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Foreword: Rappaccini's Daughters?

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FOREWORD:

RAPPACCINI'S DAUGHTERS?

OVERVIEW

The transformation of the family—the basic unit of social organization—reflects and reinforces a global sea change in gender roles. Family law may be understood as the state's mediation of this process. Family law not only defines the legal options for the individuals caught up in the flux, but in subtle as well as more obvious ways, shapes their societies. A comparative approach enables us to creatively rethink the evolving law governing family relations, and illuminates the larger project of social reorganization of which family law is a part. This volume examines the complex interrelation between family law and gender bias in the United States, Brazil, Australia, France, Sweden, Japan, China, Israel, Palestine, and several Islamic states. The contributing authors discuss the ways in which family law exacerbates or tends to neutralize gender bias in their respective countries.

The first five articles focus on family law in the United States, introducing the themes and tensions developed throughout the volume in a cultural context familiar to most of its anticipated audience. They raise provocative questions about cultural assumptions and essentialism, exploring the impact of class and race as well as the often unexpected consequences of reform.

In "Paying for Women's Work: The Unfinished Business of the American Family Law Revolution," Sheppard crisply explains why women, especially divorced women, are poor: "Work done at home is love, not work. And the

wages of love is love, not wages" (p. 4). Sheppard proposes that caretaker benefits be paid to women as direct compensation because "the caretaking impelled by love is indeed valuable, remunerable work, the cost of which should be borne by the social and economic system that depends on it for the maintenance of families and children" (p. 10). How might such a system affect male caretaking? She ends by throwing down the gauntlet, quoting a male colleague:

You feminists seem to think that a family centered life demeans women ... I for one would welcome such a life if I could afford it, and so would most men.

For the moment at least, I am willing to take him at his word (p. 10).

Sheppard suggests that intrusive state supervision, like that of welfare dependent families, could be avoided by "our collective acknowledgment that [these benefits] represent payment due for services rendered" (p. 9). In "The Concept of the Natural Family and the Limits of American Family Law," Fineman describes some of the formidable obstacles to such acknowledgment in a patriarchal society. Noting that "joint custody and the ideal of shared parenting" ensures continued male control over children and through them, over their mothers (p. 17), she focuses on the "socially suspect category" of single mothers. She locates this in a discourse which tacitly assumes that the poverty of the underclass "results from their own failings. Single motherhood is taken as a sign of degeneration on the same level as crime and other social pathology" (p. 22).

Rigorously documenting her thesis, Fineman makes a compelling argument that notwithstanding "overwhelming evidence to the contrary ... the face of poverty increasingly has become that of a single mother, particularly an African-American single mother." Restricting our idea of families to "intact" nuclear families, she concludes, not only renders "discussion, policy and law incomplete," but relegates *other* families to "symbolically laden categories of legal regulation ... [where they are] subjected to potentially more intrusive state regulation and intervention" (pp. 24-25).

In "Gender and Racial Stereotypes, Family Law and the Black Family: Harpo's Blues," Hobbs describes the devastation of the black family by racism. He returns the reader to Fineman's African-American single mother, but rather than dispelling stereotypes, he amplifies and exaggerates them, reminding us that they are always larger-than-life. He describes a stereotypical black woman, "a welfare queen ... 'a woman of inordinate strength with an ability for tolerating an unusual amount of misery'" (p. 38). She lives in dangerous tension with a stereotypical black man—a man emasculated by a racist society, who attempts to prove his virility and express his rage by dominating, often violently, the black woman.

Hobbs is less interested in the inaccuracy of these stereotypes than he is in their impact, particularly on the black community. How can these stereotypes be transformed or transcended? How can we constructively grapple with domestic violence if it is seen as the black man's only allowable expression of "manhood" in a racist and sexist society? Drawing on Walker's renowned novel, *The Color Purple*, Hobbs shows how we might learn from our own experience both to break down stereotypes and to develop more constructive models, which could be used to reshape the law.¹

"Psycho-Feminism and Divorce Law: 'Oedipus Wrecks'" similarly focuses on stereotypes, specifically the stereotypes of "woman-as-mother" that permeate family law. Building on the work of feminist psychoanalysts, I suggest that these stereotypes originate in exclusive female caretaking. Because women almost always assume primary responsibility for infants and young children, children in the most crucial stages of their development learn to perceive women generically as "mothers." If we accept the premise that children's early experiences of intimacy establish the patterns for those that follow, what are the social consequences when these early experiences are predicated on relationships with women? What are the implications for divorce law?

Whatever their origins, Maxwell suggests there are clear differences in male and female values and problem-solving methods. Maxwell approaches "The Feminist Dilemma in Mediation" from a refreshingly pragmatic perspective. After a cogent review of feminist critiques of mediation as a process that masks and permits exploitation, she argues that a "private" ordering process can probably be crafted to correct for bias as well as a more formal process. On the assumption that the core values of mediation—"staying connected, fostering relationships, and meeting needs rather than enforcing rights"—reflect values most important to women, she makes a persuasive case that "feminist energy is better spent in molding and protecting mediation from patriarchal corruption than trying to infuse feminist values in [inherently incompatible] conflict resolution models" (p. 79).

We leave the United States, but retain an "American" perspective, in "Violence in the Family: Human Rights, Criminal Law, and the New Constitution in Brazil." The "common usurpation [of the term 'American'] by inhabitants of the United States" (Henkin, 1990: x) ignores the other "Americans" in the western hemisphere. Tinker and Pimentel show us how family law has similarly silenced the victims of domestic violence by excluding them, legally as well as linguistically, from the dominant discourse. Domestic violence, hidden by what becomes a terrible privacy, is addressed in several of the papers in this volume.² Tinker and Pimentel add an important dimension to the growing feminist outcry, insisting that domestic violence be acknowledged and addressed on the highest state, and even the international, level.

The next three papers provide overviews of gender bias and family law in affluent western democracies: Australia, France, and Sweden—different and yet enough alike to provide illuminating variations on common themes. All of these authors emphasize context, a focus on the real circumstances of family life. In “Mediation of Family Disputes in Australia,” Astor examines the increasing reliance on mediation in a variety of settings. She cautions that in general “men go to mediation to get a better deal and . . . women go to avoid conflicts,” while noting the appeal of an alternative that promises a “quick, cheap and caring method of dealing with family matters” and the well-documented failure of “formal” equality to produce *real* equality.

Astor describes several situations in which mediation may well be counterproductive. Family violence, for example, “creates such an extreme imbalance of power” that mediation is likely to be unhelpful or even dangerous for the victim. Utilization of mediation in disputes between aboriginal people is similarly problematic, because “the models of mediation commonly used by white Australians embody cultural assumptions” which may well be unsuitable (p. 113). The author concludes by urging us to “focus on what women need to assist them to resolve family disputes . . . different women in different circumstances need different dispute resolution mechanisms.” Whatever process is used, however, “should be sensitive to the reality of women’s lives and the nature and extent of all women’s oppression” (pp. 114-115).

Dekeuwer-Defossez is similarly concerned with the concrete reality of women’s lives. She points out that gender equality is a relatively recent phenomenon in France, where women were not enfranchised until 1970. Family law legislation, far more important than case law in France, has been drafted with the explicit aim of educating the public. It is progressive, intentionally ahead of social mores.

Dekeuwer-Defossez carefully analyzes the resulting conflicts. Notwithstanding reform, patriarchal concerns still surface in the related contexts of family names³ and legitimacy. Biological differences are used to “justify legal discriminations far beyond” what nature requires (p. 118). It is no coincidence, she acutely observes, that the most successful “gender-neutral” reforms have been those most favorable to men.

Like France, Sweden explicitly intends for legislation “to shape attitudes and direct behavior.” Sweden has enacted many of the reforms urged by feminists in other countries. The result is sobering, as shown in the ground-breaking paper by Dahlberg and Taub, which sheds new light on the gap between an ideal of gender equality and the reality of women’s continuing subordination. The Swedish experience shows that a purportedly “gender neutral” model is in fact usually a male model. This model not only reflects the traditional male focus on the workplace at the expense of the home, but basically ignores a complex social context and the greater burdens borne by women within that context. While a more active parenting role for noncustodial fathers may

theoretically relieve mothers of some responsibilities, for example, the authors note that in practice women have to coordinate schedules and generally manage the situation. In addition, the emphasis on the father's role reinforces the idea that, "women, standing alone, simply do not suffice."⁴

Like the Swedish and French laws, modern Japanese family law explicitly provides for equality between the sexes. The chasm between the western and Japanese systems must be understood in light of the traditional Japanese family system, transformed after the war. Mizuno's lucid description of the pre-war *ie* (family) system vividly illustrates how unwritten social mores influence and even determine family law everywhere. Under the *ie* system, all property passed to the first son and all of the other family members were subordinate to him. Loyalty and obedience to the family leader was coupled with a moral norm of loyalty to the feudal lord, part of a comprehensive pre-war ideology which viewed the family as a microcosm of the state.

Mizuno observes that the post-war family law has "shown flexibility in coping with the changing reality of the family ... [p]aradoxically ... by being quite ineffective as family law" (p. 156). The result is a system of private ordering which basically fails to promote genuine equality by failing to address the real constraints on the economically weaker wife.

Family law in the People's Republic of China draws on a similar tradition of patriarchy and feudalism—a tradition, notes Hom, characterized by "rigid moral norms" and the patriarch's "power over life and death" (p. 177). Hom skillfully guides the reader through history and myth to contemporary China. She describes a poor, agrarian state under a socialist government, with neither a tradition of individual rights nor any real commitment to their protection today. Hom offers a telling variation on a theme raised by Sheppard, Dahlberg and Taub, and Mizuno when she describes the travesty of "formal" legal equality, "the suggestion that the rights are already in existence and the task is one of guaranteeing" them (p. 181).

Kenya, like China a developing state, traces its complicated family law system to its former status as a British colony. By 1900, Kenya had four distinct family law regimes: indigenous customary law, statutory law, Islamic, and Hindu law. The four systems remained in uneasy coexistence after independence. Kabeberi-Macharia compares the systems by describing how each deals with marriage gifts,⁵ wifely status,⁶ matrimonial rights and duties, and matrimonial property.

Kabeberi-Macharia argues forcefully that custom supports the "obsolete norms of traditional society," supporting her thesis with a stark description of institutionalized domestic violence euphemistically referred to as "wife chastisement." While she appreciates the political appeal of diversity, the author concludes that a unified code is the only way to prevent inequality and to protect vulnerable women.⁷

The last three papers discuss family law regimes structured by religious authorities in the Middle East and Northern Africa. Raday's paper, a sharply drawn overview of the Israeli system, serves as a useful introduction. In Israel, partly as a result of political compromise, the law of marital status was left to the Jewish, Christian, and Moslem religious authorities. This personal status law is expressly exempt from the Women's Equal Rights Law. While property and alimony may be determined under a secular regime, the divorce itself can only be obtained in accordance with the applicable religious laws. As a practical matter, accordingly, religious laws have a pervasive influence on all aspects of divorce.

Raday notes that the Israeli approach privileges the religious autonomy of ethnic groups over the idea that the women in those groups are entitled to equality. In a concise and scholarly argument, she shows how the legal authority of patriarchal religions effectively deprives women of political power as well as private autonomy. Raday further criticizes the Israeli system for imposing religious norms on secular women. While secular marriage is technically an option, it provides less legal protection and fewer legal benefits. Given the overwhelming social and psychological pressures on women, moreover, she suggests that choice is illusory:

The vast majority of secular couples seek traditional marriages—"white weddings"—and the romantic notions and social conservatism which surround this subject is stronger, at the time of marriage, than are the rational considerations for avoiding the patriarchal bonds of a religious marriage ceremony (p. 215).

Al-Hibri is similarly concerned with the range of women's real options, specifically, their options under Islamic law as interpreted and applied in four countries where it is the dominant religion. Al-Hibri provides an erudite overview of family law in Muslim countries, beginning with its dual origins—a religious foundation in the Qur'an and cultural roots in profoundly patriarchal societies. These cultural roots are the source of the gendered stereotypes which have historically and theoretically shaped Muslim family law—stereotypes of the male as "rational, courageous and firm" and the female as "emotional, weak and rash" (p. 231).

Al-Hibri explains two major schools of Islamic thought clearly and succinctly for the western reader. The author points out that in practice, moreover, even devout modern Muslims frequently deviate from the norms established by both schools. By correcting the common Western misconception of Islamic law as monolithic and unchanging, al-Hibri prepares the reader for what some may consider a radical reconstruction of Islam, pointing the way toward a more flexible model which would "have room for traditional women as well as for those women who desire a more independent life and a less patriarchal marriage relationship, if any" (p. 241).⁸

Finally, Rishmawi describes the actual impact of Moslem⁹ family law on the Moslem majority in the Palestinian West Bank. Although the West Bank is occupied by Israel, its Islamic domestic relations courts function under Jordanian auspices and the Jordanian personal status law is applied. Under this regime, "women are restricted from freely choosing their husbands; they do not possess the power to contract their own marriages; they cannot work outside the house without their husbands' consent; they can be divorced according to the husbands' whim" (p. 250).

Whatever the theoretical possibilities for a feminist reinterpretation of Islam, the likelihood of actual reform in the West Bank seems slight. Not only do the religious authorities exert considerable influence, but religious norms are widely internalized and accepted. As the director of an internationally prominent human rights organization, Rishmawi further points out that Palestinian women seeking legislative change have special difficulties because "Palestinians have no control over the legislative process in the Occupied Territories" (p. 254).

CONCLUSION

This volume may at first look like a disheartening catalog of what Rubin has called "the endless variety and monotonous similarity [of the oppression of women]" (Rubin, 1975: 160). All of the authors recognize myriad, and often subtle, forms of women's subordination. Many of them note that women in their respective countries—like women throughout the world (United Nations, 1991: 2)—are disproportionately poor. All of the family law regimes discussed reflect at least residual concerns of patriarchy, from provisions for establishing paternity to laws governing surnames.

Each paper explains how the law perpetuates patriarchal family systems in which women are disadvantaged, subordinated, and often exploited within their own homes. Yet each also describes, sometimes implicitly in a terrifying subtext, how women cling to the family. While this may be attributed in part to "false consciousness," more often it reflects a very accurate understanding of the poverty and abuse women are likely to encounter in the larger world outside the family.

In Hawthorne's short story, "Rappaccini's Daughter," a father raises his daughter in a garden filled with beautiful poisonous plants (Hawthorne, 1961: 206). Exposed to the garden since infancy, she is not only inured to its poison, but dependent on it. She cannot live outside the garden. Is the legal family like this garden? Are all women "Rappaccini's daughters"?

"Not necessarily," readers of this volume will probably conclude. Analyzing the specifics of women's oppression turns out to be a surprisingly liberating experience. Focusing on the concrete mundane details of women's actual

experience frees us from the trap of essentialism (Shalleck, 1992). The papers in this volume shift the reader's attention from the apparently universal subordination of women to its many variations. There are surely rigid stereotypes in each society, but they are *not the same stereotypes*. What is considered inherently gendered varies from culture to culture. Even where different cultures share a gendered stereotype, moreover, the authors encourage us to ask whether it can be traced to similar social or legal constructs.

What exactly does it require to maintain the ubiquitous subordination of women? The family everywhere is so tightly controlled—by laws, social norms, and internalized constructs of gender. Why does such a “natural” or “inevitable” social order require so much regulation? If subordination is “natural” for women, why must they be so relentlessly suppressed?

Some of the authors are more inclined to consider options, while others propose at least partial solutions. All describe reform efforts—some bold, others tentative, many misguided. All are sharply aware of the tension between rejecting gendered norms and the laws that perpetuate them and neglecting (or worse) women who live by those norms. How can stereotypes be abandoned without abandoning women in stereotypical circumstances? Many more questions are raised than are answered.

Yet this discourse, and the questions it generates, is itself both empowering and indicative of the substantial empowerment that has already taken place. Even in cultures where women are legally beaten and raped, women are challenging gendered hierarchies. This volume should give readers some fresh perspectives on their own family law systems, and the authors hope that it will enable as well as inspire them to continue the crucial, painstaking task of identifying gender bias in family law, and its profound effects on us all.

Barbara Stark
Volume Editor

NOTES

1. Hobbs' notion of deliberately attempting to change prevailing attitudes through law resonates with the statements of intent accompanying Swedish and French family legislation described by Dahlberg and Taub and Dekeuwer-Defossez (this volume).
2. The Hobbs, Maxwell, Astor, and Kabeberi-Macharia papers also contain excellent analyses of domestic violence in their respective contexts.
3. The author's concerns about the “loss of French names” when French women marry foreigners touches upon two important themes raised by Hobbs and Fineman: (1) families in fact constitute communities, and (2) the legal regulation and definition of families legitimates and privileges them.
4. Fineman sees the same unspoken denigration of women in the rhetoric of those suggesting that “stable families” are the solution to poverty in America (pp. 19-23).

5. Still a prominent feature in other systems, this form of dowry is conspicuously absent in the modern western systems described by Dekeuwer-Defossez, Dahlberg and Taub, and the U.S. authors (Sheppard, Fineman, Hobbs, Stark, and Maxwell).
6. The discussions of cohabitation in Sweden and de facto marriage in Japan provide an illuminating contrast.
7. In a different context, Raday reaches a similar conclusion (p. 223).
8. This paper may be particularly instructive when read in conjunction with the articles on family law in Kenya, Israel, and the West Bank.
9. The differences in spelling; that is, "Muslim" or "Moslem," reflect the authors' preferences.

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