

2009

## Foreward

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### Recommended Citation

Dowd, Nancy E. (2009) "Foreward," *University of Florida Journal of Law & Public Policy*. Vol. 20: Iss. 1, Article 1.

Available at: <https://scholarship.law.ufl.edu/jlpp/vol20/iss1/1>

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## FOREWORD

*Nancy E. Dowd\**

Families and family law are at the cutting edge of social policy. As we navigate through difficult times, we are reminded not only of the importance of families, but also of their vulnerability. The challenge for family law and policy is to remain responsive and relevant. This requires that we confront the realities of families, their needs and issues. We live in times of enormous diversity in family forms. That reality is frightening and worrisome to some, but reminds us that it is how families function, rather than what they look like, that is most important. Embracing function over form is the challenge of the movement for recognition of same-sex marriage and adoption by homosexuals, as well as debates over whether cohabitation should engender legal rights and responsibilities.

We tend to think of family in the singular, yet the situations of families are multiple, and their differences matter. Family law and policy historically has served the privileged positively, while intruding dramatically and often negatively into the lives of low-income and minority families. Even within families, circumstances are dissimilar and differences matter. Gender neutrality, for example, can perversely hide gender-specific differences that remain in the average situation of fathers and mothers. Race and class fault lines heighten vulnerability.

Families' core function of care is unchanging. The context within which care is given, however, has changed dramatically. The changes in context often are exposed as gaps between the myths and realities of family life. Despite our expressed valuing of children, for example, we tolerate abominable levels of child poverty and have failed to ratify the UN Convention on the Rights of the Child<sup>1</sup> (and are one of the few countries on the globe who has failed to do so). Similarly, we value family care and the model of full-time parental care of children, yet the reality is that virtually all parents perform wage work as well as family care work within a structure hostile or indifferent to balancing work and family.

Families confront a multitude of problems, and virtually every family has their share over time. Although family conflicts are among the most familiar and devastating to our society, traditional adversarial legal models are often inadequate and even counterproductive when families are

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\* Director, Center for Children and Families, and David H. Levin Chair in Family Law.

1. U.N. Convention on the Rights of the Child, <http://www.unhcr.ch/html/menu3/b/k2crc.htm> (last visited Mar. 4, 2009).

involved. Thus, family law has been challenged to explore new, innovative models for conflict resolution in order to address the need for complex problem solving. Interestingly, many alternative models developed in family law have inspired or been applied to other areas of law.

The broad range of family law issues and the challenge of devising policy and solutions generated this special issue. Dena S. Setzer, J.D. '09, conceptualized this issue, inviting noted scholars to contribute to a volume focused on cutting-edge family law issues. She first drew in part from the 2007-2008 lecture series sponsored by the Center for Children and Families entitled "Families in Transition." Second, inspired by learning the collaborative model of family law practice in her family law class, Dena invited one of the leading proponents of this model, Professor Susan Daicoff, to write about this new model of practice. Finally, on the heels of the 2008 publication of Professor Barbara Bennett Woodhouse's groundbreaking book, *Hidden in Plain View: The Tragedy of Children's Rights from Benjamin Franklin to Lionel Tate*,<sup>2</sup> she invited Professor Woodhouse to tell a story of children's rights.

It is particularly fitting that the lead piece in this special issue comes from Professor Woodhouse, the founding director of the Center for Children and Families at the University of Florida Levin College of Law, and the David H. Levin Chair in Family Law, who is a longtime champion of children's rights. By the time this issue is published, Professor Woodhouse will have taken on her new position as the L. Q. C. Lamar Chair in Law and Co-Director of the Barton Child Law and Policy Clinic at Emory University School of Law. Her contributions as an eloquent family law scholar will continue to inform national and international discourse on family law. Her particular contributions to the University of Florida, both within the law school and in collaboration with others in the Gator Nation, are incalculable. Her lasting legacy is the Center that she founded and its array of programs, publications, and advocacy.

Professor Woodhouse's article, coauthored with Kelly Reese, J.D. '08, focuses on the right of all children to be part of a legally-recognized and valued family. In *Reflections on Loving and Children's Rights*,<sup>3</sup> Woodhouse and Reese explore the story and the enduring legacy of *Loving v. Virginia*.<sup>4</sup> Unlike the usual analysis of the implications of *Loving* for the right to marry and the relationships of adults, however, they explore the

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2. BARBARA BENNETT WOODHOUSE, *HIDDEN IN PLAIN VIEW: THE TRAGEDY OF CHILDREN'S RIGHTS FROM BENJAMIN FRANKLIN TO LIONEL TATE* (Princeton 2008).

3. Barbara Bennett Woodhouse & Kelly Reese, *Reflections on Loving and Children's Rights*, 20 U. FLA. J.L. & PUB. POL'Y 11-32 (2009).

4. 388 U.S. 1 (1967).

meaning of *Loving* for children. *Loving* not only expanded the right to marry, they point out, but it also re-conceptualized family. Children of interracial couples saw their families legally recognized and valued. Rules of custody and adoption that directly implicate children also were affected by *Loving*, as it permitted relationship and emotion to be valued over discriminatory assumptions about race. Beyond the obvious implications of *Loving* for the racial configuration of family, however, is the broader principle of the right of children to be part of a family unit and to recognize “family” as a term that includes a range of family forms that serve children’s needs for care and stability. Thus, *Loving* has contemporary meaning as the foundation for the principle of children’s rights that is at stake in the recognition of same-sex marriage, adoption by homosexuals, and the full acceptance of multiracial children.

Achieving the full measure of *Loving* and acknowledging a robust concept of children’s rights remains a radical vision. Yet the stories shared by the coauthors of this piece remind us of the possibilities of change. Professor Woodhouse shares the fears and real concerns of violence and harm to her interracial aunt and uncle, who were contemporaries of the Lovings, while Kelly Reese shares her family stories of growing up in the South 40 years later, secure that an interracial relationship would be completely accepted by her family and community. Both point to President Obama’s biography and his election as additional evidence of change. In the context of the debate over gay and lesbian relationships and families, these stories remind us of the distance that can be travelled and the potential for children born in the twenty-first century.

A different story is the focus of Professor Angela Mae Kupenda’s article, *The State as Batterer: Learning from Family Law to Address America’s Family-like Racial Dysfunction*.<sup>5</sup> Professor Kupenda bravely tells her own story as a battered wife, and how she gathered her strength to leave her dysfunctional 13-year marriage. Professor Kupenda shared this story with a rapt audience at the University of Florida Levin College of Law when she delivered the lecture that was the basis for this article.<sup>6</sup> We often cannot believe the stories of domestic violence victims; it simply seems unimaginable. Watching this beautiful, dignified, compassionate, warm-hearted woman tell this story was enough to make me weep. The stories of domestic violence are always like that: how can someone who loves, someone who is family, hurt another member of the family. They

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5. Angela Mae Kupenda, *The State as Batterer: Learning from Family Law to Address America’s Family-like Racial Dysfunction*, 20 U. FLA. J.L. & PUB. POL’Y 33-64 (2009).

6. Lecture delivered February 2008, cosponsored by the UF Law Center for the Study of Race and Race Relations.

also are stories of great power. As she says, the reason that she left was not an acute battering incident. Rather, “It came when I realized the effect the abuse was having on my spiritual and moral self.”

But, Professor Kupenda tells a second story as well: she is a Black woman who grew up and continues to live in Mississippi, and, as a Black woman, she has experienced the everyday racism that is part of the context of life for Black people in America. And again, she made me weep, listening to the story. As one of many Whites in that audience, I know that as often as I am reminded of the realities of race, it still is too easily ignored and denied. The harsh and abusive treatment of people of color in the American family is the parallel that Professor Kupenda draws with the paradigm of domestic violence. Using the domestic violence wheel of power and control, she explores how isolation, emotional abuse, economic abuse, sexual abuse, and physical abuse, along with using children, privilege, and intimidation, not only are the ways power and control have been exercised within individual relationships, but also have been characteristic of the relationship of Blacks and Whites, as reinforced by the state. Professor Kupenda points out how other characteristics of battering are present in the relationship between the state and Black Americans, including the role of shame, the complicity of the legal system, the construction of abuse as isolated rather than as common, the complicity of the battered, the cyclic nature of battering, and the role of religion. Finally, she also draws on the experience of domestic violence victims, including herself, in resisting domestic violence, to draw lessons for confronting and changing the abuse of Blacks within the American family.

The third article in this special issue also comes from a lecture delivered at the University of Florida “Families in Transition” series, by Professor Richard Collier of the University of Newcastle, a leading family law scholar of men, masculinities, gender theory, and fatherhood. Professor Collier’s article on fathers and the fathers’ rights movement, *The Fathers’ Rights Movement, Law Reform and The New Politics of Fatherhood: Some Reflections on the UK Experience*,<sup>7</sup> brings a comparative perspective to trends similar to those in the United States. As Professor Collier notes, the social and legal concept of the “good father” has changed dramatically, particularly post divorce. The change reflects two very different narratives, as he points out, and those narratives generate different agendas for law reform.

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7. Richard S. Collier, *The Fathers’ Rights Movement, Law Reform, and the New Politics of Fatherhood: Some Reflections on the UK Experience*, 20 U. FLA. J.L. & PUB. POL’Y 65-110 (2009).

One narrative is the fragility of father-child relationships, the negative impact of the diminution of those relationships, and, therefore, the importance of supporting fathers to sustain and strengthen those connections. An alternative narrative sees the relationship between men and their children as affirmatively changing toward a norm of engagement, care, and sustained relationship. In this view, men have re-conceptualized fatherhood and masculinity, and based on their record of care, argue for stronger support of their actual familial role. The differences between these negative and positive views of fathers and fatherhood account, in his view, for the schizophrenia of the fathers' rights movement. Collier presents the shift in the legal models of divorce in the UK as well as the development of fathers' rights groups that represent both narratives, culminating in a model of presumptive shared co-equal parenting as the post divorce norm. Collier explores how concepts of fatherhood are affected and constructed around rights talk and concepts of masculinity, resulting in a combination of both traditional and emerging norms of fatherhood. He rejects an overly simplified view of the fathers' rights movement and argues for a more complex, nuanced view of the potential for change in men, masculinity, and fatherhood.

Finally, Professor Susan Daicoff closes the issue with a survey of the groundbreaking shift in the paradigm of law practice that has taken root in family law practice. *Collaborative Law: A New Tool for the Lawyer's Toolkit*<sup>8</sup> provides a comprehensive introduction to collaborative law, including the history of its development, a description of the concept, and an outline of the process. Emerging from the common frustration with the adversarial model, particularly in the context of families, the collaborative approach aims for win-win outcomes by treating everyone as stakeholders and problem solvers, and uses experts and lawyers as facilitators rather than as weapons. This process works best, according to its creators, with a complete commitment or buy-in to the model. Professor Daicoff identifies the "linchpin feature" of collaborative practice: the lawyers are committed to problem solving and working together to a shared resolution of divorce, and if they are unable to reach that resolution, then they must withdraw from representing the parties. The adversarial approach is, therefore, completely absent as an alternative or fallback for the same attorneys to use.

Professor Daicoff not only describes and explains this innovative approach, but also analyzes its advantages and disadvantages. In addition, she points out that it is one of several approaches that re-conceptualize law

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8. Susan Daicoff, *Collaborative Law: A New Tool for the Lawyer's Toolkit*, 20 U. FLA. J.L. & PUB. POL'Y 111-44 (2009).

practice, that she subsumes under the name “comprehensive law movement.” That movement includes restorative justice, therapeutic jurisprudence, and unified family courts. These approaches reflect the insights of multidisciplinary research and a shared goal of problem solving, rather than conflict creation or exacerbation. Family law has been a rich environment for the development of these approaches, although they are by no means limited to families in the sense of our immediate families. To the contrary, they suggest beneficial ways to maximize the well being of the entire human family on a global scale.

This diverse set of articles represents some of the most challenging and radical scholarship in the field. It is an honor to write this forward celebrating and introducing the work of these distinguished scholars. Imagine what the world would be like if their ideas were fully implemented. It is a vision to strive for.