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From the Lemma Barkeloo and Phoebe Couzins Era to the New Millennium: 130 Years of Family Law

Susan Frelich Appleton*

Lest you worry from the title that this review will itself take 130 years, let me explain that I plan to present three brief snapshots. Each snapshot depicts a distinct period in the evolution of family law, and I have given each snapshot its own “caption” to help convey what the picture is all about. The snapshots focus on 1869, the year that marks the admission to law school of Lemma Barkeloo and Phoebe Couzins, among the nation’s first women law students; 1975, the year when I began teaching at Washington University School of Law; and Spring 2000, the semester we are just completing and the beginning, depending upon your definition, of the new millennium.

I. 1869: GENDER DIFFERENCES IN THE FAMILY

Washington University had no women students and no courses on family law when it opened its Law Department in 1867. Perhaps serendipitously, given our celebration today, two changes happened concurrently in 1869. First, Lemma Barkeloo and Phoebe Couzins enrolled as the school’s—and perhaps the nation’s—first women law students.¹ Second, the Honorable Samuel Reber, who taught “History

* Associate Dean of Faculty and Lemma Barkeloo and Phoebe Couzins Professor of Law. This Article is a slightly revised version of an address delivered by the author on April 21, 2000, on the occasion of her installation as the Lemma Barkeloo and Phoebe Couzins Professor of Law. To the extent that issues raised in the address reached some resolution after April 21, I have added appropriate updating in footnotes.

In addition to those whom I thanked at the installation ceremony, including my family, I now thank Martha Chamallas, Professor of Law at the University of Pittsburgh School of Law and John S. Lehmann Distinguished Visiting Professor at Washington University School of Law during spring 2000, for insightful suggestions that helped me improve the original address and, in turn, this Article.

1. Cartus Rhey Williams, *History of the Law Department of Washington University (The St. Louis Law School) 1867-1900*, at 106 (1942) (unpublished M.A. dissertation, Washington University). Williams explains that “Miss Couzins and Miss Barkaloo [sic] may have entered the Law School at the same time as Miss [Ada] Kepley, who, nevertheless, maintains the

and Science of Law; Equity, and Law of Successions,”² was instructed at a faculty meeting “to devote whatever spare time he might have to the subject of domestic relations.”³ True, family law was not a full-fledged course in the curriculum, but it had gained a toehold.

What might family law—or “domestic relations”—have encompassed in 1869? We might assume that issues of marriage, support, divorce, and adoption predominated; yet the legal structures underlying some of these practices were just then beginning to emerge. Domestic relations in 1869 also would have included the law of “master and servant,” presenting some interesting questions in this period so soon after the Civil War had ended slavery.⁴ If we take today’s understanding of family law and turn the clock back to 1869,

distinction of being the first woman to receive the LL.B. degree,” which she obtained from the Union College of Law, “a department of the old University of Chicago, but later affiliated with Northwestern University.” See Leila J. Robinson, *Women Lawyers in the United States*, 2 THE GREEN BAG 10, 13 (1890) (citing enrollment of Barkeloo and Couzins in 1869 while naming Kepley as first woman to earn “a degree for a regular course of legal study,” but failing to indicate when Kepley entered law school); Karen L. Tokarz, Commemoration, *A Tribute to the Nation’s First Women Law Students*, 68 WASH. U. L.Q. 89, 90 (1990) (citing KAREN MORELLO, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA 1638 TO THE PRESENT* (1986) (describing Barkeloo as “the nation’s first woman law student”)).

2. A CATALOGUE OF THE OFFICERS AND STUDENTS OF WASHINGTON UNIVERSITY FOR THE ACADEMIC YEAR 1869-70, at 46 (1870). An irresistible aside: Examining this catalogue gave me a special thrill because of the tangible reminder that Mary Institute, the single-sex school that I attended for fourteen years, from “Junior Kindergarten” through high school, had originally been a part of Washington University. The University established Mary Institute in 1859 in response to the absence in St. Louis of schools that women could attend to prepare for college:

The Institute is provided with the most thorough and varied instruction, so that no citizen of St. Louis need send his daughter a thousand miles *away from home, for four or five of the most critical years of her life, to be trained by strangers.*

The connection of the [Female] Seminary with the University will be only such as to secure to the young ladies all the means of high intellectual culture accessible to young men

Id. at 52. See also Arthur Newell Chamberlin III, *Mary Institute: The Story of a Hundred Years*, in FROM MARY TO YOU: CENTENNIAL 1859-1959, at 7, 8-20 (1959). Despite the University’s pipeline for women students prepared for a college education, “coeducation in the Law Department [of Washington University] preceeded [sic] coeducation in the College.” Williams, *supra* note 1, at 107.

3. See Williams, *supra* note 1, at 117 (citing MINUTES OF THE FACULTY OF THE LAW DEPARTMENT, 1867-1935, at 31).

4. See Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1299, 1319, 1389-91 (1998).

however, a number of salient points emerge, emphasizing just how far ahead of their time Lemma Barkeloo and Phoebe Couzins must have been.

The Catalogue outlining the course of instruction for 1869-70 in Washington University's Law Department lists Blackstone's Commentaries as one of several required texts for the "Junior" or entering class.⁵ Today's family law students, of course, know Blackstone best for his articulation of the legal nonexistence of married women. As Blackstone wrote: "By marriage, the husband and wife are one person in law: that \S , the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband"⁶ Each spouse had a well defined role under the law, making the husband responsible for support and the wife for domestic services.⁷

This common-law concept of marriage also authorized domestic violence which today, unfortunately, provides much work for our students in the Civil Justice Clinic. As Blackstone described:

The husband also (by the old law) might give his wife moderate correction. For, as he is to answer for her misbehaviour, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his servants or children⁸

5. See A CATALOGUE OF THE OFFICERS AND STUDENTS OF WASHINGTON UNIVERSITY FOR THE ACADEMIC YEAR 1868-69, at 50 (1869) (specifying "Blackstone's Commentaries (Sharswood), Books I., II., III." among the "text books [that] will be used by the Junior Class during the next term (1869-70).").

6. 1 WILLIAM BLACKSTONE, *442.

7. See *id.*

8. *Id.* at *444 (footnote omitted). Is it an overstatement to say in text that Blackstone's concept of marriage authorized domestic violence? True, Blackstone referred to "the old law" and used the word "moderation." He added that "with us, in the politer reign of Charles the Second, this power of correction began to be doubted." *Id.* at *445. Nonetheless, this section concludes with the following observation: "Yet the lower rank of people, who were always fond of the old common law, still claim and exert their ancient privilege: and the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehaviour." *Id.* See also Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117, 2129-30, 2153 (1996) (stating that although the husband's prerogative to chastise his wife was abolished by the 1870s, laws continued to condone violence in marriage through other doctrines, including marital privacy).

Note that Blackstone's understanding of marriage not only made physical force a legitimate part of a husband's role but also ensured that a wife or a child on the receiving end of such force could not turn to law enforcement for help.⁹

Just four years after Lemma Barkeloo and Phoebe Couzins became law students, the United States Supreme Court upheld Illinois' denial of Myra Bradwell's application to practice law.¹⁰ The famous concurring opinion by Justice Bradley offers a telling portrait of the law's approach to family life at that time.¹¹ Justice Bradley's opinion provides the classic description of the "separate spheres" occupied by each sex during an era when the world of commerce and ideas belonged exclusively to men and the "cult of domesticity" celebrated women's roles as "nurturing mothers and submissive wives."¹² In explaining why Mrs. Bradwell had no right to practice law, Justice Bradley wrote:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.¹³

9. See, e.g., Raymond I. Parnas, *The Police Response to the Domestic Disturbance*, 1967 WIS. L. REV. 914, 930-31; Nadine Taub & Elizabeth Schneider, *Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 151, 154-57 (David Kairys ed., revised ed. 1990).

10. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872).

11. See *id.* at 141-42 (Bradley, J., concurring).

12. Martha Minow, "Forming Underneath Everything That Grows:" *Toward a History of Family Law*, 1985 WIS. L. REV. 819, 866.

13. 83 U.S. at 141 (Bradley, J., concurring).

The opinion invoked biology as destiny, called on religion for reinforcement, and treated the Blackstone understanding of marriage as immutable.¹⁴

Justice Bradley went on to note that exceptions to the stereotype—exemplified by women like Lemma Barkeloo and Phoebe Couzins, who never married—did not justify different treatment:

It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.¹⁵

A number of modern scholars challenge the traditional story of how family law evolved. They question whether the “separate spheres” ideology accurately captures the actual experiences of women (and men) of the nineteenth century.¹⁶ Indeed, we know that some young women worked outside the home, particularly women of color and working-class women.¹⁷ In addition, many women, including African-Americans, joined voluntary associations that ultimately became instrumental in legal reforms related to the family, including juvenile courts, welfare programs, and birth control.¹⁸ Yet, even if Lemma Barkeloo and Phoebe Couzins led lives that did not

14. *See id.*; *see also* Minow, *supra* note 12, at 843.

15. 83 U.S. at 141-42.

16. *See generally* Minow, *supra* note 12; Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1163-74 (pointing out the difficulty of identifying “any objective sense in which the family is a private domain” and asking whether “private” and “public” more properly refer to social circumstances or perspective based on different ways of experiencing the world).

17. *See* JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT* (1985); Minow, *supra* note 12, at 869-75.

18. *See* LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890-1935* (1994), at 111-43; Minow, *supra* note 12, at 877-82; DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 82 (1999).

conform to the conventional regime, they nonetheless would have studied Blackstone's version of reality in law school. If experience counts most, then try to imagine the experience of a woman studying legal rules that explicitly subordinate all women.

Although marriage might have had its drawbacks in this era, forming a family without marriage posed even greater risks. Fornication and nonmarital cohabitation constituted crimes.¹⁹ Children born outside of marriage suffered not just social stigma, but real legal disabilities including the absence of any right to inheritance or support from their fathers.²⁰ Legislative efforts to limit family forms did not always prove successful, however. For example, Congress had outlawed bigamy in the territories in 1862, but polygamy continued to thrive among Mormons in Utah.²¹

The Lemma Barkeloo and Phoebe Couzins era was also the period in which childbearing became compulsory, at least in the eyes of the law. Before then, abortions early in pregnancy had long been commonplace and without legal consequence—indeed, newspapers and ladies' magazines openly advertised such remedies and services.²² The second half of the nineteenth century, however, witnessed a dramatic change in the law. Laws against contraception were enacted,²³ and many states made abortion, even early abortion, a crime. Historians have offered two explanations for the change. First, physicians, seeking to upgrade their professional status, undertook to ban the services performed by their competitors such as midwives, abortion-providers, and other “irregular” practitioners.²⁴ Second, the

19. See, e.g., MODEL PENAL CODE AND COMMENTARIES § 213.6 at 430 (Note on Adultery and Fornication) (1980) (“At one time or another, most American states extended their penal laws to reach such misconduct, but the trend in this century has been toward decriminalization or reduction in penalties.”).

20. MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 196-233 (1985). See generally HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY (1971). See also I BLACKSTONE, *supra* note 6, at *459.

21. See *Reynolds v. United States*, 98 U.S. (8 Otto) 145, 168 (1878). Utah banned polygamy in 1894, in response to a condition mandated by Congress for admission into the Union. See *United States Statutes at Large*, 53 Cong. Ch. 138, 28 Stat. 107 (1894).

22. JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900, 51-57 (1978).

23. GROSSBERG, *supra* note 20, at 156-95.

24. See, e.g., KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 20-35

influx of immigrants into the United States—who were usually both poor and fertile—prompted fears of “race suicide,” providing an impetus to stop white, middle-class women from limiting family size.²⁵ The emergence of criminal abortion prohibitions (almost always aimed at abortion providers and not women) certainly reinforced the rigid gender-based roles within the family that Justice Bradley described in *Bradwell*.²⁶

Formal adoption laws made their debut around 1869, with the first comprehensive American adoption statute enacted by Massachusetts in 1851.²⁷ Missouri enacted its first adoption statute in 1857, and New York did so in 1873.²⁸ Although something akin to adoption had occurred in earlier times through the practices of apprenticeship and “placing out,” the 1851 Massachusetts statute initiated a legislative trend, in turn sparking the establishment of Children’s Aid Societies and other private agencies designed to place young children in homes with families willing to rear them.²⁹

Yet on other matters of child welfare, the law in 1869 remained completely undeveloped. To find a basis for legal intervention in a case of horrible child abuse that occurred in the early 1870s, a creative social worker sought the assistance of the American Society for the Prevention of Cruelty to Animals on the theory that the child was a member of the animal kingdom.³⁰

For many, the law of domestic relations means divorce law: the bases for dissolving a marriage and the rules for resolving all the issues arising in the wake of a dissolution, including property division, alimony, child custody, and child support. The time when Lemma Barkeloo and Phoebe Couzins began law school marked a watershed for divorce law. According to legal historian Lawrence Friedman, many states enacted highly permissive divorce laws

(1984); MOHR, *supra* note 22, at 147-70.

25. MOHR, *supra* note 22, at 86-118, 128. See LINDA GORDON, *WOMAN’S BODY, WOMAN’S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA* 136-58 (1976).

26. See *supra* notes 10-15 and accompanying text.

27. Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 465 (1971).

28. See *id.* at 466 nn.111-12.

29. See *id.* at 473-74.

30. Peter Stevens & Marian Eide, *The First Chapter of Children’s Rights*, 41 AM. HERITAGE 84 (1990).

between 1850 and 1870; yet, around 1870 the tide turned with fears that “easy divorce” would cause the downfall of America just as it had for the Roman Empire.³¹

II. 1975: EQUALITY WITHIN THE FAMILY

In this very personal chronicle of family law, the next milestone is 1975, when I arrived here as an assistant professor of law after completing my clerkship with Judge Webster on the United States Court of Appeals for the Eighth Circuit.³² I asked to teach family law as one of my courses. I had fallen in love with the subject matter as a law student in 1971 or 1972 in Berkeley, where my mentor, Professor Herma Hill Kay,³³ introduced me to this field. Phil Shelton,³⁴ my co-clerk during my first year with Judge Webster, taught family law as a visiting professor at Washington University in 1974, and he appeared only too willing to unload this often disfavored course. Indeed, Professor Martha Minow from Harvard has written about family law’s low status within the profession,³⁵ and Professor Sylvia Law of New York University has observed that, among teachers and scholars, constitutional law is King and family law is Cinderella.³⁶ Yet, I certainly did not feel that any wicked stepsisters had conscripted me to a life of drudgery and misery!

Not surprisingly, much had changed since 1869, when family law

31. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 498-99 (2d ed. 1985).

32. The Honorable William H. Webster sat on the United States Court of Appeals for the Eighth Circuit (1973-78) and subsequently served as Director of the Federal Bureau of Investigation (1978-87) and Director of Central Intelligence (1987-91). He then became a partner at the law firm of Milbank, Tweed, Hadley & McCloy.

33. Professor Kay served as Dean at Boalt Hall (the University of California at Berkeley School of Law) from 1992-2000, and during that time she assumed a chaired position named for an earlier member of the Boalt faculty, Barbara Nachtrieb Armstrong. In 1922, Armstrong became “first woman law professor appointed to a tenure-track position in an American Bar Association (ABA)-approved, AALS-member school.” Herma Hill Kay, *The Future of Women Law Professors*, 77 *IOWAL REV.* 5, 5-6 (1991).

34. Philip D. Shelton subsequently served as Washington University School of Law’s Associate Dean (1975-85) and its Acting Dean (1985-87), departing to become Dean at the Walter F. George School of Law at Mercer University. In 1993, he became President and Executive Director of the Law School Admissions Council.

35. Minow, *supra* note 12, at 819.

36. Sylvia A. Law, Speech at the Washington University School of Law Public Interest Law Speakers Series (Mar. 22, 2000).

first crept into the curriculum at this law school. Just two years before I began teaching, the United States Supreme Court had decided *Roe v. Wade*,³⁷ which—to borrow from Sylvia Law once again—is the most important thing the Supreme Court has ever done for women.³⁸ *Roe* challenged the notion that biology determines destiny and it gave every woman the opportunity to decide her own place in society, her own role in her family, and of course her own health care. With childbearing a choice rather than an inevitability, motherhood acquired new value.³⁹

At this same time, following the enactment of California's path-breaking law in 1969,⁴⁰ no-fault divorce became a legal reality and changed not only the way families dissolve but also our understanding of marriage.⁴¹ Again, enhanced social value followed, once staying married became a choice.⁴² The choice broadened as the Supreme Court cleared away most of the previously existing discriminations against children born outside of marriage⁴³ and as other courts began fashioning remedies designed to achieve fairness at the end of nonmarital relationships. California led the way in this area too, with its supreme court's famous 1976 decision in *Marvin v. Marvin*,⁴⁴ which imposed financial responsibilities on cohabitants after the relationship ends.

Domestic violence was just beginning to emerge from the shadows, but I cannot recall spending a moment on the subject in my early classes. Many states still adhered to the doctrine of spousal

37. 410 U.S. 113 (1973).

38. Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 981 (1984).

39. See, e.g., BARBARA KATZ ROTHMAN, *RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN APATRIARCHAL SOCIETY* 107 (1989).

40. See CAL. FAMILY CODE §§ 2310, 2311, 2335 (West 1994) (formerly in California Civil Code §§ 4506, 4507, 4509).

41. See Herma Hill Kay, *Beyond No-Fault: New Directions in Divorce Reform*, in *DIVORCE REFORM AT THE CROSSROADS* 6-11 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

42. See ROTHMAN, *supra* note 39. Cf. Kay, *supra* note 41, at 10 (noting a new understanding of marriage that elevates self-interest).

43. See, e.g., *Levy v. Louisiana*, 391 U.S. 68 (1968); *Weber v. Aetna Casualty Co.*, 406 U.S. 164 (1972); *Trimble v. Gordon*, 430 U.S. 762 (1977); see also *Stanley v. Illinois*, 405 U.S. 645 (1972) (requiring notice and a hearing before children of some unmarried fathers become wards of the state).

44. 557 P.2d 106 (Cal. 1976).

immunity,⁴⁵ and the crime of rape contained an explicit exemption for husbands.⁴⁶ Nonetheless, one student in my first family law class, Nina Balsam, soon thereafter co-authored Missouri's Adult Abuse Act.⁴⁷

All of the issues I have addressed—reproductive freedom, divorce, cohabitation, and domestic violence—have a common, though perhaps implicit, core: family law's changing treatment of women and their roles: a fitting theme to emphasize in honor of Lemma Barkeloo and Phoebe Couzins. Nonetheless, I have not yet mentioned the very explicit ways in which this theme pervaded family law discourse in the mid-1970s.

The mid-1970s was the time when proponents of the Equal Rights Amendment (ERA)—which Congress passed in 1972—held high hopes for ratification by the states;⁴⁸ when Phyllis Schlafly, the most high-profile opponent of the ERA, was a law student here in some of my classes;⁴⁹ and when, even without the ERA, the Supreme Court began to hold unconstitutional many examples of sex-based discrimination, including gender-specific family laws.⁵⁰

Legal challenges to traditional gender-based family laws also drew strength from science and medicine during this period. One such contribution deserves special mention: an excerpt from *Man and Woman, Boy and Girl* by John Money and Anke Ehrhard was featured in one of the leading family law casebooks of this period.⁵¹

45. Missouri did not abolish the doctrine of interspousal immunity until 1986. See *S.A.V. v. K.G.V.*, 708 S.W.2d 651 (Mo. 1986).

46. See, e.g., *People v. Liberta*, 474 N.E.2d 567, 573 (N.Y. 1984) (finding that exemption violates equal protection).

47. MO. REV. STAT. §§ 455.010-455.085 (1994 & Cum. Supp. 1999). See Steven J. Givens, *Opening Doors for Domestic Violence Victims*, WASHINGTON UNIVERSITY SCHOOL OF LAW MAGAZINE, Fall, 1997, at 12 (profile of Nina Balsam, class of 1976).

48. See, e.g., Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 893 (1971).

49. Phyllis Schlafly, president of the conservative Eagle Forum, enrolled at Washington University as a first-year student in 1975 and received her J.D. in 1978.

50. See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Orr v. Orr*, 440 U.S. 268 (1979). This development resulted from the meticulous advocacy of attorney Ruth Bader Ginsburg, who in her current role as Associate Justice of the United States Supreme Court will visit us in 2001 as Jurist in Residence.

51. John Money & Anke Ehrhardt, *Man and Woman, Boy and Girl: The Differentiation and Dimorphism of Gender Identity from Conception to Maturity* 118-23 (1972), in JUDITH AREEN, *CASES AND MATERIALS ON FAMILY LAW* 30-33 (1978). See also JUDITH AREEN,

The excerpt recounted the story of an infant boy who had suffered a serious injury during circumcision. His parents sought medical advice and ultimately found their way to experts who counseled them to raise their son as a daughter. The scientific literature went on to report that these efforts succeeded and that the child—treated as a girl by parents and others—actually became one, and a happy and healthy girl at that. Hundreds of family law students studied this case in successive editions of Dean Judith Areen’s family law casebook,⁵² which I and many other teachers assigned in our courses over the years. The message for family law was clear: Gender is entirely a social construct. If—with the right conditioning—anyone can be a male, and anyone can be a female, then the foundation of the separate spheres for men and women crumbles. Gender-based legal rules governing the family become little more than reflections of cultural and social stereotypes.⁵³ With such scientific support, we could comfortably predict that family law of the future would look increasingly gender neutral.

III. 2000: DIVERSITY AND MULTIPLICITY

In my final snapshot, the current semester’s family law students, the first of the new millennium, had the opportunity to see how this prediction of increasing gender neutrality has played out. Four important cases competed for national attention as the year began—not counting the controversy about Elian Gonzalez.⁵⁴

CASES AND MATERIALS ON FAMILY LAW 24-26 (2d ed. 1985); JUDITH AREEN, CASES AND MATERIALS ON FAMILY LAW 30-33 (3d ed. 1992). *But see* JUDITH AREEN, CASES AND MATERIALS: FAMILY LAW 46 (4th ed. 1999).

52. *See supra* note 51.

53. The Supreme Court often has condemned the “archaic and stereotypic notions” underlying the laws it has invalidated as unconstitutional gender classifications. *See, e.g.*, *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982); *Craig v. Boren*, 429 U.S. 190, 197-99 (1976).

54. I could not discuss the Elian Gonzalez controversy on the merits in my address because my mother and I so vehemently disagree! My mother, who contends Elian should have been permitted to remain in the United States, still has not accepted my conventional family-law arguments that parental autonomy gave Elian’s father the authority to make important decisions for his young son, including the decision to return to Cuba.

Another irresistible aside: I learned later that, precisely as I was giving the address on which this essay is based, the dean who brought me to Washington University School of Law, Edward T. Foote (now President of the University of Miami), was participating in negotiations

First, the Vermont Supreme Court had just ruled that reserving marriage and all its benefits for male-female couples, without providing equal opportunities for same-sex couples, violates the state constitution.⁵⁵ In response to the court's directive, the Vermont legislature is currently working to develop a special regime—a legally recognized civil union—for same-sex couples, who will not be able to say that they are “married” but will be eligible for all of the other benefits that the law gives to married couples.⁵⁶ Under one reading, this case marks yet another challenge to our traditional understanding of what it means to be a husband and what it means to be a wife.⁵⁷

Second, we await a decision from the United States Supreme Court in a Washington case publicized as a challenge to “grandparents’ visitation rights.”⁵⁸ A close look at the statute in question, however, shows that much more is at stake, including whether other persons without the legal status of parents can petition for visitation with a child.⁵⁹ This broader question shares a connection with the Vermont Supreme Court case: As families and couples take on more diverse forms, there will be a variety of adults

between Elian’s father and the Miami relatives. A few hours later, the INS raided the Miami relatives’ home to return Elian to his father’s custody. Lizette Alvarez, *The Elian Gonzalez Case: The Overview*, N.Y. TIMES, Apr. 24, 2000, at A1.

55. *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999) (holding exclusion of same-sex couples from the benefits and protections that laws provide to married couples violates the Common Benefits Clause of the Vermont Constitution).

56. Vermont House Bill 847 was signed by the Governor on April 26, 2000, and became effective July 1. See 2000 VT. Acts & Resolves 91.

57. I should add that the American Law Institute project on which I have worked for several years, the Principles of the Law of Family Dissolution, was a step ahead of the developments in Vermont. This blueprint for family law reform spells out comparable rules for the dissolution of both traditional marriages and nontraditional families, including same-sex couples. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (Tentative Draft No. 4 2000). The Institute gave its final approval to this project at the Annual Meeting in May 2000. Since 1994, I served as one of the advisers to the *Principles*.

58. In *Troxel v. Granville*, 120 S. Ct. 2054 (2000), decided June 5, a splintered Court produced six different opinions, ultimately invalidating the third-party visitation statute as applied in this case. The different approaches exemplified in the opinions leave open many questions about the constitutional limits on such family laws.

59. WASH. REV. CODE § 26.10.160(3) (1994). The Washington statute permits any person to petition the court for visitation at any time under any circumstances. See 120 S. Ct. at 2057-58 (plurality opinion).

who will function as a child's parent and for whom maintaining contact through visitation would serve the child's best interests.⁶⁰ In the coming years, family law must face the difficult challenge of finding a way to safeguard such nontraditional relationships without unduly infringing parental autonomy.

Third, we await a decision from the United States Supreme Court about whether violence against women, including domestic violence, has achieved recognition as a problem of sufficient national dimension to justify a federal law on the subject.⁶¹ The questions of diversity or multiplicity that arise here do not concern family forms; rather, these questions center on the appropriate sources of family law. Does family law belong exclusively to the states, as we often read?⁶² To what extent do "the feds" have authority to make family law?⁶³ Put differently, should family law reflect national or state policies? The Elian Gonzalez situation provided a Rorschach test on this jurisdictional issue, regardless of the substantive controversies it sparked, with some finding a question of federal immigration policy in the inkblot and others discerning a child custody case that belongs in state family court.

Fourth, the United States Supreme Court will hear arguments on the constitutionality of Nebraska's so-called "partial birth abortion" ban.⁶⁴ Although the focus on a particular abortion procedure might

60. The opinions recognize the variety of family forms prevalent today. *See, e.g.*, 120 S. Ct. at 2059 (plurality opinion); *id.* at 2073 (Stevens, J., dissenting); *id.* at 2077 (Kennedy, J., dissenting).

61. In *United States v. Morrison*, 120 U.S. 1740 (2000), a five-to-four decision handed down May 15, the Court struck down the Violence Against Women Act's civil remedy for gender-based violence. The majority found the law exceeded Congress' authority under both the Commerce Clause and section 5 of the Fourteenth Amendment.

62. *See* Ankenbrandt v. Richards, 504 U.S. 689 (1992) (interpreting narrowly the domestic relations exception to federal court jurisdiction based on diversity of citizenship).

63. *See* Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995); Naomi R. Cahn, *Family Law, Federalism and the Federal Courts*, 79 IOWA L. REV. 1073 (1994); Anne C. Dailey, *Federalism and Families*, 143 U.P.A. L. REV. 1787 (1995); Hasday, *supra* note 4; Sylvia A. Law, *Families and Federalism*, 4 WASH. U. J.L. & POL'Y 175 (2000); Judith Resnik, "Naturally" *Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682 (1991).

64. In *Stenberg v. Carhart*, 120 S. Ct. 2597 (2000), decided five-to-four on June 28, the Court held the law unconstitutional because it both failed to provide an exception for abortions necessary to preserve the woman's health and imposed an undue burden on a woman's ability to choose abortion.

appear to raise a new issue,⁶⁵ in reality the question remains the same as always: To what extent can legislatures inject their own value judgments into women's health care, second-guessing both the considered medical judgment of physicians and the choices of patients?⁶⁶

Indeed, medical discretion and the contributions of medicine to reproductive freedom have gained new importance in today's world of assisted reproduction. Some of the greatest excitement in contemporary family law emerges from studying adoption law, first developed in the nineteenth century, side by side with modern alternatives to adoption, including in vitro fertilization and all variations of "surrogacy" arrangements.⁶⁷ Medicine now permits so-called "technological adoptions"⁶⁸—with some authorities opining that today a child might have five parents⁶⁹ and other authorities concluding that such children might lack even a single "parent" whom the law recognizes.⁷⁰ The news here is not all good: What happens to children awaiting adoptive homes once prospective parents can buy the eggs and sperm of their dreams? To what extent do new reproductive options send the message that women really have no choice but to have children?

The year 2000 brought the opportunity to revisit some earlier landmarks. The ERA is back in the news again, with talk that Missouri (surprise!) will take the lead in efforts to resume the ratification process.⁷¹ Utah is seeking new enforcement tools in its

65. *But see* Planned Parenthood v. Danforth, 428 U.S. 52, 75-80 (1976) (invalidating a law prohibiting a particular abortion procedure, saline amniocentesis).

66. *See* Susan Frelich Appleton, *Abortion: Who Decides Medical Questions?*, ST. LOUIS POST-DISPATCH, June 19, 2000, at B7 (op-ed).

67. *See* D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 1129 (1998).

68. *See* ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING 219 (1993).

69. *See, e.g.,* LEE M. SILVER, REMAKING EDEN: HOW GENETIC ENGINEERING AND CLONING WILL TRANSFORM THE AMERICAN FAMILY 155-57 (1998).

70. *See In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Ct. App. 1998), *rev. denied*, 1998 Cal. LEXIS 3830 (Cal. June 10, 1998). Luanne Buzzanca and her husband contracted to have a child, Jaycee, with the help of donor egg, donor sperm, and a gestational surrogate. When the husband sought to disclaim responsibility upon divorce, the trial court ruled that Jaycee had no lawful parents. The court of appeal reversed, ruling the Buzzancas are Jaycee's parents because, but for the arrangement they initiated, Jaycee would not have been born.

71. *See* Ellen Goodman, *A Glimmer of Hope for the Dormant Equal Rights Amendment*,

continuing effort to stamp out polygamy⁷² while the practice continues to flourish and contemporary “sister wives” debate whether polygamy exploits women or, instead, provides a feminist solution in the struggle to balance career and family.⁷³

Finally, 2000 unveiled the poignant denouement in the story of the boy who was raised as a girl. Published this year, a book recounting the child’s own experiences reveals that the earlier reports were all wrong.⁷⁴ The attempted sex reassignment resulted in a hopelessly miserable childhood. When the child learned the truth at age fourteen, he felt enormous relief and quickly resumed a male identity. Despite the psychological scars, he now lives his life as a happily married man and adoptive father.

This case emphasizes something my students from the early years, and even those from the most recent semester, must now know: How we approach all of the questions raised by family law requires continuous rethinking and reevaluation. Certainly, Lemma Barkeloo and Phoebe Couzins never imagined the transformation of the subject that Professor Reber presumably spent a few hours covering in his “spare time” in 1869.

BOSTON GLOBE, Feb. 13, 2000, at B7 (op-ed). See also Mason Kalfus, Comment, *Why Time Limits on the Ratification of Constitutional Amendments Violate Article V*, 66 U. CHI. L. REV. 437 (1999).

72. *Utah Senate Approves Bill to Fight Polygamist Crimes*, N.Y. TIMES, Feb. 24, 2000, at A12; *Utah Rejects Prosecutor for Polygamous Clans*, N.Y. TIMES, Jan. 30, 2000, at § 1, 19.

73. Compare Greg Barrett, *Polygamy Thrives; Utah May Consider Crackdown on Abuse*, CINCINNATI ENQUIRER, Feb. 6, 2000, at A14; Katha Pollitt, *Polymaritally Perverse: Polygamy and its Relation to Same-Sex Marriages*, THE NATION, OCT. 4, 1999, at 10, with Elizabeth Joseph, *My Husband’s Nine Wives*, N.Y. TIMES, May 23, 1991, at A15 (op-ed).

74. JOHN COLAPINTO, AS NATURE MADE HIM: THE BOY WHO WAS RAISED AS A GIRL (2000).

