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LAW, CULTURE, AND FAMILY: THE TRANSFORMATIVE POWER OF CULTURE AND THE LIMITS OF LAW

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Law inevitably is involved in the resolution of cultural conflicts. Nonintervention acts as powerfully as intervention; in either case, law is a powerful actor in its role as a part of cultural dialogue, as well as in its role as a coercive force.¹

Law is never neutral in my view. If it "stays out" of a situation, then it is complicit in the status quo or in permitting the conflict to be resolved without legal intervention, which may weight the outcome in a particular direction.² If law "comes in," it similarly "sides" with a particular position because, in part, our adversarial, either/or, dichotomous orientation tends toward a winner and a loser, rather than a win-win situation.³

¹. See Robert M. Cover, Foreword: Nomos and Narrative, 97 Harv. L. Rev. 4 (1983); Kenneth B. Nunn, Illegal Aliens: Extraterrestrials and White Fear, 48 Fla. L. Rev. 397, 400-01 (1996) [hereinafter Nunn, Illegal Aliens]; Kenneth B. Nunn, The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process—A Critique of the Role of the Public Defender and a Proposal for Reform, 32 Am. Crim. L. Rev. 743, 755–56 (1995) [hereinafter Nunn, The Trial as Text]. One recent example of this is the case of a Nigerian woman, Amin Lawal, who was sentenced to be stoned to death for the crime of having a child out of wedlock. The argument for nonintervention is a respect for culture as well as sovereignty; the argument for intervention in the name of human rights norms and gender norms is an argument for law as well as an argument for culture. See Court Upholds Stoning for Nigerian Mother, N.Y. Times, Aug. 20, 2002, at A10. More recently, it appears that the president of Nigeria will intervene, if the courts do not, in carrying out this sentence. See President Says Stoning Won’t Happen, N.Y. Times, Oct. 2, 2002, at A5.


³. For examples, consider abortion (see Planned Parenthood v. Casey, 505 U.S. 883 (1992); Roe v. Wade, 410 U.S. 113 (1973)) and medical decision-making (see Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261 (1990) (removal of feeding tube); In re A.C., 573 A.2d 1235 (D.C. App. 1990) (en banc); In re Baby Boy Doe, 632 N.E.2d 326 (Ill. App. Ct. 1994) (cases involving decisions of pregnant women regarding medical treatment or refusal of treatment that would harm their fetuses or themselves)).
In the area of family law, law is consciously not neutral and heavily value-laden. If we believe that law represents and enforces moral consensus and cultural norms (the Devlin model discussed by Post), then clearly family law is an area where moral judgments are the stated premise of many aspects of the law. At the same time, because privacy is such a core moral value of family law, private ordering and resolution gives the illusion of law remaining outside of familial conflict or cultural conflict about families, leaving conflict to legal resolution only when necessary. But as Fran Olson argued long ago, and many domestic violence scholars have similarly noted, nonintervention is not neutral in the context of family hierarchies and social/cultural norms that impact the freedom and equality of family members. This is not to say that family law has not attempted to adhere to positions of neutrality. For example, family law arguably is wedded to the principles of gender neutrality and gender equality, and therefore, its application should not reflect a gendered pattern. Nevertheless, both women and men claim bias, operating simultaneously but in different ways, in the family law system.

If the law's role inevitably is to contribute to a resolution of conflicts, then I would suggest two starting points. First, we should be

4. Marriage and illegitimacy are two examples of this characteristic of family law. Marriage statutes reflect a moral consensus linked to religious traditions, and the strong support of marriage through the extensive array of benefits for married couples states a clear preference for a certain structure of family and adult partnership. Baker v. State, 744 A.2d 864, 883–84 (Vt. 1999) (cataloguing the state and federal benefits of marriage in the context of a challenge to Vermont marriage statute by same-sex couples). Recent efforts to strengthen marriage as expressed in the adoption of covenant marriage statutes in several states similarly reflect a moral stance or value determination about marriage, especially as a lifelong relationship. See Katherine Shaw Spaht, Louisiana's Covenant Marriage: Social Analysis and Legal Implications, 59 LA. L. REV. 63, 107 (1998). Illegitimacy is an example of a not neutral, moral stance in family law regarding the categorization and stigmatization of nonmarital children. Although illegitimate children have gained some constitutional protection, the status is still permitted and, even with constitutional protection, some discrimination is permissible. See Lalli v. Lalli, 439 U.S. 259 (1978); Trimble v. Gordon, 430 U.S. 762 (1977); Labine v. Vincent, 401 U.S. 532 (1971); see generally Ralph C. Brashier, Children and Inheritance in the Nontraditional Family, 1996 UTAH L. REV. 93, 103–47.


particularly concerned about the ability of law to stigmatize, subordinate, and constrain. Both law and culture are expressions of power, at least to the extent that culture is the expression of consensus or dominant cultural norms. It is important to ask whether law, in the resolution of cultural conflict, is acting to subordinate or liberate. I will call this the antisubordination principle. Translated into a methodology, this suggests that we ask where the power lies in cultural conflicts and in the expression and application of legal rules. We also should "ask the other question": when we evaluate the intersection of law and culture, we should look for traditional patterns of inequality, even when it may not seem obvious to do so.

Second, in addition to the antisubordination principle, we should recognize the limitations of law as a means to accomplish social change in the absence of cultural support. I will call this the limited instrumentalism principle. Mere legal rules, without affirmative and meaningful support, can be undermined by power, culture, or both.

10. See Nunn, The Trial as Text, supra note 1, at 760; see also Nunn, Illegal Aliens, supra note 1, at 398–400.

11. I mean to borrow here from feminist and critical race theories. I therefore focus on subordination as the means to analyze the role of private and public actors and also to explore the intended and unintended consequences of legal structures and institutions. See, e.g., Catharine A. MacKinnon, Feminism Unmodified 44 (1987); Catharine A. MacKinnon, Toward a Feminist Theory of the State (1989); Mari Matsuda et al., Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment (1993); Patricia Hill Collins, The Social Construction of Black Feminist Thought, reprinted in Reflections: An Anthology of African American Philosophy (James A. Montmarquet & William H. Hardy eds., 2000); Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stanford L. Rev. 581 (1990).

12. This is a methodology identified by Mari Matsuda. Mari J. Matsuda, Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition, 43 Stanford L. Rev. 1183, 1189 (1991): The way I try to understand the interconnection of all forms of subordination is through a method I call “ask the other question.” When I see something that looks racist, I ask, “Where is the patriarchy in this?” When I see something that looks sexist, I ask, “Where is the heterosexism in this?” When I see something that looks homophobic, I ask, “Where are the class interests in this?” Working in coalition forces us to look for both the obvious and non-obvious relationships of domination, helping us to realize that no form of subordination ever stands alone.

See also Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim’s Story, 87 Mich. L. Rev. 2320, 2380–81 (1989) (“The emerging jurisprudence of outsiders uses the experience of subordination to offer a phenomenology of race and law. . . . If law is where racism is, then law is where we must confront it.”).

13. The limits of law as an agent of social change is not a new concept. See Fineman, supra note 8. Another recent example of this is the pattern of usage of the Family and Medical Leave Act, which is disproportionately taken by female caretakers, despite the gender neutral entitlement. Mary Anne Case, Commentary: How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted, 76 Chi.-Kent L. Rev. 1753 (2001); Michael Selmi, The Limited Vision of the Family and Medical Leave Act, 44 Vill. L. Rev. 395 (1999).
When we look at the relationship between culture and law with family as the axis for analysis, the analysis exposes the power of cultural norms of family. If you look at law and culture through the axis of family, the cultural construction of family is so strong that culture can change law, but law cannot change culture. Changing, evolving conceptions of family can subvert and eventually transform law. But law cannot force change in the culture of family. Law may facilitate change, but cannot make it happen. While law can force individual outcomes contrary to the lived experience of family, law cannot reorient family norms in conflict with culture.

This interaction between culture, law, and family is apparent in the work of Professors Bentley and Gordon. Their papers illustrate the complex interaction of cultural constructions of family, particularly of marriage and intimacy, with law. They do so by focusing on relationships deemed at the margin by the dominant culture in the nineteenth century: interracial marriages and plural marriages. Their insightful analyses point the way for excavating meaning from current cultural conflicts and the role of law. In particular, their analyses point in the direction of current marginalized groups in family law: single-parent families; gay and lesbian partners and parents; step relations and blended families; nonbiological parent-child ties; nurturing fathers; economically marginalized mothers; nonmarital families; and immigrant families. Their work also reminds us that when we "ask the other questions," hierarchies of race, religion, class, sexual orientation, and gender may be revealed. Those revelations would suggest that we look for those hierarchies in our modern cultural conflicts.

In order to more fully explore the insights raised by these two papers, I consider here a current example of the interplay between culture and law around the axis of family. The tragedy of September 11, 2001, operated on a multitude of levels, and continues to unfold in law and culture in many ways. What I want to explore, in a preliminary way, is the impact on law and culture of the sudden focus on a cross section of families that suffered the loss of family members on that day. The family stories collected and told in the pages of the New York Times in its unique Portraits of Grief were the initial

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My core proposition is that family is such a strong cultural construct it can change the law, but law cannot change family. Our cultural conception of family can be transformative or subversive of the law, redefining family in relation to existing legal rules. But law is an ineffective tool, by itself, to accomplish change or redefine family. It may facilitate change or support change, but it cannot force change in family culture.

For example, the fluidity of family forms contrasts with static legal definitions that presume stability. Although our dominant legal norm is that family is a heterosexual, marital, biological unit, our social and cultural patterns expose a culture that is largely at odds with that nuclear, marital family norm. Nearly a third of all families with minor children under age eighteen are single-parent families. The rates of nonmarital cohabitation and divorce are significant.

Marriage is no longer practiced by many as a lifelong partnership, nor is it the only form of committed partnership, and the frequency of...
more than one marital partner or committed partner over a lifetime is on the rise.\textsuperscript{21} Step or blended families are another related part of this picture. From the perspective of children, they are a far more frequent part of family life. Forty percent of children spend some time with a stepparent before the age of fourteen; and at any one time, roughly fifteen percent of all minor children live in a blended family.\textsuperscript{22} Furthermore, children blend more commonly than do parents: living with a half sibling is the most common blended family form, from the perspective of children.\textsuperscript{23} The establishment of family ties irrespective of marriage or blood builds on the adoption model, but originates and is lived out in entirely different ways.

There are other examples of culture subverting and transforming law. The increase in independent adoptions, outside the traditional adoption norm of family law, is another example of culture subverting family.\textsuperscript{24} The rejection of secrecy and disempowerment of birthparents, and the reconceptualization of adoption as an open relationship of shared knowledge and multiple parents combine to create an emerging alternative model of adoption. The more open lives of gays and lesbians, including civil unions, domestic partnerships, and name changes, as well as the use of adoption law to legally stabilize non-biological parenting relationships, is another example of culture subverting the legal privileging of the heterosexual marital nuclear family.\textsuperscript{25} These are examples of the culture of family subverting family law norms.

22. DOWD, supra note 9, at 27, 64.
23. Id. at 27.
The second part of my argument about law, culture, and family is that family culture is so strong that law standing alone cannot achieve change in family norms. In this respect, law can at best be a follower or supporter, but cannot force change. Achieving social policy solely by changing the rules is not possible; law is a limited instrumentality without cultural support. Law may, possibly, facilitate cultural change, but it cannot dictate such change in the realm of family.

One example of cultural resistance to legal change is the response to changes in family law reconceptualizing parenthood from a gender-specific, hierarchical, unequal model to a gender-neutral, egalitarian model. This change is reflected in legal rules of joint custody, gender neutrality, and presumed coequal partnership of parents with shared work and family responsibilities.26 Changing concepts of gender equality demand such reorientation of formerly explicitly gendered norms of family law that incorporated male breadwinner and female homemaker roles. Yet the pattern of custody and care of children remains sharply skewed by gender.27 It can be argued that the barriers to equality norms are structural, but the most significant barriers are cultural. Balancing work and family obligations in a coequal way, without gendered expectations of who most likely would be the sole or dominant caregiver or wageworker; would be truly revolutionary. The perpetuation of inequality within family law norms of equality and neutrality suggests that the limits of new rules or legal standards are linked to the depth of commitment to social change. Support for a balance of work and family remains minimal in the United States, especially as compared to other advanced industrialized countries.28 Structural barriers and the lack of


affirmative supports, especially family income supports and childcare, as well as time flexibility through leave, disability, or sick time policies, means a commitment to equality and balance is difficult, if not impossible, to achieve.

Another related example of legal rules’ inability to change family culture is the legal norm of equal parenthood as applied to fathers. Despite a gender-neutral legal norm, our cultural definition of fatherhood remains firmly embedded in the breadwinner paradigm of men as economic fathers.29 The cultural diminution of fathers as caregivers and nurturers is nowhere more evident than in the treatment of the father of Elian Gonzalez.30 If the circumstances of Elian’s dilemma were reversed, e.g., if his father had brought him to the United States and perished in the journey, while his mother remained alive and in Cuba, it is hard to imagine that he would not have been immediately reunited with his mother (unless she were transformed into a “bad” mother). The vigorous fight to prevent his return was only possible, in my view, because it was his father who remained

29. DOWD, supra note 9, at 132–56.
30. As described in Read Sawczyn, Note, The United States Immigration Policy Toward Cuba Violates Established Maritime Policy, It Does Not Curtail Illegal Immigration, and Thus Should Be Changed So That Cuban Immigrants Are Treated Similarly to Other Immigrants, 13 FLA. J. INT’L L. 343, 345 (2001):

Elian Gonzalez was plucked from the Florida Straits on November 25, 1999 after clinging to an inner tube for two days. His mother, stepfather, and ten other people accompanied him in a seventeen-foot aluminum boat. Dreadfully, both his mother and stepfather died along with nine others. After being lashed onto an inner tube for two days, Elian and two others were spotted by an American fishing boat and later brought to the United States by the U.S. Coast Guard. Later, Elian was legally paroled into the custody of his great uncle, Lazaro, under the Cuban Adjustment Act of 1966. This would not pose a problem except his biological father, Juan Miguel, who resides in Cuba and works as a hotel doorman, demanded his son’s return to Cuba, claiming that the boy’s mother, Elizabet, kidnapped him.

Attorney General Janet Reno determined that Elian’s father should have custody of the boy. Upset with this decision, Lazaro filed a federal lawsuit challenging Reno’s decision. This action forced Juan Miguel to travel to the United States to exert custody over his son. Upon the exhaustion of legal appeals granted to Lazaro and the forcible removal of Elian from his care, Elian returned to Cuba with his father. See also Deborah Sharp, Miami Shares Cuban Boy’s Turmoil Exiles Voice Outrage Over INS Ruling, USA TODAY, Jan. 6, 2000, at A3 (quoting Professor Berta Hernandez) (“Whether or not we like the politics of Cuba is irrelevant. There’s only one custodial parent left and there should be no conflict. If the father’s country had been Sweden instead of Cuba, the discussions would have been dramatically different.”). For a sampling of the legal literature on the case, see Susan Frelich Appleton, From the Lemma Barkeloo and Phoebe Couzins Era to the New Millennium: 130 Years of Family Law, 6 WASH. U. J.L. & POL’Y 189 (2001); Margaret F. Brinig, Troxel and the Limits of Community, 32 RUTGERS L.J. 733 (2001); Berta Esperanza Hernandez-Truyol, Nativism, Terrorism, and Human Rights—The Global Wrongs of Reno v. American-Arab Anti-Discrimination Committee, 31 COLUM. HUM. RTS. L. REV. 521 (2000); Peter Margulies, Children, Parents, and Asylum, 15 GEO. IMMIGR. L.J. 289 (2001); Charles J. Ogletree, Jr., American’s Schizophrenic Immigration Policy: Race, Class, and Reason, 41 B.C. L. REV. 755 (2000).
alive. The commonplace legal rule that a surviving child would be reunited with a surviving parent could be questioned because of cultural assumptions and beliefs about fathers that could be used to challenge and attempt to subvert legal rules.\footnote{31}

II. INTERRACIAL MARRIAGE AND PLURAL MARRIAGE

The power of cultural norms of family and the limits of law to change family are vividly demonstrated by Bentley and Gordon. Both focus on the nineteenth-century treatment of families deemed at the margin: interracial couples and plural marriages. They tell us a great deal about race and religion in the course of telling us about the meaning of stigma and how the law helped construct this marginalization. At the same time, the stories in these papers also tell us how core cultural meanings were defined, in particular, the meaning of marriage. Interracial marriages and plural marriages were deemed beyond the pale of the sacred, emotional bond of marriage. What is striking are the parallels in the definition of marriage defended against these two perceived challenges. Marriage is conceptualized in a way that underscores feeling and relational connection and is characterized as so unique and meaningful as to be spiritual. Equally fascinating is the evidence that despite subordination and stigma, these relationships continued to exist, and at least in the case of interracial marriage, cultural practice subverted legal rules, even as legal rules complicated and even destroyed relationships. Ultimately, legal rules changed with respect to miscegenation in the face of changed cultural norms. Polygamy, on the other hand, remains a practice both legally and culturally condemned.

A. Nancy Bentley, Legal Feeling: The Place of Intimacy in Interracial Marriage Law

"Does law properly control sexual and family intimacy?" is the question with which Nancy Bentley opens her paper.\footnote{32} But she rightly tells us that question gets it backwards because "in important respects intimacy can be said to control law."\footnote{33} While controlling intimacy may be the law's justification to intrude, intimacy also subverts law.

\footnote{31. For another example of cultural attitudes toward fathers affecting the application of legal analysis, see Nguyen v. INS, 533 U.S. 53 (2001).}  
\footnote{32. Bentley, supra note 14, at 773.}  
\footnote{33. See id.}
Bentley’s example is miscegenation law. The insight she gives us is not the familiar one of focusing on *Loving v. Virginia*. Rather, she deconstructs one of Abraham Lincoln’s arguments against slavery. Lincoln argued, “[If] I do not want a negro woman for a slave, I do [not] necessarily want her for a wife.” This statement encapsulates, Bentley argues, an understanding of sex, intimacy, marriage, and race. That understanding was reflected in the concrete regulation by race of who could marry (but not of who could have sex). Yet this understanding was subverted by culture and by cultural practices of intimacy, which frequently crossed the color line.

The cultural understanding and meaning of the difference between sex and intimacy, and its relationship to race, are further illuminated by Bentley’s analysis of Charles Chesnutt’s novel, *The Marrow of Tradition*. As Bentley tells us, in the novel the main character, Olivia Carteret, is horrified to discover that her father, a white man, was married to a Black woman. This strong emotional response exposes the operation of racial patriarchy that both privileged and subordinated white women. It also exposes, as Bentley argues, a cultural presumption of the known and significant difference between sex and intimacy, especially intimacy expressed in its highest form, in marriage. As Bentley says, “it is intimacy or marital feeling, not sex, that prompts this censorship.”

The law thus reflects the cultural construction of sex, intimacy, marriage, and racial subordination. By separating sex and intimacy, and privileging intimacy within marriage while allowing interracial sex and nonmarital partnership or concubinage, racial subordination could be reinforced and sexual access preserved, while also preserving the power to confer less than full family privacy and individual autonomy along racial lines. Gender privilege is also reinforced since this construction was widely understood to preserve sexual and intimate relationships of white men with Black women. At the same time, it preserved the race privilege of white men over Black men, as Black men were not understood to have the same sexual freedom with respect to white women.

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36. See id. at 778.
37. See id. at 784.
38. See id.
39. See id.
As Bentley deftly shows us, Lincoln's remark and Chesnutt's story not only demonstrate the law's support of cultural practices, but also reveal the subversion of law by culture, because they reveal the reality of interracial intimacy, not just interracial sex. Ironically, to the extent cultural practice defies law, it also borrows from it. Bentley talks about Habermas' notion of intimacy formalized through marriage, where marriage acts as a "seal," a "public guarantor of a private realm of free and autonomous human subjectivity." When those who are denied the seal claim it, they transgress and undermine legal limits and boundaries. But they also are lured by the dominant cultural norm. They claim the power of the core legal meaning of marriage: a unique human bond of feeling and interrelation deserving of public respect and honor.

One of the things that is striking about Bentley's examination of miscegenation is the contrast to the more common view of miscegenation as simply a long-ago immoral legal regime. Rarely do we look more deeply into the sexual and intimate relations that it sought to regulate. We might be inspired by this example to inquire into modern family law, particularly the regulation and/or support of nonmarital relationships. We also might be challenged to explore the specific example of contemporary interracial couples. We remain a remarkably segregated culture, and that is reflected in the racial configuration of families. We might also explore the racial configuration of family law. The culture that family law reflects and operates to protect is predominantly white, middle-class culture.

B. Sarah B. Gordon, The War of Words: Revelation and Storytelling in the Nineteenth-Century Campaign against Mormon Polygamy

Sally Gordon's examination of the nineteenth-century campaign against polygamy is an equally interesting and challenging paper. It

40. See id. at 780.
presents the problem of minority cultures functioning within majority culture. It also presents the issue of the definitions of freedom and individual autonomy. Finally, because polygamy is linked to religious belief, it raises constitutional questions of whether the First Amendment should trump everything else, and do so always.

What Gordon explores, like Bentley, are stories that tell us how the culture viewed polygamy and the legal story told to justify its proscription. Her goal is not to critique whether Reynolds v. United States is well reasoned, but rather to see how nineteenth-century culture described, understood, and argued against the practice of polygamy. Her analysis ultimately leads to a description of "true" marriage that is strikingly similar to the valued marriage described by Bentley.

Gordon sets out the origin of plural marriage in the history and doctrine of the Mormon church, emphasizing that it was linked to a patriarchal tradition that was an elitist tradition: the propagation of the genetic line of religious leaders, from the example of Abraham, translated to apply only to church leaders. Polygamy was linked to what Gordon describes as "the role of revelation and the promise of exaltation in all aspects of the faith." What you did for the faith in this life insured your eternal life; those things that called for the most sacrifice, because they would be the most challenged by the dominant culture, would insure this spiritual glory. As Gordon puts it, this "transformed daily life into the most profound of spiritual exercises."

As Gordon explains, the Mormons' position was a serious challenge. Their commitment to patriarchy, authority, and polygamy was in the name of revelation, religious doctrine, and therefore the free exercise of religion. If monogamy was simply a Christian tradition, then it could not invalidate polygamy; indeed, to do so would violate both the Free Exercise Clause and the Establishment Clause. Instead, opponents of polygamy used stories to construct a secular, neutral definition of marriage. Marriage's monogamous form was made essential to foundational secular and political principles silently

42. See Reynolds v. United States, 98 U.S. 145 (1878).
44. See id. at 743.
45. See id. This connection between the spiritual and sexual was not limited to Mormons, Gordon points out; "spiritual wifery" was known in other sects, and other sexual practices, including celibacy, were characteristic of other religions. Id. at 746.
46. See id. at 747-48; see also U.S. CONST. amend. I.
enshrined in the Constitution. Anti-polygamy novels thus claimed polygamy was not only a threat to the family, but also to the Republic. “[S]piritual union in marriage was the true source of the faith and virtue essential to republican government.” Because of marriage’s importance and vulnerability, it needed to be protected.

Gordon also points out that protection of women factored into the argument against polygamy. Women needed protection from men’s animal desires and from exploitation, since women were expected, by broad cultural agreement, to obey their husbands. Anti-polygamy arguments drew the parallel to slavery, thus using the power of anti-slavery rhetoric, but without crossing the line to challenge marriage institutions themselves and their subordination of women. “Though they entreated federal politicians to protect otherwise helpless women in Utah, novelists were careful not to directly challenge legislators’ views of themselves as husbands.”

The understanding of marriage that Gordon finds in the anti-polygamy stories is strikingly parallel to the conception of marriage that Bentley describes in the miscegenation stories. Marriage is spiritual and sacred, a unique bond. “True” marriage is deemed fundamental and antecedent to the Constitution. The United States Supreme Court’s opinions mirror this view of marriage as transcendent and embedded in the Constitution, with monogamy simply presumed.

47. See Gordon, supra note 15, at 747–48
48. See id. at 753.
49. See id.
50. See id. at 761.
51. Compare id. (spiritual union in marriage was the true source of the faith and virtue essential to republican government), with Bentley, supra note 14, at 777 (marriage in a particular opposition to sex bespoke a species of feeling or intimacy that had become a powerful source of social legitimacy).
52. Comparing the two arguments reveals how the characterization of marriage shifts to defend culture. In opposition to polygamy, marriage is secularized and constitutionalized. Within the constitutional cases that recognize marriage as a fundamental right, even though not explicit in the text of the Constitution, marriage is characterized in natural law terms, as something universal and transcendent, linking its value to its spiritual and religious nature. See Griswold v. Connecticut, 381 U.S. 479 (1965).
III. DEFINING "FAMILY" AFTER 9/11: TRANSFORMATIONS AND LIMITS

Like these two nineteenth-century examples, amidst 9/11 are stories of marginalized families. Unlike the fiction used to condemn marginalized marriages analyzed by Bentley and Gordon, however, the true stories of families touched by 9/11 have the potential to be transformative rather than subordinating. In these stories lies the potential to honor intimate relational ties of love and feeling over formal or structural definitions of family. At the same time, the aftermath of 9/11 reveals the constraints on such transformation, as the pattern of loss was deeply gendered, raced, and classed.53

One of the remarkable consequences of 9/11 is what it revealed about families. The lives of those who perished exposed the complex fabric of family relationships that are the reality of American society. Rather than statistics on single-parent families, cohabitating couples, blended families, and same-sex couples, 9/11 yielded powerful individual vignettes of the lives that were cut short on that day, and the implications of those losses for the relational webs of individuals.54 What we see in the 9/11 victims and their families are patterns of change, patterns of multiple family forms, and relationships of feeling sometimes in alignment with legal relationships, but often not.

One of the questions that emerged early was who would be entitled to compensation for their loss, focusing particularly on cohabitating couples, common law marriages, same-sex couples, and stepfamilies. Families and family members outside the preferred nuclear heterosexual marital norm with biological or formally adopted children faced, in addition to grief and loss, challenges to a recognition of their loss and to their need for assistance. Their dependency or interdependency was obscured by their lack of legal status.

53. See Andy Humm, Second Class Survivors: Gay and Lesbian Partners of 9-11 Victims Struggle to Receive Their Benefits, THE VILLAGE VOICE (New York), Nov. 20, 2001, at 55; Nightline (ABC, television broadcast, Sep. 10, 2002), LEXIS, News Library, Current News File (This Nightline newscast included the voices and music of the night workers in WTC, who are dominantly Latinos/as, low income and male.).

54. The New York Times for months ran an extraordinary section of obituaries, covering the lives of those who died in a quite unique way, very different from the ordinary obituary with its almost ritual sparse set of facts. See PORTRAITS OF GRIEF, supra note 16.
Our response to 9/11, it seems to me, has been to embrace all who have lost and thereby to embrace the most fluid, flexible, relational view of family. It is a definition of family founded in love and emotion, acts and history, rather than status or formality. At least on this occasion, we have forgotten our objections to nontraditional families and embraced a definition of family based on emotional connection. Perhaps we have witnessed a transformation. The movement to embrace nontraditional families in this instance may support greater tolerance and even change legal rules that deny the cultural realities of the characteristics of family culture as it is lived out in the patterns of these families: pluralistic, multifaceted, creative, and fluid.

A. Stories from 9/11

The 9/11 stories include those of husbands and wives, of daughters and sons. In Middletown, a suburban New Jersey town on the train line from New York, fifty residents who left for work that morning never came home. One who lost her husband, Pat Wotton, visited Ground Zero, rushed to the railing, and shouted “Rod, come back! How could you leave me!” Eight days after the attacks, she delivered a baby boy who spent the next three weeks in intensive care with serious respiratory problems. Kevin Laverty was waiting for his wife Anna to retire so they could move to a condo in Florida. He too felt angry: “Angry at her. One hundred percent! She called me, and I told her to get the hell out. But she was so kind-hearted to people.” Nikki Stern, whose husband died, never tires of talking about him, and the story of how they met and nurtured a romance during a wonderful summer in Paris: “I mean, it was just a love story.” For some, the loss was too difficult to bear. Ninety-one days after the attacks, the wife of one victim, Pat Flounders, committed suicide.

55. It is also mirrored in the spiritual diversity demonstrated since 9/11 as well as the recognition and reaction to cultural ignorance of Islam, and concern that fear not translate into racial and religious hatred. See NPR News Special: Native American Elders Performing Ceremony to Release Spirits in Battery Park (NPR radio broadcast, Sep. 11, 2002), LEXIS, News Library, Current News File (Native American ceremony to release the spirits of the dead; the neighborhood ceremony in Battery Park included a Buddhist, imam, rabbi, priest, and minister).
56. Gail Sheehy, Six Months Later; U.S. Fragments, USA TODAY, Mar. 11, 2002, at 15A.
57. Id.
58. Id.
There are also stories of family surprises. After the death of Alexis Leduc, Isa Rivera, his partner of twenty-three years who had three children with him, filed for benefits as a survivor. A second woman, however, also had a marriage certificate showing that she was Leduc’s wife. Soon thereafter, two children of Leduc’s from a prior relationship also filed claims. Under the federal fund, each victim may have only one family representative, who decides how money will be divided among family members.

Far more common than multiple marriages or other intimate partners were couples who had lived as partners for years and were able to marry, but never did so. Marmily Cabrera was the partner for eleven years of Pedro Checo, vice president of investment operations for Fiduciary Trust, and had two children with him. They considered themselves married in a common law marriage, but New York State does not recognize common law marriage. Marmily will not be able to recover under the final rules of the federal fund, nor under state law.

Then there are the stories about children lost to parents and parents lost to children. One of the children who lost a parent is twelve-year-old Hilary Strauch, who was the subject of an extended article one year after 9/11. Hilary saw the continuous television coverage of planes flying into the World Trade Center (“WTC”), her father’s workplace, knowing he was in the building. George Strauch worked on the ninety-ninth floor of the south tower. Hilary became a “celebrity” in her hometown of Avon-by-the-Sea, New Jersey, and felt pressure to take care of the feelings of awkwardness that those around her, including her teachers, were feeling. She continues to search for the right “face” to wear through all of this, the face that will allow her to blend back into the crowd.

64. Jodie Morse, The 9/11 Kid, TIME, Sep. 9, 2002, at 48. Regarding her unwanted fame, Hilary stated:

I’ve heard about people having their 15 minutes. I think I’ve had a little more than 10, and I’m done with it. But I don’t think it will stop. Maybe someday when I get older, get a job and move away from Avon, maybe at that point I won’t be that different from everyone else. I think it feels a little like being schizophrenic or being a character in a play.

She found some normalcy, and a place where she could be herself at a camp for children of the victims. According to the article, Hilary and the other children at the camp were most worried about having to relive their own suffering during 9/11 anniversaries. Hilary did not like the fact
One of the most poignant statistics of 9/11 is that sixty-three babies were born to sixty-one women after that day.\(^6\) But there were also the children never born: one victim who had just told her husband hours before that she was pregnant died that morning.\(^6\) One British report estimates the number of orphans from the attacks at 1,300.\(^6\) Some of the children killed were adult children. Not all parents are in agreement on how to proceed, as some are long divorced. One such couple is acting totally independently regarding the death of their son, each retaining separate counsel.\(^6\)

There were thirty-nine sets of twins affected, where one of the twins lost their life on 9/11. One set of twin brothers, both firefighters, rushed to the scene of the WTC. One survived, the other did not. Both had children, and because of the biological link between the brothers, the cousins are virtually identical cousins. When the surviving brother was asked, "Does it bother her that you look so much like her dad?" with regard to his niece, he replied, "I'm sure at some times [it bothers her] more, [but] I think its more good than bad because I think the one thing she'll get [is] to see someone who looks almost just like her dad as he would have looked growing older."\(^6\)

Intertwined within the 9/11 stories also are step relationships that attest to the emotion and power of the relationships within blended families. At the New York City memorial service one year after 9/11, the reading of the names was striking in its exposure of who was lost. Also part of the ceremony was Marion Kean's rereading of her eulogy for her stepfather, Franco Lalama: "He was the best father I could ever ask for."\(^7\) A stepsister of another 9/11 victim traveled to Afghanistan in her sister's memory, to link with Afghan families and protest a military response to 9/11, in honor of her stepsister's pacifist beliefs.\(^7\)

Immigrant families were among those hardest hit by 9/11. Among the survivors are the next of kin of undocumented workers,

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70. Franco Lalama was an engineer for the Port Authority who worked on the sixty-fourth floor of the WTC. *Id.*
who cannot risk making a claim.\textsuperscript{72} There are also family members of visa holders who have lost their link to a legal immigrant.\textsuperscript{73}

The community that has suffered disproportionately from intersecting problems of denial of legal status and recognition are family members of gay and lesbian victims. Mark Bingham was one of the passengers on Flight 93, which crashed into a field in Pennsylvania.\textsuperscript{74} A rugby player and ex-campaign worker for Senator John McCain, Bingham apparently was part of the group that attacked the hijackers and brought the plane down, avoiding a second attack on Washington. Bingham is survived by his partner of many years, who resides in California. Another California survivor, Keith Bradkowski,\textsuperscript{75} was Jeff Coleman’s registered domestic partner of eleven years. David O’Leary lost his partner of seventeen years in the WTC.\textsuperscript{76} David Charlebois, the copilot of the plane that crashed into the Pentagon, is survived by his partner of fourteen years.\textsuperscript{77} George Cuellar lost the “love of his life,” his partner of twenty years, Luke Dudek, who was a food and beverage controller for the restaurant at the top of the WTC, Window on the World. They lived in New Jersey, where George manages a flower shop that they owned together.\textsuperscript{78}

Elba Cedeno waited for nearly three weeks after the towers collapsed and finally reluctantly went to Pier 94 to register as a survivor.\textsuperscript{79} Her domestic partner, Catherine Smith, perished in the WTC.

\textsuperscript{72} There has been a flood of citizenship applications, up 72\% from previous years, some from long-time green card holders, for fear of the repercussions if they did not become citizens. \textit{See} Leslie Casmir, \textit{Stampede’s On to Become a U.S. Citizen}, \textsc{N.Y. Daily News}, Mar. 14, 2002, at suburban-1. Among the families hardest hit by the tighter immigration restrictions are undocumented workers, and disproportionately those are Hispanic workers. Ironically, a coalition of national organizations is pushing for legalization of millions of undocumented workers, those without criminal records who work and pay taxes. They argue that these workers are a primary support of agricultural, poultry, and services sectors, and use their income to support their families seeking a better life in the United States. \textit{See} Rebeca Logan, \textit{US-Immigration (Hispanics)—Coalition Seeks Legalized Status for Undocumented Workers in U.S.}, \textsc{EFE News Service}, May 16, 2002, LEXIS, News Library, Current News File.

\textsuperscript{73} \textit{Id.}


\textsuperscript{76} Press Release, \textit{supra} note 74.

\textsuperscript{77} \textit{See id.}

\textsuperscript{78} Humm, \textit{supra} note 53.

\textsuperscript{79} Jessica DuLong, \textit{Pair Recognition; Sept. 11 Survivors of Same Sex Partners Face Extra Challenges}, \textsc{NewSDay}, Jan. 22, 2002, at B3.
Cedeno is an unregistered domestic partner. She described Smith as her “soul mate.” Cedeno may ultimately receive some compensation under the liberalization of city and state funds, but will be unlikely to recover under the federal fund. The lesbian partner of a civilian Pentagon employee similarly was denied benefits from the comparable state agency in Virginia.

There are twenty-four known surviving domestic partners of those who perished on 9/11. Many were long-term partnerships. Whether they are assisted at all, by private or state funds, depends upon the variable state frameworks for unmarried partners. Because the federal fund will follow state law, the variability of state law will yield uneven results. California has domestic partner legislation, as does New Jersey and New York City. There is no such legislation in New York State, Connecticut, or Virginia.

The American Red Cross quickly adopted a policy of explicitly offering disaster relief to domestic partners, as the result of immediate lobbying efforts by gay and lesbian activist groups, led by Empire State Pride Agenda. Governor George Pataki amended his 9/11 emergency executive order to redefine a dependent person to include those showing “mutual interdependence.” Just a few years before, the same state board had successfully fought not to treat domestic partners the same as spouses. Pataki was also lobbied to make domestic partners of uniformed workers who were killed in the rescue effort eligible for pensions and other benefits. The City of New York also offered benefits to domestic partners. Most private funds set up by businesses hit by the WTC collapse cover domestic partners, although they do not advertise this on their web sites.

Despite this liberalization of many sources of relief, sources of financial relief that were denied to most domestic partners included federal social security, state pensions, and worker’s compensation, all of which would have required new legislation to include domestic partners. Despite efforts to liberalize the language (including support from senators from New York, Massachusetts Congressman Barney Frank, and Senator Feinstein of California), the final regula-

80. See id.
81. See id.
82. Barrett, supra note 63.
83. Humm, supra note 53.
84. See id.
85. See id.
86. DuLong, supra note 79.
tions for the Victim Compensation Fund issued in March, 2002 limit relief in ways that deny compensation to gay or straight unmarried partners, fiancées, and common law spouses. On the other hand, the receptive and sympathetic public response to the victims of 9/11 has contributed to a new challenge to New Jersey’s marriage law, with explicit reference to the partners lost and children affected by 9/11. In addition, the long-stalled New York State gay rights bill is moving through the legislature.

B. Patterns of Hierarchy: Race, Gender, and Class

Although the 9/11 stories reveal patterns of pluralistic family forms, if we “ask the other question” of the presence of other hierarchies in the patterns, the 9/11 stories expose some familiar hierarchies. First, race patterns are evident in the victims. The victims of the attacks were predominantly white, middle-class males. The rush to provide financial compensation for the victims is dramatically different from the response to the earlier terrorist attack on the U.S. embassy in Kenya, also linked to Al-Qaeda. On August 7, 1998, 5,000 people were injured and 218 were killed, including twelve Americans. The vast majority of the dead and injured were Kenyans. Although aid has been provided to Kenya, no compensation has been provided to the victims. Proposed legislation would compensate the families of the twelve diplomats killed at about $1 million each. The families of the 167 Kenyans who died would get nothing under the legislation.

Second, the pattern of 9/11 victims is strongly differentiated by class, and that class-based pattern is being reinforced by a compensation system linked to earnings, rather than loss in absolute terms. Lives are not equal in this tragedy, but rather are valued by earning power in addition to the scope of dependents connected to each victim. Compensation, however, does not require dependency.

87. Barrett, supra note 63; see also Bush Administration, supra note 75.
88. The Lambda Legal Defense Fund is challenging the New Jersey marriage law: “The case (Lewis et al. v. Harris et al.) is being launched at a critical time. The valiant struggle for gays and lesbians who lost their partners on September 11 has helped to create a new reservoir of respect and understanding for our loving relationships. Now is the time to translate that new support into legal equality.” Available at http://www.lamdalegal.org/cgi/iowa/cases/record?record=179. On the progress of the New York gay rights bill, see James C. McKinley, Jr., New York Bill on Gay Rights Is Set for Vote, N.Y. TIMES, Oct. 23, 2002, at A1.
Value, instead, is attached to earnings.\textsuperscript{90} Class-based compensatory systems also inevitably have a disproportionate racial impact. Finally, the pattern of the victims is strongly gendered, because the time of day and location of the attacks meant the victims, including victims among the rescuers, were predominantly men, reflecting the gender distribution of work as well as the gender distribution of work and family responsibilities.\textsuperscript{91}

What the stories of 9/11 also expose, then, is what we do not notice or choose to ignore. Most notably, we ignore the perpetuation of those hierarchies in the compensation rules that replicate these hierarchies. Lives lost are devalued by race and class and valued by gender, and inequities are reinforced while the norms of inequality are quietly enforced. Thus, within potential transformation is the reinforcement of other hierarchies.

CONCLUSION

One of the positive legacies and dramatic lessons of 9/11 may be that among the many unities that have emerged is a unity of cultural acceptance of family pluralism. For some, the patterns were known and familiar; for others, abstract statements and statistics were suddenly made powerfully real. Sympathy perhaps opened the door to understanding the lived realities of families as consciously plural. With that understanding may come another incremental shift towards accepting, even valuing, actual relational ties. Responsiveness to those treated as being at the margin, beyond the scope of aid, would suggest that. It suggests that law will yield to changed cultural norms and realities. At the same time, the acceptance of hierarchies among

\textsuperscript{90} The complications even of determining "earnings" reflect class differences. One group of employees who sought help after 9/11 were a group from the Hotel Employees and Restaurant Employees International Union, Local 100. These downtown waiters were unable to file tax returns because their earnings records were destroyed in the restaurants crushed by debris. Big firm tax lawyers, who had volunteered their services, had to figure out how to replace the lost records. According to another story, some survivors asked how to report off-the-books income for purposes of compensation without triggering tax problems. Federal Victims Compensation Fund at http://www.usdoj.gov/victimcompensation/

\textsuperscript{91} The demographics of the World Trade Center victims, including those on planes, based on over 90\% of estimated total deaths are as follows: 75.9\% White, 9.4\% Hispanic, 7.9\% Black, 6.3\% Asian, 4\% other; approximately 78\% male and 22\% female. Statistics available at http://www.september11victims.com/september11victims/wtc_statistics.htm. The FDNY was 94\% white male as of November, 2000; 11,344 total firefighters, 321 Black, 341 Hispanic, 20 Asian, 9 Native American, and 36 female. Elissa Gootman, Graduates of New Program to Join Fire Department Soon in Diversity Effort, Nov. 16, 2000, available at http://www.nytimes.com//learning/students/pop/001117snapfriday.html.
the families demonstrates how transformation can yet remain profoundly limiting, even reinforcing conservative, subordinating norms to which the culture clings. Law has not succeeded in changing those hierarchies; culture continues to embrace them.