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SYMPOSIUM

JAZZING UP FAMILY LAW: THE FIRST ANNUAL MIDWEST FAMILY LAW CONFERENCE

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Welcome to the first annual Midwest Family Law Conference¹ symposium issue. With this issue, the *Indiana Law Review* celebrates the work of forty scholars who gathered at the Crossroads of America,² both literally and figuratively, on June 13, 2008, to share their research on family law. Why were we jazzed? We chose the Friday before *Indy Jazz Fest*³ to hold our conference for several reasons. First, this conference marked the inaugural meeting of the Midwest Family Law Consortium in the U.S. heartland—a region known to support families.⁴ We were expecting to hear research reports and papers from some of

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1. Founding members of The Midwest Family Law Consortium include: Professor June Carbone and her colleagues, Professors Barbara Glesner-Fines and Mary Kisthardt, at University of Missouri-Kansas City (UMKC), myself at Indiana University School of Law—Indianapolis, and Professor Nancy Ver Steegh, at William Mitchell School of Law. Indiana University School of Law—Indianapolis hosted the Inaugural Midwest Family Law Conference. William Mitchell will host the 2009 conference, and UMKC will host the 2010 conference. If you would like to join the band, let us know.

2. The National Park Service of the U.S. Department of the Interior refers to Indianapolis as the “Crossroads of America.” See Nat’l Park Serv., U.S. Dep’t of the Interior, The Capital at the Crossroads of America, <http://www.nps.gov/history/nr/travel/indianapolis/introessay.htm> (last visited July 8, 2009); see also David J. Bodenhamer & Randall T. Shepard, *The Narratives and Counternarratives of Indiana Legal History*, in THE HISTORY OF INDIANA LAW 3 (David J. Bodenhamer & Hon. Randall T. Shepard eds., 2006).

3. See Indy Jazz Fest, History of IJF, <http://www.indyjazzfest.net/Legacy.html> (last visited July 8, 2009) (providing overview of Indy Jazz Fest, an annual music festival held in Indianapolis, Indiana).

4. See Zack O’Malley Greenburg, *America’s Best Places To Raise A Family*, FORBES MAGAZINE, June 30, 2008, available at <http://www.forbes.com/2008/06/27/schools-places-family->

this nation's best family law scholars.⁵ Consistent with the art form of jazz music, we wanted to improvise and experiment with different legal forms from various communities.⁶ This Article introduces several of the papers presented during this conference, which are published in this volume.

Second, many Americans had been following the cases of the over 400 Fundamentalist Church of Latter Day Saints (FLDS) children removed from homes at the Yearning for Zion ranch.⁷ We shared a common concern for all children, especially those in foster care systems across this nation, including those in Texas and Indiana. Thus, we looked forward to the keynote address by Judge James W. Payne, Director of Indiana Department of Child Services (DCS). This introduction gives highlights of that presentation. Third, many of us were excited because the following week, same-sex couples would be marrying (again) in California, following that state's supreme court decision, *In re Marriage Cases*.⁸ We were jazzed for our gay and lesbian neighbors and wanted to hear more about the changing legal arrangement of marriage.⁹ Finally, we wanted to

forbeslife-cz_zg_0630realestate.html (ranking only Midwestern counties in its top five places to raise a family). Heartland Family Service, located in Omaha, Nebraska, is an example of a family-oriented service provider. See Heartland Family Service, <http://www.heartlandfamilyservice.org/about/default.asp> (last visited Mar. 13, 2009).

5. To obtain a copy of the conference program, see Inaugural Midwest Family Law Conference, Jazzing up Family Law, Conference Agenda, <http://indylaw.indiana.edu/familylaw/jazzconf/agenda.cfm> (last visited Mar. 13, 2009) [hereinafter Conference Agenda].

6. See, e.g., ALYN SHIPTON, A NEW HISTORY OF JAZZ 4-5 (2d ed. 2007) (noting the improvisational nature of jazz music).

7. Martha Neil, *State Wrongly Removed 400 FLDS Kids, Texas Appeal Court Says*, A.B.A. J., http://www.abajournal.com/news/state_wrongly_removed_460_fds_kids_texas_appeals_court_says/ (May 22, 2008, 12:38 CDT).

8. *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008) (holding that "the language of section 300 limiting the designation of marriage to a union 'between a man and a woman' is unconstitutional and must be stricken from the statute, and that the remaining statutory language must be understood as making the designation of marriage available both to opposite-sex and same-sex couples."), *superseded by const. amend.*, CAL. CONST. art. 1, § 7.5. After the conference, California voters overturned the law with Proposition 8, and the California Supreme Court upheld the Proposition as constitutional. See generally *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

9. See Tamara Audi et al., *California Set to Join Trend of Banning Gay Marriage*, WALL ST. J., <http://online.wsj.com/article/SB122594011478104085.html> (Nov. 6, 2008); Tamara Audi et al., *California Votes for Prop 8*, WALL ST. J., http://online.wsj.com/article/SB122586056759900673.html?mod=special_page_campaign2008_mostpop (Nov. 5, 2008, 22:59 ET) [hereinafter Audi et al., *California Votes for Prop 8*] (noting that on November 4, 2008, California voters passed Proposition 8, which changed the California Constitution to recognize only heterosexual marriage). Opponents of Proposition 8 have since challenged its constitutionality and the effective popular rejection of the decision of *In re Marriage Cases*. See, e.g., Maura Dolan & Jessica Garrison, *Battle Over Prop. 8 Goes To High Court*, L.A. TIMES, Nov. 20, 2008, n.p., available at <http://articles.latimes.com/2008/nov/20/local/me-prop8-supreme-court20>. Just this year, the California Supreme Court upheld Proposition 8. See generally *Strauss*, 207 P.3d 48.

revisit our fellow Americans from the U.S. capital city of jazz, New Orleans, as they continue to recover from Katrina, and now from Gustav.¹⁰ This introductory Article takes a look at the innovation and stasis in family law, its continuing failure to address the needs of our children and neighbors, and the issues which arise following a crisis.

In their book, *The History of Indiana Law*, David J. Bodenhamer and Randall T. Shepard explore the evolution of Indiana state law:

The preferred narrative casts law as forward-looking or progressive. Law has enabled a polyglot society to meld and has provided both ballast and impetus to an economy that rapidly moved from agriculture to industry to service activities over a brief 150-year history. The counternarrative is darker in its portrait, seeing law as discriminatory and protective of entrenched interests. In this story, law is oppressive and moralistic, the stern guardian of small town values that kept Indiana benighted and backward, an obstacle to progress rather than its aide.

Neither story is correct, but what is striking about both is their inability to speak with discernment or detail about the role of the law in Indiana's history.¹¹

Shunning both the rosy, Pollyanna perspective and the negative conclusions about Indiana law's relevance, these legal historians suggest that neither view adequately describes the law's historical significance. However, one might argue that *both* narratives are correct; both narratives may hold true even today.¹² Arguably, Indiana law is both progressive and in some ways discriminatory, moralistic, and oppressive. For example, observers might argue that the 2003 Indiana same-sex adoption case, *In re the Adoption of M.M.G.C.* which permits same-sex, co-parent adoptions, evidences Indiana's innovative capabilities.¹³ On the other hand, the Indiana Supreme Court's 2008 decision in *Willis v. State*,¹⁴ permitting a child's whipping with a belt (or extension cord) by his mother, arguably showcases the law's more oppressively punitive features, at least toward children. *Jazzing Up Family Law* addressed both legal novelties and regressions.

10. See Nat'l Park Serv., U.S. Dep't of the Interior, New Orleans Jazz, <http://www.nps.gov/jazz/> (last visited July 8, 2009) (highlighting the New Orleans Jazz National Historical Park).

11. Bodenhamer & Shepard, *supra* note 2, at 4.

12. Some Indiana law not only promotes business but also protects entrenched interests. For example, the Indiana Civil Rights Act prohibits employment discrimination. See IND. CODE § 22-9-1-2 (2007). But see IND. CODE § 22-9-1-16 (2007) (noting that an aggrieved worker cannot sue her employer in an Indiana court under the statute unless the employer agrees in writing to be sued). How convenient for the employer and its business. Needless to say, there is almost no Indiana case law stemming from this law. This statute pays lip service to civil rights while protecting the financial interests of Hoosier business owners. See Kathryn Olivier, Note, *The Effect of Indiana Code § 22-9-1-16 on Employee Civil Rights*, 42 IND. L. REV. 441 (2009).

13. *In re Adoption of M.M.G.C.*, 785 N.E.2d 267, 270-71 (Ind. Ct. App. 2003).

14. 888 N.E.2d 177 (Ind. 2008).

I. CHILDREN, ABUSED AT HOME

Just weeks before our conference, the Indiana Supreme Court fine-tuned the modern parental privilege and appeared tone deaf to Hoosier children's cries in its *Willis* decision.¹⁵ The *Willis* court reversed a single mother's battery conviction by validating her exercise of the parental privilege to use physical force in disciplining her eleven-year-old son, J.J.¹⁶ Acknowledging that "there is still 'precious little Indiana caselaw providing guidance as to what constitutes proper and reasonable parental discipline of children, and there are no bright-line rules[,]'"¹⁷ the court looked elsewhere for guidance. It noted that "several jurisdictions have embraced some, parts, or all of either the Model Penal Code or the Restatement (Second) of Torts to identify permissible parental conduct in the discipline of children."¹⁸ While the court considered these two legal sources, it failed to mention any social science research regarding the efficacy or hazards of corporal punishment.¹⁹ It cited to no law review articles or scholarly journals concerning corporal punishment of children. Ignoring an official policy statement by the American Academy of Pediatrics,²⁰ the court validated the lashing of a boy with a belt (or extension cord).²¹ In doing so, the court kept

15. *Id.*

16. *Id.* at 179 (explaining that "Willis instructed J.J. to remove his pants and place his hands on the upper bunk bed. J.J. complied, and Willis proceeded to strike him five to seven times with either a belt or an extension cord. Although trying to swat J.J. on the buttocks, his attempt to avoid the swats resulted in some of them landing on his arm and thigh leaving bruises. J.J. testified that during this exchange his mother was 'mad.' . . . Willis countered that she was not angry but 'disappointed.'") (citation and footnote omitted).

17. *Id.* at 181 (quoting *Mitchell v. State*, 813 N.E.2d 422, 427 (Ind. Ct. App. 2004)).

18. *Id.*

19. See, e.g., Am. Acad. of Pediatrics, *Consensus Statements*, 98 PEDIATRICS 853, 853 (1996) (providing Consensus Statements from a 1996 Conference entitled: "The Short- and Long-Term Consequences of Corporal Punishment").

20. See Comm. on Psychosocial Aspects of Child & Family Health, Am. Acad. of Pediatrics, *Guidance for Effective Discipline*, 101 PEDIATRICS 723, 723 (1998), available at <http://aappolicy.aappublications.org/cgi/reprint/pediatrics;101/4/723.pdf> (stating that "[c]orporal punishment is of limited effectiveness and has potentially deleterious side effects. The American Academy of Pediatrics recommends that parents be encouraged and assisted in the development of methods other than spanking for managing undesired behavior").

21. *Willis*, 888 N.E.2d at 184. But see *id.* (Sullivan, J., dissenting) (noting that "[w]e see on appeal many cases of child abuse in which the parents claim that they were only disciplining their children, that they reasonably believed that the force they used was necessary to control their children or prevent misconduct. By authorizing parents to impose as much force they believe is necessary unless the State proves *beyond a reasonable doubt* that either (1) the force used was unreasonable; or (2) the parents' belief was unreasonable, the Court increases the quantum of effort that the State will be required to expend in its efforts to protect children from abuse. As such, the Court's opinion constitutes a change in our State's policy toward child abuse. Particularly given the commitment of time and resources that the legislative and executive branches have devoted to

consistent with Indiana law dating from the late nineteenth century affirming the parental privilege to beat a thirteen-year-old with a buggy whip.²²

Noting the *Willis* decision and the law's generic failings with regard to abused and neglected children, our conference's keynote speaker, Judge James W. Payne, described his vision for implementing progressive juvenile law.²³ Director Payne attacked "the mile high wall and mile wide moat" of conservatism that "keeps innovation out" of Indiana.²⁴ While praising Republican Governor Mitch Daniels's administration, Payne repeatedly struck the innovation chord in his keynote address concerning the needs of U.S. children and the role of the Indiana Department of Child Services (DCS) to help Hoosier children.²⁵ First, he gave an historical review of the plight of many Midwestern children, explaining that during the last half of the nineteenth century the New York Children's Aid Society moved over 92,000 orphans from New York City to the Midwest following the devastating cholera epidemic.²⁶ In contrast, Payne emphasized modern Indiana child welfare advocates' focus on the proper return and placement of children.²⁷ Surveying federal legislation,²⁸ Director Payne admonished that efforts to "move cases along" are not enough.²⁹

Director Payne stressed the importance of Child Family Services Reviews.³⁰ The Children's Bureau of the U.S. Department of Health and Human Services administers this review system.³¹ It ensures conformity with federal child

this subject for the last two decades and more, I believe that such a policy change should be made by the legislative and executive branches, not the judiciary").

22. *Hornbeck v. State*, 45 N.E. 620 (Ind. App. 1896) (holding that whether punishment was excessive was a question of fact for the jury).

23. Hon. James W. Payne, Director, Ind. Dep't of Child Servs., Keynote Address at the Indiana Law Review Symposium: Jazzing up Family Law (June 13, 2008) (notes on file with author) [hereinafter Payne, Keynote Address]. Per his preference, the *Indiana Law Review* did not transcribe Judge Payne's address. Thus, all discussion of the keynote address is compiled from this author's notes.

24. *Id.*

25. *Id.*

26. *See id.*; *see also* DUNCAN LINDSEY, *THE WELFARE OF CHILDREN* 13 (1994).

27. Payne, Keynote Address, *supra* note 23.

28. *See id.* (mentioning Multi-Ethnic Placement Act of 1994, 42 U.S.C. §§ 622, 1320A-2 (2006); Family Preservation and Support Services Program Act of 1993, 42 U.S.C. §§ 629-629i (2006); Strengthening Abuse and Neglect Courts Act of 2000, Pub. L. No. 106-314, 114 Stat. 1266 (codified as amended at 42 U.S.C. § 670 (2006)); Foster Care Independence Act of 1999, Pub. L. No. 106-169, 113 Stat. 1822 (codified as amended in scattered sections of 31 U.S.C. & 42 U.S.C.); Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.)).

29. *Id.*

30. *Id.* For specific information on Child Family Services Reviews, see generally Child Welfare Information Gateway, Child and Family Services Reviews Resources, <http://www.childwelfare.gov/systemwide/service/cfsr/> (last visited July 3, 2009).

31. Payne, Keynote Address, *supra* note 23; *see also* U.S. Dep't of Health & Human Servs.,

welfare requirements, determines what is actually happening to children and families while they are in the child welfare system, and assists states in helping children and families achieve positive outcomes.³² More specifically, the Bureau tries to ensure that it protects children from abuse and neglect and maintains children in their homes whenever possible, thus fostering permanency and stability.³³ When children cannot remain in their homes, Director Payne explained that DCS tries to secure an early appropriate placement.³⁴ He highlighted the need for children to have personal items for security and comfort.³⁵ DCS attempts neighborhood placements and school consistency.³⁶ DCS also facilitates visitation with siblings and other family members and keeps relevant family members regularly informed of a child's status.³⁷ DCS watches for evidence of alcohol and drug problems in families to provide early referral to services and treatment programs.³⁸ By involving all stakeholders and expanding the network of formal and informal support, DCS takes "care of those least capable of taking care of themselves."³⁹

Director Payne emphasized the need for tighter time-lines and state responsiveness as he called for data collection and outcome accountability.⁴⁰ He noted the importance of time in a child's life: thirty minutes, thirty hours, thirty days. Time, argued Payne, means something very different for a child than it does for an adult.⁴¹ Focusing on the details while not losing sight of the "big picture," Payne suggested that the first thirty minutes of intervention is a critical period for the child.⁴² He stressed training for crisis responders and highlighted a child's perspective when discussing this initial phase of intervention.⁴³ Payne detailed during the second phase—the first thirty hours—risk/safety assessment, placement and/or services, timeliness of service delivery, location of delivery, and follow-up are essential.⁴⁴ Decisions concerning these aspects of child protection can significantly influence the rest of the child's life and social

Children's Bureau, Child Welfare Monitoring, <http://www.acf.hhs.gov/programs/cb/cwmonitoring> (last visited July 3, 2009).

32. See U.S. Dep't Health & Human Servs., Children's Bureau, Child & Family Services Reviews Fact Sheet, <http://www.acf.hhs.gov/programs/cb/cwmonitoring/recruit/cfsrfactsheet.htm> (last visited July 3, 2009).

33. *Id.*

34. Payne, Keynote Address, *supra* note 23.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

adjustment.⁴⁵ In the third phase—the next thirty days—DCS must not just care for the child, but must also manage data collection and reassess the effect of services and intervention.⁴⁶ Payne also emphasized the need for rewards for service and intervention success.⁴⁷

When looking to the future of child welfare, Payne again described the need for structural and programmatic innovation. He mentioned family group conferencing, neighborhood meetings, courthouse mediation (when possible in lieu of hearings), expedited family court proceedings, and renewed focus on taxing sources and funding streams to pay for such innovations.⁴⁸ Payne advocated one judge for one family and family court over criminal court to promote consistency, efficiency, and better outcomes.⁴⁹ He also focused on drug abuse education and eradication and poverty alleviation, citing to the work of Dr. Ruby K. Payne, a pioneer in the effects of poverty on childhood education.⁵⁰ Director Payne envisions call centers, more assistance for children stuck in or aging out of foster care, the use of education advocates, and new health care initiatives.⁵¹ One alternative approach mentioned by Payne mandates that children remain in the family home while abusive or troubled parents rotate out.⁵² Such a plan puts the children first and safeguards their comfort, security, and stability.⁵³

Payne lamented that courts had become trauma centers. An emphasis on therapeutic jurisprudence, he offered, would enhance compliance with judicial orders, facilitate services, and foster better coordination and communication.⁵⁴ He noted that while courts may be good at resolving or containing conflict, they are not particularly good at raising children.⁵⁵ With vision, respect, leadership and ownership, as well as a commitment by community leaders and key stakeholders, DCS could ensure that Hoosier children fare much better than they have in the past.⁵⁶

In fitting end to his discussion of DCS and its children, Director Payne closed by reciting from memory Mary Dow Brine's poem, *Somebody's Mother*.⁵⁷ He finished, "And 'somebody's mother' bowed low her head/In her home that

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* For more information on Dr. Ruby K. Payne, see aha! Process, Inc., About Ruby K. Payne, Ph.D., http://www.ahaprocess.com/About_Us/Ruby_Payne.html (last visited July 3, 2009).

51. Payne, Keynote Address, *supra* note 23.

52. *Id.*

53. *Id.* (mentioning Mary Dow Brine, *Somebody's Mother*, in BEST LOVED POEMS OF THE AMERICAN PEOPLE 373, 373-75 (Hazel Felleman & Edward Frank Allen eds., 2008)).

54. *Id.*

55. *Id.*

56. *Id.*

57. Brine, *supra* note 53, at 373-75.

night, and the prayer she said/Was ‘God be kind to the noble boy, Who is somebody’s son, and pride and joy!’”⁵⁸ So, to the beat of this poetic rhyme, our family law conference began on time, against the backdrop of J.J. Willis and his mother’s privileged crime.⁵⁹

II. EARLY INDIANA MARRIAGE (AND DIVORCE) LAW

Director Payne’s call for family law reform was not the first in Indiana. Unbeknownst to many people, Indiana has a history of producing innovative, as well as scandalously punitive, family law.⁶⁰ For example, Indiana marital laws of the 1840s and 1850s permitted any form of ceremony as long as an authorized official witnessed the pair consenting to wed.⁶¹ Even if the marriage was illegitimate, it might still survive if the couple believed it to be valid.⁶² Another example of legal innovation occurred in 1850, when the Indiana Constitutional Convention debated whether fundamental rights included the property rights of married women.⁶³ One man, Robert Dale Owen, encouraged much of this

58. *Id.*

59. *See* Willis v. State, 888 N.E.2d 1767, 180-84 (Ind. 2008); *see also* IND. CODE § 35-42-2-1 (2008) (“A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor.”). Arguably, Ms. Willis’s whipping was “a rude, insolent or angry” touching—at least to J.J. *Id.*

60. *But see* David J. Bodenhamer & Hon. Randall T. Shepard, *Preface and Acknowledgments*, in *THE HISTORY OF INDIANA LAW*, at ix, x (David J. Bodenhamer & Hon. Randall T. Shepard eds., 2006) (suggesting that Indiana “has rarely led a legal reform movement, but it has been quick to adopt changes enacted elsewhere”). Indiana family law of the mid-nineteenth-century may be the rare exception.

61. Michael Grossberg notes that an 1843 Indiana Act declared:

When any marriage is solemnized, the ceremony of marriage may be according to such form or custom as the person solemnizing the same may choose to adopt; but in all cases, no particular form of ceremony shall be necessary, except that the parties shall declare in the presence of the person solemnizing the marriage, that they take each other as husband and wife; and no marriage solemnized before any person professing to be an officer or minister authorized by law to solemnize marriages, shall be adjudged to be void.

MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 76 (1985).

62. *See* NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 43 (2000); GROSSBERG, *supra* note 61, at 76.

63. The Convention considered the following provision:

Women hereafter married in this State, shall have the right to acquire and possess property to their sole use and disposal; and laws shall be passed securing to them, under equitable conditions, all property, real and personal, whether owned by them before marriage or acquired afterwards by purchase, gift, devise, or in any other way, and also providing for the registration of the wife’s separate property.

See HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 111 (2000) (quoting *THE REPORT*

Indiana debate and focus on the equality of women.⁶⁴ Owen, a women's rights advocate and abolitionist, helped his father found the utopian community of New Harmony in southern Indiana.⁶⁵ He viewed legally imposed marital unity as potentially oppressive for women.⁶⁶ Historian Hendrik Hartog explained:

To reformers, in fact, marital unity was a cruel joke, a sanctimonious gloss on the reality of male arbitrary authority. "One flesh" might be all very well in theory, but were wife and husband "one in purse?" Of course not. "No sir," declared a reform delegate to the Indiana constitutional convention: if one took "gentlemen in the common run," one would find that they kept "their purses in their pockets," that they distributed money "as their caprice" dictated. Meanwhile, their wives were always "asking and even begging for a solitary dollar" to purchase household necessities.⁶⁷

These views contributed to the notion that oppressed wives should be allowed to rid themselves of drunken, abusive, and neglectful husbands.⁶⁸

During the mid-nineteenth century, Indiana also became commonly known as a "divorce mill" when it passed an omnibus clause to amend its divorce statute.⁶⁹ In addition to seven previously recognized grounds for divorce, Indiana added, "any other cause for which the Court shall deem it proper that a divorce should be granted."⁷⁰ While not exactly "no-fault" divorce, this clause certainly created no-hassle divorce.

OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 474 (1850) [hereinafter INDIANA CONVENTION]).

64. See generally RICHARD WILLIAM LEOPOLD, ROBERT DALE OWEN: A BIOGRAPHY (Octagon Books 1969) (1940); ROBERT DALE OWEN, THREADING MY WAY, TWENTY-SEVEN YEARS OF AUTOBIOGRAPHY (1874); ROBERT DALE OWEN'S TRAVEL JOURNAL, 1827 (Josephine M. Elliott, ed., 1978); ELINOR PANCOAST & ANNE E. LINCOLN., THE INCORRIGIBLE IDEALIST: ROBERT DALE OWEN IN AMERICA (1940).

65. See LEOPOLD, *supra* note 64, at 24-46.

66. HARTOG, *supra* note 63, at 112.

67. *Id.* at 113 (citing INDIANA CONVENTION, *supra* note 63, at 498-99).

68. *Id.* at 382 n.53 (suggesting that "Robert Dale Owen insisted on a feminist goal: to free abused women from corrupted men.").

69. See COTT, *supra* note 62, at 51; LAWRENCE M. FRIEDMAN, PRIVATE LIVES: FAMILIES, INDIVIDUALS, AND THE LAW 37-38 (2004); HARTOG, *supra* note 63, at 14, 265; see also GLENDA RILEY, DIVORCE: AN AMERICAN TRADITION 62 (Univ. Neb. Press 1997) (noting "[i]n a passionate outburst he [Horace Greeley of New York] branded the Hoosier state 'the paradise of free-lovers,' where people could 'get unmarried nearly at pleasure'").

70. COTT, *supra* note 62, at 50; see also HARTOG, *supra* note 63, at 265 ("Two legislative innovations identified Indiana as the pioneer. The first, instituted in 1824, gave Indiana judges the right to grant divorces for any reason they regarded as legitimate if the petitioner failed to demonstrate a ground predefined by legislation. The second, passed in 1852, allowed a judge to grant a divorce to anyone (wife or husband) who had established 'bona fide' residence in his county, without insisting on proof of any prior period of residence.").

That omnibus clause and Indiana's almost non-existent residency requirement attracted many unhappy spouses to evade the divorce laws in their own states to divorce in Indiana.⁷¹ According to an 1858 *Indiana Daily Journal* article, nonresidents filed more than two-thirds of the divorce actions then pending in Marion County.⁷² The newspaper noted that the state was "'overrun by a flock of ill-used, and ill-using, petulant, libidinous, extravagant, ill-fitting husbands and wives as a sink is overrun with the foul water of the whole house.'" ⁷³ Between 1867 and 1871, Indiana had the highest divorce rate in the nation.⁷⁴ Petitioners could rent a room in a boarding house or hotel to establish residence, hire a lawyer, divorce, and then return to another state.⁷⁵ While this divorce industry might have been good for Indiana businesses and services, especially those provided by Indiana lawyers, sister states such as New York, with no such legal escapes, decried the practice.⁷⁶ The question arose, raised in terms of American federalism, whether New York judges, for example, were obligated to give full faith and credit to Indiana divorce decrees under the Full Faith and Credit Clause of the U.S. Constitution.⁷⁷

In 1869, the United States Supreme Court confirmed in *Cheever v. Wilson*, "[t]he Constitution and laws of the United States give the [divorce] decree the same effect elsewhere which it had in Indiana. If a judgment is conclusive in a State where it is rendered, it is equally conclusive everywhere in the courts of the United States."⁷⁸ In 1857, Annie Jane Cheever had come to Indiana from Washington, D.C. five months prior to her filing for divorce from her then husband B.H. Cheever.⁷⁹ At issue in the case was the payment of rents from her separate property owed to Mr. Cheever as child support.⁸⁰ Thus, the validity of the divorce decree was pivotal. The Court noted that she could not have obtained this divorce in Washington, D.C.⁸¹ Within months of the divorce, Mrs. Cheever remarried and moved to Kentucky with her new husband, further complicating the situation.⁸²

71. See COTT, *supra* note 62, at 51; RODERICK PHILLIPS, PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY 474 (1988).

72. PHILLIPS, *supra* note 71, at 474 (quoting Val Nolan Jr., *Indiana: Birthplace of Migratory Divorce*, 26 IND. L.J. 515, 522 (1951)).

73. *Id.*

74. *Id.* at 475.

75. HARTOG, *supra* note 63, at 265.

76. See COTT, *supra* note 62, at 51.

77. U.S. CONST. art. IV, § 1.

78. *Cheever v. Wilson*, 76 U.S. 108, 123 (1869) (internal quotes and footnotes omitted); see also *Christmas v. Russell*, 72 U.S. 290, 302 (1866).

79. *Cheever*, 76 U.S. at 109-10.

80. *Id.* at 112.

81. *Id.* at 110.

82. *Id.* (explaining that "[t]here was little in the record to show exactly what motive took Mrs. Cheever from Washington to Indiana; or how long *exactly* she remained in Indiana, or how or where, by dates, she was living after she left it. But it was certain that divorces *a vinculo* could not,

Since *Cheever*, the Supreme Court has numerous times confirmed the validity of one state's legally obtained divorce decrees in sister states.⁸³ However, partly in response to public outcry concerning the divorce market here, "[b]etween 1859 and 1873 Indiana increased its residency requirement and eliminated the omnibus clause."⁸⁴ Between 1877 and 1881, Indiana reverted to seventh place in the nation for its divorce rate.⁸⁵ Robert Dale Owen had retired from political service by 1859 and died in June 1877.⁸⁶ Thus, one of the major forces behind liberal divorce and rights for women was inactive during this proverbial backward pendulum swing. Not until the 1970s did Indiana again significantly liberalize its divorce statutes, when it became the third state to adopt "no fault" divorce.⁸⁷

In her article, *Jazz and Family Law: Structures, Freedoms, and Sound Changes*, Professor Sheila Simon compares the evolution of jazz and the evolution of family law.⁸⁸ She highlights the tension between restriction and freedom, between group performance and individuality, in both jazz and family law.⁸⁹ Indiana's experiment with liberal divorce reinforces her points. She writes, "[w]e [can] learn from the history of jazz that expansion of freedoms will be treated with disdain, at least initially."⁹⁰ And so was liberal divorce treated with disdain—for another hundred years until the adoption of exclusive "no fault" divorce in California in 1969 during the tenure of Governor Ronald Reagan.⁹¹

when she went to Indiana, nor until long after she was divorced in that State, be obtained by law in the District of Columbia"). And, we think we live in a more mobile society today!

83. See, e.g., *Haddock v. Haddock*, 201 U.S. 562 (1901) (holding that when one court does not have jurisdiction over the subject matter or the defendant, courts of other states are not obligated under the Full Faith and Credit Clause to enforce the judgment of the first state), *overruled by* *Williams v. North Carolina*, 317 U.S. 287 (1942); *Cheely v. Clayton*, 110 U.S. 701 (1884) (rejecting the validity of a decree of divorce obtained in Colorado by a husband domiciled there against his wife in Illinois for failure to satisfy the Colorado notice requirement but confirming the effect of validly obtained decrees).

84. COTT, *supra* note 62, at 44 n.61; see also RILEY, *supra* note 69, at 65-66 (citing LAWS OF THE STATE OF INDIANA, 1859, at 108-10 (1859)); LAWS OF THE STATE OF INDIANA PASSED AT THE FORTY-EIGHTH REGULAR SESSION OF THE GENERAL ASSEMBLY, 1873, at 107-12 (1873) (explaining that the residency requirement increased to one year in 1859 and two years in 1873).

85. PHILLIPS, *supra* note 71, at 475 (citing Nolan, *supra* note 72, at 517-20).

86. See Biographical Directory of the United States Congress, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=O000152> (last visited Mar. 10, 2009).

87. See Michael Grossberg & Amy Elson, *Family Law in Indiana: A Domestic Relations Crossroads*, in THE HISTORY OF INDIANA LAW 60, 77 (David J. Bodenhamer & Hon. Randall T. Shepard eds., 2006).

88. See Sheila Simon, *Jazz and Family Law: Structures, Freedoms and Sound Changes*, 42 IND. L. REV. 567, 567 (2009).

89. See *id.* at 572.

90. See *id.* at 580.

91. Herma Hill Kay, "Making Marriage and Divorce Safe for Women" Revisited, 32

III. MODERN FAMILY LAW

In recent years, far from being an instrument of innovation, Indiana has resisted marriage (and consequently divorce) law improvisation by other state courts. For example, in 1996 a circuit court of Hawaii found that the state law providing for only opposite-sex marriage violated Hawaii's equal protection clause.⁹² In a cacophony of legislative motion following this 1996 *Baehr v. Miike* decision, many states amended their state constitutions to prohibit same-sex marriage and sometimes even the recognition of same-sex marriages performed elsewhere.⁹³ Many scholars have addressed the issue of whether the 1996 Federal Defense of Marriage Act (DOMA)⁹⁴ and the state constitution equivalents violate the Full Faith and Credit Clause.⁹⁵ Several academics have also explored the issue of comity between states to evaluate whether such limitations on the right to marry are enforceable.⁹⁶

Under the doctrine of comity, validly married same-sex couples that come to Indiana (whether from Massachusetts,⁹⁷ California,⁹⁸ Connecticut,⁹⁹ Iowa,¹⁰⁰

HOFSTRA L. REV. 71, 74 (2003).

92. See *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996).

93. Although this Author recognizes the ease with which Wikipedia may be altered, since the issue of which states recognize same sex marriage is rapidly changing, Wikipedia is the best source to monitor this change. Thus, for a U.S. map of state stances on same-sex marriage, see Wikipedia.org, Same Sex Marriage in USA, http://en.wikipedia.org/wiki/Image:Samesex_marriage_in_USA.svg (last visited July 3, 2009).

94. Defense of Marriage Act, U.S.C. § 7 (2006), 28 U.S.C. § 1738C (2006).

95. See, e.g., Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1, 18-19 (1997) (noting the disagreement about the scope of Congress' power under the Full Faith and Credit Clause); Mark Strasser, *Loving the Romer Out for Baehr: On Acts in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279, 301 (1997) (arguing, among other things, that "the explicit provision of power to Congress in the Full Faith and Credit Clause does not entitle Congress to 'restrict, abrogate, or dilute' the effects of the Full Faith and Credit Clause"); Heather Hamilton, Comment, *The Defense of Marriage Act: A Critical Analysis of Its Constitutionality Under the Full Faith and Credit Clause*, 47 DEPAUL L. REV. 943, 947 (1998) (arguing that "Congress violated the mandates of the Full Faith and Credit Clause when it enacted section 2 of DOMA").

96. See, e.g., Joanna Grossman, *Resurrecting Comity: Revisiting The Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433 (2005).

97. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

98. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded by const. amend.*, CAL. CONST. art. 1, § 7.5.

99. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

100. See *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

Vermont,¹⁰¹ Maine,¹⁰² New Hampshire¹⁰³ or some other state that might ultimately sanction same-sex marriage) arguably should enjoy the same rights that Hoosiers married in Indiana enjoy.¹⁰⁴ Comity is a doctrine of courtesy, however, not of rights. In 2002, an Indiana court confirmed that “Indiana courts need not apply a sister state’s law if such law violates Indiana public policy.”¹⁰⁵ Indiana Code section 31-11-1-1(b) passed as amended in 1997 evidences such a policy: “A marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized.”¹⁰⁶ This statute is Indiana’s mezzo-forte public policy response to same-sex marriage—a complete exclusion of untraditional marriage. So much for comity in Indiana.

Indiana’s public policy may also provide the means to avoid the Full Faith and Credit Clause. The Clause provides, “Full Faith and Credit shall be given in each State to the public *Acts, Records, and judicial Proceedings* of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”¹⁰⁷ Family law scholars have thoroughly debated whether this clause, which clearly protects state divorce decrees, also protects state-sanctioned marriages and particularly same-sex marriages.¹⁰⁸ As part of that debate, they explored whether a state’s public policy justifies the refusal to grant full faith and credit. Some

101. See S. 115, § 8, 2009-2010 Leg., Reg. Sess. (Vt. 2009) (to be codified at VT. STAT. ANN. tit. 15, § 8 (effective Sept. 1, 2009)).

102. See L.D. 1020, 124th Leg., 1st Reg. Sess. (Me. 2009) (to be codified at ME. REV. STAT. ANN. tit. 19-A, § 650-A) (effective September 2009).

103. See H.B. 436-FN-LOCAL, 2009 Leg., 1st Reg. Sess. (N.H. 2009) (to be codified at N.H. REV. STAT. ANN. § 457:1) (effective Jan. 1, 2010).

104. See generally *Mason v. Mason*, 775 N.E.2d 706, 709 (Ind. Ct. App. 2002) (recognizing the existence of a foreign marriage as a matter of comity). An official opinion from former Attorney General Stephen Carter suggests otherwise, however. Carter wrote, “With the notable exception of same-sex marriages, Indiana generally accepts the validity of a marriage that complied with the legal requirements of the jurisdiction in which it was performed.” Stephen Carter, *Solemnization of Marriages Under Indiana Law*, 2004 Ind. Op. Att’y Gen. No. 03 (Mar. 26, 2004).

105. *Mason*, 775 N.E.2d at 709 (citing *Maroon v. State Dep’t of Mental Health*, 411 N.E.2d 404, 410 (Ind. Ct. App. 1980)).

106. IND. CODE § 31-11-1-1(b) (2008).

107. U.S. CONST. art. IV, § 1 (emphasis added).

108. Compare Mark Strasser, *Baker and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 BROOK. L. REV. 307 (1998) (arguing that the Full Faith and Credit Clause requires recognition of marriages valid where celebrated if the parties are domiciled in that jurisdiction at the time of celebration), and Mark Strasser, *For Whom the Bell Tolls: On Subsequent Domiciles’ Refusing to Recognize Same-Sex Marriages*, 66 U. CIN. L. REV. 339 (1998) (suggesting that states must recognize same sex marriages of couples domiciled at place of celebration but not those marriages of couples who evade their home state’s restrictive marriage laws by marrying in another state), with David P. Currie, *Full Faith & Credit to Marriages*, 1 GREEN BAG 2D 7, 8 (1997) (rejecting the notion that Full Faith and Credit would require states to recognize same-sex marriage).

argue that marriages, valid where celebrated, are protected by the clause in sister states.¹⁰⁹ Others scholars insist that one state may not forcibly export its unusual marriage laws to sister states.¹¹⁰ Professor Joseph Singer makes an important contribution to this debate:

In my view, there are two strong arguments for requiring recognition of same sex marriages under the Full Faith and Credit Clause. The first argument is that the Full Faith and Credit Clause must be construed in light of other constitutional norms, including those underlying the Commerce Clause, the constitutional right to travel, the Takings Clause, the First Amendment, and the fundamental right to marry. Even if none of these clauses or constitutional rights is sufficient in itself to impose a rigid place of celebration rule, the combination is arguably powerful. Second, the marriage case is analogous to other cases in which the Supreme Court has identified a single state whose law is entitled to recognition by other states even if this allows that one state to export its law to the whole country. Those cases include the mandated recognition of Nevada divorces in *Williams I* and the mandated recognition of Delaware corporate law in *CTS Corp.* and in *Edgar v. MITE*.¹¹¹

109. See Deborah M. Henson, *Will Same-Sex Marriages Be Recognized in Sister States?: Full Faith and Credit and Due Process Limitations on States' Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii's Baehr v. Lewin*, 32 U. LOUISVILLE J. FAM. L. 551, 581-82 (1994) (arguing that states should recognize legal incidents of marriages that are valid where celebrated); Evan Wolfson & Michael F. Melcher, *Constitutional and Legal Defects in the "Defense of Marriage" Act*, 16 QUINNIPIAC L. REV. 221 (1996).

110. See, e.g., Jeffrey L. Rensberger, *Same-Sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit*, 32 CREIGHTON L. REV. 409 (1998); see also Linda Silberman & Karin Wolfe, *The Importance of Private International Law for Family Issues in an Era of Globalization: Two Case Studies—International Child Abduction and Same-Sex Unions*, 32 HOFSTRA L. REV. 233, 247-49 (2003); Joseph Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. CIV. RTS. & CIV. LIBERTIES 1, 32 (2005).

111. Singer, *supra* note 110, at 35 (citing *Williams v. State*, 317 U.S. 287 (1942); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1989); *Edgar v. NITZ Corp.*, 437 U.S. 624 (1982); John Sauer, *The Full Faith and Credit Clause, Reverse Incorporation and Interstate Recognition of Same-Sex Marriages* (2004)). Professor Joseph Singer also discusses "the justifications for the place of celebration rule or a substitute choice of law rule that chooses the law that would validate the marriage." *Id.* at 31 (citing WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS § 119[c] (3d rev. ed. 2003)); see also Henson, *supra* note 109, at 576 (noting that "[b]ecause marriage is a long continuing relationship, there normally is a need that its existence be subject to regulation by one law without occasion for repeated redetermination of the validity. Human mobility ought not to jeopardize the reasonable expectations of those relying on an assumed family pattern. Consequently, the courts will usually look to a law deemed to be appropriately applicable to the parties at the time the relationship is begun." (quoting EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS §§ 813.1-2 (2d ed. 1992))).

Singer further elaborates on this debate by suggesting:

How ironic that Indiana, which experimented with marriage and divorce law in the 1850s and 60s and saw its decrees contested in sister states, now refuses either to practice comity or to give full faith and credit to sister state marriages more than 150 years later. Time will tell whether the U.S. Supreme Court puts its weight behind the federation and the Constitution's Full Faith and Credit Clause or behind niggardly state rights, such as those now offered in Indiana.¹¹² No one anticipates a judicial preference from the Court for gay marriage any time

Thus the question may [be, in part] . . . whether those who undertake the obligations of marriage in Massachusetts may, unlike other married couples, escape those obligations simply by relocating to another state. . . .

Such states are, in effect, establishing themselves as havens for the unscrupulous, as refuges for fugitives from justice. In the guise of determining their own family law, they may be enabling spouses and parents to evade their obligations.

Singer, *supra* note 110, at 6. One might argue that gays and lesbians are no more unscrupulous than other persons in the general population. Same-sex couples marry not to avoid their obligations but to commit officially to ones informally made. Arguably, few homosexuals will travel to Connecticut to marry just so they that can then avoid their obligations later. Furthermore, Singer's reasoning here would have justified state refusal to recognize sister state divorce decrees on the ground that such divorces enable unscrupulous spouses and parents to evade their obligations.

112. During the 2008 *Jazzing Up Family Law* Conference, Professor Adele Morrison, Ms. Cathy Sakimura, Esq. and Ms. Judith Sperling-Newton, Esq. each dealt with the legal problems of same-sex couples who cannot marry by addressing adoption and surrogacy laws that discriminate against lesbian, gay, bisexual, and transgender (LGBT) nonmarital families. Professor Susan Waysdorf moderated this panel, entitled "Over The Rainbow: LGBT Families." See Conference Agenda, *supra* note 5. Professor Adele Morrison presented *Straightening Out the Kids: LGBT Identity and the State's Construction of Optimal Families by Abandoning the Best Interests Standard*; Cathy Sakimura presented *Protecting LGBT Parent Families*; and Judith Sperling-Newton presented *Family Building Through Surrogacy for Same-Sex Couples*. For notes from this session, see Jennifer Drobac, Notes from "Over the Rainbow: LGBT Families" (June 13, 2008) (on file with author) [hereinafter "Over the Rainbow" Notes].

Not all states that prohibit same-sex marriage discriminate in their adoption laws. In 2003, the Indiana Court of Appeals found, for a prospective adoptive mother and same-sex partner, a common law variation of step-parent adoption that leaves intact the parental rights of the first adoptive mother. The court reasoned:

Consonant with our General Assembly's policy of providing stable homes for children through adoption, we conclude that Indiana's common law permits a second parent to adopt a child without divesting the rights of the first adoptive parent. Allowing a second parent to share legal responsibility for the financial, spiritual, educational, and emotional well-being of the child in a stable, supportive, and nurturing environment can only be in the best interest of that child.

In re Adoption of M.M.G.C., 785 N.E.2d 267, 270-71 (Ind. Ct. App. 2003). This ringing endorsement of the best interests of the child standard and creative use of common law to provide two adoptive parents to three children confirms that Indiana courts still have the ability to improvise—at least for adopted Hoosier children.

soon.

Both legislative and judicial biases figure prominently in the formulation of marriage law—as we saw emphasized by several panelists during the conference. Following Director Payne’s overture, which included his mention of poverty and child welfare outcomes, other speakers, and particularly Professor David Papke, focused more directly on biases relating to poverty.¹¹³ In his article, *Family Law for the Underclass: Underscoring Law’s Ideological Function*,¹¹⁴ Papke examines the law’s treatment of the underclass, that population of un- or underemployed Americans who “lead lives of semi-permanent poverty and debilitating transience.”¹¹⁵ He illustrates the notion that “the underclass does not comport itself with the norms of the middle and upper classes and, therefore, lives its collective life improperly.”¹¹⁶ Describing the underclass’s vilification even in the media, Papke quotes Myron Magnet who characterized the underclass “through ‘not so much their poverty or race as their behavior—the chronic lawlessness, drug use, . . . welfare dependency, and school failure.’”¹¹⁷

Papke asserts that family law, particularly marriage, child support, and adoption law, condemns the underclass.¹¹⁸ For example, Papke explains in his article that members of the underclass do not marry with the same frequency as those of the upper and middle classes.¹¹⁹ A decoupling of sex and marriage, along with rising economic standards (at least up until 2008!) and a desire for financial stability, has disproportionately prompted many poor people to postpone or forego marriage.¹²⁰ Decrying this “lifestyle choice [not to

113. This panel, entitled “Greenback Dollar: Family Law, Support, & Poverty” and moderated by Prof. Evelyn Tenenbaum, also included: Prof. Karen Czapanskiy, presenting *Child Support and Families with a Child with a Disabling Condition*, Prof. Maria Pabón López, presenting *A Tale of Two Systems: Analyzing the Treatment of Noncitizen Families in State Family Law Systems and Under the Immigration Law System*, and Prof. Courtney Joslin, presenting *Assisted Reproductive Technology and Parentage: How Exclusionary Parentage Rules Leave Children Financially Vulnerable*. See Conference Agenda, *supra* note 5; see also Jennifer Drobac, Notes from “Greenback Dollar: Family Law, Support, and Poverty” (June 13, 2008) (on file with author).

114. See David Ray Papke, *Family Law for the Underclass: Underscoring Law’s Ideological Function*, 42 IND. L. REV. 583 (2009).

115. See *id.* at 584.

116. See *id.*

117. See *id.* at 586 (quoting Myron Magnet, *America’s Underclass: What to Do?*, FORTUNE, May 11, 1987, at 130).

118. See generally *id.* at 589-608.

119. See *id.* at 589 (citing Kathryn Edin & Joanna M. Reed, *Why Don’t They Just Get Married? Barriers to Marriage Among the Disadvantaged*, 15 THE FUTURE OF CHILDREN, Fall 2005, at 117-18).

120. See *id.* at 590 (citing GARY S. BECKER, A TREATISE ON THE FAMILY 14-37 (1981); KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 201 (2005); Christina M. Gibson-Davis et al., *High Hopes but Even Higher Expectations: The Retreat from Marriage Among Low-Income Couples*, 67 J. MARRIAGE & FAM. 1307 (2005)).

marry],”¹²¹ marriage proponents emphasize marriage as the foundational building block of society which promotes the interests of children.¹²² Part of “The Deficit Reduction Act of 2005,” “The Healthy Marriage Initiative” creates marriage promotion programs,¹²³ some specifically targeting members of the underclass.¹²⁴ Papke concludes that such marriage promotion laws encourage marriage as “the moral and intelligent choice.”¹²⁵ “If they [the underclass] do not make such a choice, they are living in an inappropriate way and in effect responsible for their own poverty. Upstanding Americans need not approve, and surely the state should not have to provide financial support.”¹²⁶ Papke effectively reveals the flaws with this policy and its results.

This condemning reasoning regarding members of the underclass who choose not to marry prompts further analysis concerning another so-called “lifestyle choice,” same-sex relationships. If marriage is the optimal family union that fosters children, the question arises why states—especially those that purport to value children and families—would not promote “healthy marriages” for same-sex couples. Is it possible that the wealthier, more politically powerful, moral majority condemns not only the underclass but also the homosexual class? To wit, laws that foreclose same-sex marriage leave homosexuals with the option of only heterosexual marriage. If homosexuals do not make such a choice, they are living in an inappropriate way and are in effect responsible for their own moral and financial poverty. Upstanding Americans need not approve, and surely the state should not have to provide financial support in the form of numerous federal and state marital benefits. Arguably, Professor Papke’s analysis for the underclass in the context of marriage has relevance more broadly.

A. Child Support

In his exploration of family law’s censure of the underclass, Papke also reviews the deadbeat-dad laws designed to establish paternity, locate fugitive child support payers, and enforce child support orders.¹²⁷ He notes in particular the Child Support Recovery Act (CSRA) and the Deadbeat Parents Punishment Act (DPPA) which amended the CSRA in 1998.¹²⁸ The DPPA operates under the *presumption* that the target debtor is capable of paying child support.¹²⁹ Papke

121. *Id.* at 592 (citing Dan Quayle, U.S. Vice President, Address to the Commonwealth Club of California (May 19, 1992) (transcript available at <https://www.commonwealthclub.org/archive/20thcentury/92-05quayle-speech.html>)).

122. *See id.* at 592-93.

123. *See id.* at 593 (citing Deficit Reduction Act of 2005, Pub. L. No. 109-171, 104 Stat. 4 (codified as amended at 42 U.S.C. § 603(a)(2)(1) (2006))).

124. *See id.* at 594.

125. *Id.* at 596.

126. *Id.*

127. *See id.* at 597-98.

128. *See id.* at 600 (referring to 18 U.S.C. § 228 (2006)).

129. *See* 18 U.S.C. § 228(b) (2006).

explains that, not surprisingly, collection efforts have been most effective against middle and upper class payers, not against the underclass.¹³⁰ He concludes that the failure to deal with the inability to pay, namely poverty, confounds wealthier American lawmakers.¹³¹ Papke suggests that according to “comfortable Americans who promoted the new laws and processes, the poor not only fail to respect the institution of marriage but also fail to satisfactorily support their children Members of the underclass can be deplored and vilified even if we do not effectively police them.”¹³² One wonders whether the majority of these fathers are deadbeats or more like proverbial bloodless turnips, used by the more affluent to confirm their own righteousness and worth.

Professor Leslie Harris also addresses poor and nonmarital families in her article, *The Basis for Legal Parentage and the Clash between Custody and Child Support*.¹³³ In particular, she suggests that “a public system of family law, that applies principally to poor people, especially recipients of public benefits, focuses on conservation of public funds.”¹³⁴ Dealing with the issues of custody and child support, Harris evaluates the traditional importance of functional parent-child relationships for custody and biology (DNA) for financial support.¹³⁵ She argues that, in some cases, biology trumps functional parenthood in the award of support or disestablishment of support obligations.¹³⁶ Such rulings may contravene the best interests of the child whom courts then leave without an alternate supporting parent.¹³⁷ Such rulings can also produce psychological trauma in children when they lose the only father (typically) whom they have ever known.¹³⁸

Harris is less concerned with the efficacy of child support collection and the legal treatment of primarily poor fathers than is Papke.¹³⁹ Instead, she concentrates on how the law distinguishes biological and functional parenthood in a manner sometimes unrelated to child welfare.¹⁴⁰ Echoing Papke and Payne’s reminders that the birth rate of nonmarital children has trebled,¹⁴¹ Harris emphasizes the growing dominance of public law, “which privilege[s] biology.”¹⁴² She suggests that biology based parentage “threatens to displace

130. See Papke, *supra* note 114, at 600.

131. See *id.*

132. See *id.* at 601.

133. See generally Leslie Harris, *The Basis for Legal Parentage and the Clash Between Custody and Child Support*, 42 IND. L. REV. 611 (2009).

134. *Id.* at 612-13 (citing Jacobus tenBroek, *California’s Dual System of Family Law: Its Origin, Development, and Present Status (Part 1)*, 16 STAN. L. REV. 257, 257-58 (1964)).

135. *Id.*

136. *Id.* at 632.

137. *Id.* at 633.

138. *Id.*

139. Compare Papke, *supra* note 114, with Harris, *supra* note 133.

140. Harris, *supra* note 133, at 632.

141. See *id.* at 631-32.

142. See *id.* at 614.

rules based on functional parent-child relationships”¹⁴³ Here, we see the proverbial reign of form over substance.

Attacking the disestablishment of paternity for those claiming “paternity fraud,” Harris suggests that the law disadvantages nonmarital children whose parentage is not so irrevocably set as the law establishes it for marital children.¹⁴⁴ Marital children typically enjoy a presumption that the mother’s husband is the father.¹⁴⁵ Harris advocates for the protection of functional parent-child relationships that work in the best interests of children in the contexts of both custody and support disputes.¹⁴⁶ She also urges the de-emphasis of biology in child support, especially if the father is a raped minor (per statutory law) or if DNA testing might create more trauma for the child than it resolves for the adults.¹⁴⁷ In sum, she suggests that the piper should call the tune.

B. Adoption and Its Annulment

Continuing the focus on children at the conference, several family law theorists explored adoption.¹⁴⁸ In her article, *Permanence and Parenthood: The Case for Abolishing the Adoption Annulment Doctrine*, Professor Margaret Mahoney examines the plight of adopted children whose parents desire to return them or otherwise sever the parent-child relationship and avoid support obligations.¹⁴⁹ Advocating evenhanded treatment of adopted children and public policies, like the one stressed by Director Payne favoring permanency, Mahoney calls for the abrogation of the adoption annulment doctrine.¹⁵⁰

Using an Indiana case, *In re Adoption of T.B.*,¹⁵¹ Mahoney argues how the adoption annulment doctrine discriminates against adopted children and often does not operate to further their best interests.¹⁵² Contrasting standards applied to biological parents seeking to terminate their rights, Mahoney notes that the best interests of those biological children usually prevail.¹⁵³ When discussing adoption, Mahoney explores fraud claims, the extension of limitations rules, and

143. *See id.*

144. *See id.* at 627-28.

145. *See id.* at 622-23.

146. *See id.* at 633-34.

147. *See id.* at 627, 633 (citing Mary R. Anderlik, *Assessing the Quality of DNA-based Parentage Testing: Findings from a Survey of Laboratories*, 43 JURIMETRICS J. 291, 305-06 (2003)).

148. While many scholars including Professor Papke touched on adoption, the “Over the Rainbow” panel visited it more in the context of same-sex relationships. *See* “Over the Rainbow” Notes, *supra* note 112.

149. Margaret M. Mahoney, *Permanence and Parenthood: The Case for Abolishing the Adoption Annulment Doctrine*, 42 IND. L. REV. 639 (2009).

150. *See id.* at 642.

151. *In re Adoption of T.B.*, 622 N.E.2d 921 (Ind. 1993); Mahoney, *supra* note 149.

152. Mahoney, *supra* note 149, at 646.

153. *Id.* at 648.

the power of courts to cure their own adoption mistakes.¹⁵⁴ She argues that in *T.B.*, “the parent-child relationship was judicially terminated, without any consideration of the child’s interests, because the parents were able to prove fraud in the initial adoption proceeding.”¹⁵⁵ She concludes that the adoption annulment doctrine serves “the interests of adult parties and the integrity of the judicial system”¹⁵⁶ but not necessarily children.

While Mahoney’s overarching assertions are convincing, her use of Indiana’s *T.B.* case is problematic because of its ultimate resolution.¹⁵⁷ *In re Adoption of T.B.* involved a mother’s request for state assistance with her adoptive daughter.¹⁵⁸ In response to a request by T.B.’s mother for intervention, the Indiana Juvenile Court found T.B. a child in need of services (CHINS) and assigned her to a residential care facility.¹⁵⁹ Five years after the adoption when T.B. was 16, the mother filed a petition to revoke her daughter’s adoption.¹⁶⁰ It is difficult to tell from the recitation of the facts whether T.B. was a typical teenager, rebelling against her mother, or an unusually violent runaway.¹⁶¹ The facts acknowledge, however, that “T.B. made death threats against Sudis [her adoptive mother].”¹⁶²

The Indiana Supreme Court ultimately overturned the case in which the trial court had granted the adoption annulment,¹⁶³ but not before noting that it had the power to set the adoption aside.¹⁶⁴ Mahoney emphasizes the court holding, “Although public policy abhors the idea of being able to ‘send the child back,’ we recognize that an order of adoption is a judgment and may be set aside pursuant to Indiana Trial Rule 60(B).”¹⁶⁵ The problem, as the court saw it, was that the *T.B.* facts failed to support the mother’s fraud allegation.¹⁶⁶ The court noted, “T.B. admitted to her guardian ad litem that she did not inform anyone of the [sexual] abuse [which occurred before her adoption] until her treatment at Charter Hospital [four years after the adoption].”¹⁶⁷ Thus, the supreme court specifically rejected the fraud allegation.¹⁶⁸

154. *Id.* at 655.

155. *Id.* at 665 (citing *In re Adoption of T.B.*, 622 N.E.2d at 925).

156. *Id.* at 660.

157. Mahoney may use *In re Adoption of T.B.* not because it ultimately furthers her point, but because she writes for an Indiana audience and the lower court decisions support her reasoning.

158. *In re Adoption of T.B.*, 622 N.E.2d at 922-23.

159. *Id.* at 922.

160. *Id.* at 923.

161. *See id.* at 922.

162. *Id.*

163. *Id.* at 925.

164. *Id.* at 924.

165. *Id.*

166. *Id.* at 924-25.

167. *Id.* at 922.

168. *Id.* at 925 (“Although the record may support a finding that [the Department of Family Services (FCS)] acted negligently in failing to discover the alleged sexual abuse, it does not support

Even though Indiana law allowed for an adoption to be set aside, the court rejected the petition because the mother “was not the proper party to bring the action,” and the trial court had mistakenly ruled on the case.¹⁶⁹ Overruling the trial court, the supreme court reasoned:

Sudis’ petition also asserted that it was in the best interests of T.B. to terminate the relationship. . . . Because Sudis was not the proper party to bring the action, the merits of the action were not properly before the trial court. If at some future date the guardian ad litem or other party provided by statute chooses to bring the action, the merits could then be properly adjudicated by the trial court.¹⁷⁰

This passage indicates that the court would have engaged in a best interests analysis had the guardian ad litem or special advocate for the child brought the action.¹⁷¹ The Indiana Supreme Court seemingly anticipated Mahoney’s primary point emphasizing the child’s best interests and made an arguably progressive ruling to deny the adoption annulment.¹⁷²

Mahoney’s proposal for reform makes sense despite the final outcome of *In re Adoption of T.B.* Specifically, she suggests that the appropriate remedy in the fraud cases is damages.¹⁷³ She logically argues, “Rescission of the adoption order, on the other hand, dramatically impacts the adopted child, who was not a party to the fraud alleged by the adoptive parent.”¹⁷⁴ Mahoney further asserts that the vindication of the judicial system offered by an adoption annulment does not justify the disruption of the parent-child relationship.¹⁷⁵

Professor Papke also addresses adoption law in his discussion of the underclass.¹⁷⁶ Unlike Mahoney, Papke places less confidence in the best interests standard.¹⁷⁷ He argues that adoption laws and procedures favor the adoption of underclass children by wealthier parents and “encourages underclass biological parents to think of themselves as failures.”¹⁷⁸ The “best interests of the child” standard when combined with idealized notions of the nuclear family promotes child adoption out of poor single parent or nonmarital families into more “bourgeois nuclear families.”¹⁷⁹ Papke explains that an emphasis on “exclusive mothering” undervalues shared parenting patterns developed in underclass

a finding that FCS committed fraud. Consequently, the attempt to set aside the adoption based upon fraud must fail.”).

169. *Id.*

170. *Id.* (citing IND. CODE §§ 31-6-5-2 & -4 (2008)).

171. *See id.*

172. *See id.*

173. Mahoney, *supra* note 149, at 673.

174. *Id.*

175. *Id.*

176. *See* Papke, *supra* note 114, at 602.

177. *See id.* at 605.

178. *Id.* at 602.

179. *Id.* at 606.

networks.¹⁸⁰

Papke uses law and even popular culture, the film *Losing Isaiah*,¹⁸¹ to support his point:

According to the dominant ideology, underclass children are poised on the junk heap of life. Their homes are unstable and perhaps unhealthy, and their biological parents do a lousy job of parenting. The children will have their best chance to thrive if they move from their scrambled, underclass families to stable, bourgeois families typical of the American mainstream.¹⁸²

The problem with Papke's use of *Losing Isaiah* to illustrate this point is that the law (via the court) ultimately returned Isaiah to his formerly drug addicted, biological, African American, underclass mother, Khaila Richards.¹⁸³ While the film may have condemned Richards and favored the middle class adoptive mother, the law (at least in this script) worked to reunite the underclass family.¹⁸⁴ Papke's point is well taken, however, that the audience is meant to empathize not with Richards, but with the middle class, adoptive parents and the child.¹⁸⁵ In this fictional case, biological parenthood thwarted the "best interests of the child" and trumped all else, including class biases. In that regard, *Losing Isaiah* reinforces Professor Harris's point about biology's dominance (Richards) over functional parenthood (the preferred fictional adoptive mother).¹⁸⁶

One sees the relevance of these thematic strands in Indiana's *Willis* case, mentioned at the beginning of this Article.¹⁸⁷ The court began its opinion, "Sophia Willis is a single mother raising her eleven-year-old son, J.J., who has a history of untruthfulness and taking property belonging to others."¹⁸⁸ The court detailed how "[e]xperiencing ongoing disciplinary problems with J.J., Willis sent him to her sister's home over the next two days to ponder her options."¹⁸⁹ While Papke notes the law's modern, middle class preference for exclusive parenting,¹⁹⁰ here, the court favors the use of the extended network so that Willis could rationally weigh her options.¹⁹¹ Her considered decision was to beat the child into submission and good behavior.¹⁹² The court, overturning the battery conviction that had been affirmed at the appellate level, noted twice more that

180. *Id.*

181. *Id.* at 607-08 (citing *LOSING ISAIAH* (Paramount Pictures 1995)).

182. *Id.* at 608.

183. *See id.* (citing *LOSING ISAIAH*, *supra* note 181).

184. *LOSING ISAIAH*, *supra* note 181.

185. Papke, *supra* note 114, at 608.

186. *Id.*

187. *Willis v. State*, 888 N.E.2d 177 (Ind. 2008).

188. *Id.* at 179.

189. *Id.*

190. Papke, *supra* note 114, at 606.

191. *See Willis*, 888 N.E.2d at 179.

192. *Id.*

Willis was a single parent and joined the court of appeals, “[s]ympathizing with Willis’ argument that she is a single parent doing the best she can.”¹⁹³

Facts that do not appear in the court decisions bring nuance to the Willis case. According to her white, appellate court attorney, Robert D. King, Jr., Sophia Willis is a “petite, African-American woman” who “weighs about the same as an eleven-year-old boy.”¹⁹⁴ The suggestion that she should (or could) have given J.J. “a time-out for behavior that could have been charged as a felony [stealing his mother’s clothes] is a joke.”¹⁹⁵ Statements she made to DCS while unrepresented by counsel were later used by the prosecution to convict her.¹⁹⁶ King speculates that had Willis’s trial attorney requested a jury instead of a bench trial, no Hoosier jury would have convicted her given the facts of the case and the criminal path her son was taking.¹⁹⁷

These additional facts raise serious questions. Did DCS find J.J. a Child in Need of Services (CHINS) and offer (or mandate) services?¹⁹⁸ Surely, counseling for the boy and parenting classes for Ms. Willis would have been preferable to Willis’s criminal conviction for child abuse. If services were not offered, why not—and why was this case diverted to the criminal justice system? J.J. was ultimately sent to live with his father in Georgia.¹⁹⁹ Did Indiana authorities ship out an African-American male youth whom they suspected was headed for the criminal justice system himself? King further speculates that if Sophia Willis had been a white, single mother with a white, middle class child from Boone County (where he lives) instead of an African-American mother from Marion County, this case would have turned out very differently at the early stages.²⁰⁰ Did the Indiana Supreme Court cure a defect in the law²⁰¹ or did it address race and class bias at an administrative level, such as at the prosecutor’s

193. *Id.* at 180.

194. Telephone Interview with Robert D. King, Jr., Attorney, Law Firm of Robert D. King, Jr., P.C., in Indianapolis, Ind. (Dec. 23, 2008) [hereinafter King Telephone Interview].

195. *Id.*

196. *Id.*

197. *Id.*

198. Statements made at the supreme court oral argument indicate that a CHINS inquiry might have been initiated but the record did not reflect the results of that process. *See* Oral Argument, *Willis*, 888 N.E.2d 177 (Sep. 6, 2007), available at <http://www.indianacourts.org/apps/webcasts/default.aspx?view=table&yr=2007&sort=&page=5> [hereinafter Willis Oral Argument].

199. *Id.*; King Telephone Interview, *supra* note 194.

200. *See* Willis Oral Argument, *supra* note 198, at 4:50 to 5:11 minutes (during oral argument, Justice Dickson suggested with his questions that the trial judge showed leniency and sympathy toward Ms. Willis by reducing the charge from a felony to a misdemeanor and by suspending the sentence).

201. *Smith v. State*, 489 N.E.2d 140, 142 (Ind. Ct. App. 1986) (affirming the battery conviction of a father who beat his daughter approximately fifteen times with a belt after her report card showed three failing grades. The fifteen year old suffered facial lacerations as well as contusions and the court called the punishment excessive). It is not clear that *Willis* would cause a court to decide *Smith* differently.

office, with a decision that will prove unwieldy and unwise legal precedent?

We cannot know from this anecdotal account how the family law system actually played out in all its particulars. Without more information, we cannot make any conclusions about the functioning of DCS or the prosecutor's office. The question remains whether an African-American father who administered such a beating would have been successful advancing the defense of privilege. That is, did Ms. Willis's sex play a role in the law's treatment of her case? Did her marital status make a difference? If so, should it have? Finally—taking an intersectional approach,²⁰² we do not know if state officials treated Sophia Willis like Khalia Richards,²⁰³ a single, female, African-American member of the underclass. However, the Willis family story and its legal outcome raise concerns. Unlike the fictional Khalia Richards, the real Sophia Willis lost custody of her son.²⁰⁴ Moreover, this case highlights that, despite advances in modern biology including child development and social science, little has changed in the Indiana parenting privilege in the last 100-plus years.²⁰⁵

C. Abuse Outside of the Family Home

Themes from our panelists' presentations regarding the abuse of family members resonated not just with respect to child abuse by their parents but also to abuse of family members by others, outside of the family.²⁰⁶ Questions arose regarding how family members and society at large should first identify and then address such abuse.²⁰⁷ In her paper, *Drawing a Line on the Blackboard: Why High School Students Cannot Welcome Sexual Relationships with Their*

202. See, e.g., Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (exploring the notion of intersectionality with respect to women of color).

203. See LOSING ISAAH, *supra* note 181.

204. See King Telephone Interview, *supra* note 194.

205. For a more complete review of the Willis case and the Indiana parenting privilege, see Kyli L. Willis, *Willis v. State: Condoning Child Abuse in Indiana*, 14 U.C. DAVIS J. JUVENILE L. & POL'Y (forthcoming Winter 2010).

206. During the panel entitled: "Ain't Misbehavin: Family Law and Abuse," moderated by Professor Julie Shapiro, three scholars presented their research. Professor Elaine Chui presented *The Guy's a Batterer! A Public Approach to Domestic Violence in the Information Age*. Professor Evelyn Tenenbaum discussed *Adultery Between Dementia Patients in Nursing Homes: Intimacy for the Lonely or Deplorable Violation of Marital Vows?*, and my former student, Ms. Rozlyn Fulgoni-Britton spoke on *Drawing a Line on the Blackboard: Why High School Students Cannot Welcome Sexual Relationships With Their Teachers*. See Conference Agenda, *supra* note 5; see also Jennifer Drobac, Notes from "Ain't Misbehavin: Family Law and Abuse" (June 13, 2008) (on file with author). It is not often that a teacher enjoys the pleasure of inviting a student to present at an academic conference before this student even completes law school. I would like to congratulate Ms. Fulgoni-Britton here for her hard work and great success.

207. Payne, Keynote Address, *supra* note 23.

Teachers,²⁰⁸ Ms. Rozlyn Fulgoni-Britton explores the legality of sexual relationships between teachers and their students,²⁰⁹ particularly in light of Title IX of the Education Amendments of 1972.²¹⁰ Professor Evelyn Tenenbaum also looks at sexual relationships but she focuses on dementia patients in nursing homes in her article, *To Be or to Exist: Standards for Deciding Whether Dementia Patients in Nursing Homes Should Engage in Intimacy, Sex, and Adultery*.²¹¹ Both writers examine the importance of legal capacity, competence, consent, power, and the role of physical confinement. While Fulgoni-Britton deals with youth,²¹² Tenenbaum discusses the elderly.²¹³

Legal capacity to consent to sexual activity is not an issue for most people. For youth, who the law deem limited because of developmental ability (or disability), and for the elderly who suffer from dementia, full legal capacity to consent may not exist. Ms. Fulgoni-Britton notes the statutory rape and other state laws that protect students who lack capacity from sexual predation.²¹⁴ These laws are often inconsistent and vary from state to state.²¹⁵ She argues that the unwelcomeness requirement associated with a Title IX claim of sexual harassment makes adolescents vulnerable to a trial of their own uncertain capacity and perhaps misdirected conduct.²¹⁶ She points to the Department of Education's (DOE) rebuttable presumption, that sexual conduct between an adult school employee and student is not consensual, as problematic.²¹⁷ She posits that a blanket rule banning sexual conduct between secondary students and their teachers would better serve youth at school.²¹⁸ She writes, "A bright line rule that protects *all* secondary students, regardless of relevant age of consent laws, easily can be achieved by making all students incapable of consenting to a sexual relationship with a teacher."²¹⁹

Challenging the DOE Guidance, Fulgoni-Britton criticizes the "totality of the circumstances test" and the set of circumstances that the DOE suggests might be considered in evaluating whether a secondary student "welcomed" sexual attention from a teacher.²²⁰ Relying on *Chancellor v. Pottsgrove School*

208. Rozlyn Fulgoni-Britton, Note, *Drawing a Line on the Blackboard: Why High School Students Cannot Welcome Sexual Relationships with Their Teachers*, 42 IND. L. REV. 257 (2009).

209. *Id.* at 258.

210. 20 U.S.C. § 1681(a) (2006).

211. See Evelyn Tenenbaum, *To Be or to Exist: Standards for Deciding Whether Dementia Patients in Nursing Homes Should Engage in Intimacy, Sex, and Adultery*, 42 IND. L. REV. 675 (2009).

212. See Fulgoni-Britton, *supra* note 208, at 258.

213. See Tenenbaum, *supra* note 211, at 675.

214. Fulgoni-Britton, *supra* note 208, at 258-63.

215. *Id.* at 261-62.

216. *Id.* at 278-79.

217. *Id.* at 276.

218. *Id.* at 279.

219. *Id.* at 273.

220. *Id.* at 272-76.

District,²²¹ Fulgoni-Britton emphasizes the absurdity of the results possible under Title IX.²²² A teacher's sexual relationship with two different students in the same class might result in different liability determinations, depending on the students' respective ages, mental capacity, and the circumstances of sexual activity.²²³ Fulgoni-Britton does not reject the unwelcomeness requirement completely, however.²²⁴ She reasons, "Welcomeness should not be completely removed from Title IX analyses because of cases involving college and graduate students in which the majority of students are over the age of eighteen."²²⁵ Adult students, she believes, should navigate the law as currently composed.²²⁶

While Ms. Fulgoni-Britton advocates a blanket ban on sexual activity between high school students and their teachers,²²⁷ Professor Tenenbaum recommends a more nuanced and individualized approach with dementia patients who may still exhibit much functional and cognitive competence.²²⁸ Tenenbaum does not challenge a ban on staff-patient sexual relationships; she examines only those sexual relationships between patients that may be nonconsensual or objected to by nonresident family members.²²⁹ Documenting the benefits of intimacy and sexual activity for elderly adults, Tenenbaum suggests that a blanket ban on sexual relationships for these adults might do more harm than good.²³⁰ She stresses the isolation from former sexual partners and confinement away from family and friends in exploring the importance of new intimate, comforting, and sexual relationships.²³¹ She also highlights the legal interests in privacy and autonomy that adults traditionally enjoy.²³²

Acknowledging the chance for abuse, Tenenbaum considers several ways to protect dementia patients from sexual predators and from family members whose interests may conflict.²³³ She rejects control by relatives, substituted judgment, and a best interests test because each of these methods fails to account for continuing functional competence and personal autonomy and privacy.²³⁴ Instead, she proffers a four-step approach for the evaluation of functional competence to choose engagement in sexual activity in an adulterous relationship.²³⁵ The first step involves confirming that the patient can somehow,

221. 529 F. Supp. 2d 571 (E.D. Pa. 2008).

222. Fulgoni-Britton, *supra* note 208, at 276-77.

223. *Id.* at 278-79.

224. *Id.* at 279.

225. *See id.*

226. *See id.* at 278-80.

227. *Id.* at 280-83.

228. *See* Tenenbaum, *supra* note 211, at 713-16.

229. *See id.*

230. *See id.* at 680-81.

231. *See id.* at 681.

232. *See id.* at 685.

233. *See id.* at 691-95.

234. *See id.* at 713-16.

235. *Id.*

even if not verbally, express his or her desires.²³⁶ The second step requires a consideration of the “critical interests” of the patient.²³⁷ She highlights three such critical interests: 1) the patient’s interest in protecting family members’ feelings, including those regarding infidelity, 2) the patient’s interest in being remembered after death in a particular way, and 3) the religious directives that the patient may value.²³⁸

The third step calls for an analysis of whether the patient can adequately consider the critical interests detailed in the second step.²³⁹ Finally, if the patient cannot adequately engage in the reasoning and analysis required by the first three steps to come to a decision, a fourth step functions to assure that the nursing home staff will balance the patient’s interest in continued adulterous sexual activity with the other identified critical interests.²⁴⁰

One could argue that this four-step process might prove useful to Fulgoni-Britton’s adolescent students. Unfortunately, the critical interests that apply for dementia patients do not readily translate for youth who may not have been sexually active previously and are not already married. These teenagers are not yet concerned with how they will be remembered after death and may not have well-defined religious values. In sum, a minor’s lack of established mental capacity, her fewer life experiences, and different priorities significantly distinguish her from the dementia patients that once enjoyed full legal capacity. Even more important, Fulgoni-Britton addresses sexual activity not amongst students, but between a teacher and student.²⁴¹ The power differential in that relationship much more closely resembles the relationship between nursing home staff and patient that Tenenbaum rightly exempts from her analysis.

With her notes on the elderly, Tenenbaum and the other presenters featured in this law review volume descant the discrete family law issues that have challenged legal maestros for decades and longer.²⁴² While complex and

236. *Id.* at 713-14.

237. *Id.* at 714-15.

238. *Id.* at 714.

239. *Id.* at 715.

240. *Id.* at 716.

241. Fulgoni-Britton also emphasizes that the teacher-student relationship is more like a parent-child relationship for which no one would dispute that sexual activity is inappropriate. She writes, “Clearly there is no question of welcomeness involved in parent-child sexual relationships. However, the question is raised in teacher-student relationships even though the relationship encompasses many of the same features of a parent-child relationship.” See Fulgoni-Britton, *supra* note 208, at 267.

242. Numerous other panelists also delved into interesting and challenging family law issues. For example, in their panel “Cherokee: Issues Under the Indian Child Welfare Act,” moderated by Professor Sheila Simon, Professor Patrice Kunesh delivered *Cultural Identity Considerations in Jurisdictional Disputes Involving Indian Children Outside Reservation Boundaries* and Professor Jacquie Hand presented *Indian Children, Indian Parents, and Indian Tribes: The Whys and Hows of Treating Indian Children Differently*. See Conference Agenda, *supra* note 5; see also Jennifer Drobac, Notes from “Cherokee: Issues Under the Indiana Child Welfare Act” (June 13, 2008) (on

nuanced, these refrains lend themselves for review by legal practitioners and theorists. New arrangements promise more harmony and fewer skipped beats. Some scores, however, are just too complex for a single instrument. The dissonant blast of a natural disaster, such as a hurricane, requires symphonic response.

D. Family Law in a Disaster

In the final ground-breaking article featured in this volume, *Katrina Disaster Family Law: The Impact of Hurricane Katrina on Families and Family Law*,²⁴³ Ms. Sandie McCarthy-Brown and Professor Susan Waysdorf review the effects of a natural disaster on the functioning of family law.²⁴⁴ One of the first analyses of its kind, their article explores how our legal system adjusts when there is no family home due to damage or complete destruction.²⁴⁵ What if a disaster destroys not only homes, but also schools and government buildings? As our conference began, massive floods crippled southern Indiana.²⁴⁶ In the midst of the flooding, private citizens and government officials, including Director Payne, questioned prior preparedness, particularly in the aftermath of Katrina.²⁴⁷ The response by McCarthy-Brown and Waysdorf is not encouraging but should cause us to adapt and begin planning for future natural disasters. Their herald calls us to action in Indiana and across the country.

McCarthy-Brown and Waysdorf emphasize that the consequences of Katrina comprise a social justice issue because of the disproportionate impact on women, children, the poor, and the disabled.²⁴⁸ After detailing some of the demographic effects of the Katrina diaspora,²⁴⁹ these scholars track the legal issues that

file with author).

243. See Sandie McCarthy-Brown & Susan L. Waysdorf, *Katrina Disaster Family Law: The Impact of Hurricane Katrina on Families and Family Law*, 42 IND. L. REV. 721 (2009). Just as I mentioned with regard to Ms. Fulgoni-Britton, I congratulate my former student, Ms. McCarthy-Brown. After graduating from Indiana University School of Law—Indianapolis in 2005, Ms. McCarthy-Brown moved with her son to New Orleans to help with the post-Katrina devastation there. She stayed and currently works at The Pro Bono Project-New Orleans, providing disaster- and non-disaster related legal services to low-income individuals and families and to not-for-profit organizations that serve low-income families. Ms. McCarthy-Brown also manages the case load of The Project while overseeing the work of a bank of national volunteer attorneys and law students who handle those cases. She is a credit to her alma mater and I thank her here for her courage and service.

244. See *id.* at 722-23.

245. See *id.*

246. See WHTR.com Eyewitness News, *1 Dead, 1 Missing in Indiana Flood: Severe Flooding Grips Portion of State*, <http://www.theindychannel.com/news/16542019/detail.html> (June 8, 2008, 20:13 EDT).

247. See, e.g., Payne, Keynote Address, *supra* note 23.

248. McCarthy-Brown & Waysdorf, *supra* note 243, at 735-36.

249. *Id.* at 733-36.

plagued the at-risk groups. Beginning with the family home, McCarthy-Brown and Waysdorf discuss evictions, succession issues—for accessing insurance and other benefits, and pervasive homelessness.²⁵⁰ They explain:

For many homeowners, particularly poor, African-American homeowners, the issue of succession, or gaining clear legal title, was the first challenge. . . . As family members passed away, the next generation lived in the house without changing the recorded owner. . . .

Over the years, family members had paid taxes and even taken out and paid for insurance policies on these houses. Yet, after the Storm, FEMA would not accept claims for subsidies and assistance without proof of titled ownership. Moreover, homeowners could not successfully file insurance claims without clear title.²⁵¹

Thus, many of the people who needed assistance the most could not readily access government aid or private insurance.²⁵² The name on the title disqualified women, children, and families from relief.²⁵³ Not since the days before the Married Women's Property Acts of the late nineteenth century has title arguably caused such hardship for families.²⁵⁴

This property title problem (among numerous other reasons) also resulted in increased divorce filings as couples who had been living separate and apart but who had never formally divorced tried to formalize their prior casual arrangements and property divisions.²⁵⁵ McCarthy-Brown and Waysdorf suggest that "tremendous amounts of community property are jointly owned by people who no longer have a social connection to each other. When a disaster occurs, finding a long-lost spouse, a lawyer (or two), and navigating the divorce process is one more significant source of stress."²⁵⁶ Such stress leads to increased domestic violence²⁵⁷ and greater need for psychological services in a community already grossly underserved.²⁵⁸ McCarthy-Brown and Waysdorf document numerous ways that Louisiana quirks of law and local customs worked additional serious hardships on residents devastated by the hurricane.²⁵⁹

Their discussion of the New Orleans children strangely echoes Director

250. *See id.* at 738-42.

251. *Id.* at 739-40 (footnotes omitted).

252. *See id.*

253. *Id.*

254. *See* NANCY LEVIT & ROBERT R.M. VERCHICK, *FEMINIST LEGAL THEORY: A PRIMER* 4 (2006) (explaining that the Married Women's Property Acts allowed women to control their own property).

255. McCarthy-Brown & Waysdorf, *supra* note 243, at 742-46.

256. *Id.* at 744-45.

257. *Id.* at 746-48.

258. *See* Jodi L. Kamps, *Reflections on Hurricane Katrina and Its Impact: One Psychologist's Experience*, 39 PROF. PSYCHOL. RES. & PRAC. 7, 9 (2008) (noting "a recent outflow of psychiatrists, including child psychiatrists, from New Orleans area").

259. *See generally* McCarthy-Brown & Waysdorf, *supra* note 243, at 738-65.

Payne's discussion of abused and neglected children.²⁶⁰ Like many foster-care children, Katrina "[c]hildren lost their physical possessions, connection to their culture, friends, and support systems, all in an instant."²⁶¹ Many of these children, because of the operation of Louisiana divorce law, did not have legally established custodial arrangements with their divorced (or long separated) parents.²⁶² Relocation issues, custody disputes, and visitation modifications all made life for these children even more uncertain and stressful as their parents also dealt with the housing, health care, and financial problems.²⁶³ McCarthy-Brown and Waysdorf give concrete examples of the chaos that results when disaster relief efforts do not adapt to local law and customs.²⁶⁴

Similarly, they recommend reform and re-evaluation of state and local law to anticipate future disasters.²⁶⁵ They urge court systems everywhere to plan now for disasters so that judicial systems can adequately serve those most at risk and avoid the collapse that befell New Orleans.²⁶⁶ For example, they note that

custody relocation laws, standards, and cases, perhaps more starkly than other areas of family law, have been shaken by the mass displacement and dislocation of hundreds of thousands of parents during Katrina. Judges, lawyers, family law experts and legislators should review this post-Katrina experience and initiate a process of evaluation and reform of these traditional and, at times, conflicting approaches to relocation in custody cases.²⁶⁷

One reform approach that these scholars celebrate is Louisiana's adoption of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).²⁶⁸ Reducing interstate conflict, uniform laws help people navigate across state borders during a disaster. Moreover, folks who draft such uniform laws can anticipate the types of problems that often result in a natural disaster. McCarthy-Brown and Waysdorf argue, "[t]he UCCJEA provides better protection for children, especially if enacted pre-disaster, by creating consistency in the legal process and court decisions. A judge who is familiar with the case and the family history can issue rulings which better protect a child"²⁶⁹ One judge, one family? Sounds familiar!²⁷⁰

Another familiar chord in the Katrina article and one on the top of the family

260. *See id.* at 752-58 (describing the hardships child custody laws create for single parents who fled New Orleans).

261. *Id.* at 748.

262. *Id.* at 749.

263. *Id.* at 750-58.

264. *Id.* at 750-60.

265. *Id.* at 765.

266. *Id.*

267. *Id.* at 758.

268. *Id.* at 758-60.

269. *Id.* at 760.

270. *See supra* note 49 and accompanying text.

law score for many scholars and practitioners are their notes on same-sex families.²⁷¹ These families, when unprotected and invalidated by state and federal law, face particular hardship during a natural disaster.²⁷² McCarthy-Brown and Waysdorf briefly highlight the problem:

An issue of great importance to non-traditional couples in the wake of a disaster is whether relief programs will recognize the surviving partner as the legal spouse for purposes of benefits and other relief. For those couples who have children, issues of child custody relocation, cross-adoption by both parents, and related matters will rise to the fore in the wake of a disaster, particularly if one of the adults dies or is severely injured in the disaster.²⁷³

This passage only hints at the complexity of the troubles possible as a consequence of disaster.

McCarthy-Brown and Waysdorf's comments fit neatly within this Article's review of same-sex marriage. Moreover, the controversy created by the November 4, 2008, passage of California's Proposition 8, which now prohibits same-sex marriage in California,²⁷⁴ extends beyond California's borders.²⁷⁵ Imagine a lesbian couple, Alice and Zoe, not from New Orleans but from California. Suppose that Alice and Zoe married in San Francisco in June 2008. In late November 2008, Alice gave birth to Ben, via artificial insemination. Because Ben was a child of the marriage, Zoe did not think that she had to adopt him and assumed that she was listed as the second parent on the birth certificate. Further suppose that a hospital official, uncertain about the ramifications of Proposition 8, might not have listed Zoe, the non-birth mother, on Ben's certificate.

Now imagine a huge and devastating earthquake near San Francisco. Mass displacements. Destruction of facilities and infrastructure. Gas fires and aftershocks. Families and children are separated. Zoe is severely disabled and moves back to Indiana with Ben to be with relatives while Alice tries to secure their property and rebuild in California. However, Indiana²⁷⁶ (and the federal government²⁷⁷) will not recognize their marriage and authorities deny social security benefits and other relief benefits for Ben and the family. Because of the lack of documentation and because Zoe never adopted Ben, she is arguably a legal stranger to the child and under Indiana law has no obligation to support him. Theoretically, she cannot even consent to routine well-baby care for Ben because Indiana law might not regard her as his legal parent or qualified

271. McCarthy-Brown & Waysdorf, *supra* note 243, at 762-64.

272. *See id.*

273. *Id.* at 764.

274. *See generally* Strauss v. Horton, 207 P.3d 48 (upholding Proposition 8 as a valid constitutional amendment, but holding that marriages prior to its enactment remained valid).

275. *See* Audi et al., *California Votes for Prop 8*, *supra* note 9.

276. IND. CODE § 31-11-1-1(b) (2008).

277. Defense of Marriage Act, 1 U.S.C. § 7, 28 U.S.C. § 1738C (2006).

consenting adult.²⁷⁸

The stress of the earthquake, the displacement, and the legal red tape take a toll on the marriage. Zoe decides that she wants a divorce but cannot obtain one in Indiana since Indiana refuses, as a matter of public policy, to recognize her marriage to Alice.²⁷⁹ Her disability and the devastation in California prevent her from moving back there to secure legal closure. Months pass. Thinking that her marriage is null and void in Indiana, Zoe falls in love with and marries Chuck. Now she is possibly a bigamist under California law and faces possible prosecution if she moves back.²⁸⁰ She will probably lose custody of Ben if Alice, the birth mother, sues for custody. Legal limbo, voter discrimination, and natural disaster create legal chaos.

The Alice and Zoe hypothetical is the material from which family law class examinations are made (including mine from this year).²⁸¹ The problem is that all of these issues could arise—in Indiana and many other states. Events in New Orleans researched by McCarthy-Brown and Waysdorf confirm how bizarrely and inadequately the law sometimes operates.²⁸² McCarthy-Brown and Waysdorf are correct that the adoption of uniform laws, reforms, and private contractual planning might all improve a family's chance of survival post-disaster—whether or not that family is a same-sex or traditional family. However, Professor Simon reminds us:

[B]oth in creating and dissolving a family, the trend in American law is increased opportunity for individuals to make their own choices. . . .

Expanded freedoms allow us to be who we are, and contribute our best to a free market and democracy. Our families are not just what we do along the way, but who we are. Families are the most important area for humans to be able to express themselves.²⁸³

Professor Simon's words ring true. However, members of our democracy have refused to extend—and have even withdrawn—rights and legal recognition for many “untraditional” families.²⁸⁴ Additionally, the desire for freedom creates a tension with the need for structure and predictability, another familiar refrain.

So is the law progressive, or discriminatory and protective of entrenched

278. See, e.g., IND. CODE § 16-36-1-5 (2008) (enumerating persons authorized to consent to medical care for minors, while failing to discuss nonmarital partners of a biological parent).

279. *Id.* § 31-11-1-1(b).

280. See CAL. PENAL CODE § 281 (West 2008) (criminalizing bigamy).

281. See also Singer, *supra* note 110, at 35-36 (discussing the hypothetical case of Lily and Anne).

282. McCarthy-Brown & Waysdorf, *supra* note 243, 753-55 (recounting the holding in *McLain v. McLain* in which the court found that a mother did not meet the requirement of good faith when she did not return after evacuating with her child for Katrina).

283. Simon, *supra* note 88, at 576.

284. See, e.g., Jennifer A. Drobac & Antony Page, *A Uniform Domestic Partnership Act: Marrying Business Partnership and Family Law*, 41 GEORGIA L. REV. 349, 374-379 (2007) (discussing alternative family structures that current family laws fail to protect).

interests? It is both . . . and will be what we make it in the future. The question is how hard we will work to make new law and create innovation. Professor Simon warns that family law scholars and teachers—most of whom are women—“can expect our ideas to be discounted or criticized with ease.”²⁸⁵ She suggests, however, “Outsiders built a new musical culture [Jazz], and similarly, outsiders can build family law in ways that move beyond previous limitations.”²⁸⁶ With this conference we moved beyond previous limitations . . . and all that jazzzzzzzzzz.

285. See Simon, *supra* note 88, at 580.

286. *Id.*