds of the Law of Nature, without asking leave, or depending upon the Will of any other Man.") (emphasis omitted).

<sup>5</sup> JEAN-JACQUES ROUSSEAU, EMILE 333-34 (Barbara Foxley trans., 1911).

<sup>6</sup> *Id.* at 324.

<sup>7</sup> *Id.* at 324-26.

<sup>8</sup> ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND 115-16 (1987).

<sup>9</sup> *Id.* at 115, 128-31.

Feminism has directly challenged this political justification for the traditional family by asking why the family—with its sex-specific division of labor and the related economic vulnerability of mothers and homemakers—should be immune to the same principles of justice that govern all other institutions of society.<sup>10</sup> Further, because women feel no inherent conflict between their identity as individuals and their identity as parents, women have made these claims for family justice *in defense of the family*, as well as in the name of women as individuals. For the family is a “school of justice,” to use the term of political philosopher Susan Moller Okin.<sup>11</sup> Children’s moral development is centered in families. In this sense, Okin argues that “[r]ather than being one among many co-equal institutions of a just liberal society, a just family is its essential foundation.”<sup>12</sup> Justice in the family is perhaps even *more* important than justice in any other social institution.

Thus, any discussion of family law that begins from the premise that individual rights threaten family responsibility can be true only to the extent that (1) we remain willing to allow men to make commitment to their families contingent on unjust claims to authority over other family members, and (2) we accept the view that justice is somehow incompatible with the intimacy, harmony, altruism, generosity, and love we seek in our family lives. Families *are* essential to our society, and public policymakers should be profoundly concerned with the well-being of families. It is within families that we raise children, and it is there that we seek and give the love and companionship that makes it possible for us to survive the loneliness and harshness of our lives. Personal and social well-being, now and in the future, demand that we do both things well.

To balance the claims of individual rights and family responsibility in crafting our family law, however, we need a new vision of the social contract underlying the family. Whatever the imagined practical virtues of a social vision that demanded women’s subordination as a condition for male involvement in the family, or that posited an inherent conflict between justice and the family, such a view imposes too high a cost—both in the way it undermines women as full citizens in our society, and in the way it fundamentally subverts the moral education of our children. Thank you.

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<sup>10</sup> See generally SUSAN MOLLER OKIN, *JUSTICE, GENDER AND THE FAMILY* (1989) (any adequate theory of moral and social justice must take account of the family).

<sup>11</sup> *Id.* at 17.

<sup>12</sup> *Id.*