



## Alabama Law Scholarly Commons

---

Articles

Faculty Scholarship

---

1984

### We Are Family: Changing Times, Changing Ideologies and Changing Law

Steven H. Hobbs

*University of Alabama - School of Law*, shobbs@law.ua.edu

Follow this and additional works at: [https://scholarship.law.ua.edu/fac\\_articles](https://scholarship.law.ua.edu/fac_articles)

---

#### Recommended Citation

Steven H. Hobbs, *We Are Family: Changing Times, Changing Ideologies and Changing Law*, 14 Cap. U. L. Rev. 511 (1984).

Available at: [https://scholarship.law.ua.edu/fac\\_articles/161](https://scholarship.law.ua.edu/fac_articles/161)

This Article is brought to you for free and open access by the Faculty Scholarship at Alabama Law Scholarly Commons. It has been accepted for inclusion in Articles by an authorized administrator of Alabama Law Scholarly Commons.

# WE ARE FAMILY: CHANGING TIMES, CHANGING IDEOLOGIES AND CHANGING LAW

STEVEN H. HOBBS\*

We will raise a family  
A boy for you, a girl for me  
Can't you see how happy we will be  
TEA FOR TWO

—Irving Caesar

The “perfect” family of four captured in song. Grim statistics suggest that the reality stands in stark contrast to the lyrical fantasy family.<sup>1</sup> The rising levels of divorce and out-of-wedlock pregnancies, especially among teenagers, are spawning more female-headed households than ever imagined.<sup>2</sup> The number of women and children living below the poverty

---

\* Assistant Professor of Law, Washington and Lee University. B.A. 1975, Harvard College; J.D. 1979, University of Pennsylvania. This article was made possible in part through a research grant from the Frances Lewis Law Center. The author wishes to thank his colleagues Denis Brion, Fay Wilson Hobbs, Toni Massaro and Jim Phemister for their helpful comments on earlier drafts.

1. The monumental study by Carter and Glick documents that the divorce rate has more “than doubled between 1960 and the mid-1970’s . . . . In [1975] the number of divorces reached 1.0 million for the first time, whereas the number of marriages declined to 2.1 million.” H. CARTER & P. GLICK, *MARRIAGE AND DIVORCE* at 393-394, (rev. ed. 1976).

See also G. MASNICK & M. BANE, *THE NATION’S FAMILIES: 1960-1990* (1980) [hereinafter cited as *MASNICK & BANE*]. This significant study analyzes fertility rates, illegitimacy ratios, women joining the workforce, and the increase in solitary living arrangements.

2. See U.S. COMM. ON CIVIL RIGHTS, *CLEARING HOUSE PUB. 78, A GROWING CRISIS: DISADVANTAGED WOMEN AND THEIR CHILDREN* (May 1983) [hereinafter cited as *A GROWING CRISIS*].

In 1960 female-headed families were 10 percent of all families; in 1970, 10.8 percent. By 1981 female-headed families were 18.8 percent of all families with children under 18 years of age, and the number of female-headed families had increased by 2.8 million (97 percent) since 1970. . . . By 1981, 47.5 percent of black families with children present were headed by women, a rise from an already high 30.6 percent in 1970. Among Hispanics, women headed 21.8 percent of all families in 1981, an increase from the 16.9 percent figure of 1970.

*Id.* at 5.

A recent study by the Alan Guttmacher Institute showed that teenage pregnancy rates have increased to a level where 4 out of 10 girls who are now 14 years of age will get pregnant in their teens. The study found the following:

About 1,142,000 pregnancies among teenagers were terminated in 1978; 434,000 ended in abortion, and 362,000 resulted in births conceived out of wedlock. Only 192,000—one in six pregnancies—concluded as births conceived following marriage; the remainder were miscarried.

Faced with an out-of-wedlock pregnancy, most teenagers chose abortion (only six percent of abortions among teenagers were obtained by married women). Of those who did not obtain an abortion, 69 percent remained unmarried and

line continues to increase at an alarming rate as fathers abdicate their custodial and support responsibilities.<sup>3</sup> Children have an enhanced probability of living in a divorced, single-parent household or a "blended" family created by remarriage.<sup>4</sup> Yet it is upon the individual family unit that society pins its hope for the nurture, caring and development of the next generation.<sup>5</sup>

This bleak mosaic is set against a backdrop of revolutionary changes in family law. In recent years we have changed the way we think about family law as evidenced by such developments as no-fault divorce, joint or shared custody, equitable property distribution, and alternative, non-marital relationships.<sup>6</sup> Although some have welcomed these changes, others are concerned that the new developments have caused the new complex problems.<sup>7</sup> Still, the law must stand as a mechanism for ordering family life and structure. It is through the law that society demands

31 percent married to legitimize the birth.

THE ALAN GUTTMACHER INSTITUTE, *TEENAGE PREGNANCY: THE PROBLEM THAT HASN'T GONE AWAY* at 17 (1981).

3. "Female-headed families are disproportionately impoverished. Families headed by women with no husband present constituted 47 percent of all families below the poverty line in 1981. Minority female heads of household experience even higher levels of deprivation. More than half (53 percent) of all female-headed black and Spanish-origin families were below the poverty line." A GROWING CRISIS, *supra* note 2, at 14.

See also Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 U.C.L.A. LAW REV. 1181 (1981); Hunter, *Child Support Law and Policy: The Systematic Imposition of Costs on Women*, 6 HARV. WOMEN'S L. J. 1 (1983); D. CHAMBERS, *MAKING FATHERS PAY* (1979).

4. Twenty percent (12 million) of American children live in a one-parent household. V. PACKARD, *OUR ENDANGERED CHILDREN: GROWING UP IN A CHANGING WORLD* at 259 (1983). One-third of all American youngsters "under age 18 are no longer living with both their natural parents." *Id.* at 186.

5. See discussion *infra* in Part Two, notes 39-63 and accompanying text.

6. See *The Revolution in Family Law: 25 Years of New Directions*, 5 FAM. AD. VOC. (1982). In the introduction of the issue, the editors observe the following:

Some have said that the family as we know it is dying. They cite as evidence the increase of divorce, non-marital cohabitation, and single-parent families.

But the family is neither dead nor dying; it is simply evolving into new forms. Like a tree, the family remains the center of life and the changes we have witnessed over the past quarter century represents offshoots, not the destruction of this basic unit.

As family structure has changed, so has family law. The differences in the practice of family law today are so vast and so drastic that they can only be labeled revolutionary.

*Id.* at 1.

7. In some areas, such as non-marital relationships, matters may have become worse, especially in regard to the children of such relationships. The uncertainty of when a relationship is formed and what type of relationship is formed is as confusing as the unpredictability of a court of law finding a relationship exists.

that individuals fulfill specific functions within the family unit, especially where children are involved.

But how does one describe the contemporary American family? Family is currently a popular discussion topic, especially among politicians. Searching for an elusive definition is made difficult by the diverse forms of family unit structures. The type of intimate family relationships established by men and women will be determined in part by their ideological frames of reference: what values and philosophies motivate and guide individuals when they come together to form a family unit.<sup>8</sup> The ideology shapes the individual's perception of his or her role within the family unit.

As ideologies on family styles develop and evolve, the possible variations of family structure create different challenges for the law as a facilitator and maintainer of necessary family functions.<sup>9</sup> Most ideological response to family style is motivated by sociological, economic and political factors. In the current family law reform movement there is not a complete discussion of changes in these factors that have occurred over time between men and women, between adults and children, and between individuals of either sex and society's expectations of the individual in a family. One must ask: have our notions on the family in society changed so much that the assumptions upon which our family laws are based are no longer valid, thus rendering family law ineffective as a mechanism for ordering family life? Put another way, is the developing law based on traditional family law concepts or on optimistic egalitarian assumptions that have not yet been established in reality?

This article will examine the rapid changes in family law in terms of evolving ideological frames of reference held by individuals who form families. It will further analyze how the ideologies shaping family structure influence the policies and assumptions that underlie family law. This article will also examine how the policymakers who articulate societal demand often proceed from a narrow, usually traditional, ideological frame of reference. The principal thesis is that current family law is not fully reflective of the needs engendered by emerging family structures and the changing nature of intersexual, personal relationships. Nor

---

8. Ideology often gives individuals seeking to form a family unit a frame of reference from which the choice of unit structure is made. Factors which influence the ideological frame of reference include economic status, race, religion, political philosophy, and prior human relations experience. Ideological values which come into play in interpersonal relationships cover all points of view, including the traditional to the radical feminists to the playboy sexist.

9. In this regard ideology will determine whether an individual willingly submits to the authority of law by fulfilling basic family functions such as providing food and shelter. See discussion *infra* Part II, notes 39-63 and accompanying text.

is it an adequate benchmark of the demands placed on families by larger society.

First, there will be a brief survey of major changes in the law which have come about primarily as a result of major changes in society. Consideration is given to how the changes impact on the completion of primary family functions, especially that of childrearing.<sup>10</sup> Second, the article will examine what society requires of family units by attempting to define what a family is, what it does, and what its functions are from the vantage point of law. Acknowledging that different segments of society hold different philosophies on the functions of the family, this is a difficult task. Again, the focus is on the needs of family units with children. Third, there will be a critical examination of the emerging philosophical and scholarly debate on the nature of the family as a function of emerging ideological frames of reference. The principle focus will be on work which addresses society's agenda for the future directions of the family: what ideological dilemmas men and women will have to struggle with in the future to have functioning families. Finally, a revised agenda will be proposed for scholars, policymakers and practitioners who seek to address the needs of individual families as they wrestle with the complex problems of life. The principle recommendation is that future efforts of law reform must consider the interrelationship of what people actually do as a function of ideological frame of reference and what society can legitimately demand of family units.

### I. THE FAMILY LAW REVOLUTION AS A RESPONSE TO IDEOLOGICAL CHANGE

If form follows function, certainly law reform is driven by changing mores, experiences, realities and ideologies of society.<sup>11</sup> The past three decades have witnessed a revolution in family law driven by exciting changes in society.<sup>12</sup> For the purposes of this article, the most signifi-

---

10. In this article, the discussion of role within the family is specifically focused on the childrearing function. A particular ideological frame of reference will in part determine who has the role of primary income producer and primary child caretaker with the distribution of the attendant responsibilities of each role. The distribution of responsibilities between the two partners creating the family relationship becomes a critical issue at the dissolution of the family unit. (Who gets the kids?) Ideology plays a significant part in determining who receives the benefits and the burdens of childrearing.

11. See Llewellyn, *Behind the Law of Divorce: I*, 32 COLUM. L. REV. 1281 (1933).

12. The change in the ideology expressed in the law is profound. Reflecting in part, as it does, processes which are already well underway in society itself, it constitutes official recognition of the waning of housewife marriage as the dominant norm and of other sex-role stereotypes. At the same time new norms, ideals and symbolic expressions are being enshrined in the law. To some extent these seem to reflect what is going on in society. In other cases the new norms seem to be those of influential bodies of opinion whose ideas are different from

cant changes in the law have been spawned by advances in civil and individual rights, especially those affecting women.<sup>13</sup> The focus of the changes in family law centered on elimination or modification of the mechanisms which facilitate ordering familiar relationships by modernizing the law to reflect changing realities and ideologies within the family structure.

Chief among these changes was the attempted elimination of the subordinate role in which the law placed women.<sup>14</sup> Philosophically, at least, women no longer have to walk two steps behind the "master" of the house.<sup>15</sup> Women have equal or increased bargaining power and authority as to major decisions affecting the household.<sup>16</sup> Women in increasing numbers work outside of the home and pursue careers.<sup>17</sup>

The incidences of divorce and the laws regulating divorce have changed dramatically.<sup>18</sup> No-fault divorce laws have made ending a marital relationship easier from a technical point of view.<sup>19</sup> It is no longer

those held by the majority of men and women in the society. Finally, with the establishment of new egalitarian and democratic norms much direct legal sex discrimination withers away through repeal or disuse.

Glendon, *Power and Authority in the Family: New Legal Patterns as Reflections of Changing Ideologies*, 23 AM. J. COMPARATIVE L. 1, 3 (1975) [hereinafter cited as Glendon, *Power and Authority*].

13. See Fineman, *Implementing Equality: Ideology, Contradiction and Social Change*, 1983 WIS. L. REV. 789.

14. Stereo-typed sex roles which result in social and economic disabilities are as inimical to equality as are laws and practices which directly discriminate against women. Family law, especially, has traditionally embodied ideas of separate spheres of activity appropriate for women and men. It has carried the image of the woman as housewife, the man as breadwinner, and of a family authority structure dominated by the husband and father.

15. In the discussion below we will examine the reality of the role relations of men and women, considering whether in fact men have changed their views of women.

16. In law and in fact in the United States, England, France and West Germany one can say that husband and wife are nearly equal so far as decision-making powers are concerned. The trend furthermore seems to be toward the abolition of the remaining distinctions. There is a general tendency for the law to pull away from the area of interspousal relationships altogether, and the new ideology of marriage expressed in the laws emphasizes equality and cooperation rather than hierarchy within the family. These trends are related to a number of social and economic phenomena which sociologists collect under the heading 'modernization.'

Glendon, *Power and Authority*, *supra* note 12, at 26.

17. For further discussion on demographic measurements of participation in the workforce by women see, MASNICK & BANE, *supra* note 1, at 52-73. Masnick and Bane state that the workforce participation rate for married women living with their husbands and with children under 18 years rose from approximately 18 percent in 1950 to almost 48 percent in 1978. MASNICK & BANE, *supra* note 1, at 63.

18. See CARTER & GLICK, *supra* note 1.

19. The essence of no-fault divorce laws is that the couple or just one spouse must state that they are unable to live together in the bonds of matrimony. States articulate

necessary to go through the horrors of proving fault of one party. The no-fault statutes also reflect society's acceptance of divorce. "[T]he social stigma attached to divorce is increasingly being accepted as a normal solution to an unhappy marriage."<sup>20</sup> Alimony is no longer based on fault, but is generally calculated on the basis of financial need.<sup>21</sup> There is an assumption that the financially needy spouse will enter the workforce, thereby requiring only a short-term maintenance award or a lump-sum rehabilitation award.<sup>22</sup> The rules for property distribution at marital dissolution are becoming more equitable as states use partnership concepts which take into consideration that both partners worked to accumulate marital property.<sup>23</sup> The courts have also divided other property such as pensions<sup>24</sup> and interests in a professional degree or a practice.<sup>25</sup>

The law as it affects children has also changed. With the elimination of the maternal preference doctrine,<sup>26</sup> both parents can be entitled to custody depending upon the best interests of the children.<sup>27</sup> A parent's

this requirement in differing ways using such statutory mandates as irreconcilable differences, incompatibility, or irretrievable breakdown, the latter being the standard adopted in the Uniform Marriage and Divorce Act § 305, 9A U.L.A. 132 (1973) [hereinafter cited as U.M.D.A.]. In most instances, the standard can be met by declaring that the couple have lived apart for a specified period of time, usually six months. *See generally, FLR's 1983 Survey of American Family Law*, 10 FAM. L. REP. (BNA) 3017 (1984).

For studies of the impact of divorce on the individual parties, see J. WALLERSTEIN & J. KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* (1980); R. WEISS, *GOING IT ALONE: THE FAMILY LIFE AND SOCIAL SITUATIONS OF THE SINGLE PARENT* (1983); Peterson, Leigh, & Day, *Family Stress Theory and the Impact of Divorce on Children*, 7 J. OF DIVORCE 1 (1984).

20. Weitzman, *Changing Families, Changing Law*, 5 FAM. ADVOC. 5 (1983).

21. See U.M.D.A., *supra* note 19, at § 308. See generally Gillman, *Alimony/Spousal Support: From Punishment to Rehabilitation*, 7 COM. PROP. J. 135 (1980); Weitzman & Dixon, *The Alimony Myth: Does No-Fault Divorce Make A Difference?* 14 FAM. L. Q. 141 (1980).

22. See U.M.D.A., *supra* note 19, at § 308(b).

23. See UNIFORM MARITAL PROPERTY ACT § 4, 9A U.L.A. 29 (Supp. 1985). See also Glendon, *The New Family and the New Property*, 53 TUL. L. REV. 697 (1979); Oldham, *Is the Concept of Marital Property Outdated?*, 22 J. FAM. L. 263 (1984).

24. See *McCarty v. McCarty*, 453 U.S. 210 (1981); see generally Troyan, *Pension Evaluation and Equitable Distribution*, 10 FAM. L. REP. (BNA) 3001 (1983); Troyan, *Divorce and the Valuation of a Disability Pension*, 10 FAM. L. REP. (BNA) 3043 (1984).

25. See Note, *Family Law: Ought a Professional Degree Be Divisible as Property Upon Divorce?*, 22 WM. & MARY L. REV., 517 (1981); Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 U. KAN. L. REV. 379 (1980); Mullenix, *The Valuation of an Educational Degree at Divorce*, 116 LOY. L.A.L. REV. 227 (1983).

26. Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423 (1976-77). *But see* *Albright v. Albright*, 437 So. 2d 1003 (Miss. 1983) (upholding the tender years presumption).

27. See U.M.D.A., *supra* note 19, at § 402. See generally, J. GOLDSTEIN, A. FREUD & SOLNIT, *BEYOND THE BEST INTEREST OF THE CHILD* (1973) and *BEFORE THE BEST INTEREST OF THE CHILD* (1979); M. WHEELER, *DIVIDED CHILDREN* (1980).

social life or sexual orientation will no longer be an automatic disqualifying factor.<sup>28</sup> Both parents, at least theoretically, can be held responsible for the financial support of the child.<sup>29</sup>

Finally, one of the most dramatic changes has been the judicial recognition of alternative or non-marital relationships.<sup>30</sup> Promises, oral or written, to live together and share life and living expenses will be enforced in court.<sup>31</sup> Accumulated property of non-marital relationships can be divided at the dissolution of the relationship.<sup>32</sup> This is significant because the formal legal protections and rights afforded persons who comply with the marital regulations are given, at least in part, to those who specifically avoid those regulations with the incumbent protections and rights.<sup>33</sup>

One could argue that the revolution in family law has accomplished the task of equalizing marriage partners in terms of responsibility and authority during and after marriage. The new regime has taken office in the form of the new family law and is attempting to implement the new changes, refine the family ordering mechanism, and is generally claiming success in overthrowing the oppressive forces of the old family law. But has the situation really changed in terms of equalizing the sexual roles within a marriage, especially in the tasks of childrearing? Do parties have equal bargaining power in defining the terms of the relationship? If the parenting function falls on one sex more than another is it because of ideological response or the operation of divorce and custody laws?

Certainly it is easier today (for either party) to obtain a divorce or for fathers to have an opportunity to obtain child custody. But this is true only if we measure the success of the family law revolution in terms of ease of entering or exiting a relationship. Minimizing legal hassles, if that is the only goal of law reform, is short satisfaction to individuals whose needs and interests fall outside of the law's protections. Divorced mothers and single mothers, especially teenagers, whose households are in part created as a result of the reformed law, look to the law for pro-

---

28. See U.M.D.A., *supra* note 19, at § 402; *Jarrett v. Jarrett*, 78 Ill. 2d 337, 400 N.E.2d 421 (1979) (disregard of parent's homosexuality in custody determination).

29. See U.M.D.A. *supra* note 19, at § 309.

30. The landmark case in this area is *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P. 2d 106, 134 Cal. Rptr. 815 (1976).

31. In the *Marvin* case, principles of contract were applied to find an agreement to cohabit. Partnership or joint venture principles and express, resulting or constructive trust principles have also been applied to cohabitation relationships. See L. WEITZMAN, *THE MARRIAGE CONTRACT—SPOUSES, LOVERS, AND THE LAW* (1981); Foster & Freed, *Marvin v. Marvin: New Wine in Old Bottles*, 5 FAM. L. REP. (BNA) 401 (1979); Beck, *Non-traditional Lifestyles and the Law*, 17 J. FAM. L. 685 (1978-79).

32. See Flaherty, *Property Rights on Termination of Alternative Life Styles: Cohabitation*, 10 CAP. U.L. REV. 1 (1980).

33. See *supra* note 31.



tection and find little. Yet these same households are expected to fulfill the basic family functions discussed in the next part of this article.

However, in terms of distribution of real power between the parties to control and exercise authority within the relationship, we may in fact be closer to the former status quo than we would like to admit. It is difficult to measure the effects the recent law reform efforts have had on families with children since the advent of no-fault law coincides with rising divorce rates.<sup>34</sup> No-fault laws have, however, made it easier for couples with children to split. With liberalized alimony laws both couples, if able-bodied, must attempt to become self-sufficient and contribute to the support of the children. The burden of childrearing, however, is not shared equally. The economic and social consequences have a disparate impact upon women with custody of minor children.<sup>35</sup> "[O]ne longitudinal study found that among middle-aged women with children whose marriages ended between 1967 and 1972, the proportion of families below the poverty level increased from about 10 percent to over 25 percent for whites and from 44 percent to almost 60 percent for blacks."<sup>36</sup> The woman (who usually obtains physical custody) is thus forced to be the sole breadwinner and caretaker. As a matter of practical reality, the mother is in the least advantageous position economically to provide adequate care for the children.

Parenting is a difficult task when a man and a woman work together.<sup>37</sup> The difficulties are magnified when one parent has to go it alone with limited resources.<sup>38</sup> Female-headed households have the biggest task with the fewest resources. Realization of the enormity of the task of childrearing and the subsequent impact on society fuels concerns over the increasing divorce rates and the influence of law reform efforts.

In fact, the changes in family law may not really be reflective of the complete changes in the relationships between men and women and in the way families function in society as a result of these inter-sexual

---

34. See Sepler, *Measuring the Effects of No-Fault Divorce Law Across Fifty States: Quantifying a Zeitgeist*, 15 FAM. L. Q. 65 (1981).

35. See generally Saunders, *The Social Consequences of Divorce: Implications for Family Policy*, 6 J. DIVORCE 1 (1983); Hunter, *Child Support Law and Policy: The Systematic Imposition of Costs on Women*, 6 HARV. WOMEN'S L.J. 1 (1983); Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 U.C.L.A. L. REV. 1181 (1981).

36. A GROWING CRISIS, *supra* note 2, at 11.

37. See generally L. POGREBIN, *FAMILY POLITICS: LOVE AND POWER ON AN INTIMATE FRONTIER* (1983); I. BRODSKY, *THE WORLD'S NEWEST PROFESSION* (1975); Wilson, *Raising Kids*, ATL. MONTHLY, Oct., 1983, at 45.

38. See generally A. DALLY, *INVENTING MOTHERHOOD* (1983); V. PACKARD, *OUR ENDANGERED CHILDREN: GROWING UP IN A CHANGING WORLD*, (1983); M. WHEELER, *DIVIDED CHILDREN* (1980).

changes. There are other more subtle ideological changes occurring than the ones which spawned the initial revolution, changes which are now just beginning to be recognized by writers and thinkers in the family law area. The harder question for law reformers to address is: has the law acted as facilitator or maintainer of necessary family functions in light of the emerging changes that men and women have gone through and the changes in society which confront them as they work out their relationships?

## II. FAMILY FUNCTIONS DEFINED

At the outset, one must recognize that when the term "THE FAMILY" is used, it evokes different definitions for different segments of society. The family is generally conceived as one of an infinite number of amorphous units of persons living in one household.<sup>39</sup> When we speak of "THE FAMILY" in this respect it is usually in terms of laws and public policies which affect these units collectively on a macro-cosmic level. It is to this level that we look for a clearer definition of what constitutes an individual family in the legal sense irrespective of the definitions used by various sectors of society.<sup>40</sup>

There is a unit of individuals whose relationship is domestic in nature which the law calls "family."<sup>41</sup> It is this domestic association which society has offered protection of the law. It is usually formed at the instance of a state-sanctioned marriage ceremony.

The unit may obtain judicial recognition without a state-sanctioned ceremony, as in a Marvin-type, non-marital relationship. A legal, domestic relationship is also formed by the birth of a child. At the instant of birth, the law recognizes the legal relationship of the mother and infant.<sup>42</sup> The law makes provision by which the father of the child may be afforded legal status or rights vis-a-vis the child.<sup>43</sup> In some cases the

---

39. There is a profound difference between a family in crisis, and The Family in crisis. One family in trouble tests the compassion, commitment and capacity of the community to respond in a humane way—whether that community is one's neighbors or one's fellow citizens and taxpayers. The Family is, by comparison, an empty slogan, useful only as a tool for social control, and rarely applicable in real life.

O'Reilly, *Families or 'The Family'?* THE NATION July 9-16, 1983, at 51, 54.

40. See generally H. CLARK, LAW OF DOMESTIC RELATIONS, (1968) [hereinafter cited as CLARK].

41. "The law of domestic relations is the law of the household or family, as distinguished from that of individuals in the external concerns of life. Four leading topics are embraced under the head: *First*, husband and wife. *Second*, parent and child. *Third*, guardian and ward. *Fourth*, infancy." J. SCHOUER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS, at 1 (6th ed. 1921).

42. UNIFORM PARENTAGE ACT, § 3(1), 9A U.L.A. 589 (1973).

43. *Id.* at § 4.

father may even be forced to assume legal obligations vis-a-vis the child.<sup>44</sup> A domestic relationship may also be created by adoption<sup>45</sup> or by operation of a judicial determination of legal guardianship.<sup>46</sup> These units appear in a variety of forms, including the conjugal family,<sup>47</sup> the extended family, female or male headed households, childless families, single households, and alternative families.<sup>48</sup>

The initial task then is to arrive at a working definition of what a family is and does irrespective of which category one places the family unit. Are there universal family functions with which one can find general agreement? Put another way, what does society require from and of our families? And how are the requirements reflected in the operation of the law as a mechanism for ordering family relationships? What is the essential nature of the domestic legal relationship?

The history of the family is in part the history of the law offering protection to the family unit from outside interference with the relationship.<sup>49</sup> The law also offers protection to the individual within the familial relationship from loss of valued rights by acts of other family members.<sup>50</sup> The legal protection offered is based on society's articulation of the collective conscience operating through governmental

44. *Id.* at § 6.

45. Howe, *Adoption Practice, Issue, and Laws 1958-1983*, 17 *FAM. L.Q.* 173 (1983).

46. R. MACKAY, *THE LAW OF GUARDIANSHIPS*, (3d ed. 1980); see also CLARK, *supra* note 40, at § 8.4.

47. The conjugal or nuclear family generally consists of a married man and woman and their children.

[T]he term "conjugal" is preferable when referring to the family system as a whole. No nuclear family *system* exists, if by that we mean a system in which most families maintain few or no relations with their extended kin. All contemporary studies in the most industrialized countries—Great Britain and the U.S.—show that in fact each family unit maintains contact with a wide range of relatives, and that the largest single category of "recreation" is "visiting with relatives." In addition, it is easy to see that many of these relatives *outside* the conjugal unit cannot be cut off without annoying or hurting someone *inside* the family, simply because each person in the family is or will be a member of two families simultaneously. . . .

Thus, at present it seems useful to keep in mind that a conjugal family system is one in which more social emphasis is placed on the conjugal bonds, or on the structural form of the nuclear family, than in other family systems, but the small family unit is not entirely independent.

W. GOODE, *THE FAMILY*, at 51 (1964) [hereinafter cited as *THE FAMILY*].

48. For purposes of this discussion, the primary emphasis is placed on families where minor children are present. The author places a higher value on considering the needs of family units with children because the children have limited choice of family structure. As a subjective assumption it is here that the law plays a critical role of offering protection.

49. See CLARK, *supra* note 40, at § 10.

50. *Id.* at § 9.

mechanisms. The law thus becomes a reflection of the interrelationship between the demands of the society and the demands of individual family units. It gauges normative behavior and codifies the norms establishing a system of rights and responsibilities. The familial rights and responsibilities of individual family members are owed in part to society and in part to other individual within the family units.

The studies of sociologists and anthropologists exploring fundamental social units can provide definitional assistance for analyzing the role of law in ordering family structure, responsibility and function.<sup>51</sup> Families function in innumerable arenas—economic, political, social, emotional, etc. The response to individual and societal demands depend upon such variables as race, class, ethnicity, religion and any other imaginable social substrata. Regardless of family style or structure, each family where children are present must socialize the children, provide the economic necessities of life and act as a center for emotional growth and support.

First, the function of a family is to provide societal training to its members. Societal training is the process by which members of the family, the smallest social unit, are equipped for membership in a larger social unit—a clan, a community or a state. Goode describes the symbiotic relationship of family and larger society as follows:

The strategic significance of the family is to be found in its *mediating* function in the larger society. It links the *individual* to the larger social structure. A society will not survive unless its many needs are met, such as the production and distribution of food, protection of the young and old, the sick and the pregnant, conformity to the law, the socialization of the young, and so on. Only if *individuals* are motivated to serve the needs of society will it be able to survive. . . . What is needed is a set of social forces that responds to the individual whenever he does well or poorly, supporting his internal controls as well as the controls of the formal agencies. The family, by surrounding the individual through much of his social life, can furnish that set of forces.<sup>52</sup>

The socialization function in the family is vital to the greater good of the larger society. This process provides individuals who can perform

51. See generally C. ZIMMERMAN, FAMILY AND CIVILIZATION, (1947); THE CONTEMPORARY AMERICAN FAMILY, (W. Goode ed. 1971); THE AMERICAN FAMILY, (D. Reiss & H. Hoffman eds. 1979); CONTEMPORARY THEORIES ABOUT THE FAMILY, Vol. 1 & 2, (W. Burr, R. Hill, F. Nye & I. Reiss eds. 1979).

52. THE FAMILY, *supra* note 47, at 2. Professor Goode further explains that "[t]he formal agencies of social control (such as the police) are not enough to do more than force the extreme deviant to conform. Socialization makes most of us wish to conform, but throughout each day we are often tempted to deviate." *Id.*

roles needed by the larger social unit.<sup>53</sup> It should be noted that the most significant benefit to the larger community of the family socialization process is societal continuity. "The crucial result of the socialization process is that individuals come to *want* to do the tasks that must be done if the society and its members are to survive."<sup>54</sup> The process is not complete if the current generation of children does not obtain the motivation and moral values necessary to socialize its progeny.<sup>55</sup>

Second, part of the socialization process is an economic function which provides the means for maintaining life. Family members must develop an understanding of the obligation and necessity for providing food, clothing, shelter and health care for each other. This is especially crucial for family members unable to provide for themselves; that is, the young, aged, or infirmed.<sup>56</sup> The essential necessities of life are thus provided primarily by the family.<sup>57</sup> The obligation is both a moral one<sup>58</sup> and one imposed by law.<sup>59</sup>

Third, the family unit also provides an entity in which emotional needs can be met and personal fulfillment achieved. Emotional satisfaction "is the most important force that puts meaning into life and work."<sup>60</sup> The family members care for and about each other and furnish security

53. "Socialization is the process by which the young human being acquires the values and knowledge of his group and learns the social roles appropriate to his position in it." *Id.* at 10.

54. *Id.* at 18.

55. This means that for an individual infant to survive, and thus for the society itself, he must be socialized; and one or more individuals must also *want* to socialize him. This in turn means that these persons must have been socialized themselves, when *they* were young, to want to socialize their children. This structural relation, linking *three* generations, by which one generation socialized a second to want to socialize the third, is a necessary link between the cultural and the biological heritage. Merely to teach the young the necessary cultural conduct for the society would not maintain the culture, if it did not include the moral injunction to teach each generation to teach the succeeding one.

*Id.* at 18.

56. See generally THE FAMILY, *supra* note 47.

57. For a discussion on the doctrine of necessities see CLARK, *supra* note 40, at § 6.3, and Mahoney, *Economic Sharing During Marriage; Equal Protection, Spousal Support and the Doctrine of Necessaries*, 22 J. OF FAM. L. 221 (1984).

58. For a discussion on the moral value of the family see S. HAUERWAS, A COMMUNITY OF CHARACTER at 155-166 (1981).

59. For a discussion on legal obligations to support children see generally J. CASSETTY, THE PARENT CHILD-SUPPORT OBLIGATION (1983); H. KRAUSE, CHILD SUPPORT IN AMERICA (1981).

60. A. SCHULLER, THE POSITIVE FAMILY at 3 (1982) [hereinafter cited as SCHULLER]. See also BANE, HERE TO STAY (1976). Bane expresses a concern for protecting "the fabric of affection and concern that makes family life worthwhile." *Id.* at xiii.

against the forces and vagaries of life. As Robert Frost stated, "Home is the place where, when you have to go there, they have to take you in."<sup>61</sup> In her book on Christian living, Arvella Schuller captures the essence of the emotional rewards the family engenders:

What a precious treasure the Almighty created when He planned the human family—sharing together, loving together, growing together, building together.

What is a family? To the positive believer, it is a colony of caring—two or more individuals caring very deeply for each other. A family then, is a group of people who, when you hurt, show that they care. You *know* they care!<sup>62</sup>

The law provides that at the instant of birth, the operation of a valid marriage ceremony, or the judicial recognition of a quasi-legal or legal relationship, a legal family relationship is constituted. Collective society has, at a minimum, demanded that the legal family unit must socialize its members, provide the necessities of life and provide emotional security. The law imposes upon the family primary responsibility for fulfilling these functions. This is reflected in laws which require the support and emotional nurture of children, the support of dependent spouses, the provision of education, and familial responsibility for the control and discipline of juveniles.

The nature of that legal family relationship is such that if you do not fulfill these functions as agreed upon by society, society, operating through the judicial mechanisms of the state, will intervene in the relationship. The state may reorder the relationship by temporarily or permanently removing a member of the unit. The state may also demand that family members demonstrate behavior which falls within norms set by the collective society. Failure to demonstrate such behavior will result in loss of the full benefits of the legal relationship or complete termination of the family relationship.

To summarize, universal family functions include a socialization process which fits members for the larger society and schools the next generation in carrying forward the socialization process to their progeny; the ability to provide the necessities of life; and an emotion security mechanism. These functions are or should be universal to all families. The domestic relationship is subject to state interference and possible

---

61. "The Death of the Hired Man", ROBERT FROST POEMS at 160 (L. Untermeyer ed. 1946).

62. SCHULLER, *supra* note 60 at 4.

dissolution for failure to perform these functions. If the family cannot accomplish these functions, society at large must carry out these obligations.<sup>63</sup>

### III. THE RHETORIC OF FAMILY

A survey of recent literature on the family reveals the diversity of ideological rhetoric. A search for trends on families finds advocates for every direction. The literature does provide revelation on the reality of family life in modern society. The structure and operation of each family unit is dependent on the ideological frame of reference held by each individual family unit member. This, in part, explains why individuals act, fail to act, or act poorly, in performing necessary family functions. This section will survey the literature of writers who analyze the evolving ideologies of men and women.

#### A. *Changing Ideologies of Women*

Many of the changes in family law were spurred by the Women's Movement of the 1960s and 1970s, as women sought true equality in society at large and in their personal and family lives. Betty Friedan reassesses the impact and significance of that movement in her recent book, *The Second Stage*.<sup>64</sup> The issues raised by Friedan are important for understanding the changing ideologies that affect the relationships of men and women as they attempt to form new restructured families. In this regard, Friedan highlights the history of the first stage movement and calls for a rethinking of priorities now that equal opportunity is in part achieved—women (and men) are now ready for the second stage of the movement.

"In the first stage, our [feminists] aim was full participation, power and voice in the mainstream, inside the party, the political process, the professions, the business world."<sup>65</sup> Accordingly, the true feminists fought for equal opportunity—economic, political and social. Anything which rose in the path towards equality had to be repudiated. In this respect, women had to repudiate the "feminine mystique which placed women on a pedestal, defined their place in society as homemakers and mothers, and classified them as the weaker sex dependent upon a man for protection

---

63. The foster care system, juvenile justice system, and Aid to Families with Dependent Children Program are examples of society carrying out these functions through government mechanisms. See also Law, *Woman, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249 (1983). Clubs and social organizations can fulfill some emotional needs.

64. B. FRIEDAN, *THE SECOND STAGE* (1981) [hereinafter cited as *THE SECOND STAGE*].

65. *Id.* at 27.

and provisions."<sup>66</sup> Women had to liberate themselves from their stereotyped sexual roles, especially those roles emanating from the family.<sup>67</sup> Reproduction was viewed as a mechanism for ensuring that women would remain in their places by saddling them with the responsibility of primary child care.<sup>68</sup> Marriage was equated with submitting one's self to the domination of and dependence on a man.<sup>69</sup> The family was, indeed, "the last bastion of conservatism."<sup>70</sup>

In repudiating the family as a source of female oppression, feminists found themselves confronting their own constituency—other women. Pro-family forces, led by women such as Phyllis Schlafly and others, counterattacked to urge preservation of the traditional family and women's traditional place within it.<sup>71</sup> Woman's primary role was to re-

66. It is historical, political reality that women at one time had no control over their reproductive process, no real choice about motherhood. . . . It is historical, political reality that when motherhood was woman's only function, status and identity, as well as her biological necessity, it kept her, or was used as an excuse to keep her, from education or opportunity to use her abilities in the mainstream of our evolving society. The inequality of women, her second-class status in society, was in historical reality linked to that biological state of motherhood.

*Id.* at 90. *See also*, B. FRIEDAN, *THE FEMININE MYSTIQUE* (1963).

67. In reassessing and readdressing the value of family, Friedan poses the following questions which supposedly symbolize the generally accepted feminists position on the family (although not necessarily voiced as such by all feminists):

It is hardly new for women to be concerned with the family, I realize. But weren't feminists supposed to be liberating themselves *from* the family? Wasn't the women's movement supposed to be trying to destroy the family with the Equal Rights Amendment? And isn't the family, after all, supposed to be the last bastion of conservatism? Would the women's movement be surrendering, then, to the forces of reaction by reembracing the family, or would it truly be entering a new stage?

*Id.* at 84. *But see* B. HOOKS, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* (1981); Press, *Black vs. White Women: The Gap Grows*, *Roanoke Times & World News*, Oct. 23, 1983, at F-3.

68. *THE SECOND STAGE* at 54-55 (citing from the work of feminist Ellen Willis, *The Family: Love it or Leave it*, *Village Voice*, Sept. 17, 1979) and *Id.* at 90-91.

69. *Id.* at 112-113.

70. *Id.* at 84.

71. *See* discussion *infra* on pro-family ideology. An example of the rhetoric used by the pro-family forces denouncing the feminists movement is articulated by Phyllis Schlafly:

What is it that the women's liberation movement invites women to be liberated from? An objective reading of the liberation movement literature compels the conclusion that the answer must be marriage, home, husband, family, and children—because, by definition, those are all evidences of the "second-class status" of women. The movement literature paints marriage as slavery, the home as a prison, the husband as the oppressor, family as an anachronism no longer relevant to woman's happiness, and children as the daily drudgery from which



main in the home, taking care of a husband and nurturing children. Working women were detrimental to society. The conflict in ideologies increased tension among women and between men and women, as each point of view attempted to assert its definition of the female role.

The very nature of the debate produced a tension of a different sort among feminists themselves. The tension was especially evident in young women, second generation feminists who were taking advantage of the new opportunities won in the first stage of the women's movement. The primary question confronting them was whether or not to have a baby—especially since their biological clocks were ticking away.<sup>72</sup> This question did not confront the first generation feminists because many of them already had children.<sup>73</sup> The second generation feminists found themselves in a perplexing dilemma for which there were few role models to look for guidance. The dilemma was the choice between having a career and having a family. To achieve both, women had to be superwomen or they had to sacrifice one for the other.<sup>74</sup>

There were many horns to this dilemma. First, in the work world, women were competing against men who had wives at home to take care of the details of the men's personal and family lives.<sup>75</sup> Second, part of the reaction against motherhood for feminists was derived from observing the toll the sacrifices of motherhood took on their own mothers.<sup>76</sup> Third, in economic terms, "the price of motherhood [was] still too high for most women; the stunting of abilities and earning power [was] a real fear."<sup>77</sup> If a woman is the primary caretaker of a child then she will not be able to put in the long work hours of her colleagues who do not have that responsibility. Finally, the most salient aspect of the dilemma is that these women are recognizing an inner desire to have a family.<sup>78</sup>

It is in recognition of this dilemma that Friedan pens her book. The essence of her second stage ideology is to recognize the need to develop mechanisms for combining home and career. She states:

---

the modern woman must be freed in order to pursue more fulfilling careers. P. SCHLAFLY, *THE POWER OF THE POSITIVE WOMAN* at 45-46 (1977) [hereinafter cited as *THE POSITIVE WOMAN*].

72. *THE SECOND STAGE* at 85.

73. *Id.* at 88.

74. "Those few who combined motherhood and professions were 'exceptional,' and had, indeed, to be superwomen. Or they had to settle for second best in career, and/or were oppressed by terrible conflicts and guilts in their relationship with husband and children." *Id.* at 89.

75. *See Id.* at 89-94, and 111-12.

76. *Id.* at 84.

77. *Id.* at 87.

78. *Id.*

Personal choices and political strategies of women today are distorted when they deny the reality of both sets of needs: women's need for power, identity, status and security through her own work or action in society, which the reactionary enemies of feminism deny; and the need for love and identity, status, security and generation through marriage, children, home, the family, which those feminists still locked in their own extreme reaction deny. *Both sets of needs are essential to women, and to the evolving human condition.*<sup>79</sup>

In the second stage, according to Friedan, feminists and pro-family groups must reconcile their competing agendas, because at base they are fighting for the same thing. Feminists must come to grips with their "instinctive" needs for mothering, intimacy and familial relationships. Pro-family groups must recognize that with the majority of women working because of financial necessity, the ultimate survival of the family will depend upon women obtaining equal economic, political and social opportunity.<sup>80</sup> The combined agenda should include efforts expended to ensure the passage of the Equal Rights Amendment, preservation of "the choice to have children, . . . the need for child-care options and restructured jobs, flexible working hours and maternity and paternity leaves."<sup>81</sup>

79. *Id.* at 94-95.

80. According to Friedan, one such coalition of efforts occurred at the 1980 White House Conference on Families in Baltimore, Maryland. (There were actually three different meetings of the Conference held in Baltimore, Minneapolis and Los Angeles.) Instead of holding a feminist caucus before the main meeting of the caucus, she and other feminists participated in a larger church-and-family caucus with this result.

In this new political coalition "for families," feminists were able to work with such diverse groups as the National Conference of Catholic Bishops, Parents Without Partners, the Red Cross, the National Council of Churches, the American Home Economics Association and the National Gay Task Force.

*Id.* at 109.

81. *Id.* at 108. These issues should be part of a national agenda on the family because they deal with helping families meet basic needs. Friedan expressed as follows her hopes for the second stage:

*The second stage cannot be seen in terms of women alone, our separate personhood or equality with men.*

*The second stage involves coming to new terms with the family—new terms with love and with work.*

*The second stage may not even be a women's movement. Men may be at the cutting edge of the second stage.*

*The second stage has to transcend the battle for equal power in institutions.*

*The second stage will restructure institutions and transform the nature of power itself.*

*The second stage may even now be evolving, out of or even aside from what we have thought of as our battle. [Emphasis in original].*

*Id.* at 28.

However, this agenda has not been subscribed to by more conservative, pro-family advocates. Writers such as Phyllis Schlafly, Rita Kramer and Tim La Haye see the feminist point of view as the cause of family breakdown.<sup>82</sup> The ideology of the traditionalists or pro-family advocates is grounded on what is perceived as basic, traditional family values.

The traditional family is a nuclear family which consists of a husband, who is the principle wage-earner and a wife, who is a homemaker and is primarily responsible for the care of any children born of the marriage.<sup>83</sup> The traditionalists claim that men and women have separate roles which are based on biology and religious tradition. As Schlafly explains:

Our Judeo-Christian civilization has developed laws and customs that, since women must bear the physical consequences of the sex act, require men to assume other consequences. These laws and customs decree that a man must carry his share by physical protection and financial support of his children and of the woman who bears his children, and also by a code of behavior that benefits and protects both the woman and the children.<sup>84</sup>

According to Schlafly, it is essential that men recognize their appropriate role as family provider.<sup>85</sup> Conversely, women are imbued with an "innate maternal instinct" which has helped preserve the human race.<sup>86</sup> The human race survives because women have the unique ability and need to care for others, especially their own infants.<sup>87</sup> Others can provide

82. R. KRAMER, IN DEFENSE OF THE FAMILY (1983) [herein after cited as KRAMER]; T. LA HAYE, THE BATTLE FOR THE FAMILY (1982) [hereinafter cited as LA HAYE]. See also SCHULLER, *supra* note 60.

83. Married partners should be lovers, not competitors. But the drive to take women out of the kitchen and compel them to compete on an equal basis with men is not conducive to the promotion of harmony between mates. . . . In fact, the best marriages are those in which the partners appreciate each other's distinctive gifts and realize they can accomplish far more by cooperation with each other than either could achieve alone. This awareness will inspire the willingness to sacrifice their individual self-centered desires for the greater corporate good.

LA HAYE, *supra* note 82 at 140-141.

84. THE POSITIVE WOMAN, *supra* note 71, at 33.

85. Man's role as family provider gives him the incentive to curb his primitive nature. Everyone needs to be needed. The male satisfies his sense of need through his role as provider for the family. If he is deprived of this role, he tends to drop out of the family and revert to the primitive masculine role of hunter and fighter.

*Id.* at 96.

86. *Id.* at 17.

87. The Positive Woman starts from the premise—which is self-evident to most people but which can also be scientifically demonstrated—that babies

food, dry clothing and warmth to an infant, but it is only its mother who can respond to the infant's needs for security and begin the process necessary for the successful social adjustment of the child.<sup>88</sup>

The traditionalists are not against women working outside of the home—working is recognized as an economic necessity for some.<sup>89</sup> But the working mother must have her values straight if she is “to combine a career in marriage and the business, professional, academic or political worlds.”<sup>90</sup> Although it is admittedly difficult, Schlafly claims it is possible to occupy both worlds if a woman “establishes a set of priorities under which business or professional demands must always give way to home and family whenever there is a conflict.”<sup>91</sup> She further asserts that this is the primary reason for the wage differential between men and women.<sup>92</sup>

Equally significant to the traditionalists, women have certain valuable rights within the traditional family structure. It is the recognized “obligation of the husband to support his wife financially and provide her with a home.”<sup>93</sup> Their tasks, quite necessarily, are different and unique. Their

grow and develop better in a family with a mother's loving care than in an institution. The Positive Woman, therefore will work tirelessly to safeguard the mother-care concept and to defeat government-care proposals.

*Id.* at 161. See also LA HAYE, *supra* note 82 at 64.

88. See KRAMER, *supra* note 82, at 44-55.

89. THE POSITIVE WOMAN, *supra* note 71, at 45.

90. *Id.* at 45.

91. *Id.*

92. The woman's allocation of career priorities necessarily limits the range of her financial return. There is no way, for example, that a married woman lawyer who puts in a forty-hour week or less and who opts out of her career for several years to have babies can ever earn the same income or achieve the same status in the professional world as a topflight lawyer, who typically devotes sixty hours a week to acquiring, serving, and retaining clients. There is nothing discriminatory about this differential. It is simply a matter of personal choice based on the different scales of male and female values. The situation should not cause 'remedial' legislation or court action to abolish 'discrimination,' or whining complaints about how few lawyers or judges are female, but a mature acceptance of the different goals of men and women.

*Id.* at 38.

93. *Id.* at 70-71.

Schlafly argues that this right would be jeopardized if women liberationists have their way and secure passage of the Equal Rights Amendment to the United States Constitution. Homemakers would lose their financial security and be forced into the workforce.

No one can predict for sure which kind of "equality" will be enforced by the courts and by legislatures if ERA is ever ratified. The new equality rule may be a requirement that the husband and wife each contribute 50 percent of the income required to support the family, or that each spouse take a paying job for half of each week, or half of each month, or half of each year to provide the financial support of the family. Most ERA proponents concede in debate

sex roles cannot be neutralized if the basic marriage unit is to survive. The rights and obligations that fall to men and women complement each other in full recognition of sexual differences.<sup>94</sup>

For the traditionalist, the family is the seat of all moral training and socialization.<sup>95</sup> In coordination with the school systems, the family teaches the moral principles described in the Bible, including the fundamental power of prayer.<sup>96</sup> The traditionalists see feminism, liberalism and secular humanism as threats which weaken the moral fabric of the family.<sup>97</sup> The moral function of the family, then, necessarily becomes a high item on the traditionalists political agenda and as such a source of ideological tension.<sup>98</sup>

that if the wife takes a paying job, she would then be *obligated* to provide half the financial support of the family.

*Id.* at 75.

94. The Positive Woman recognized the fact that, when it comes to sex, women are simply not the equal of men. The sexual drive of men is much stronger than that of women. That is how the human race was designed in order that it might perpetuate itself. The other side of the coin is that it is easier for women to control their sexual appetites. A Positive Woman cannot defeat a man in a wrestling or boxing match, but she can motivate him, inspire him, encourage him, teach him, restrain him, reward him, and have power over him that he can never achieve over her with all his muscle. How or whether a Positive Woman uses her power is determined solely by the way she alone defines her goals and develops her skills.

*Id.* at 17.

95. Traditionalists do not believe that this can be accomplished in child-care centers by professionals. They oppose any legislation which would provide federal funding for day-care. Again, child-care is the primary responsibility of the mother. See KRAMER, *supra* note 82, at 44-55.

Schlaflly explains the mission thus:

It is on its women that a civilization depends—on the inspiration they provide, on the moral fabric they weave, on the parameters of behavior they tolerate, and on the new generation that they breathe life into and educate. . . .

If her influence is limited to her immediate family, she knows that, after all, nothing is more important than building the morals and integrity of the family unit, especially its children, and she addresses herself to that.

THE POSITIVE WOMAN, *supra* note 71, at 139.

96. Moral education is a basic necessity for civilized living. To abdicate this obligation is to resign our schools and our cities to the law of the jungle, and to allow ourselves to be terrorized by young savages. Many innocent victims of crime are paying the bitter price for our failure to teach the Ten Commandments or to permit the daily acknowledgment of the Divine Creator, whose moral laws should be obeyed.

*Id.* at 143-144. See also LA HAYE, *supra* note 82, at 24-25.

97. For a discussion on secular humanism as an enemy to the family see LA HAYE, *supra* note 82, at 31-52.

98. For a discussion on the moral value of the family see S. HAUERWAS, A COMMUNITY OF CHARACTER at 155-166 (1981).

### 1. *Summary*

The fervidity of the ideological debate can obscure the reality women face today. Women now have almost all of the doors of opportunity open to them. They can be independent, engage in the work force and achieve the same status in society historically possessed by men.<sup>99</sup> Yet women also hold employment positions with low skill requirements and low wages.<sup>100</sup> The wage gap between men and women also refuses to close.<sup>101</sup>

But the more significant consequences can confront a woman if she decides to desire a child. Let her decide to procreate and her options can begin to change. She might be fortunate and have a man who is equally committed to having a child, raising it, nurturing it and performing the family functions as required by law. Then again, she might be "stuck" with the kids by herself through divorce or an out-of-wedlock birth. Assuming she is like many women, she is not in a high paying job, or may not even be employed, or may not be old enough to work. Statistics suggest that she will have to fend for herself in providing her children with societal training, economic necessities and emotional security.<sup>102</sup>

Although artificial insemination is an option, most women do not conceive on their own. There is a man or a boy who participates in the creation of the child. The hard facts suggest that this may be his only contribution. In this situation, the reality makes the ideological frame of reference of the woman irrelevant. Unless she also abdicates her responsibilities, she will have to singularly perform the function demanded by society. The crucial question becomes: does society have an obligation to assist her in performing the requisite societal tasks? Ideology is insufficient to address this reality.

99. Excellent examples of contemporary women in powerful influential positions can be found in the careers of Geraldine Ferraro, Barbara Jordan, Sandra Day O'Connor and Mary Cunningham.

100. For an excellent study on the employment problems of women see U.S. COMM. ON CIVIL RIGHTS, CLEARINGHOUSE PUB. 74, UNEMPLOYMENT AND UNDEREMPLOYMENT AMONG BLACKS, HISPANICS, AND WOMEN (Nov. 1982). The study makes the following observation:

Minorities and women were more often unemployed than majority males.

Employed minorities and women were more often in less remunerative occupations than were majority males. Similarly, minorities and women more frequently had higher levels of formal education than their jobs compared with majority males. Recent statistics from the U.S. Department of Labor make clear that women, blacks, and Hispanics remain disadvantaged in the labor market.

*Id.* at 2 (citing U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, REPORT NO. 652 EMPLOYMENT IN PERSPECTIVE: MINORITY WORKERS, table A (1981); U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, REPORT NO. 653 EMPLOYMENT IN PERSPECTIVE: WORKING WOMEN, p.2 (1981)).

101. See *infra* note 207.

102. See A GROWING CRISIS, *supra* note 2, at 15-35.

B. *The Male of the Species-Revolt or Reform*

In the last three decades men have also undergone a metamorphosis in sex role ideology. Men's perception of themselves and their relationships with women have changed. In part, women have demanded a change, not being content with the role of woman as a servant of man's needs and desires. But men have undergone changes of their own, some not consistent with the movement towards sexual equality.

Barbara Ehrenreich presents a provocative argument in her book, *The Hearts of Men: American Dreams and the Flight from Commitment*, analyzing the changes men have undergone.<sup>103</sup> She attempts to catalogue the changing attitudes of men and society's expectation of the male role during the past thirty years. The premise of her argument is that by mid-twentieth century, there was an acceptable role of breadwinner established for men. This role was supported by custom and literature.<sup>104</sup> Men were kept in line by social custom and the fear of homosexuality if they did not fulfill the male role of breadwinner.<sup>105</sup>

According to Ehrenreich's theory, several historical phenomena occurred in the 1950s and 1960s that paved the way for the new male role of the 1970s. The first signs of change began in the suburbs, freshly built after two world wars, by what she labels the Gray Flannel

103. B. EHRENREICH, *THE HEARTS OF MEN: AMERICAN DREAMS AND THE FLIGHT FROM COMMITMENT* (1983) [hereinafter cited as *THE HEARTS OF MEN*].

104. See generally L. KRIEGLER, *ON MEN AND MANHOOD* (1979); J. DUBBERT, *A MAN'S PLACE: MASCULINITY IN TRANSITION* (1979); *MEN IN DIFFICULT TIMES*, (R. Lewis ed. 1981); R. STAPLES, *BLACK MASCULINITY: THE BLACK MALE'S ROLE IN AMERICAN SOCIETY* (1982).

105. The successful male was required to hold a job, support a family, and participate in community activities. Ehrenreich explains the popular conception of a man who did not adapt to this role:

In psychiatric theory and in popular culture, the image of the irresponsible male blurred into the shadowy figure of the homosexual. Men who failed as breadwinners and husbands were "immature," while homosexuals were, in psychiatric judgment, "aspirants to perpetual adolescence." So great was the potential overlap between the sexually "normal," but not entirely successful man, and the blatant homosexual that psychoanalyst Lionel Ovesey had to create a new category—"pseudohomosexuality"—to absorb the intermediate cases. There was no "sexual component" to the pseudohomosexual's deviance, at least not if caught at an early stage. Rather, he suffered from some "adaptive failure" to meet the standards of masculine conformity, and had begun a subconscious slide toward a homosexual identity:

[A]ny adaptive failure—sexual, social, or vocational—may be perceived as a failure in the masculine role and, which is worse, may be symbolically extended through an equation that is calculated only to intensify the anxiety incident to the failure.

This equation is the following: *I am a failure = I am castrated = I am not a man = I am a woman = I am a homosexual.* [Emphasis in original.]

*THE HEARTS OF MEN*, *supra* note 103, at 24-25, (quoting Lionel Ovesey, M.D., *L. OVESEY, HOMOSEXUALITY AND PSEUDOHOMOSEXUALITY* at 24-25 (1969)).

Dissidents.<sup>106</sup> These were essentially men who conformed to the appropriate male role model, but who complained about it.<sup>107</sup> From their point of view the male role model fit too tightly. Conformity, although it was suffocating, was the only acceptable alternative.

The answer, for the millions of grays, was not to do anything nonconformist—like leaving wife and job to study Zen Buddhism—but to at least be aware of the potential “I” sleeping within their pajamas. For most gray flannel malcontents, this was as far as their rebellion went: They cultivated an acute awareness of the problem of conformity—much as everyone else did—and achieved, through their awareness, a kind of higher, more reflective conformity.<sup>108</sup>

The Gray Flannel Dissidents blamed women for this conformity because in women's role as wives they required that the breadwinner be a responsible male.<sup>109</sup> Similarly, the white-collar, middle class world of corporate employment demanded conformity.<sup>110</sup> It is in conforming to the work-a-day world that one was able to fulfill one's role as a breadwinner. However, the Gray Flannel Dissident would never leave his job, nor his wife (unless he had another woman waiting in the wings).<sup>111</sup> “The gray flannel rebellion was never more than a lament, a critique far too diffuse to lead to action, stooping, at its lowest, to a nasty reprise against woman, and rising, at its best, to sublimation in the ‘higher’ conformity of self-conscious submission.”<sup>112</sup>

The first to break the male breadwinner mold was Hugh Hefner when he first published *Playboy* in December 1953.<sup>113</sup> Ehrenreich argues,

---

106. The grey flannel rebel lived by the rules. He accomplished his major “developmental tasks” by his late twenties, found a wife and made the appropriate adjustments to marriage, established himself in a white-collar job that would lead, over the years, to larger offices and longer vacations, bought a house, and nestled into the “congenial social group” with whom he would share highballs and the tribulations of lawn maintenance. He was adjusted; he was mature; he was, by any reasonable standard, a success as an adult male breadwinner.

*Id.* at 29.

107. *Id.* at 29-41.

108. *Id.* at 30-31.

109. *Id.* at 37-39.

110. Ehrenreich examines such authors as William F. Whyte, author of *The Organization Man*, and concludes that: “The whitecollar work world crushed initiative, rewarded conformity rather than creativity, and forced the individual to submit to the collective will of the committee, the ‘team.’” *Id.* at 35.

111. *Id.* at 40.

112. *Id.*

113. *Id.* at 42.



quite persuasively, that Playboy was about liberating men from wives.<sup>114</sup> She describes Hefner's plan as follows:

Recall that in their losing battle against "female domination," men had been driven from their living rooms, dens, and even their basement tool shops. Escape seemed to lie only in the great outdoors—the golf course, the fishing hole or the fantasy world of Westerns. Now Hefner announced his intention to reclaim *the indoors for men*. 'Most of today's "magazines for men" spend all their time out-of-doors—thrashing through thorny thickets or splashing about in fast flowing streams,' he observed in the magazine's first editorial. 'But we don't mind telling you in advance—we plan spending most of our time inside. We like our apartment.' . . . Women should be welcome after men had reconquered the indoors, but only as guests—maybe overnight guests—but not as wives.<sup>115</sup>

The playboy rejected the traditional role. The playboy was not against work or responsibility; the rewards of work, however, were different. "The new male-centered ensemble of commodities presented in Playboy meant that a man could display his status or simply flaunt his earnings without possessing either a house or a wife—and this was, in its own small way, a revolutionary possibility."<sup>116</sup> More importantly one could still be a *man* even though not married, because a heterosexual relationship was readily available as demonstrated by the pictorials of nude women.<sup>117</sup> He could "buy sex on a fee-for-service basis, [and not] get caught up in a long-term contract."<sup>118</sup> Even with its playboy bunnies, "[t]he real message was not eroticism, but escape—literal escape from the bondage of breadwinning."<sup>119</sup>

One set of male rebels who actually succeeded in rejecting the male breadwinner role was the Beats.<sup>120</sup> "In the Beat, the two strands of male

114. *Id.* at 42-51.

115. *Id.* at 43-44.

116. *Id.* at 49.

117. *Id.* at 51.

118. *Id.* at 46.

119. *Id.* at 51.

120. The original Beats were men who crisscrossed the continent between New York, Mexico City and San Francisco, hopped freight trains, talked all night over cheap wine, had visions, coined the word "beat" (deriving it from "beatitude"), ate peyote and smoked pot, had sex with countless women (and men), amplified all this in a torrent of words (some written) and, when they were finally singled out for attention, confused their television audiences by talking familiarly about God and death. The "beatniks" on the other hand ("beat" chastised by the addition of the Russian diminutive ending) were shortish sloppy men who appeared in comic strips and situation comedies wearing goatees and

protest—one directed against the white-collar work world and the other against the suburbanized family life that work was supposed to support—come together into the first all-out critique of American consumer culture.<sup>121</sup> The ranks of the Beats included Jack Kerouac, Neal Cassady, and Allen Ginsberg. The Beats represented the eruption of restlessness that was to engulf the youth of the 1960s.<sup>122</sup> The dissatisfaction with the normal, staid conformity of middle America was acutely portrayed in the Beat writings.<sup>123</sup> For the Beats, to be a male breadwinner was to be “square.”<sup>124</sup>

Although the Beats were a short-lived phenomena and did not move the mass of American men, they did succeed in proving an alternative male role model which was not bound by the conformists’ strictures of society. The active voice they gave to male discontentment with the breadwinning role demonstrated the possible. “And that, in large, was the Beat’s lasting contribution to the male rebellion: to establish a vantage point from which the ‘normal’ could be judged, assessed and labeled—square.”<sup>125</sup>

To further legitimize the rejection of the male breadwinner role model, medical science discovered that being a breadwinner was hazardous to one’s health.<sup>126</sup> Climbing the corporate ladder of success produced

sunglasses. The Beats were speedy, “mad to live,” while their images and imitators were studiously “cool”—conformists, like everyone else, but cut from a different mold.

*Id.* at 53.

121. *Id.* at 52.

122. *Id.* at 58-59.

123. Ehrenreich suggests as examples of Beat writing *On The Road*, by Jack Kerouac and *Go*, by John Clellon Holmes. *Id.*

124. Ehrenreich suggests “squareness” is the substantial equivalent of dullness. Illustrative of the concept is a *Life* photo-essay published in 1959 which contrasted Beat life in Venice, California against Middle America in Hutchinson, Kansas.

[T]he scenes from Venice include interiors from a Beat artist’s “pad,” a “ram-shackle” \$75-a-month house, . . . a shot taken inside the Gas House (a Beat gathering place, sort of a noncommercial coffee house). . . . Arrayed on facing pages are the scenes from Hutchinson, Kansas, seemingly chosen for their bland wholesomeness: A family sits in a semi-circle, backs to the camera, watching TV, the town’s bugle and drum corps marches down a main street; three paunchy retirees sit impassively on park benches. . . . Thanks to Venice, Hutchison has become an event, a spectacle itself; and, seen from Venice, as the camera invites us to do, Hutchison even achieves a kind of character in its dullness: This is “Squaresville.”

*Id.* at 64-65.

125. *Id.* at 67.

126. *Id.* at 68-87.

stress and stress produced heart attacks.<sup>127</sup> "The prescription for male survival was to relax and even to regress to a more feminine, dependent state."<sup>128</sup> It became the wife's task to see that her husband received plenty of sleep, a low cholesterol diet and a stress-free home environment.<sup>129</sup>

The recognition of coronary disease as a major health problem coincided with the introduction of revolutionary thinking in the field of psychology. "[P]sychology discarded maturity as the universal developmental goal and introduced the doctrine of *growth*."<sup>130</sup> The leader of the movement was Abraham Maslow, whose major contribution "was to open up psychology to the study of 'healthy' people. Freud had gone wrong, he believed, by paying undue attention to the 'sick' and neurotic patient, and this concentration had led to an unnecessarily dim view of the human condition."<sup>131</sup>

Classified as the "Human Potential Movement,"<sup>132</sup> life's experiences were a never ending source of self-improvement by psychological growth.<sup>133</sup> The challenge was to free one's self to strive to achieve fulfillment in the myriad possibilities of life.<sup>134</sup> Chief among the human growth proponents was Frederick Perls, who along with psychologist Ralph Hefferline, authored *Gestalt Therapy: Excitement and Growth in Human Personality*.<sup>135</sup> Perls is credited with coining the phrase, "Do your own

127. *Id.* at 70-71.

128. *Id.* at 84.

129. *Id.* at 85. For a discussion on recent findings indicating the relationship between cholesterol and heart disease see Cohn, LINKING DIET, HEART AND HEALTH, Wash. Post, Jan. 29, 1984, at H1.

130. THE HEARTS OF MEN, *supra* note 103, at 88.

131. *Id.* at 89. Ehrenreich cites Maslow's work in TOWARD A PSYCHOLOGY OF BEING (1968), as documentation of the development in psychology. She summarized the development as follows:

The premises of the new psychology were refreshingly upbeat: that people's impulses are basically good, that the human potential for creativity is vast, that spontaneity is preferable to stagnation and that, contrary to Freud, life is an "adventure" and not a tragedy. This was good news for anyone, man or woman, who chafed against middle-class conformity.

*Id.* at 89.

132. *Id.* at 90.

133. What was no less important to its success, the new psychology offered its own critique of the consumer culture: It was right to want "something more out of life" and that something more could itself be purchased as one of the many commoditized therapeutic experiences including, by the late sixties, Gestalt therapy, nude therapy, encounter groups, primal scream therapy and transactional analysis, plus their combinations and improved versions.

*Id.* at 90-91.

134. *Id.* at 90-91.

135. *Id.* at 93.

thing."<sup>136</sup> For men constrained to philosophize over the repressive conformity of the male breadwinner role model, this offered an avenue away from the burden. Ehrenreich concludes:

Medicine, in its popularized versions, ruled that these tasks were hazardous to the heart, psychology added that they were crippling to the spirit. "Responsibility" had been reclassified under "guilt" by the physicians. If there was an alternative to an early death, it was, by implication, a life of perpetual growth—growth pursued for its own sake and, if necessary, in defiance of all past norms for masculine behavior.<sup>137</sup>

With this rush of history described, Ehrenreich has conceptually explored the theory that men (or at least some men) have liberated themselves from the role of breadwinner. The corollary is that they still view women in sexist terms—objects of sexual affection, subject to males' beckon and call, and cast out from under the male moral obligation to support and protect.

Ehrenreich's model of the retired breadwinner provides only a partial analysis of the ideological response men have to rapidly changing intersexual personal relations and redefined role models. There is a broader spectrum of male models to assess. *The Playboy Report on American Men*, a survey conducted by Louis Harris and Associates for Playboy Magazine, studies the breadth of ideological positions held by men between the ages of 18 and 49.<sup>138</sup> The purpose of the survey was to determine how "[a] man's age, his marital status, his level of education, his income, how he earns his living, and his religion, ethnic group or race . . . influence the ways men respond to prevailing conditions, mores and institutions of society."<sup>139</sup>

136. *Id.* at 94. Ehrenreich also cites Perls as the author of the following well-known verse:

I do my thing, and you do your thing.  
I am not in this world to live up to your expectations  
And you are not in this world to live up to mine.  
You are you, and I am I,  
And if by chance we find each other, it's beautiful.  
If not, it can't be helped.

*Id.* at 95.

137. *Id.* at 97-98.

138. *The Playboy Report on American Men* PLAYBOY (March 1979) [hereinafter cited as *Playboy Report*]. A survey and analysis of the views of American men in their prime years, regarding family life, love and sex, marriage and children, the "outer" man and "inner" man, drug use, money, work, politics and leisure. The poll was conducted by Louis Harris and Associates; Analysis and Interpretation by William Simon, Ph.D., University of Houston, and Patricia Y. Miller, Ph.D., Smith College.

139. *Playboy Report*, *supra* note 138, at 5.

The survey noted four classifications of men: Traditionalists,<sup>140</sup> Conventionals,<sup>141</sup> Contemporaries,<sup>142</sup> and Innovators.<sup>143</sup> The classifications are instructive in light of survey data indicating "men's attitudes and opinions on a great many subjects are often a reflection of their willingness or unwillingness to accept certain changing directions in society."<sup>144</sup> The survey explored fifteen general topics,<sup>145</sup> each in specific detail. For example, the section on "Love and Sex" explored the role of love in providing life satisfaction, the ideal lover and the importance of sex and sexual satisfaction.<sup>146</sup> The chapter on "The Family" indicated that "84% of American men said that family life is 'very important' to them for a happy satisfied life."<sup>147</sup>

One major criticism of the survey is that the textual discussion focuses excessively on comparisons of the Innovator and the Traditionalist. The Innovator best represents the Playboy man, one which rejects the breadwinner ethic.<sup>148</sup> However, the survey also verbalizes

140. "Traditionalists are defenders of the past, men who are deeply committed to time-honored values. They rally round what is secure and familiar, persisting in old allegiances and finding little value in new alternatives." *Id.*

141. "Conventionals also prefer what is established and familiar; but, unlike Traditionalists, these men are more ready to consider new alternatives—after they have gained acceptance and approval by society in general." *Id.*

142. "Contemporaries prefer the new, but their inclination is tempered by a concern for continuity within the established order. Men in this category are usually fashionable but rarely *avant-garde*." *Id.*

143. "Innovators show a strong enthusiasm for what is new. Their preference is marked by a willingness to experiment with traditional forms. These men are not the inventors of new alternatives, but they are generally the first to try them out." *Id.*

144. *Id.* at 5. How one perceives and defines the changing directions in society will impact on how one reads the results of the survey.

145. Each general topic was discussed in individual chapters entitled as follows:

Section III: Basic Values of Men

Section IV: The Family

Section V: Love and Sex

Section VI: Marriage and Children

Section VII: The Outer Man: His Appearance

Section VIII: The Inner Man: Religion and Psychotherapy

Section IX: Attitude Toward Drug Use Section X: Money and Possessions

Section XI: Work

Section XII: Politics

Section XIII: Leisure

146. *Playboy Report*, *supra* note 138, at 12-14.

147. *Id.* at 11. The survey found that "Innovators—and, to a lesser extent, Contemporaries—consistently assign a lower value to family." *Id.*

148. The flavor of the questions asked in the survey tend to reinforce the assumption that the Innovator is on the leading edge of change in familial and sexual relationships. An analysis of the Innovator led the surveyors to the following conclusions:

The Innovator does not represent what used to be called the "counterculture"—the dropouts and radicals of the 60's. When he enters the arenas of work and

through the Innovator a keen sense of change in family relationship ideology. Although the family is important, it is taking on a new role.

Family life is widely considered critical to many aspects of personal happiness. The study suggests that while the family will continue to be important, it will not be *as* important. The family today is burdened with more major social responsibilities than any other institution. Its range of responsibilities runs from the mental health of its individual members to the survival of the species.

In the future, the family will perform fewer of these significant functions. And, correspondingly, its members will demand that these "pay off" in ever greater satisfaction. The focus of what is important for the family will subtly shift from an emphasis on meeting social obligations to a greater emphasis on personal needs and satisfactions.<sup>149</sup>

The survey suggests that this emerging family phenomena is resultive of certain traditional values being de-emphasized and new values becoming prominent. For example, having children is becoming less of "a major factor in a successful marriage."<sup>150</sup> Similarly, men are less inclined to stay in a bad marriage for the sake of the children.<sup>151</sup> Most significantly, perhaps, is a recognition that within marriage there must be sufficient room for individual growth and development.<sup>152</sup> The marriage

politics he is indistinguishable, for the most part, from men with other social-change orientations—the Traditionalists, Conventionals and Contemporaries. The Innovator is a rather effective participant in the system, judging by the fact that he tends to be more affluent and better educated than those in the other 3 groups. Even in his use of leisure he is not significantly different from other American men. It is in the most private, most intimate aspects of his life that the Innovator distinguishes himself. . . .

The Innovator attaches less importance to family life than do most American men. He is not swayed by the time-honored reasons for marrying. In a mate he seeks a woman with admirable qualities of her own, rather than someone who will assist and complement him. He places a higher value on sex—and is more dissatisfied with his own sex life—than men in other groups. He prefers a small family and would not remain in a unsuccessful marriage for the sake of the children. He considers individual growth to be a factor in a successful marriage and places a lower premium on sexual fidelity than does the Traditionalist. The Innovator is more likely to favor sexual relations outside of marriage generally.

*Id.* at 59.

149. *Id.* at 11.

150. *Id.* at 18. The survey also suggests that this is reflected in the trend toward smaller families.

151. *Id.* at 18-19.

152. *Id.* at 15-17.

unit is thus no longer conceived as two individuals becoming one, but as two individuals coming together to form a partnership of shared life experiences.<sup>153</sup> (of course, the partnership is dissolvable at the will of either party.)

What the changing values suggest to the surveyors is a changing family in which expectations of life-long happiness are diminished because happiness is primarily sought within the individual.<sup>154</sup> It is suggested that American men are drifting toward "a gradual decline in the centrality of the family [in their lives]."<sup>155</sup> Again, the survey points to the Innovator as leading the movement of social-familial change.<sup>156</sup> Although no firm conclusion is drawn from this observation, the survey does address the implications:

It will mean the continued evolution of the family toward a less confining, less permanent, less all-embracing model. The absolutist family of earlier generations will be replaced by what has been termed the "family of limited liability."<sup>157</sup>

Other writers have pointed to new consequences of ideological changes in sexual interpersonal relationships. Men with or without changing ideological foundations must interact with women who may or may not exhibit differing ideological changes. The dilemma which results is an unsureness of the appropriate response to a member of the opposite sex.<sup>158</sup> With a variety of sexual role models from which to choose, the

153. This new orientation of marriage partners is described as follows: The lesser value of togetherness coupled with greater emphasis on individual development among Innovators suggests that this group has developed a perspective on marriage that is relatively new in our society. According to the togetherness ethic, marriage joins two incomplete individuals. In such marriages, each partner hopes to find in the mate the qualities he or she lacks. The support among Innovators of individual autonomy and growth within marriage also implies that these men do not view marriage as compensating for their own inadequacies or those of their mates. Rather than regarding personal growth as secondary in a marriage or as a menace to marital solidarity, these men would be more likely to feel that the stronger each partner is in a marriage, the stronger the marriage is.

*Id.* at 17.

154. *Id.* at 20.

155. *Id.*

156. *Id.* at 59.

157. *Id.*

158. In *The Postfeminist Hero*, HARV. MAG., at 48A (July-August 1983), an essay on male response to the feminist movement, Mark Gerzon suggests that males are motivated or influenced by who they select as heroes. (A classic male hero might be the late John Wayne.) If one challenges the traditional masculine role models as outdated, then men are left searching for a suitable replacement, thus creating the response dilemma. Gerzon describes it as follows:

He must still deal with women. When he dates, the question of whether

success of the ensuing interpersonal interaction will largely depend upon where the individuals are along the ideological spectrum.

Mark Gerzon stated the issue in terms of young people looking to heroes and heroines for guidance on appropriate courses of conduct in interpersonal relationships by posing the following questions:

How should men treat women, and vice versa? What are "masculine" and "feminine" responsibilities? Who leads, and who follows, and under what circumstances?<sup>159</sup>

There are at least four different responses. First, men can conform to traditional male role models and seek only women who will submit to the decision-making authority, leadership, and financial power of a male. In common parlance, such man would seek a woman who knows her proper place. A recent study suggests that such American men are increasingly finding submissive, non-liberated women in Asia through matrimonial mail-order firms.<sup>160</sup>

he should pay for dinner or split the bill is easily resolved compared to the much more troublesome issue of sex. According to tradition, the woman may respond to or rebuff the hero's advances, but it is he who is supposed to 'make the moves.' If they become sexually intimate, the hero is supposed to be confident in his ability to satisfy his woman. But judging from what men say, both seriously and in jest, confusion has replaced confidence. The postfeminist hero is not sure if being sexually aggressive, or macho, is what is expected by today's women; he is not sure what "liberated" lovemaking means. If he is too "laid-back," he fears women will not find him sexy enough; if he is too demanding, he fears being rejected as "oppressive."

Assuming that he marries his sweetheart, our hero's confusion is not over. Does he expect to play the traditionally heroic male role of breadwinner? If so, he must face the startling reality that roughly four out of ten American families have *two* breadwinners. Should he encourage his wife to work, perhaps even demand that she pay her fair share of their living expenses out of her salary? Or should he strive to be the sole support of the family, thus preserving his honored masculine responsibility and, of course, his power?

*Id.* at 48D-48E.

159. *Id.* at 48F.

160. Joseph, *American Men Find Asian Brides Fill the Unliberated Bill*, Wall St. J., Jan. 25, 1984, at 1. Of course, the traditional model offers other, less drastic, alternatives. The more majoritarian view is expressed by Dr. James C. Dobson as follows:

God has charged men with the responsibility for providing leadership in their homes and families: leadership in the form of loving authority; leadership in the form of financial management; leadership in the form of spiritual training; and leadership in maintaining the marital relationship. Husbands are instructed to 'love [their] wives, just as Christ loved the Church and gave himself up for her' (Eph. 5:25, NIV). This is not casual suggestion to Christian men; it is God's *commandment* to husbands and fathers.

The Judeo-Christian concept of manliness has been blurred by the Women's Liberation Movement, which has not only brought into question everything traditionally feminine, but has confused men as well. The 'macho man' is portrayed by the media as an



A second response could be from men who want egalitarian female relationships with the caveat that the man is still in charge. Anthony Brandt best expressed this anomaly as follows:

Men do indeed want women who are their equals, women they can respect and admire, whom they can relate to on any number of levels, who can match them in wits, in depth, in seriousness of purpose. At the same time they want to be the boss. They do not want to give up their dominant role. All of us, men and women alike, are trapped in this contradiction.<sup>161</sup>

The third response would be of men who are truly egalitarian in their interaction with women. They share in the housework and child rearing chores, are supportive of each other's outside work experiences, and make joint decisions with mutual respect for the other's opinion.<sup>162</sup>

The fourth response is the situation where the woman is the dominant figure in the relationship. This could be positive in the sense that a married woman may be a high-level public official whose career has high priority. Certainly men have historically been the ones to place career first. In the negative sense, this relationship would be the same as men have traditionally demanded; the woman sacrifices home life and marital relationships for the sake of the job.

### 1. *Summary*

Men are in a state of ideological flux. They are unsure of the role they are to play in an intersexual relationship—that is, are they the head of the house and primary breadwinner or are they entering into

anachronism. The sit-con [sic] father on television is invariably a bumbling fool who has trouble remembering his name and address. This concerted attack on 'maleness' has damaged or destroyed the notion of what a good father is . . . what a loving husband does. [Emphasis in original.] J. DOBSON, *STRAIGHT TALK TO MEN AND THEIR WIVES* 22-3 (1980).

161. Brandt, *We're Equals, But I'm The Boss*, *MCCALL'S* August, 1983, at 64.

162. See, Cazenave, 'A Woman's Place': *The Attitudes of Middle-Class Black Men*, 54 *PHYLON*, 1983, at 12.

Cazenave examines family-related sex role preferences of middle-class men. She surveyed 155 middle-class black men and made the following findings:

The overwhelming majority of these respondents report attitudes that indicate general support for nontraditional roles for women, women's issues, and egalitarian marital relationships. . . . It also appears that the minority of men who support traditional sex roles for women and who are opposed to women's liberation are: more traditional about their sex role orientations, more pessimistic about black male-female relationships, and less likely to feel that men should act in an emotionally expressive manner. The evidence suggests that such men may be less secure in their sex role orientations and relationships, and in some cases may blame women for forces beyond the control of either.

*Id.* at 31.

an egalitarian relationship with their spouses? In any event, the law provides him with an easy escape route if he opts out of a traditional ideology. If one relationship is too confining he can easily terminate that one and start another. He has the economic power and society gives him the greater freedom to go out and "do his thing," especially since there are a significant number of women who will endure significant maltreatment to keep him around.<sup>163</sup>

If Ehrenreich and Professor David Chambers<sup>164</sup> are to be believed, there are a significant number of men for whom there is no moral compulsion to support their families, especially children. For men it is easy to enter and leave a relationship with low economic costs to them. Without child custody, men then are better off economically because they earn more money than a female head of household.<sup>165</sup> For men, the revolution in family law has precipitated the truncation of the socialization process. There is no moral compulsion to socialize their progeny to provide for the next generation. If men are in a marital or non-marital relationship, even with a "liberated" women, it is the woman who still ends up doing and being responsible for the majority of household chores and child rearing tasks.<sup>166</sup> The reality is that ideological frame of reference can keep men from performing the necessary family functions.<sup>167</sup>

#### IV. WHEN IDEOLOGY, LAW AND REALITY CLASH

The exciting interplay between the concepts of ideology, law and reality produces countervailing influences. Ideology tempered by reality influences law. Law tempered by reality influences ideology. Reality tempered by law influences ideology. To understand the current issues in family law one must understand the interaction of ideology, law and reality.

A critical assessment of changing ideologies in changing times can provide guidance to law givers attempting to craft legal mechanisms which protect, promote and demand performance of universal family functions. This section explores the dimensions of societal demand as reflected

---

163. Mesch, *Why Women Stay with Men Who Beat Them and Why They Finally Leave*, ESSENCE, Apr. 1983, at 85.

164. See D. CHAMBERS, *MAKING FATHERS PAY* (1979).

165. See Weitzman, *supra* note 3, at 1241-1249 (discussing how men experience upward mobility and a higher standard of living upon divorce while women, especially with children, are likely to slip into poverty).

166. THE POSITIVE WOMAN, *supra* note 71, at 43; see also Crittenden, *We 'Liberated' Mothers Aren't*, Wash. Post, Feb. 5, 1984, at D1.

167. For an insightful discussion on young males whose outlook on marital relationships have been soured by their parents' divorce see, Francke, *The Sons of Divorce*, N.Y. Times, May 22, 1983, (Magazine), at 4.

in positive law. It also examines how ideological frame of reference influences the individual response of policymakers addressing problems of the family.

A. *Uncle Sam Wants Your Family*

As discussed in Part II, our society demands certain universal functions be performed by individual families; each family unit thus contributing to the greater collective good. The societal demand is generally articulated as positive law. Controversy over "THE FAMILY" intensifies when civic leaders attempt to articulate the societal demand. The controversy is a product of lawmakers' failure on the one hand, to understand the interplay between ideology, law and reality; and on the other hand, to properly understand the role of law in ordering universal family functions. This failure results in confusion over what rights and responsibilities can appropriately be placed by society on the individual through the operation of law. Complicating the task is the realization that the opinions on the reach and extent of societal demand are multifaceted and diverse.

There is a failure to reach a consensus on the scope of societal demand. The failure is a product of the lack of understanding of the two dimensions of societal demand for performance of family functions.<sup>168</sup> The first dimension is that of societal demand as a function of governmental/political process (as expressed by positive law) which legitimizes or provides efficacy to the family legal relationship.<sup>169</sup> For example, the positive law devises marital regulations, sets standards for parental responsibility, and dictates marital dissolutions requirements. Positive law is a codification of the universal family functions as demanded by society.

The second dimension of societal demand are those forces emanating from the umbrella of what can be loosely called nongovernmental social institutions: the church, the community, the workplace, the social club or association, and even our network of kinfolk.<sup>170</sup> The nongovernmental social institutions epitomize the collective spirit of society. In our pluralistic society of diverse ethnic, religious and racial groups, one might more properly call this force "collective spirits." An additional aspect of this dimension of societal demand is the heavy influence of morals—this covers the broad spectrum of philosophical bases.<sup>171</sup> Therefore, the

---

168. There may, in fact, be other dimensions. The two dimensions that are discussed cover the major societal forces.

169. See *supra* notes 39-62 and accompanying text.

170. See generally KINSHIP AND FAMILY ORGANIZATION (Farber ed. 1966).

171. See Hauerwas, *supra* note 58. For a discussion on the moral dynamics of a community, see Shaffer, *Moral Theology of Atticus Finch*, 42 U. PITT. L. REV. 181 (1981).

second dimension of societal demand is driven by individual ideology.

Contrastingly, the first dimension of societal demand is the legacy of moral collective conscience canonized as law, which provides motivation from without.<sup>172</sup> An individual's ideological frame of reference, which motivates the inner person, is usually strongly influenced by the second dimension of societal demand.<sup>173</sup> What society through law can legitimately demand of the individual is different than what society can demand of the individual by way of societal forces of nongovernmental institutions. One force establishes the family as a legal relationship with incumbent individual law-based rights and responsibilities. The other force establishes the social relationship of individuals and families to the larger community or social body.<sup>174</sup> Lawyers, lawmakers and scholars must comprehend the difference.

An individual comes to a lawyer for vindication or protection of his or her family unit legal rights.<sup>175</sup> At times the client seeks to create the legal relationship, often by unorthodox methods.<sup>176</sup> At times the individual may even desire relief from a particular family legal responsibility.<sup>177</sup> The client's personality and motives for seeking the lawyer's assistance are derivative of his or her ideological frame of reference. In this regard, they may favor a belief in a particular family unit structure with certain prescribed roles played by the individual members.<sup>178</sup> Regardless of the ideological frame of reference, the client possesses the same bundle of legal rights and responsibilities created by the first dimension of societal demand that all possess at the creation of the particular legal family relationship. The client is subject to the same sanctions for failure to fulfill any of the proscribed functions.<sup>179</sup>

However, it is the individual ideological frame of reference which

---

172. R. POUND, *LAW AND MORALS* (2d ed. 1926).

173. Either as acceptance or rejection of the persuasiveness of the force.

174. One's status and recognition within the community is thus a function of one's acceptance into the community based on forces other than legal rights. Although lack of legal rights may impact upon community status and recognition as a person of worth.

175. The family rights and responsibilities would be raised in a custody case, an abuse or neglect proceeding, or a paternity suit.

176. R. SNOWDEN & G. MITCHELL, *THE ARTIFICIAL FAMILY*, (1981); N. KEANE & D. BREO, *THE SURROGATE MOTHERS*, (1981). See also, Morrisroe, *Mommy Only: The Rise of the Middle-Class Unwed Mother*, *NEW YORK*, June 6, 1983, at 22, for a discussion on single, middle-class women who chose artificial insemination as a means for creating a family.

177. See, Joyce, *A New Situation in Adoption*, *N.Y. Times*, Aug. 8, 1983, at B6, for a discussion on married couples placing their children for adoption because of the perception that an increased family size would lower their standard of living. Most of the couples interviewed were middle-class.

178. See *supra* Part III, notes 64-167 and accompanying text.

179. Although historically, the ideological frame of reference of the decision-maker (or law-maker) may have determined the outcome. See references on maternal preference doctrine, *supra* note 57.

gives character and texture to the bundle of legal rights and responsibilities. The individual's frame of reference will determine how faithfully he or she adheres to the demands of that bundle. The faithfulness in fulfilling family functions as demanded by the law may well depend on how close the individual's ideology is to that of the policymakers. The following section presents an examination of this tension.

*B. Slipping in the Reagan Family Line*

In analyzing the present revolution in family law or proposed further reform, the second dimension of societal demand is too often used as a basis for analysis. The second dimension provides fertile territory for intellectual debate, but is unstable ground for a policymaker directing the role of law as an orderer of family functions. When the second dimension is the basis for societal demand, as expressed through articulated or unarticulated national or state policy, the policy is too dependent on the ideological frame of reference of the policymaker.<sup>180</sup>

President Ronald Reagan provides an excellent case study of what happens when law and ideology clash with reality. He has expressed his ideological frame of reference in presidential presentations. President Reagan's rhetoric on the family at first glance appears to be innocuous and capable of use in a general discussion on a variety of family forms. On November 4, 1983 in Proclamation 5126, President Reagan, proclaiming the week of November 20 through November 26, 1983, as National Family Week, recognized the role families play in society.

The family and family life are central to our American heritage. Family bonds give us an anchor in the past, as well as hope for the future. It is within the family that tradition is created, individuals grow, and faith is nurtured. Through family living, we discover who we are, how to interact with our fellow man, and the values that make a free society possible.

Families perform the daily tasks that sustain and renew us, including raising children and caring for the elderly.<sup>181</sup>

But what does the President mean when he uses the term "family"? What is his ideological frame of reference and how does it influence the articulation of his national policy on the family? One month after the issuance of Proclamation 1526, President Reagan, in a radio address to

---

180. State and national laws and policy covering the family are different. Historically, family law has been the sole province of the state. But we are edging slowly toward the federalization of family law. See also, K. REDDEN, *FEDERAL REGULATION OF FAMILY LAW* (1982); Burt, *The Constitution of the Family*, 1979 SUP. CT. REV. 329.

181. 19 WEEKLY COMP. PRES. DOC. 1528 (Nov. 4, 1983).

the nation, expressed his ideological frame of reference in terms of the role of government in today's families. President Reagan's "family" is the one where "the values that make a free society possible" are preached, practiced and passed on to the next generation.<sup>182</sup> He is exclaiming the traditional family defended by Rita Kramer.<sup>183</sup> All other families are placed in categories where the traditional values have either been lost or displaced by secular or humanistic philosophy. These other families are wracked by divorce, welfare dependency and teenage pregnancies.<sup>184</sup> All of these problems he places at the feet of the architects of "Great Society-type programs" foisted on America by over-spending Democrats.<sup>185</sup> As he sees it, here, as in other aspects of American life, the federal government has become over-intrusive and must be restrained.<sup>186</sup>

That the Reagan definition of family is traditional is borne out in a speech to the National Evangelicals Association in Orlando, Florida on March 8, 1983.<sup>187</sup> Evoking the legacy of our founding fathers, Reagan discusses how the religious beliefs (in the Judeo-Christian tradition) of these men and concepts on democracy are inextricably intertwined.<sup>188</sup>

182. 19 WEEKLY COMP. PRES. DOC. 1643 (Dec. 3, 1983).

183. *See supra*, notes 82-98 and accompanying text.

184. 19 WEEKLY COMP. PRES. DOC. 1643 (Dec. 3, 1983).

185. As economic and social pressures have increased, the bonds that bind families together have come under strain. For example, three times as many families are headed by single parents today as in 1960. Many single parents make heroic sacrifices and deserve all our support. But there is no question that many well-intentioned Great Society-type programs contributed to family breakups, welfare dependency, and a large increase in births out of wedlock. In the 1970's the number of single mothers rose from 8 to 13 percent among whites and from 31 to a tragic 47 percent among blacks. Too often their children grow up poor, malnourished, and lacking in motivation. It's a path to social and health problems, low school performance, unemployment, and delinquency.

If we strengthen families, we'll help reduce poverty and the whole range of other social problems.

*Id.* at 1644.

186. Families stand at the center of society, so building our futures must begin by preserving family values. Tragically, too many in Washington have been asking us to swallow a whopper: namely, that bigger government is the greatest force for fairness and progress. But this so-called solution has given most of us a bad case of financial indigestion. How can families survive when big government's powers to tax, inflate, and regulate absorb their wealth, usurp their rights, and crush their spirit? Was there compassion for a working family in 21 1/2 percent interest rates, 12 1/2 percent inflation, and taxes soaring out of sight?

*Id.* at 1643.

187. 19 WEEKLY COMP. PRES. DOC. 364 (Mar. 14, 1983).

188. The American experiment in democracy rests on this insight. Its discovery was the great triumph of our Founding Fathers, voiced by William Penn when

The centrality of God, family and democratic principles is what makes this country great. Each force influences the other. In the Reagan vision, the role of government and law in family life is to preserve and promote those families which uphold the ideological principles of traditional America—that is, the family which epitomizes the Judeo-Christian notion of family.<sup>189</sup> He places himself in the vanguard of protecting these cherished principles:

I want you to know that this Administration is motivated by a political philosophy that sees that greatness of America in you, her people, and in your families, churches, neighborhoods, communities—the institutions that foster and nourish values like concern for others and respect for the rule of law under God.<sup>190</sup>

His Administration's economic program of less taxes and less governmental regulation are key to his national family policy of bringing back the traditional family. As part of this program, he proposes an increased tax credit for child care, continued reduction of unemployment, job training programs and development of urban enterprise zones.<sup>191</sup> He also promises:

[to design] new ways to help families stay together, remain independent, and cope with the pressures of modern life. A cornerstone of our efforts must be assisting families to support themselves. As Franklin Roosevelt said almost 50 years ago, "Self-help and self-control are the essence of the American tradition."<sup>192</sup>

The Reagan rhetoric on the family and the economy could be perceived as the classic, political diatribes addressed to specific constituencies. The platitudes construct a glorious form but have no particular substance. However, the ideology does become the force behind law reform attempts of the Administration. Nowhere is the clash of ideology,

---

he said: "If we will not be governed by God, we must be governed by tyrants." Explaining the inalienable rights of men, Jefferson said, "The God who gave us life, gave us liberty at the same time." And it was George Washington who said that "of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports."

*Id.* at 365.

189. *Id.* at 366.

190. *Id.* at 365.

191. 19 WEEKLY COMP. PRES. DOC. 1643 (Dec 3, 1983).

192. *Id.* at 1644.

The unspoken implication is that the federal government must get out of the welfare business.

law and reality more evident than in the role of law in sex education as a key agenda issue for President Reagan.<sup>193</sup>

Family planning projects are funded by the federal government under Title X of the Public Health Service Act.<sup>194</sup> One aspect of the program is the funding used to counsel minors on sexual behavior, family planning, pregnancy counselling, and the provision of contraceptive devices.<sup>195</sup> The primary emphasis of the program is to seek methods of reducing the incidents of teenage pregnancies.

The Reagan Administration, through the Department of Health and Human Services, proposed to amend the rules regulating federally-funded family planning projects. Based on its interpretation of the 1981 Congressional amendment to Title X encouraging greater family participation in the family planning services offered to minors,<sup>196</sup> the Administration proposed: 1) Parental notification when prescription drugs or devices were issued to unemancipated minors;<sup>197</sup> 2) projects dispensing drugs or devices must comply with state laws requiring parental notification or consent for the provision of family planning services;<sup>198</sup> and 3) unemancipated minors must base eligibility for free assistance on total family income, including their parents' income.<sup>199</sup> This regulatory reform became known as the "squeal rule controversy."

The proposed rules touched off a heated, national debate on family planning and the role of the federal government. Reagan, viewing the problem from his ideological frame of reference, saw the issue as a secular intrusion into our national moral values.<sup>200</sup> Weakened national

193. Another example of Reagan ideology influences policy decisions was the proposal of the so-called "Baby Doe Rule." This rule sought to give handicapped status to infants born with severe birth defects. Denial of food or necessary medical care was to be reported via a special hotline to the U.S. Department of Health and Human Services. See 48 Fed. Reg. 9631 (1983) (to be codified at 45 C.F.R. § 84.61(b)) (interim rule proposed Mar. 7, 1983). The rule was declared invalid as an arbitrary and capricious agency action in *Am. Academy of Pediatrics v. Heckler*, 561 F. Supp. 395 (D.D.C. 1983).

194. 42 U.S.C. § 300 (1976 & Supp. V. 1981).

195. See 42 U.S.C. § 300(a) (1981); 42 C.F.R. § 59.2.

196. For a thorough discussion of the Reagan Administration's position on parental notification requirements under Title X of the Public Health Services Act, see 48 Fed. Reg. 3600-3614 (Jan. 26, 1983).

197. 48 Fed. Reg. 1614 (Jan. 26, 1983) (to be codified at 42 C.F.R. § 59.2).

198. 48 Fed. Reg. 1614 (Jan 26, 1983) (to be codified at 42 C.F.R. § 59.5(a)(12)(i)). But see *Planned Parenthood of Utah v. Matheson*, 582 F. Supp. 1001 (D.C. Utah 1983) where a state statute requiring parental notification when minor requests contraceptives was declared unconstitutional.

199. 48 Fed. Reg. 1614 (Jan. 26, 1983) (to be codified at 42 C.F.R. § 59.5(a)(12)(ii)).

200. Well, we have ordered clinics receiving Federal funds to notify the parents such help has been given. One of the Nation's leading newspapers has created the term "squeal rule" in editorializing against us for doing this, and we're be-



morals would weaken the family which, in turn, weakens the democracy. For Reagan, unless the government-sponsored program taught the traditional moral values, government should not be involved.<sup>201</sup> Therefore, sex education is an issue better ceded totally to the domain of right-thinking parents.<sup>202</sup>

The proposed rules were challenged in federal court before they became effective and were declared invalid in two separate, circuit court opinions.<sup>203</sup> There are several lessons to be learned from this example

---

ing criticized for violating the privacy of young people. A judge has recently granted an injunction against an enforcement of our rule. I've watched TV panel shows discuss this issue, seen columnists pontificating on our error, but no one seems to mention morality as playing a part in the subject of sex.

Is all of Judeo-Christian tradition wrong? Are we to believe that something so sacred can be looked upon as a purely physical thing with no potential for emotional and psychological harm? And isn't it the parents' right to give counsel and advice to keep their children from making mistakes that may affect their entire lives?

Many of us in government would like to know what parents think about this intrusion in their family by government. We're going to fight in the courts. The right of parents and the rights of family take precedence over those of Washington-based bureaucrats and social engineers.

19 WEEKLY COMP. PRES. DOC. 364, 366 (Mar. 14, 1983).

201. Although, for Reagan, the present family planning program is an intrusion into family matters, his actions were viewed as equally intrusive.

202. In a question and answer session with high school students on February 25, 1983, President Reagan was asked to justify the squeal rule. He responded as follows:

The legislation that authorized the Federal Government to subsidize centers where birth control advice and so forth and means of birth control were being offered the young people, that they should in return for these subsidies, to the greatest extent possible, involve a maximized family participation. Well, they haven't done it. They simply are allowing girls who are under age to come and receive their information and their prescriptions for these various birth control devices and at the same time to keep this information from the parents.

Now, I don't think any of us can say that sexual behavior is without a moral connotation, connection. And it seems to me that where they're all complaining that this is now government interfering with the rights of young people—what about government injecting itself into the family, between parent and child, and saying, 'We the government reserve the right to do something of this kind in collusion with your children, and we're not going to let you know about it'? I don't think, at a time when we're worried about the family as an institution and wanting to preserve the family as a unit—because that's the basis for all civilization—I don't think government has a right to stick its nose into the family and tell parents what they can or cannot know about their children. And, therefore, we've put out that regulation. And I feel very strongly about this.

19 WEEKLY COMP. PRES. DOC. 305, 309 (Feb. 28, 1983).

203. *Planned Parenthood v. Heckler*, 559 F. Supp. 658 (D.D.C. 1983), *aff'd*, 712 F.2d 650 (D.C. Cir. 1983); *New York v. Heckler*, 557 F. Supp. 354 (S.D.N.Y. 1983), *aff'd*, 719 F.2d 1191 (1st Cir. 1983).

Although the rules were challenged as a violation of the minor's constitutional right of privacy, the courts found the rules were invalid because they

of implementing rules for ordering family relationship from a narrow ideological frame of reference.

One, legislating in the family law arena is a question of political feasibility. Persons who disagree with the ideological frame of reference of the Administration will remain ambivalent to the political platitudes found in speeches. But they will be stirred to action when the ideology becomes reflected in laws and programs which affect their individual rights and lifestyles. The protest against the government's action is more vocal when there are questions of constitutionality and compliance with administrative procedure. Then there is a sense of government overbearance and intrusiveness. In such circumstances, the government's action has its lowest level of efficacy and societal demand in the first dimension is at its weakest force.

Two, on a deeper level, the squeal rule controversy evidenced a failure to understand the meaning of reality. One cannot understand why teenagers are sexually active<sup>204</sup> and contraceptive counselling is a major need of national proportions, if such governmental programs are judged from a preconceived ideal (our perfect family in Tea For Two). Why are so many teenagers sexually active? What sex education is being done in the home and why is it failing as reflected in the increased teen pregnancy rates? Are some parents looking for an alternative to remove themselves from the sex education hot seat? What social pressures make the issue larger than the family? Operating from a narrow ideological frame of reference blinds the policymaker to the complete range of data that is available.<sup>205</sup>

Three, the ideological frame of reference of those intended to be regulated is so powerful that they will not obey the law unless disobe-

---

contradict the intent of Congress. In finding for the respondents (plaintiffs below), Judge J. Skelly Wright recognized the broader significance of the controversy: This court is, of course, fully aware that these Title X regulations are at the center of a great whirlwind of public controversy. No doubt the moral and political wisdom of the Secretary's action will remain in dispute for some time to come. The legality of those actions, however, should not. Our review of Title X [of the Public Health Service Act] and its legislative history leads to the inescapable conclusion that the Secretary exceeded the bounds of statutory authority by promulgating regulations that contravene congressional intent.

712 F.2d 650, 665.

204. President Reagan prefers the term "promiscuous" and applies that term to girls. See 1983 PRESIDENTIAL COMPILATION OF DOCUMENTS 366. In the traditionalist sense, the moral burden is placed on girls to protect their virtues from playful boys. Or in terms of another myth: boys are supposed to be sexually experienced on their wedding night, while girls must be virginal.

205. THE ALAN GUTTMACHER INSTITUTE, *TEENAGE PREGNANCY: THE PROBLEM THAT HASN'T GONE AWAY* (1981); Goodman, *The Turmoil of Teenage Sexuality: Parents' Mixed Signals*, Ms., July, 1983, at 37.

dience carries a heavy price. In this respect, the societal demand in the first dimension has to be changed in radical ways in order to be reflective of changes in family responsibilities. For example, in the People's Republic of China, to control the size of each family unit in an overpopulated nation, family units are rewarded for having only one child and penalized in increasing severity for procreating each additional child.<sup>206</sup>

Ignoring the reality leads to the creation of wrong or inappropriate solutions. No matter what ideological frame of reference one possesses, the reality of the one possible consequence of sexual relations is pregnancy with the options of abortion, adoption or instant family. This hard reality transcends ideology. Therefore, societal demand as reflected in positive law must explicitly state and define the family obligations of the individual. The individual must then receive adequate notice that failure to fulfill the society demanded functions will result in application of legal sanctions.

#### V. THE ROLE OF IDEOLOGY IN LAW AND POLICY

In reality, many individuals disregard the legal family entity and attending responsibilities. Their actions are guided by their individual ideological frames of reference. Indeed, they may consciously fail to fulfill the requisite family functions if their ideological frame of reference exerts no moral compunction to do so. On the other hand, others, based on ideological frame of reference, honor the legal family relationship to their detriment. The ease of obtaining divorce which ends the legal family relationship may well leave the person ideologically committed to the family as a viable unit in an untenable position.

As a partial result of the revolutionary changes in family law, women continue to be impoverished by divorce and birth. At least in the traditional marriage, there was the prospect of a monetary payoff (permanent alimony) at the end of the relationship. Now women may only receive a short severance pay and are left to fend for themselves. Unless there is a significant quantity of property accumulated, women start over, often at mid-life, usually with children. Divorced or unmarried women with children entering a discriminatory job market with limited skills or experience find it impossible to catch up financially to male counterparts.<sup>207</sup>

---

206. Bennett, *Population Lid: China Cajoles Families and Offers Incentive To Reduce Birth Rate*, Wall St. J., July 6, 1982, at 1.

207. Despite the gains made by women in the workforce, their salaries continue to lag behind those of men. A study of year-round, full-time workers conducted by the National Commission for Employment Policy shows that in 1971, women made only 59% of male income. By 1981, that figure had only gone up 1 percentage point.

For full-time black male workers, the median usual weekly earnings in 1981 was \$274,

The problems are compounded for female teenagers who become pregnant and bear children. A teenager with a child is ill-equipped to perform the necessary family functions. She is further handicapped by the reality that her premature motherhood will limit the work and educational opportunities that would normally be available. More frightening is the reality that there is an increase in the number of girls below the age of thirteen who are becoming pregnant. The real tragedy is that the pattern of teenage pregnancy can become cyclical as the next generation also succumbs to early pregnancy.<sup>208</sup>

The work of Professor Weitzman and others suggest that men upon divorce make out better in terms of economic power, although they also suffer emotional disequilibrium from the process. But even if they remain with the family unit, it is becoming difficult to make ends meet financially. Cyclical high employment can be devastating, especially to a family with minor children. Economic necessity is forcing more women into the job market so that the family unit can have at least one, if not two, incoming paychecks. Complicating matters is the recognition that middle-class jobs are disappearing as manufacturers move to cheaper labor pools overseas and high technology eliminates many manual labor jobs.<sup>209</sup>

The net result is a significant number of family units experience difficulty in performing family functions because of economic consequences beyond their control.<sup>210</sup> Similarly, ideological response of an individual family member may also cause family disfunction and disequilibrium.<sup>211</sup> Increasingly, for many family units it is difficult to have

while full-time black female workers earned \$210. Black males earned about 76% of white male workers' income compared to black women who made 93% of the income of white women.

BLACK ENTERPRISE, Jan. 1984, at 27.

208. For a complete discussion on the consequences of teenage pregnancy, see THE ALAN GUTTMACHER INSTITUTE, *TEENAGE PREGNANCY: THE PROBLEM THAT HASN'T GONE AWAY* (1981).

209. See generally Kuttner, *The Declining Middle*, ATLANTIC MONTHLY, July 1983, at 60; REICH, *THE NEXT AMERICAN FRONTIER* (1983); but see Linden, *Myth of the Disappearing Middle Class*, WALL ST. J., Jan. 22, 1984, at 22.

210. The problems are particularly acute for female-headed households. See A GROWING CRISIS *supra* note 2. Poverty has become especially devastating for black families as pointed out by a report by Dr. James P. Comer:

Among black women in 1982 who maintained families, 32% had never married.

The number of poor black families with a female household head rose from 834,000 in 1970 to 1.4 million in 1981. These families accounted for 70% of all poor black families in 1981.

Comer, *Single-Parent Black Families*, THE CRISIS, Dec., 1983, at 42. See also Schulman, *Poor Women and Family Law*, CLEARINGHOUSE REV., Feb. 1981, at 1069 (studies impact of law on issues of child support, custody and battered women)

211. Ideological response used in this manner principally signifies family units which suffer dislocation and hardship because of an ideology held by an essential family member. An example would be the woman and children abandoned by the Ehrenreich-type playboy who seeks liberation from the breadwinner role.

the financial and emotional wherewithal necessary for adequately performing the universal family functions.

If society is serious about what it requires of legal family units, the law must be made to enforce that desire or we fall back on moral imperative and societal philanthropy. Problems of the family then become socio-political issues. The law may succeed in effectively addressing these issues and be productive of more functioning families. On the other hand the law may be counterproductive as individuals with dissimilar family styles chaffe against the structure of family imposed by a narrow thinking policymaker.

The law should be used to fill one of three roles: 1) to expand the legal definition of family by changing the nature of the legal rights and responsibilities; 2) to confront family problems as social or political issues; or 3) to create the environment necessary for the fulfillment of the decided universal family functions.

If the law reform is an attempt to change the nature of the legal definition of family by enlarging or modifying the universal family functions. One could argue the current reform movement has generated too much freedom of choice in ordering family relationships and has narrowed the definitions of universal family functions.<sup>212</sup>

One hypothetical example can be drawn from the squeal rule controversy. One could view this as an attempt at enlargement of parental responsibility. One could argue that the Reagan Administration sought to change the nature of the legal relationship by making sex education a universal family function. Parents (as in mother and father) were to prevent teenage sexuality and pregnancy as a matter of law, with legal consequences if there was a failure. Such consequences might be loss of parental rights or bearing the cost of their child's child.

To go this far, we have to make a collective decision as a society that prevention of premature sexual activity and teen-age pregnancy is such a detriment to society that we are willing to canonize the responsibility as positive law. To do otherwise would make the law a fraud, in which case, it would be better to let nongovernmental social agencies or local communities cope with the problem.

If the law reform attempt is government's response to social issues or a political constituency, then all is fair in love, war and politics. The majority will rule the policy-making process. This may be a function of the welfare state as government offers benefits to citizens.<sup>213</sup> However,

---

212. The acceptance of non-marital relationship can be viewed as a diminution of state involvement in the legal formation of a family unit.

213. For a discussion on the modern welfare state see generally L. THURLOW, *THE ZERO-SUM SOCIETY* (1980); *PRIVATE WANTS AND PUBLIC NEEDS* (Phelps ed. 1965).

this solution may inadequately address the problem because of the inappropriate influence of narrow ideological frame of reference.<sup>214</sup>

If the law reformer desires to construct a national family policy with efficacy, one should start from the vantage point of the role of law in ordering the legal relationship. The focal question then becomes if society can legitimately demand a particular function then how can the law make that function a feasible reality? The legal nature of the family relationship becomes the measure by which to make the societal environment suitable for fulfilling the universal family functions.<sup>215</sup>

The third role is similar to the second but de-emphasizes the significance of ideological frame of reference. The goal is not to use ideology to squeeze all family units into one mold. The shaping of family units into specific ideological frameworks is the proper role of other social agencies and institutions that operate through the second dimension of societal demand. It is not the role of law to demand compliance with an "ideal" model of family unit or face punishment or detriment meted out to deviants.

Too often policymakers proceed from a narrow ideological frame of reference. They ask the questions posed by the conveners of the 1980 White House Conference on Families: Why is the law not working? Why are families disintegrating?<sup>216</sup> These policymakers fail to see that individuals are not functioning in some families in part because they possess differing ideological frame of reference. The law cannot change how individuals think, but it can insist on the fulfillment of the necessary functions valued by society regardless of ideological frame of reference.

This approach leads to confronting the essence of the problems of the family. Collectively, we have not completely settled on what our society wants from our families and how to accommodate the myriad ideologies while insuring the fulfillment of family functions. Scholars, practitioners and policymakers must squarely confront how the law is

214. See discussion on the squeal rule controversy, *supra* notes 193-206 and accompanying text.

215. For example, on the issue of tax reform, legislators might consider reforms which would help families with children regardless of family unit structure.

216. Chairperson Jim Guy Tucker, expressed the agenda of the conference as follows: President [Jimmy] Carter called this Conference because he believed 'official America had lost touch with family America.' He felt that a gap had developed in the way government and other major institutions make decisions, that there was no conscious concern for how those decisions help, hurt or ignore families. As a result, we have policies which undermine family stability, programs intended to help families but hurt them instead, and many efforts which do not serve families as well as they could because they ignore family ties and influences.

WHITE HOUSE CONFERENCE ON FAMILIES, LISTENING TO AMERICA'S FAMILIES: ACTION FOR THE 80's Nov. 1980, at 8.

to function as a mechanism for ordering family structure and legal relationships.

There are two significant efforts of family law reform that focus on the responsibilities demanded of individuals as a part of the nature of a legal family relationship. First, in postdivorce disposition of children, courts are focusing on performance of childrearing responsibilities by both mother and father. Many states are rewriting their custody statutes to favor, and in some cases to require, joint or shared parental responsibility for the custody of their children.<sup>217</sup> In West Virginia, custody of younger children is awarded upon a determination of which parent is the primary caretaker.<sup>218</sup> Assuming equal fitness, the court considers which parent exercised the most parenting skills in the day-to-day care of the child.<sup>219</sup> If both parents shared equally in childrearing tasks, then custody is determined by the best interests of the child standard.

The second effort, a response to the enormous nonpayment of child support, encompasses a commitment to increase support enforcement efforts.<sup>220</sup> Congress has recently passed legislation which should develop a national network for enforcing child support orders.<sup>221</sup> The Child

---

217. For a discussion on issues of joint custody *see*, 5 FAM. ADVOC., Fall (1982) (special issue dedicated to the subject of joint custody). For a thoughtful discussion on the concept of shared parental responsibility in legal and physical custody *see*, Note, *Shared Parental Responsibility: Florida Statutes Section 61.13*, 7 NOVA L.J. 2777 (1983).

218. *See Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981).

219. In establishing which natural or adoptive parent is the primary caretaker, the trial court shall determine which parent has taken primary responsibility for, *inter alia*, the performance of the following caring and nurturing duties of a parent: (1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning, and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, *i.e.*, transporting to friends' houses or, for example, to girl or boy scout meetings; (6) arranging alternative care, *i.e.* babysitting, day-care, *etc.*; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8) disciplining, *i.e.* teaching general manners and toilet training; (9) educating, *i.e.* religious, cultural, social, *etc.*; and, (10) teaching elementary skills, *i.e.*, reading, writing and arithmetic.

*Id.* at 363.

220. The severity of the nonpayment problem was reported in Lauter, *The Custody Support Crisis*, NATL L.J., Feb. 27, 1984, at 1.

That non-compliance currently amounts to a \$4 billion annual arrearage bill, according to recent congressional testimony. Census Bureau figures show that fewer than half of those custodial parents who do receive awards actually get the amount coming to them. For the rest, enforcement efforts face crowded court calendars that often mean months of delay before a hearing, as well as a legal system that makes it easy to frustrate an enforcement action.

*Id.* at 45.

221. H.R. 4325, 98th Cong., 1st Sess. (1983) (as codified in Pub. L. No. 98-378, 42 U.S.C. 1305).

Support Enforcement Amendments of 1984 amend Title IV-D of the Social Security Act.<sup>222</sup> The legislation is designed to require automatic deduction of support payment arrearage from the wages of a parent subject to a court-ordered support decree. Originally Title IV-D required Aid to Families with Dependent Children recipients to assign their rights to collect support payments over to the state.<sup>223</sup> Under the new legislation states must design a system which records support orders and monitors actual support payments made. If there is a delinquent payment, a state enforcement agency starts collection procedures after giving adequate notice to the late-paying parent. The state-sanctioned collection service is open to all parents who are beneficiaries of a support order. The federal government makes incentive payments to the state to defray administrative costs of the program.<sup>224</sup>

Some jurisdictions have already stepped up child support enforcement activities. The District of Columbia has automated its support order enforcement efforts by court officials.<sup>225</sup> Similar to the new federal legislation, the support recipient does not have to return to court to seek receipt of a late payment.<sup>226</sup> "Under the new system, initial delinquencies will trigger a court notice demanding payment—plus a \$5 late fee—within 10 days. If payment still is not made, the court automatically will move to garnishee the funds from the spouse's salary, plus a \$50 fine to cover court costs."<sup>227</sup>

In Prince George's Count, Maryland, a one day, support enforcement effort called for the sheriff's department "to serve arrest warrants on persons who either had failed to make child support payments or did not show up in court for a child support hearing."<sup>228</sup> Of the 150 persons brought before the Domestic Relations Court as result of a recent early morning arrests spree, most agreed to a support arrearage payment plan, some were released on bond pending a subsequent hearing, and a few were jailed for refusal to pay.<sup>229</sup> The message to these delinquent men and women and to others with support responsibilities was that payment of support is a serious matter not to be ignored.

222. 42 U.S.C. §§ 601-615 (1982). This is the Aid to Families with Dependent Children Program.

223. 42 U.S.C. § 602(a)(26)(A) (1982).

224. For a complete description of the House version of H.R. 4325 see 8 NAT'L RECIPROCAL AND FAM. SUPPORT ENFORCEMENT ASSOC. NEWS No. 6, Nov.-Dec. 1983.

225. Bruske, *D.C. Streamlines Method to Obtain Child Support*, Wash. Post, Jan. 13, 1984, at A-1, A-11.

226. *Id.* at A-11.

227. *Id.*

228. Gregg, *Child Support Effort: P.G. Dragnet Catches Scores*, Wash. Post, Jul. 19, 1984, at A-1.

229. *Id.*



These developments represent an effort to see that children get adequate necessities and emotional support from both parents regardless of family unit structure. It also relieves the burden on states to provide necessities through public assistance programs. The effort also re-emphasizes the societal demand that full responsibility for raising children falls on both parents. This especially keeps fathers from neglecting the responsibility derivative of the first dimension of societal demand.

## VI. CONCLUSION

One examines personal and sexual role ideology for assistance in understanding why individuals who are members of a family behave and believe as they do in family relationships. The performance of society-demanded family tasks will, in large part, be grounded in the individual's ideological frame of reference. Since there is a wide range of ideological response to family responsibility, there will be a potpourri of family forms and styles and a wide variance of ability in performing the universal family functions. The ideological variety of family style and form creates a lack of fit between what society demands through the law and what individuals actually achieve in reality. The "mis-fit" between law and reality is further skewed when policymakers and legislators are guided by the narrow range of their own personal family ideologies.

As a society, we recognize the increase of family instability. However, we fail to understand that a significant amount of family instability is resultive of the lack of fit between what the law demands and what individuals actually do in reality as a function of ideology. This failure prevents effective legal reform because there is not a clear statement of what society can legitimately demand of its families. Stated differently, there is no notice posted plainly on the courthouse door which declares, "Thou shalt perform these families' functions regardless of ideological frame of reference. Methodology of performance is left to individual discretion."

Recognizing the problems contemporary families face calls for a societal response which will enhance family life and the vital role family plays in society. An effective response will focus on the legal nature of the family relationship—how a legal family unit is formed and what rights and responsibilities flow from the formation of the unit. The universal family functions discussed in this article represent the minimum society can demand of an individual family member through the law. The role of the law should be to maximize the opportunities for individuals to find their own way to fulfill the universal family functions as required by the first dimension of societal demand.