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Political and Social Construction of Families through Pedagogy in Family Law Classrooms

Lundy Langston

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LUNDY LANGSTON*

INTRODUCTION

Most family law materials available today fail to reflect the diversity[1] of family arrangements in modern society. Traditionally, family law is taught as a rules-based area of law. Students learn the requirements of marriage and the grounds for and consequences of divorce. Currently, there are efforts to expand the codification of family law through such things as support guidelines, uniform acts,[2] and legislation listing specific factors to be considered in custody and property distribution cases. Many of these efforts stem from the underlying assumption that there is a uniform methodology describing and defining doctrine appropriate for resolution of family related matters. This uniform methodology stems from the perception that there is a preferred model for family structure.

Because the substance of family law is personal and emotional and because we live in a period of intense sensitivities about race, gender, and diversity, consideration of these issues is a delicate matter for both professor and student. Students as well as society have a variety of family lifestyle experiences. Our pedagogical style for family law can have a silencing, as well as normalizing effect if our focus is on the married unit as the norm.

Family law courses generally launch this silencing or normalizing effect by beginning the course in one of two ways—either with a consideration of

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* Associate Professor of Law, Shepard Broad Law Center, Nova Southeastern University. J.D., North Carolina Central University School of Law, 1989; LL.M., Columbia University School of Law, 1991. I began the critique of family law, a subject area which is so immersed in the law school curriculum, quite precariously. The social impact of what we do or ought to do in family law classrooms is critical to the thought process of future law makers and adjudicators. In my attempt to address some of the issues of pedagogy in family law, I sought, early on, the input of various people in the legal profession. I presented issues of family law pedagogy at a faculty colloquy at the University of Tulsa College of Law and at the First Annual Mid-Atlantic People of Color Legal Scholarship Conference held at Howard Law School. I thank my colleagues at Tulsa and Nova, participants at the Howard conference, and friends in the academy for their advice, input, and encouragement. I also wish to thank my former research assistants Marsha Rogers at the University of Tulsa College of Law and Karen Clark at Nova Southeastern Shepard Broad Law Center for their research, discussions, and patience.

1. By diversity, I mean in terms of ethnic groups and also in terms of the various definitions of the word "family."

2. The latest item is the Uniform Adoption Act (1994) which was approved by the National Conference of Commissioners on Uniform State Laws. *See* UNIF. ADOPTION ACT, 9 U.L.A. 1 (Supp. 1995).

the institution of marriage or with an examination of the rules governing its dissolution.[3] Given the changes in behavior in the past several decades,[4] one wonders why marriage is still the universally-accepted starting point.[5] Is it presumed that marriage continues to be the exclusive foundation of the family? If so, this article suggests it is a flawed beginning.[6]

Discussing family law from the starting point of marriage defines a family structure which may not characterize all cultures in our society and may suggest a preference for one family structure over another.[7] Our society hinges upon dichotomies.[8] Teaching family law through marriage discussions gives

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3. Several family law textbooks were reviewed. The majority of them began with some discussion of marriage, i.e., formation of marriage or its dissolution, or contrasting marriage with other units. Textbooks reviewed include: JUDITH C. AREEN, FAMILY LAW, CASES AND MATERIALS (3d ed. 1992); IRA M. ELLMAN ET AL., FAMILY LAW, CASES, TEXT, PROBLEMS (2d ed. 1986); CALEB FOOTE ET AL., CASES AND MATERIALS ON FAMILY LAW 1 (3d ed. 1985) (beginning with a discussion of the creation of families, not marriage); WALTER WADLINGTON, CASES AND MATERIALS ON DOMESTIC RELATIONS (3d ed. 1995); DAVID WESTFALL, FAMILY LAW 165 (1994) (beginning with constitutional issues, until Part II which is entitled "Family Formation: Marriage and Alternatives"); WALTER O. WEYRAUCH ET AL., CASES AND MATERIALS ON FAMILY LAW, LEGAL CONCEPTS AND CHANGING HUMAN RELATIONSHIPS (1994).

4. Men and women have come out of their closets in various ways. For example, cohabitation over marriage is a widely-accepted choice, single-parenthood is often a matter of choice, not of accident, gays and lesbians are entering into relationships much more openly than before, relationships have developed for the sole purpose of child bearing, and older men and women are selecting younger mates. *See generally Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1604 (1989) ("Society has recognized that many modern families are headed either by two adults who work outside of the home or by a single parent."); Recent Case, *Family Law—Visitation Rights—New York Court of Appeals Refuses to Adopt a Functional Analysis in Defining Family Relationships*—Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991), 105 HARV. L. REV. 941, 941 (1992) ("Increases in the number of unmarried cohabitants, single parents, and stepparents have altered the makeup of the nuclear family and have prompted many commentators to call on the courts to define the family unit more broadly.") (footnote omitted) [hereinafter Recent Case].

5. Family law professors should ponder the question of why marriage has been the starting point before they begin discussions in their family law courses.

6. One author has stated:

> As a society, we find it difficult to decide what exactly constitutes a family. In some circles we tout the nuclear family as the model family; yet divorce has broken up many "model" families, causing a disproportionate increase in single parent, female-headed households. Therefore, it would be unrealistic and elitist for us to choose one particular family style or category as having the greatest moral value. Each family style reflects some aspects of the moral values deemed important by society. Because such a broad range of family styles and relationships exists, we need to expand our scope in order to capture a more universal definition of family.

Steven H. Hobbs, *In Search of Family Value: Constructing a Framework for Jurisprudential Discourse*, 75 MARQ. L. REV. 529, 534 (1992) (footnote omitted). *But see At the Root of the Problem: Fatherlessness*, WASH. POST, Mar. 22, 1995, at A21 ("[T]he decline in the importance of marriage makes boys (and men) less valuable to their families and communities than they might otherwise be. This marginalization, I am convinced, feeds antisocial behavior.").

7. One commentator has stated:

> Family law is that area of law whereby the state regulates certain intimate relationships by defining a legal family relationship and assigning formal legal consequences and obligations within the context of that definition. Family law both reflects and contributes to our cultural understandings of the traditional family roles of mother, father, husband, wife, and child.

Martha A. Fineman, *The Neutered Mother*, 46 U. MIAMI L. REV. 653, 655 (1992) [hereinafter, Fineman, *Neutered Mother*].

8. For example:

the appearance that marriage is the accepted way of starting a family, thereby devaluing other units—even though marriage is prohibited in some units. The married family unit may be deemed the good and all other units, the bad. Relationships and arrangements that do not resemble "nuclear" families are labeled dysfunctional. This negative label is not always a result of some problem in the family, but attaches simply because the unit does not conform to the "marriage nuclear norm."

Former Vice President Dan Quayle and his allies believe that many of the problems we face today result from the breakdown of "family values," that is, the breakdown of the traditional nuclear family structure. However, the real problem is the judgmental attitude which favors certain family units while denigrating others. When a particular unit is favored as the norm, individuals who do not fit that standard often struggle futilely to conform. Frequently, this results in utter hopelessness and a lack of self-esteem. Disengagement, lack of productivity, and antisocial behavior are frequent by-products. Such a melancholy view can lead to a lack of value in one's self and in life in general. This reduction in the value of life may result in acts of violence to oneself or to others. Triggering this sense of lack of value in one's self simply because of the make-up of an individual's family unit is, to this author, preposterous. Some individuals fall outside of the norm because of factors beyond their control, such as death and divorce;[9] others do so by choice.

Clearly, we live in a pluralist society where a variety of personal lifestyle choices abounds. Therefore, the laws and legal doctrine affecting those personal choices should address the diverse nature of our society in a positive way. Family law materials should reflect diversity of family arrangements in present day society without valuing some structures over others. The personal relationships which develop when a family is formed should be celebrated and valued regardless of whether the family mirrors the traditionally accepted model. Discussing family structures only from the point of marriage may be offensive to certain ethnic groups and various individuals who prefer to organize their families in less traditional ways.

The thesis of this article posits that a discussion of "family," regardless of the unit's form, is a more appropriate starting point for a family law class.[10]

> Western thought has always been structured in terms of dichotomies or polarities: good vs. evil, being vs. nothingness, presence vs. absence, truth vs. error, identity vs. difference, mind vs. matter, man vs. woman, soul vs. body, life vs. death, nature vs. culture, speech vs. writing. These polar opposites do not, however, stand as independent and equal entities. The second term in each pair is considered the negative, corrupt, undesirable version of the first, a fall away from it. . . . In other words, the two terms are not simply opposed in their meanings, but are arranged in a hierarchical order which gives the first term *priority* . . . .

Kimberle' W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1373 (1988) (omissions in original) (quoting JACQUES DERRIDA, DISSEMINATION viii (B. Johnson trans., 1981)).

9. It may be argued that there is some control over divorce. However, arguments against divorce may lead to an increase in the hidden secrets of domestic violence.

10. Economic forces can influence the formation of a "family":

> Barbara Omolade's article, the "Unbroken Circle," describes how the [B]lack family has developed as a response to slavery, racism, and economic deprivation that have marked

Focusing on what constitutes a family would foster discussions of laws and legal doctrines which affect our personal choices and address the diverse nature of our society. A value-free discussion of family would include consideration of various cultural backgrounds, perspectives, and norms that are extant in our pluralistic society.

Part I of this paper discusses perspectives on modern day family units. Part II discusses the selection of an effective pedagogical style for teaching family law that will include various perspectives on "family." Finally, the article concludes that family law professors should select a pedagogical style and textbooks that incorporate diverse family structures without implying that marriage is the only acceptable family unit.

I. PERSPECTIVES IN FAMILY LAW

"People live in a wide diversity of intimate arrangements. . . . Historically only the nuclear family has been protected and promoted by legal and cultural institutions."[11] "In regard to regulating intimacy, the law defines and enforces norms by referencing a specific and historically based metanarrative about 'the family.'"[12] In our society, that norm has been the traditional, nuclear family

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the African-American experience in the United States. From her article, it becomes brilliantly obvious that family structures and their allocations of power develop in response to a variety of forces. They do not exist in a "natural form." She argues, focusing on the prevalence of single motherhood, that family is a "survival strategy" in a crushing culture that otherwise promises "social death." Family structure is as much a response to economic conditions as it is to "nature."

Elizabeth Daniel, Supervision of Parenting and Family Law (Feb. 15, 1991) (unpublished paper presented in Martha Fineman's Families, Poverty, and Law class at Columbia Law School on file with the author).

"Family" has been defined according to the functions of a unit:

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.

. . . .

The socialization function in the family is vital to the greater good of the larger society.

. . . .

Second, part of the socialization process is an economic function which provides the means for maintaining life.

. . . .

Third, the family unit also provides an entity in which emotional needs can be met and personal fulfillment achieved.

Steven H. Hobbs, *We Are Family: Changing Times, Changing Ideologies and Changing Law*, 14 CAP. U. L. REV. 511, 521-22 (1985).

"I have always begun my Family Law class by having students reflect, through a class discussion, on the meaning of family." Susan B. Apel, *Kinetic Classroom*, *in* THE LAW TEACHER 1, 1 (Gonzaga University, Institute for Law Teaching, Spring 1990).

11. Martha A. Fineman, *Our Sacred Institution: The Ideal of the Family in American Law and Society*, 1993 UTAH L. REV. 387, 388 [hereinafter Fineman, *Sacred Institution*].

12. *Id.* "[T]he Black American family is the product of a particular history and . . . *we must explain the family by the history and not the history by the family*." Lerone Bennett Jr., *The 10 Biggest Myths About the Black Family*, EBONY, Nov. 1989, at 114, 116 (emphasis in original).

unit, often viewed as consisting of a wage-earning male and a housewife.[13] The acceptance of this unit as the norm "reformulates images of 'appropriateness' or 'naturalness' found in the larger society."[14] The problem with accepting one entity as the norm is that "in recent years there have been changes in patterns of intimate behavior that present substantial challenges to the exclusivity of the nuclear family as the only image of appropriate intimacy."[15] Once there is a variation from the accepted norm, that unit is "labeled deviant [and] . . . abnormal."[16]

Deviancy is the label even though the traditional nuclear family "is rapidly becoming an American anachronism."[17] "Although the legal system has begun to recognize . . . demographic changes [in family] the definitions of "family," "spouse," and "parent" in many legal contexts still encompass only the traditional family and its members."[18] "We all shun the characterization of 'deviance' and seek to align ourselves and our behavior with the safety of normalcy."[19] Natural law defines "the 'family' as a legal, functional, and symbolic institution."[20]

Reflecting on the changes of how families are constructed, "some courts have shifted to a functional analysis of family."[21] What is problematic here is that even when courts have shifted to a functional approach the units have been composed of married units in an effort to legitimate non-married units. "[T]he functional approach inquires whether a relationship shares the essential characteristics of a traditionally accepted relationship and fulfills the same human needs."[22] Courts using the formal or functional approach fail to reflect true diversity because they are attempting to value structures that either are traditional or have all the necessary ingredients of a traditional unit without the marriage component.[23]

Most legal institutions are rule-based, and family law is no exception.[24]

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13. Although a family in the United States was "once seen as strictly a patriarchy, consisting of an income-earning male and a housewife," today, in light of the evolution of social norms and practices, the colloquial and legal definitions of family are broader. *Developments in the Law—Sexual Orientation and the Law*, *supra* note 4, at 1603-04.

14. Fineman, *Sacred Institution*, *supra* note 11, at 390.

15. *Id.* at 393.

16. *Id.* at 392.

17. Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640 (1989) [hereinafter *Looking for a Family Resemblance*].

18. *Id.* at 1640.

19. MARTHA A. FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 6 (1995) [hereinafter FINEMAN, TRAGEDIES].

20. Fineman, *Sacred Institution*, *supra* note 11, at 403.

21. *Looking for a Family Resemblance*, *supra* note 17, at 1641.

22. *Id.* at 1646.

23. Martha Fineman noted that

> reform of the traditional family for the liberation of women has been clearly demonstrated to be misguided. On a doctrinal level we now have an egalitarian model for the family, but it operates in a social context that remains very gendered. This is extremely detrimental to many women and children, and . . . therefore . . . we [should] leave our aspirations for the traditional family form behind and reimagine what should be our core family connection.

FINEMAN, TRAGEDIES, *supra* note 19, at 27.

24. A substantial portion of family law is statutory, e.g., marriage, divorce, and custody

Presenting discussions on family matters as "simple exercises in rule application"[25] may have the effect of silencing some students.[26] "A common formal legal definition [of family] looks to whether official rules of family formation—marriage, birth to a married couple, adoption—have been followed."[27] "Courts have traditionally adopted a formal analysis to resolve challenges to the legal definition of family relationship."[28]Courts utilizing the formal approach use terms such as "family, spouse, and parent [with reference] only to members of the nuclear family."[29] Extended family groups are referred to as alternatives.[30]

The formal legal definition does not acknowledge an extended family or people who behave like a family despite noncompliance with official legal practices.[31] For example, African-American students, many of whom come from single-parent homes,[32] may feel alienated when a family law professor is insensitive to or lacks the knowledge of various perspectives on this particular family structure due to ethnic orientation or negative views on single-parent status.[33] The alienation may be even more severe if the discussion leads to valuing single-parent adoption as a family unit only because of the difficulty of placing African-American children in stable homes.[34]

Professors further complicate matters by teaching the dominant view as the "law," rather than as a perspective.[35] Although the dominant view may be deemed the "law" because of its acceptance in society, it should be made clear

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laws.

25. Kimberle' W. Crenshaw, *Foreword, Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1, 3 (1989).

26. For example, multicultural students may be silenced because marriage may not be the norm for the formation of their family. *See id.* "If the subject involves some issue, rule, or case that is implicated in the subordination of the students' racial group, minority students confront unattractive options." *Id.* Also, family structures formed from same-sex relationships generally are not formed by the institution of marriage. *See* Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990) (discussing the legal and social complexities surrounding custody in extra-marital same-sex relationships).

27. *Definitions of Family: Who's in, Who's Out and Who Decides*, *in* FAMILY MATTERS, READINGS ON FAMILY LIVES AND THE LAW 19, 19 (Martha Minow ed., 1993) [hereinafter *Definitions of Family*].

28. *Looking for a Family Resemblance*, *supra* note 17, at 1640.

29. *Id.* at 1641.

30. *Id.*

31. *Definitions of Family*, *supra* note 27, at 19-20.

32. One-half of all African-American children live with a single parent, compared to one-third Latino and one-fifth white. Elizabeth Shogren, *Traditional Family Nearly the Exception, Census Finds*, L.A. TIMES, Aug. 30, 1994, at A1.

33. *See* Crenshaw, *supra* note 25, at 9-10.

34. Single-parent adoption of a biracial child, generally deemed an African-American if the mother is white and the father is African-American, could be discussed in the context of adoption by a white woman. This would allow a discussion without the taint of stereotypes such as poverty and low morals that are associated with single-parent African-American women. *See generally* Sharon E. Rush, *"If Black Is So Special, Then Why Isn't It in the Rainbow?"*, 26 CONN. L. REV. 1195 (1994) (discussing adoption of a biracial child, with a white biological mother and an African-American biological father, by a white woman). Adoption of a biracial child by a white woman should not be discouraged, especially when the biological home would have been with a white mother.

35. *See* Crenshaw, *supra* note 25, at 10.

that it too, like other family structures, is a perspective. By including all students in a discussion of diverse groups in society, a professor can "creat[e] space for competing perspectives," which allows for a subjective legal analysis.[36] A subjective analysis promotes discourse from students of diverse backgrounds and casts contrasting alternative views with the dominant perspective in a more positive light.[37]

The legal definition of what constitutes a family and the role of its members can be traced to 1872 when Justice Bradley, in his concurring opinion in *Bradwell v. Illinois*,[38] 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. Man is, or should be, woman's protector and defender. 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. . . . 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.[39]

Justice Bradley relayed the Court's position on the role of the woman in the family. As a married woman in Illinois, Ms. Bradwell could not enter into a contract without likewise binding her husband.[40]

The modern Court has reiterated the societal imprimatur placed on marriage. In *Griswold v. Connecticut*,[41] Justice Douglas observed that "[m]arriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."[42] "It is an association that promotes a way of life, not causes; a harmony of living . . . ."[43] The concurring opinion authored by Justice Goldberg, although seemingly concerned with the rights of privacy of individuals in intimate relationships, clearly excluded non-marital intimacies:

> Adultery, homosexuality and the like are sexual intimacies which the State forbids . . . but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an

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36. *Id.* at 12.

37. *See id.*

38. 83 U.S. (16 Wall.) 130 (1872) (Bradley, J., concurring) (denying Myra Bradwell's application for a license to practice law solely on the basis that she was female).

39. *Bradwell*, 83 U.S. (16 Wall.) at 141.

40. *Id.*

41. 381 U.S. 479 (1965) (holding that the use of contraceptives falls within the rights of marital privacy).

42. *Griswold*, 381 U.S. at 486.

43. *Id.*

> institution which the State not only must allow, but which always and in every age it has fostered and protected.[44]

It is obvious that the Court's prepossessions have set the stage for what constitutes the make-up of a family. It is also clear that the Court values certain individual perspectives on marriage and family.

In *Michael H. v. Gerald D.*,[45] a man who fathered a child during an affair with a married woman challenged California's presumption that a husband living with his wife is the father of all children born to his wife.[46] Questions were raised as to which family unit the child belonged—a unit including the biological father or the mother's husband.[47] Justice Scalia emphatically rejected the notion that the relationship of adulterers "has been treated as a protected family unit under the historic practices of our society."[48] He stated, "quite to the contrary our traditions have protected the marital family."[49] In refusing to consider the various types of family units in modern society, the Court ignored the biological father's ongoing relationship with his daughter, a relationship encouraged by her mother.[50]

In his dissent, Justice Brennan suggested that the Due Process Clause is useless if its sole purpose is to merely "confirm the importance of interests already protected by a majority of the States."[51] Justice Brennan further insisted that

> [by] offer[ing] shelter only to those interests specifically protected by historical practice . . . the plurality ignores the kind of society in which our Constitution exists. We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncracies. . . . In a community such as ours, "liberty" must include the freedom not to conform.[52]

Although the Court indirectly considered the composition of a family unit in *Bradwell*, *Griswold* and *Michael H.*, the Court addressed this issue directly in *Village of Belle Terre v. Boraas*.[53] *Belle Terre* involved a New York village zoning ordinance which restricted land use to single-family dwellings.[54] The word "family" was defined as those persons "related by blood, adoption, or marriage," or two unrelated persons "living and cooking together as a single housekeeping unit."[55]

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44. *Id.* at 499 (Goldberg, J., concurring) (alteration in original) (quoting Poe v. Ullman, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting)).
45. 491 U.S. 110 (1989).
46. *Michael H.*, 491 U.S. at 113.
47. *Id.*
48. *Id.* at 124. Justice Scalia also rejected any "rights of the natural father of a child adulterously conceived." *Id.* at 127 n.6.
49. *Id.* at 124.
50. *Id.* at 114-15.
51. *Id.* at 140-41 (Brennan, J., dissenting).
52. *Id.* at 141.
53. 416 U.S. 1 (1974).
54. *Belle Terre*, 416 U.S. at 2.
55. *Id.* It is arguable that courts treat zoning cases differently because a statute is involved.

The complainants in *Belle Terre* were six unrelated college students who leased a house in the village.[56] The Court, in stating that the ordinance placed no ban on other forms of association,[57] held steadfast to its promotion of traditional family needs and values.[58]

It is interesting that Justice Marshall in his dissent also shied away from deeming the unit a family. However, he concluded that freedom of association, together with privacy rights and the Fourteenth Amendment liberty interests, gives individuals the right to "establish a home."[59] Assuming the six students were not a family, he discussed whether a person's intellectual and emotional needs are best met by living with family or friends.[60]

Distinguishing *Belle Terre*, the Court in *Moore v. City of East Cleveland*[61] struck down a zoning ordinance which narrowly defined "family" so as to prohibit Mrs. Moore from living with her grandson.[62] Although the *Moore* decision recognized a slightly extended family, it did not address the array of non-traditional family arrangements in the modern United States.[63] The Court in *Moore* indicated that the six college students in *Belle Terre* were not a family.[64] Justice Powell, in writing the majority opinion in *Moore*, stated that *Belle Terre* involved an ordinance which "allowed all who were related by 'blood, or adoption or marriage' to live together."[65] In sustaining the *Belle Terre* ordinance, the Court was "careful to note that it promoted 'family needs' and 'family values.'"[66] Justice Powell recognized without hesitation the complainant's grandson in *Moore* as a family member, distinguishing this issue from the *Belle Terre* ordinance because it affected only unrelated individuals.[67] According to the Court, however, the related individuals in *Moore* comprised a family. Hence, the city could not impose such intrusive regulations.[68]

Although *Moore* recognized the existence of a nontraditional unit, it did not go far enough. *Anderson v. Edwards*[69] afforded the Court this opportunity. There, the Court held extended members of a family in one household constituted a family for government aid purposes.[70] *Anderson* involved Ms. Edwards, a grandmother, who received Aid to Families with Dependent

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However, the treatment of family in zoning cases also demonstrates an unwillingness of courts to recognize diversity.

56. *Id.* at 2-3.

57. *Id.* at 9. The Court stated a "family" may "entertain whomever it likes." *Id.*

58. The Court concluded the police power "is ample to lay out zones where family values . . . make the area a sanctuary for people." *Id.*

59. *Id.* at 15 (Marshall, J., dissenting).

60. *Id.* at 16.

61. 431 U.S. 494 (1977).

62. *Moore*, 431 U.S. at 496-97, 506.

63. *See id.* at 503-06.

64. *Id.* at 498-99.

65. *Id.* at 498.

66. *Id.* The Court is judging the value of the *Belle Terre* students' living arrangement.

67. *Id.*

68. *See id.* at 499, 506.

69. 115 S. Ct. 1291 (1995).

70. *See Anderson*, 115 S. Ct. at 1298.

Children (AFDC) benefits for her granddaughter.[71] An issue arose in *Anderson* when two grandnieces moved into the home.[72] The grandnieces were siblings and were entitled to $560 per month in AFDC benefits.[73] Prior to the grandnieces moving in, Ms. Edwards received $341 per month for her granddaughter.[74]

After the grandnieces moved in, Ms. Edwards received $901 per month for all three girls.[75] Sometime after the grandnieces' arrival, Ms. Edwards benefits were reduced to $694 per month.[76] The Court recognized that federal law prohibits a reduction in AFDC benefits "'solely because of the presence in the household of a non-legally responsible individual.'"[77] The Court, however, stated that the reduction was not solely because of the presence of the grandnieces, rather it was their presence plus their application for AFDC benefits through Ms. Edwards.[78] Speaking for the Court, Justice Thomas concluded that for purposes of receiving AFDC benefits the granddaughter and two grandnieces were siblings, but only as long as they lived in the same household.[79] In essence, the Court recognized all of the individuals as a family unit. Nonetheless, if the issue involved other benefits, such as health insurance, it is unlikely that the Court would consider the granddaughter and grandnieces a family unit.

Before *Anderson*, the Court's decisions reflected what many would consider the dominant views of what constitutes a family. Although family law professors should teach the "law," changes in living patterns and family units should also be reflected in family law courses.[80] To this end, professors must be cognizant of the fact that students in law school classrooms come from diverse backgrounds. Moreover, upon embarking on their careers in the legal profession, they will serve individuals of various ethnic, religious, and uncloseted backgrounds—a pluralistic society, i.e., one that consists of various groups, each of which brings to society a distinct set of norms and values. These principles inhere from a multitude of sources, such as religion, custom, history, personal choice, and formal legal mandates. The customs brought by

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71. *Id.* at 1295.

72. *Id.* Under the federal rule, all cohabitating nuclear family members are grouped into one "assistance unit" (AU) for eligibility determinations in the AFDC program. *Id.* at 1294. California additionally groups into one AU all needy children living in the same household if only one adult is caring for them. *Id.* If two or more AU's are consolidated into a single AU under the California rule, the maximum per capita AFDC benefits decrease. *Id.*

73. *Id.* at 1295.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 1296 (quoting 45 C.F.R. § 233.20(a)(2)(viii) (1994)).

78. *Id.*

79. *Id.* at 1299.

80. One author has stated:

> The law . . . 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 [sic] within the family units.

Hobbs, *supra* note 10, at 521.

these various groups may conflict with the dominant view of an appropriate family as codified in family law. In a pluralist society, these various customs should be taken into consideration when deciding family matters. Rather than taking the dominant view, or the married or related family approach, the professor should present various views of what constitutes a family, thereby allowing all students to participate.

Concerns over composition of a family do not generally arise when individuals decide their family unit, but rather when conflict arises within the unit. What do we do when faced with such a conflict? Because family units are personal in nature and derive from various sources, resolution of conflicts by the courts may be quite complex.

The interaction of customary law and state law creates a conflict to be resolved with legal pluralism.[81] The Fourteenth Amendment reflects a:

> recognition that self-definition and moral autonomy depend upon an environment in which the socializing influences of families and other intimate communities are not overwhelmed by the socializing influences of the state—an environment in which chosen systems of values interact, rather than one in which choice is inhibited and values are absolute and imposed.[82]

Legal pluralism provides a forum for deciding conflict between two or more laws.[83] The issue is not whether to use one law over another or to compare them, but rather, the issue is whether the customary law should be considered at all:[84]

> In order to render a valid report on the law of a people, two separate but related tasks have to be worked out. One is to ascertain the cognitive categories by which the people whose legal system is to be studied structure *their* ideas of . . . forms and procedures of redress to be taken. The other task requires a translation of these categories into our medium of communication. This is an exceedingly difficult job, for it demands both that the essential features of the native system not be distorted *and* that they be cast into a scientific terminology which makes cross-cultural comparisons possible.[85]

Although authors differ as to the identities they attach to plural factors,[86] they agree that these factors are defined as the "law" of the dominant group[87] and the customary law.[88] Whether it is deemed an interpretation of the cus-

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81. "Legal pluralism" refers to situations in which two or more laws interact. M. B. HOOKER, LEGAL PLURALISM, AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS 6 (1975).

82. Peggy C. Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1349 (1994).

83. Plural law involves the "meeting of two or more cultures at a point—the law—where a conflict of principle" arises. HOOKER, *supra* note 81, at 6.

84. The admissibility of customary law is at issue rather than a comparison of legal cultures (customary law) and local (common) law. *Id.*

85. *Id.* at 9 (citation omitted).

86. MASAJI CHIBA, LEGAL PLURALISM: TOWARD A GENERAL THEORY THROUGH JAPANESE LEGAL CULTURE 2 (1989) (referring to plural factors as law and customary law as non-law).

87. Chiba refers to dominant law as "state law, official law, [or] national law." *Id.*

88. Chiba states that non-law, also called "unofficial law, people's law, local law, [or] tribal

tomary law or an issue of admissibility of customary law, most would agree that an interpretation of the law according to a "contemporary human society" is required.[89]

Recognizing that students in family law classes reflect our pluralist society and that the subject matter is personal in nature, family law professors should be prepared to acknowledge the various ethnic variables and incorporate them into class discussions. Discussions considering ethnic variables should be implemented because the substantive material raises issues about families, which are, of course, the foundation of our pluralist society. Textbooks refer students to the "law" on particular issues, but generally do not incorporate ethnic norms.[90] Yet ethnic norms of various groups are a major component of our society. The initiation of family problems calling for legal resolution are not determined by cases printed in textbooks, or by the "law,"—rather they are based on culture.[91] Even if a society is committed to resolving disputes according to only one culture, including norms codified as "law," by addressing various ethnic norms, students will learn about the dispute and the effect of using one resolution method over another. Although social scientists define culture as being predictable based on scientific studies of histories,[92] other definitions of culture include past patterns giving meanings to the future,[93] and programs for survival[94] that continually change.[95] Although varying to a degree, these cultural definitions lead to the conclusion that cultures should be viewed as a whole rather than in isolated segments.[96]

Even if family law courses began with American culture, this culture is pluralist and encompasses various ethnic groups. Therefore, a discussion on

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law," is appropriate when the focus is on jurisdiction. *Id.* The terms "customary law, traditional law, indigenous law, folk law, primitive law, [or] native law," are used when cultural origin is the focus. *Id.*

89. *See id.*

90. If ethnic norms are included, they are ethnic norms of the dominant group and not the norms of individual groups, i.e., Native Americans, African-Americans, and Asian-Americans, etc.

91. "Culture" has been defined as "'that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man [or woman] as a member of society.'" JAMES A. BANKS, MULTIETHNIC EDUCATION, THEORY AND PRACTICE 72 (2d ed. 1988) (quoting E.B. Taylor from *Primitive Culture*) (citation omitted).

92. Most social scientists define culture as "patterns, explicit and implicit, of and for behavior acquired and transmitted by symbols, constituting the distinctive achievements of human groups, including their embodiments in artifacts; the essential core of culture consists of traditional (i.e., historically derived and selected) ideas and especially attached values." *Id.* (quoting ALFRED L. KROEBER AND CLYDE KLUCKHORN: A CRITICAL REVIEW OF CONCEPTS AND DEFINITIONS 161 (1952)).

93. Culture is

> an interdependent and patterned system of valued traditional and current public knowledge and conceptions, embodied in behaviors and artifacts, and transmitted to present and new members, both symbolically and non-symbolically, which a society has evolved historically and progressively modifies and augments, to give meaning to and cope with its definitions of present and future existential problems.

Id. at 73 (quoting BRIAN M. BULLIRANT, PLURALISM, CULTURAL MAINTENANCE AND EVOLUTION 4 (1984)).

94. *Id.*

95. "Cultures are dynamic, complex, and changing," however, they are often viewed as "static, unchanging and fragmented." *Id.*

96. *Id.*

the American culture should include a discussion of the various ethnic groups. In turn, a discussion of family should be characterized according to the function of the individuals within a connected group. This functional approach would include a broader class of individuals as a family unit.[97] Courts have suggested that legal protections "'should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life.'. . . [T]he nature of the family in America [has changed]."[98]

The legal scholarship on family law, however, does not reflect this change. For example, many family law textbooks fail to consider ethnic perspectives in coverage of issues such as same-sex relationships and the African-American family.[99] The state law and the Uniform Code for Marriages were discussed extensively, but coverage of the cultural influences behind the laws was sparse or nonexistent.[100]

Although a chapter in one of the textbooks reviewed is entitled "Imposing Current Values on Traditional Marriage Revolution,"[101] the current values are not those of various ethnic groups, but new values of the dominant group. Some of these new values promote or tolerate plural marriages, same-sex marriages, and marriage between siblings by adoption.[102] Even though this chapter analyzes these new values according to what is acceptable in the dominant group, addressing the values at least acknowledges that culture plays a significant role in family structures. The proposal made here simply argues for expanding this approach beyond the margins of the dominant culture to other cultures.

Ralph Ellison questioned whether African-Americans have simply fashioned themselves after white America and, therefore, do not have a culture.[103] He concluded that, "in a limited way, [African-Americans are their] own creation."[104] African-Americans have a culture. It is an old adage that "poor and segregated populations develop a distinctive set of beliefs, values, and behavior patterns."[105] African-Americans are a segregated people, forced to utilize their own uniqueness, their survival skills—their own set of norms. African-American families adhere to their norm of the "nuclear family,"[106] comprised of a cohesive, extensive kinship network.[107] This "kinship net-

97. Recent Case, *supra* note 4, at 941.
98. *Id.* at 946 (quoting Braschi v. Stahl Assocs. Co., 543 N.E.2d 49, 55 (N.Y. 1989)).
99. *See* textbooks discussed *supra* note 3.
100. *See* textbooks discussed *supra* note 3.
101. FOOTE ET AL., *supra* note 3, at 79.
102. *See id.* at 79-146. There is an awareness of cultural norms but they are contrasted to the marriage norms of the dominant group.
103. Lee Rainwater, *Crucible of Identity: The Negro Lower-Class Family*, *in* THE NEGRO AMERICAN 160, 160 (Talcott Parsons & Kenneth B. Clark eds., 1966) (quoting Ralph Ellison). Ellison asked "Are American [Blacks] simply the creation of white men, or have they at least helped create themselves out of what they found around them?" *Id.* Ellison responds that "[The American Negro] in a limited way, is his own creation." *Id.*
104. *Id.*
105. C. MINDEL & R. HABENSTEIN, ETHNIC FAMILIES IN AMERICA 240 (1977) [hereinafter ETHNIC FAMILIES].
106. *Id.* at 226.
107. *Id.*

work" is similar to the dominant group's extended family, but is "broadened to include all members of the African-American community."[108] When a court addresses the needs of a family unit that encompasses an entire community—in a child custody dispute, for example—it must recognize a cultural perspective different from that of the dominant group.[109]

The "law" begins with the premise that "parents have a fundamental right to make custody decisions,"[110] whereas in the "kinship network" within the African-American community, a non-traditional "unrelated" parent might be the best suited custodian. Law professors who discuss custody "law" without reference to the customs of the community are not preparing students to serve the needs of all members of a pluralist society.

Substantive textbook coverage of child custody often focuses on the evolution of the "best interests" of the child test.[111] The best interests of an African-American child may be different from other children. Beginning from the premise that parents have the fundamental right to make child custody decisions, the "law" then requires a determination of the fitness of the parents.[112] This determination is made according to the best interests of the child.[113] Consider once again the "nuclear family." This standard cannot apply when the parent may not be a "traditional" parent.

The "best interests" test could prove workable if judges were able and willing to resolve each problem from the child's cultural perspective. Although it would be difficult for any judge to completely rule out his or her biases about a child's culture, a rule that would consider, at the request of those involved, the cultural aspects of the particular family would move us in the right direction. It has been suggested that the "best interests" standard should be replaced with a more definite rule.[114] This rule would have "at its core an appreciation of what we as a society agree will be in the 'best interests' of children,"[115] and would better serve all members of our pluralist society.

For example, in a dispute for custody of an African-American male it may be in the best interests of the child that a male neighbor be awarded custody.[116] Without the perspective of diverse family units in family law class discussions, future lawyers may not be equipped to present this type of argument. Yet cultural perspectives are a unique part of family and should be included as part of a family law course.

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108. *Id.* at 241.

109. *Id.* Also note that the extended family of the dominant group refers to blood relatives.

110. Laura D. Dupaix, Note, *Best Interests Revisited: In Search of Guidelines*, 1987 UTAH L. REV. 651, 651 (citing Santosky v. Kramer, 455 U.S. 745, 753 (1982)).

111. *See* Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 736 (1988).

112. *See* Robert J. Levy, *Custody Investigations as Evidence in Divorce Cases*, 21 FAM. L.Q. 149, 149-50 (1987).

113. Lundy Langston, *Force African-American Fathers to Parent Their Delinquent Sons—A Factor to be Considered at the Dispositional Stage*, 4 COLUM. J. GENDER & L. 173, 175 (1994).

114. Fineman, *supra* note 111, at 770.

115. *Id.*

116. Langston, *supra* note 113, at 198.

Again, what constitutes a family? Members of a group home? Elderly persons who have lived together for a number of years? Consider the following:

> Edna Freimuth, Winnie Honsinger, and Austin Lederer live together with eleven other elderly people in a large home in Ridgewood, New Jersey. In order to insure privacy, each resident has her own room within the household, though all share common kitchen and recreational space. Members of the household care for one another, and work together to take care of their home. Residents often act as family members; some refer to other residents as "sisters." Winnie Honsinger, an eighty-eight-year-old member of the household, explains: "we are a family; we are compatible and enjoy living together."[117]

These individuals should be considered a family not solely because they live together as a group, but because "they believe themselves to be in a family . . . [and] they speak of their relationships in the language of 'family.'"[118] Individuals should be allowed to self-select or self-define their family structure, thereby entitling them to certain rights and responsibilities which reflect their unique social significance in areas such as child custody and support, tax benefits and inheritance.

Some courts have defined family on a basis other than biology, marriage, or adoption. For example, in *City of West Monroe v. Ouachita Ass'n For Retarded Children, Inc.*,[119] the court determined that six mentally retarded adults living with two foster parents as a household constituted a family and permitted them to live in a single-family zone.[120] Thus, elderly persons in nursing homes may be in the category of family:

> Like other kinds of social ties, friendship is considered precious by patients and residents [of nursing homes]. Friends spend much of their social lives together in various places at the Manor—morning until night, most days of the week. Those who are roommates are together around the clock. A change in such ties means a change in their lives.[121]

Is this problem of defining "family" unique to the American culture or is it firmly rooted in all western civilizations? The French, for example, address the needs of the new family by referring to it as the "free union."[122] French statutes and regulations give stable "free unions" the same benefits as those

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117. Kris Franklin, Note, *"A Family Like Any Other Family": Alternative Methods of Defining Family in Law*, 18 N.Y.U. REV. L. & SOC. CHANGE 1027, 1028 (1990-1991).

118. *Id.* at 1048.

119. 402 So. 2d 259 (La. Ct. App. 1981).

120. *West Monroe*, 402 So. 2d at 266.

121. Comment, *Don't Make Them Leave Their Rights at the Door: A Recommended Model State Statute to Protect the Rights of the Elderly in Nursing Homes*, 4 J. CONTEMP. HEALTH L. & POL'Y 321, 334 (1988) (quoting JABER F. GUBRIUM, LIVING AND DYING AT MURRAY MANOR 118 (1975)).

122. MARY A. GLENDON, THE TRANSFORMATION OF FAMILY LAW, STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 261 (1989).

conferred on a marital union.[123] Unlike the American "family values" debate, the French view both stable unions and marriage unions as "legitimate families."[124] However, recognition of same-sex relations as a "family" seems to be as problematic with the French as it is with Americans.[125] It appears that the French are concerned with maintaining the "secular character of the modern social order."[126]

The German[127] attitude towards unmarried cohabitants is "to treat them as though they had deliberately chosen to have a relationship without legal consequences."[128] In England, as in France and Germany, a new approach to what constitutes a "legitimate family" emerged as a result of considerations for the interests of children born outside of marriage.[129] In Sweden, where "[i]nformal family behavior is markedly more widespread . . . than in England, France, West Germany, or the United States,"[130] laws are neutral with regard to "different forms of cohabitation and different moral ideals."[131] In Sweden, when a child is born to the union, the union takes on a more marital semblance.[132]

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123. *See id.* A free union is described as follows:

> [T]he more a particular free union resembles marriage in stability and in the way the partners conduct themselves toward each other and the community at large, the more likely it is to be given effects resembling those of legal marriage. The presence of children in the household seems to play an important role in the courts' assessment of whether legal effects should be accorded.

Id.

124. *See id.* "'In appearance, the [traditional family] has . . . lost ground, but in fact it has imposed the matrimonial model on those who have declined to marry.'" *Id.* at 261-62 (citation omitted). "'No longer bothering to disdain its adversaries, it has transformed them into its own image.'" *Id.* at 262 (citation omitted).

125. *See id.* at 261. "[T]he terms *living maritally* or *free union* . . . by definition exist only between a man and a woman." *Id.* Two recent French Court of Appeal's decisions have denied "homosexual cohabitants certain benefits available both to married persons and to cohabitants." *Id.*

126. *Id.* at 263.

127. This refers only to individuals who were formerly West Germans.

128. *Id.* at 264. Although historically the West Germans treated non-married unions as immoral, in the 1960s they decriminalized adultery and passed laws to improve the conditions for children born outside marriage. *Id.*

129. *Id.* at 268. "The presence of children, the duration of the relationship . . . and the degree to which the life of the partners conformed with the court's idea of marriage are all factors which have played an important role in the cases." *Id.* at 273.

130. *Id.* Approximately "20 percent of all couples in Sweden are unmarried, and virtually all Swedish marriages are said to be preceded by a period of cohabitation." *Id.* Unlike the United States, the majority of children born outside of marriage in Sweden live with their father. *Id.*

131. *Id.* at 274. Sweden's provisions apply to persons living together in a homosexual relationship. *Id.* at 276.

132. *Id.* at 275.

Although marriage is a very significant part of all African societies,[133] it is a union between families, not individuals.[134] In African societies, a woman, her husband, and their children do not constitute a family.[135] "Family, in the African sense, is the extended family."[136] Because legitimacy is determined by paternity, all children are legitimate unless the father refuses to acknowledge paternity.[137] Even then, the consequences are not the same as in the United States. Because the child is born into an extended African family, the fact that he[138] does not have an identified father does not create for him the dysfunctional, devalued, and stigmatized childhood so likely to be in store for him in our country. Although marriage is significant in African societies, it does not determine whether the family is valued or not.

The law plays a significant role, not only in America but around the globe, in defining family units. The law becomes problematic when people choose to form non-marital or non-traditional family units. Our diverse American society as well as societies around the globe dictate that we look towards the intent of the parties and whether the intent was to form a family that resembled that of the marital union. The legal effect of non-marital unions is that they are families once children are born to the union. If laws can effectively be implemented in various changing circumstances, with some ingenuity and training we can implement laws that will work for informal or non-traditional units. This training begins in our law school classrooms. If the law of marriage is taught and non-marital units are discussed only when contrasted and compared to married ones, our future lawyers, legislators, and judges will not be prepared to address the great diversity of family arrangements in a positive light. If the Swedes have been able to legislate protections for unmarried individuals and have done so with policies that are nondiscriminatory, so can we. Like Sweden, the democratic society of the United States should also protect all family units by allowing the laws of family to reflect both the diversity in lifestyles as well as cultural differences.

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133. FLORENCE A. DOLPHYNE, THE EMANCIPATION OF WOMEN, AN AFRICAN PERSPECTIVE 1 (1991). Dolphyne stated:

> Throughout Africa, there are three types of marriage that a man may opt for—marriage under Customary law, in which he can marry as many women as he feels he can support financially; Moslem marriage, in which a man can marry up to four women; and Ordinance marriage (including Christian marriage) in which a man can only have one wife at a time.

Id. at 3-4.

134. *Id.* at 1-2.

135. *Id.* at 3.

136. *Id.* If it is a patrilineal society, where descent is traced through one's father, then it includes all the paternal relations. *Id.* at 4. If it is a matrilineal society, where lineage is through the mother, then it includes all maternal relations. *Id.* In some patrilineal societies, "a woman is never a member of her husband's family" and in some matrilineal societies "a woman and her children never belong to the husband's family." *Id.* In 1985, Ghana passed the Law on Intestate Succession which "confirms the traditional view on legitimacy of children and stipulates that all children that a man has, inside and outside wedlock, have equal interest in his property." *Id.* at 7.

137. *Id.* at 6.

138. I use the male gender here because of my deep concerns for the plight of African-American boys in the United States. *See generally* Langston, *supra* note 113, at 178-85 (discussing issues facing young African-American males).

II. SELECTING AN EFFECTIVE PEDAGOGICAL STYLE

Several concepts have emerged as techniques for educating in diverse programs and practices relating to pluralism.[139] "These concepts include multicultural education,[140] multiethnic education,[141] ethnic studies,[142] and global education."[143] Multicultural education's objective is "[t]o help reduce discrimination against stigmatized cultural groups and to provide all cultural groups with equal educational opportunities."[144] This is an objective that a family law professor can use in preparing students for practice in the domestic relations area. Adhering to a multicultural education paradigm would better prepare students, as future lawyers, to serve all groups.

"Legal education is frequently criticized as overly formalistic, abstract, and depersonalized."[145] Important lessons for teaching from a multicultural perspective can be learned from feminist theory, which "strives to include people's personal experiences."[146] Furthermore, a multicultural perspective "acknowledges that more than one individual's values and assumptions may be simultaneously correct."[147]

Feminism focuses on gender, which may or may not be significant in discussions on multiculturalism. Multiculturalism may cover a broader spectrum. There are customary ways of dealing with particular problems within each ethnic family and there are varying themes as to what constitutes a family. In addition to the cultural differences there are also differences in lifestyle.

Differing lifestyles can reflect positively in family units as well. The lifestyle discussions' dilemma questions the definition of the "unit"—who's in, who's out, who decides. The first prong—who's in—initiates an offshoot of the celebrated chicken and egg question. Does the family begin with the joining of two people or does it begin once a child is added to the union? Does

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139. *See generally* JAMES A. BANKS, TEACHING STRATEGIES FOR ETHNIC STUDIES (4th ed. 1987) (presenting strategies for teaching comparative ethnic studies and integrating ethnic content into the total school curriculum).

140. *Id.* at 29 (emphasis omitted). "[T]he term suggests a type of education concerned with various cultural groups within American society." *Id.*

141. *Id.* (emphasis omitted). The concern of multiethnic education is to modify education so that it reflects ethnic diversity within American society. *Id.* at 29-30. It involves not only showing ethnic cultures and experiences, "but also making institutional changes within the school setting so that students from diverse ethnic groups have equal educational opportunities and the concept of diversity is encouraged." *Id.* at 30.

142. *Id.* at 29 (emphasis omitted). This term is "defined as the scientific and humanistic study of the histories, cultures, and experiences of the ethnic groups within society." *Id.* at 30. Ethnic studies focuses on a formalized curriculum. *Id.*

143. *Id.* at 29 (emphasis omitted). The concern of global education is to modify "the total school environment, including teacher attitudes, curriculum, teaching strategies, and materials, so that students can develop the knowledge, attitudes, and skills needed to understand and participate effectively in a highly interdependent world society." *Id.* at 30.

144. *Id.* at 31; *see also* BANKS, *supra* note 139, at 71-72 (discussing the use of multicultural education).

145. Morrison Torrey et al., *Teaching Law in a Feminist Manner: A Commentary from Experience*, HARV. WOMEN'S L.J., Spring 1990, at 87, 90.

146. *Id.* at 97.

147. *Id.*

the joining begin with marriage, dissolving with a divorce? Beginning a family law class with a discussion of "what is a family" is a methodology that would minimize the normalizing effect of the language and concept of marriage. For example, *Thomas S. v. Robin Y.*[148] is a good source for beginning a discussion in a family law class because, unlike the beginnings of textbook coverage, the family unit here does not begin with marriage and cannot end with divorce.

In *Thomas S.*, two lesbian women joined as a family unit.[149] During the relationship, both women bore children through alternative insemination procedures.[150] A classroom discussion of what constitutes a family can pursue several different angles. Did the family unit begin when the two women decided to join in their relationship? Or when children, through alternative insemination, were brought into the unit? Or when the sperm donor was allowed to have contact with the children? Or is this unit really not a family at all? If you use the textbook approach, marriage is usually a prerequisite to "family," i.e. marriage is the only acceptable way to begin a family. Because there was not a marriage and could not be a marriage in *Thomas S.*, the child's family is deemed dysfunctional.

Those textbooks which address other family arrangements discuss them only as alternatives to traditional, conventional marriage. Marriage is the "law" of joining two people apparently with the intention of starting a family. If no children are brought into the relationship, then is there no family? If the relationship is joined with the intention of bringing in children, as in the *Thomas S.* case, it can occur without a marriage. Another example not involving marriage is single parenting by choice. However, by beginning the discussion with marriage you are stating the norms of how a family begins. Families are personal, and one unit should not be legitimized according to, or stigmatized by, another unit.

An effort to prevent the valuing and therefore, devaluing, of "family" perhaps can best be attained by changing the title of the family law course. In an attempt to counter the normalizing "marriage" aspects of the language, we could begin by changing the name of the course to "The Law of Relationships," "Legally Protected Relationships," or "Relationships." A "Relationships" course would allow for discussions about single-parenthood, including adoption, without the negative connotation that the unit is missing an essential element of a proper family, i.e., the other parent. A "Relationships" course would also allow for discussions on extended family units without the valued/devalued connotations.

A "Relationships" course does not presume that there are or will be children in the unit. What if there are no children? Is the unit a family? A "Relationships" course would allow for protections of individuals in a unit regardless of whether there are children in the unit or not. For example, if a

148. 599 N.Y.S.2d 377 (N.Y. Fam. Ct. 1993), *order rev'd*, 618 N.Y.S.2d 356 (N.Y. App. Div. 1994), *stay granted*, 650 N.E.2d 1328 (N.Y. 1995).

149. *Thomas S.*, 599 N.Y.S.2d at 377.

150. *Id.* at 378.

nonmarital relationship dissolves there may be still be property distribution protections.[151]

Another approach would be to teach family law with an emphasis on multiculturalism which would prevent a "perspectivelessness"[152] view and would provide an education on family matters according to the various cultural perspectives that make up our pluralistic society. Implementing a course on the law of relationships would allow for various lifestyles and cultural differences to be discussed in a way that would force the students to think about, but not value, varying structures. It would also encourage students, as future lawyers, to focus on serving the individual needs of their clients.

Family law class discussions can be outlined in a way to prevent valuing some units and not others. For example, outlines could take various forms:

(1) Family Law
- I. Extended Families
- II. Cohabitation
  - A. Contract
  - B. Elderly Persons
  - C. Group Homes
- III. Marriage
  - A. Who May
  - B. Rights of Married Individual
  - C. Dissolution of Marriage
    1. Divorce
    2. Rights of Children
       a. Custody
       b. Support
- IV. Single Parenthood
- V. Same-Sex Arrangements
  - A. Rights of parties
  - B. Alternative Insemination
    1. Parents
    2. Children
  - C. Dissolution of Relationship
- VI. Adoption

(2) Family Law
- I. Guardian and Ward
  - A. Adoption
  - B. Foster Care

151. *See* Marvin v. Marvin, 557 P.2d 106, 123 (Cal. 1976) (holding that certain express contracts between nonmarital partners are enforceable).

152. Crenshaw, *supra* note 25, at 2.

II. Parent and Child
III. Relationships
A. Husband and Wife
B. Same-Sex
C. Cohabitation
IV. Infancy[153]

(3) Relationships/Family Law
I. Domestic in Nature
II. Judicial Recognition
III. Child Birth

(4) Law of Relations[154]
I. Nonsexual
II. Sexual

(5) Nurturing Units or Mother/Child Dyad[155]
I. Mother/Child
A. Mothers
1. Neutered Mother
a. Mother as symbol
b. Construction of Mother-in-Law
B. Fathers as mothers
C. Child/inevitable dependency
1. Dependency of the ill
2. Elderly
3. Disabled
4. Children

Other approaches could utilize doctrines such as equal protection, privacy, and personhood under the Constitution to permeate the initial discussions in a family law or relationship course so that students can see the benefits of treating an interpersonal relationship as a family and the difficulties that abound when personal relationships are not treated as a family. Intra-family and state and family cases such as abortion, contraceptive, right to die, parent-child relationships and property distribution on death, provide excellent opportunities to discuss the legal analysis and consequences that attend to the determination of whether individuals constitute a family, without using marriage as the starting or ending point in the discussion. With either approach, when the discussions get to marriage, the students are used to examining and applying doc-

153. For a suggested outline format for (2), see Hobbs, *supra* note 10, at 519 n.41 (quoting JAMES SCHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS 1 (6th ed. 1921)).

154. *See* FINEMAN, TRAGEDIES, *supra* note 19.

155. *Id.* at 234-35.

trine that accepts diversity, thereby reducing the normalizing aspect of marriage.[156]

CONCLUSION

Family matters are personal in nature. Law and culture will oftentimes clash during discussion of "family"—what is, who are members, etc. A modern family law class, however, should adequately stimulate students to provide and appreciate input on their diverse backgrounds in an effort to incorporate customary rules into the state rules or to present the dominant view in a truly objective way. This can be done by including subjective, customary views as part of the discussion, and beginning the discussion with a truly open-ended question of what constitutes a family. These approaches would allow students more freedom to discuss various family units before addressing relevant state law on marriage. The "law" is a uniform social matrix for dispute resolution, and while it does not have to be abandoned in the family law area, its centrality to the classroom can and should be refocused.

156. One family law professor observed:

> I followed the family definition discussion with an exploration of what I called "Family Formation via Procreation." During this segment we examined issues involved in contraception, abortion, sterilization, rights of the fetus and new reproductive techniques, such as surrogacy and alternate insemination. The result of covering this material at the beginning of the course that discusses marriage, divorce and custody, has been that we did not discuss marriage until the fourth week of the semester. By then, the students appeared to be accepting the notion that "family" did not require or mean marriage. While my experience is anecdotal at best, it certainly raised the prospect of moving the discussion of family further back in the course and discussing more legal doctrine that affects "families" rather than "marriages."

Comments from a Family Law professor, First Annual Mid-Atlantic People of Color Conference at Howard Law School (Feb. 17, 1995).