

2013

What Price Liberty: The Search for Equality for Kinship-Caregiving Families

Sacha M. Coupet

Loyola University Chicago, School of Law, scoupet@luc.edu

Follow this and additional works at: <http://lawcommons.luc.edu/facpubs>



Part of the [Family Law Commons](#)

Recommended Citation

Coupet, Sacha M., What Price Liberty: The Search for Equality for Kinship-Caregiving Families, 2013 Mich. St. L. Rev. 1249 (2013)

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Faculty Publications & Other Works by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

WHAT PRICE LIBERTY?: THE SEARCH FOR EQUALITY FOR KINSHIP-CAREGIVING FAMILIES

*Sacha M. Coupet**

2013 MICH. ST. L. REV. 1249

TABLE OF CONTENTS

INTRODUCTION	1249
I. EQUALITY	1250
II. LIBERTY	1257
CONCLUSION	1261

INTRODUCTION

There is an inherent, historically rich, and yet, often antagonistic relationship between the values of equality and liberty—two cherished principles upon which our democracy was founded. While equality aims for equal treatment for entities possessing similar traits, liberty favors personal autonomy and freedom of choice, without any regard for, and often not resulting in, an objectively “equal” outcome. There are those who reasonably question whether a society that promotes full equality can simultaneously preserve personal freedom, as the authoritative tinkering necessary to achieve equality ideals tends to run against notions of individual liberty. The tension between these concepts extends beyond political philosophy into family law, where the notion of equality—the state of being treated equally in terms of status, rights, privileges, and protections—sometimes competes with that of liberty or freedom of choice. This Essay explores how equality and liberty may conflict in the context of family law, particularly as it relates to kinship families who exist in the interstices of family law and outside of the traditional conjugal norm, posing principally two questions relating to the theme of this gathering: whether a dynamic kind of equality requires treating families the same, regardless of marital status, and whether certain families trade “liberty” for a tangible, dynamic equality. This Essay also touches upon class and race as factors that influence the search for

* Associate Professor of Law and Director of Research Civitas ChildLaw Center, Loyola University Chicago School of Law. My sincere thanks to Professors Melanie Jacobs and Cynthia Lee Starnes for the invitation to participate in the symposium *In Search of Equality in Family Law*. My thanks as well to the other participants of the symposium for their useful comments and critique and to the *Michigan State Law Review* staff for their editorial assistance.

equality and profoundly shape one's definition and experience of equality and liberty.

I. EQUALITY

We had the pleasure at the commencement of this gathering to hear keynote remarks from Dean David Meyer identifying in a broad historical scope the great strides made over the past few decades in the effort to achieve equality in family law.¹ If those observations were framed from 40,000 feet, so to speak, the ones made in this Essay can be regarded as bringing us closer to ground level as it relates to how certain families are considered in the search for equality and liberty. My observations on equality are focused on two particular factors of inequality that impact kinship families—the continuing centrality of marriage and the resulting segregation of family law matters that such centrality serves to reify.

Again, picking up from Dean Meyer's keynote comments, marriage and distinctions based on marital status may present the next challenge in the search for equality.² Even as marriage is on the decline,³ the specter of marriage continues to shape family law by directing benefits and limiting protections to those within this class.⁴ As some family law scholars, including myself, have noted, a marriage-centric family law regime not only serves to channel benefits to those already more likely to have greater resources at their disposal, but also isolates and stigmatizes those outside of the ambit of marriage.⁵ As I have elsewhere, I argue here that most of our progressive achievements in expanding access to marriage and definitions of parent have thus far only reified the centrality of marriage, or at least romantic coupling.⁶ This is particularly problematic for kinship families who are not regarded as sufficiently akin to conjugal families to share in the identical protections and privileges. Understanding then that marriage is the currency for entry into private family law, these families lack the coin of the realm, so to speak and, as data suggests, are increasingly unlikely to possess

1. See generally David D. Meyer, *Family Law Equality at a Crossroads*, 2013 MICH. ST. L. REV. 1231.

2. *Id.*

3. Trevor Butterworth, *What's Behind the US Decline in Marriage? Pragmatism*, FORBES (June 25, 2013, 3:34 PM), <http://www.forbes.com/sites/trevorbutterworth/2013/06/25/whats-behind-the-us-decline-in-marriage-pragmatism/>.

4. See generally NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2008).

5. *Id.*; see also Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 503-05 (1992).

6. Sacha M. Coupet, *Beyond "Eros": Relative Caregiving, "Agape" Parentage, and the Best Interests of Children*, 20 AM. U. J. GENDER SOC. POL'Y & L. 611, 613 (2012).

it.⁷ The marriage gap then must be understood—and can only be fully appreciated—in the context of our current structure that continues to operate in the “shadow of marriage,” while leaving out a growing number of families. Applying this logic, therefore, if equality requires only that entities with *like* traits be treated *alike*, kinship families might reasonably be treated *differently*, perhaps even without regard to equality, because they fall outside of the protected class of married or quasi-married families.

Take for example, Barbara and Nancy, an unmarried, committed lesbian couple with a child born to Barbara through assisted reproductive technology (ART) before she began dating Nancy. Barbara is accepted as the biological mother, having given birth to the child, and Nancy may be either a *de facto* parent, parent by estoppel,⁸ or maybe even a parent through second-parent adoption in those jurisdictions where that is available.⁹ Contrast them with Barbara, an adult daughter who, for the sake of this analogy, also conceived a child through ART, and her mother, Nana, with whom she lives, shares household expenses, and shares childcare responsibilities. Like Barbara and Nancy, Barbara and Nana are effectively co-parenting the child in question, who in all likelihood would have developed a strong emotional attachment to his or her caregivers. For most day-to-day matters, and, most importantly, if the relationship with Barbara remains intact, neither Nancy nor Nana’s status as a legal parent matters. Both Nancy and Nana might regard themselves as a caregiver vested with legal rights and protections and will likely be regarded as parents by observers to the degree that they actually assume caregiving and parenting tasks. It is typically when there is a disruption to the underlying relationship to the legal parent that their legal status actually matters and where we see two distinct paths that these cases will take based upon each caregiver’s proximity to a marital norm.

At present, we have two different systems that are typically called upon to address the claims that Nancy or Nana might raise with respect to the child they are co-parenting. For example, while Nancy might find herself contemplated in the statute as a second parent, it will not be as easy for

7. Jason DeParle, *Two Classes, Divided by “I Do,”* N.Y. TIMES (July 14, 2012), <http://www.nytimes.com/2012/07/15/us/two-classes-in-america-divided-by-i-do.html?pagewanted=all> (observing that “[c]ollege-educated Americans . . . are increasingly likely to marry one another,” while those “[l]ess-educated . . . are growing less likely to marry at all”).

8. Sarah H. Ramsey, *Constructing Parenthood for Stepparents: Parents by Estoppel and De Facto Parents Under the American Law Institute’s Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL’Y 285, 291-92 (2001).

9. See e.g., *In re K.M.*, 653 N.E.2d 888 (Ill. App. Ct. 1995); *Sharon S. v. Superior Court*, 73 P.3d 554 (Cal. 2003); *In re Tammy*, 619 N.E.2d 315 (Mass. 1993); see also MASS. GEN. L. ch. 210 § 1 (2008) (excluding a class of relatives—brothers, sisters, aunts, and uncles—from those eligible to adopt). While not specifically excluding relatives, the Vermont statute limits second-parent adoption to family units consisting of a parent and the parent’s partner and adoption by the partner of a parent. VT. STAT. ANN. tit. 15A, § 1-102 (2013).

Nana, although both are essentially carrying out the same functions of co-parenting.¹⁰ Because Barbara and her partner Nancy are more analogous to the archetypal mother and father progenitor, Nancy's claims quite likely would be focused on Nancy's parental conduct and her relationship with the child. The law, lending a sort of legitimacy to the underlying quasi-marital relationship, might simply look to substitute Nancy, a female, for any reference to a father or male partner to a mother.¹¹ Nana's claims, however, would likely trigger an inquiry into Barbara's fitness as a parent.¹² Indeed, her ability to petition for legal recognition would depend on whether Barbara had dropped the ball with respect to adequate parenting, thus opening the door to Nana's co-parental claims.

Because the law continues to regard Nana and Barbara as something *other* than an intact family unit, or at least other than co-parents with protected relationships to the children in their care, there is a belief that our cherished sense of equality has not been offended (remember, equality requires only that we treat *like* things *alike*). The focus of the equality query would likely be limited to whether the law was treating the lesbian couple as it would have a heterosexual couple and, having answered that in the affirmative, the search for equality would likely end there. In this sense, the *pretense* of equality actually masks a pernicious and rigid hierarchy that is antithetical to the concept of equality we believe family law ought to ensure. This inequality is reflected in a more concrete manner with respect to the physically segregated spaces in which grievances like Nana's are heard and the operative rules that apply to kinship-caregiving families given the fora to which they are generally directed. Within the context of a marriage-centric family law structure, kinship-caregiving families must submit to an entirely different system governed by different rules, rights, privileges, and protections than those available to married or quasi-married couples. Such segregation makes it only harder to achieve genuine and meaningful equality.

The three fora in which family matters, such as those impacting Barbara and Nancy or Nana, could be heard are domestic relations or family

10. For example, California's second-parent adoption statute limits standing to stepparents and domestic partners. See CAL. FAM. CODE § 9000(a), (b) (West 2013).

11. Using California as an example, the second-parent adoption statute focuses on the stepparent or domestic partner's petition, not the fitness of the biological parent, whose parental rights are not jeopardized in the context of the adoption. CAL. FAM. CODE §§ 9000-9007. Second-parent or co-parent adoption statutes are modeled after stepparent adoption ones, but are inclusive of same-sex partners.

12. Nana's adoption, which is not conceived as analogous to stepparent adoption, rests on the termination of Barbara's parental rights, which requires an inquiry into Barbara's fitness. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 760 (1982) (stating that "until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship").

court, probate court, and dependency court. The first of these, domestic relations, is the forum in which matters concerning marriage, divorce, and parenthood are addressed. Although family court is criticized for agonizingly long case dispositions, overly cluttered court dockets, and far too few resources to address the growing number of cases, a great deal of attention and pressure from the private bar has prompted innovative reform in the ways in which traditional family law cases are addressed. For example, increased use of alternative dispute resolution, particularly collaborative law practice, has empowered litigants seeking justice in family court.¹³ At its core, however, family court remains primarily marriage focused and continues to consider cases that come before it within the lens of marriage or certainly in the “shadow of marriage.” There is insufficient room in this brief Essay to discuss at length how marriage has created the backdrop against which even non-marital claims are heard. As I, and other family law scholars, have observed elsewhere, the operative rules that now extend to unmarried couples simply extend the marriage framework to those who might otherwise not benefit from it, without necessarily detaching benefits and responsibilities from marriage itself.¹⁴ I offer my own home state of Illinois as but one example of a marriage-centric body of family law. In Illinois, almost all child-custody claims are governed by the Illinois Marriage and Dissolution of Marriage Act (IMDMA)¹⁵—despite the fact that nearly 40% of all births in Illinois are to *unmarried* women and that marriage rates in Illinois, as they are elsewhere across the country, are at all-time record lows.¹⁶

Kinship-caregiver claims are generally not brought in domestic relations court because such cases rarely, if ever, deal with underlying matters of marriage or divorce. This is not to say that kinship-caregiver claims are necessarily barred from family court, but since so few of these cases present with circumstances that fit the narrow standing provisions of family court, they must bring their claims elsewhere when they seek legal validation and acknowledgment of their custodial roles.¹⁷ Instead of having their claims

13. Dafna Lavi, *Can the Leopard Change His Spots?! Reflections on the ‘Collaborative Law’ Revolution and Collaborative Advocacy*, 13 CARDOZO J. CONFLICT RESOL. 61, 65-67 (2011).

14. See, e.g., POLIKOFF, *supra* note 4; Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236 (2006); Melissa Murray, *What’s So New About the New Illegitimacy*, 20 AM. U. J. GENDER SOC. POL’Y & L. 387, 431-35 (2012).

15. 750 ILL. COMP. STAT. ANN. 5/601 (West Supp. 2013).

16. Butterworth, *supra* note 3; *Births to Unmarried Women*, KIDS COUNT DATA CENTER, <http://datacenter.kidscount.org/data/tables/7-births-to-unmarried-women?loc=1&loct=2#detailed/2/10-19,2,20-29,3,30-39,4,40-49,5,50-52,6-9/false/867,133,38,35,18/any/258> (last updated Sept. 2013).

17. 750 ILL. COMP. STAT. ANN. 5/601(b)(4)(A)-(C) (providing standing for “a grandparent who is a parent or stepparent of a deceased parent, by filing a petition, if one or more of” a fairly narrow set of conditions existed at the time of the parent’s death).

heard in family court, kinship caregivers are often shunted to probate court, a forum I suspect I would not be alone in characterizing as “the wild west” as it relates to child-custody claims. Probate court has traditionally been the forum in which claims to a decedent’s estate were addressed, including guardianship of the estate and/or of minors. Minor guardianships were historically straightforward cases involving deceased or incapacitated parents. Most cases were uncontested, and the statute dealing with minor guardianships established a simplified procedure, with petitioners at times relying on fill-in-the-blank forms.¹⁸ The 1990s marked a noticeable change in the kinds of cases brought into Probate Court.¹⁹ “Probate judges found themselves inundated with complex and bitterly contested minor guardianship disputes, caused by a confluence of factors, including a significant shift in” child welfare policy and practice as well as significant cultural changes.²⁰ Factors including parental substance abuse, incarceration, “mental illness, poverty, [and] joblessness, have all contributed to [the] phenomenon” of relatives petitioning to become guardians of relative minors.²¹ These cases, although ostensibly private in nature, bear a striking resemblance to the public cases addressed in child-welfare or dependency court and, indeed, some relative caregivers were encouraged to petition in probate court by state child protective service workers who diverted these cases from dependency to probate.²² Again using Illinois as an example, prior to recent statutory amendments, parents were routinely hailed into probate court to defend against relative caregivers’ claims of unfitness, as fitness was the only applicable standard governing the appointment of a minor guardian.²³ Two years ago, however, the law changed to address the shift in the kinds of cases coming into probate court, making it even easier for relative caregivers to gain physical custody of children.²⁴ Both prior to the amendment and after, there are

18. ILL. DEP’T OF CHILD. & FAMILY SERVS., APPOINTMENT OF SHORT-TERM GUARDIAN (2009), available at <http://www.state.il.us/DCFS/docs/CFS%20444-2%20Appointment%20of%20Short-Term%20Guardian.pdf>; 755 ILL. COMP. STAT. ANN. 5/11-5.4.

19. Chi. Volunteer Legal Servs., *Minor Guardianship and the Illinois Probate Act*, ILL. LEGAL ADVOC., http://www.illinoislegaladvocate.org/index.cfm?fuseaction=home.dsp_content&contentID=8015 (last updated Oct. 2011).

20. *Id.*

21. *Id.*; see also Susan J. Kelley, Deborah M. Whitley & Peter E. Campos, *Behavior Problems in Children Raised by Grandmothers: The Role of Caregiver Distress, Family Resources, and the Home Environment*, 33 CHILD. & YOUTH SERVS. REV. 2138, 2139 (2011).

22. Ofelia Casillas & Dahleen Glanton, *Is DCFS Diverting Cases to Save Costs?*, CHI. TRIB. (Apr. 5, 2010), http://articles.chicagotribune.com/2010-04-05/news/ct-met-dcfs-family-court-20100405_1_dcfs-probate-juvenile-court.

23. Chi. Volunteer Legal Servs., *supra* note 19.

24. 755 ILL. COMP. STAT. ANN. 5/11-5 (West 2013).

fewer protections in probate court than in family court for parents, non-parent caregivers, and the children in their care.

The amendment to the Probate Act eliminated the standard of parental fitness for appointment of a guardian²⁵ and provided that a nonparent has standing to petition for guardianship if each parent:

- “voluntarily relinquished physical custody of the [child]” and is unwilling and unable “to make and carry out day-to-day child care decisions”;²⁶ or
- failed to appear for a hearing after proper notice and is unwilling and unable “to make and carry out day-to-day child care decisions” or consented to the guardianship.²⁷

Illinois’s amended probate law now also provides a way for parents to discharge or terminate a guardianship.²⁸ Once a “parent establishes, by a preponderance of the evidence, that [there has been] a material change [of] circumstances,” the guardian has to prove, by clear and convincing evidence, that terminating the guardianship is not in the child’s best interests.²⁹ These non-exclusive, non-economic factors are to be used by the court in determining those best interests:

- (1) The interaction and interrelationship of the minor with the parent and members of the parent’s household.
- (2) The ability of the parent to provide a safe, nurturing environment for the minor.
- (3) The relative stability of the parties and the minor.
- (4) The minor’s adjustment to his or her home, school, and community, including the length of time that the minor has lived with the parent or the guardian.
- (5) The nature and extent of visitation between the parent and the minor and the guardian’s ability and willingness to facilitate visitation.³⁰

Prior to the 2011 amendment, the statute provided that any person could petition for guardianship and, if he or she could persuade the court that a parent was unfit and that his or her appointment as a guardian was in the child’s best interests, a nonparent could be appointed as a guardian, thus sharing parental rights and responsibilities with a legal parent.³¹ Lending credence to the “wild west” characterization, once a guardianship was established, it was unclear, inconsistent, and unpredictable how exactly a guardian could be discharged and the guardianship itself terminated.

25. *Id.* at 5/11-5(b).

26. *Id.*

27. *Id.*

28. *Id.* at 5/11-14.1(b).

29. *Id.*

30. *Id.* at 5/11-14.1(b)(1)-(5).

31. *Chi. Volunteer Legal Servs.*, *supra* note 19.

Dependency or child-welfare court is the forum in which the state's direct supervision (most would argue, coercion) of parental conduct is most obvious. It is here where many kinship-caregiving arrangements actually come into existence, for example, when judges approve the placement of children with kin upon formal removal from the parents' home. Dependency court, unlike family court, is disproportionately populated by parents who are unmarried, poor, and persons of color.³² As noted above, kinship-caregiving cases are often diverted from dependency to probate by child protective service workers who recommend that kin assume custody, even informally, as an alternative to the commencement of a dependency case.³³ While avoiding entry into the child-welfare system might seem beneficial, kinship caregivers who assume custody through this route are deprived of all of the support, services, and therapeutic resources that foster parents of children who are adjudicated dependent would receive.³⁴ It is no small matter that the relationship between the parent and the state is radically different in dependency court than in family or probate.³⁵ The level and quality of state intrusion in dependency court is unlike that observed elsewhere. For one, even before child-welfare cases are adjudicated and come under the formal jurisdiction of the dependency court, state child-welfare authorities may remove adults or children from the family home or impose other onerous restrictions on families under the guise of preventative safety planning.³⁶ This practice is something the Seventh Circuit Court of Appeals has sanctioned as constitutional, but would surely not be tolerated elsewhere.³⁷

Anyone who has spent time visiting these three courts can attest to a palpably distinct feel in each one that signals that some kind of hierarchy is at play—something made more clearly visible by observing the protections (or lack thereof) for parents, quasi-parents, and children in each distinct setting and the relationship of the family to the state that differs in each. Families in domestic relations court, because they typically represent the marital norm around which the governing rules were drafted, are less likely

32. Veena Srinivasa, Note, *Sunshine for D.C.'s Children: Opening Dependency Court Proceedings and Records*, 18 GEO. J. ON POVERTY L. & POL'Y 79, 97 (2010) (observing "the fact that the dependency court serves mostly Black clients").

33. See Casillas & Glanton, *supra* note 22.

34. *Id.*

35. *Id.*

36. Safety plans are described by the Illinois Department of Children and Family Services as being developed with the cooperation and involvement of the family and can include a variety of forms such as the removal of the caretaker or child, or supervision of contact with the child. See *Child Protection*, ILL. DEP'T CHILD. & FAM. SERVICES (2009), <http://www.state.il.us/dcf/child/index.shtml>. Parent advocates, however, describe them as coercive and involuntary. See *Background Briefing: The Safety Plan Policies the FDC Seeks to Change*, FAM. DEF. CENTER, <http://www.familydefensecenter.net/background-briefing-the-pending-petition.html> (last visited Nov. 20, 2013).

37. *Dupuy v. Samuels*, 465 F.3d 757, 760 (7th Cir. 2006).

to perceive any inequality in either the setting in which their claims are being addressed or the rules that are being applied to them. Those families in probate or dependency court, however, are only questionably on equal footing to families in family court when they seek to have family matters addressed. With fewer protections in probate and dependency court for parents, caregivers, and children, an equality ideal remains elusive.

II. LIBERTY

Speaking now to the tension between the values of equality and liberty, one question I pose here is whether some families appear to enjoy liberty (even diminished) at the expense of a dynamic kind of equality wherein families are treated differently according to their needs. Relatedly, would some families choose to trade liberty for much needed support and assistance? To better answer this question, and avoid making the tempting assumption that all families approach this from the same vantage, it is useful to inquire how different families define, perceive, and experience both equality and liberty. In a sense, liberty or freedom in this context might be thought of as “equality of choice”—asking whether families are all equal in their ability to willfully invite the state into their lives—and “equality of opportunity”—asking whether families are equal in their ability to live detached from the state. Not surprisingly, poor families (disproportionately, families of color in which kinship arrangements are most prevalent) are not similarly situated in their ability to be “liberated” from the state, and their views on equality are likely highly shaped by their lack of access to resources and a dependency on the state to meet many unmet needs.³⁸ Unlike families in domestic relations court, those in the more public fora of probate or dependency court may be less sensitive to matters of liberty, not because they do not cherish freedom in principle, but because of their more intimate relationship to the state. Liberty may hold less currency for families whose liberty is already diminished by virtue of dependence on the state. The structure and function of probate and dependency court, where these families are disproportionately served, merely reflects this diminished liberty.

I offer an anecdote to shed light on the relationship between equality and liberty to which I am alluding, which illustrates one way in which beliefs about autonomy, freedom, and liberty can surface in the broader discourse about equality among families. It is also meant to reveal how our

38. Sacha M. Coupet, “Ain’t I a Parent?”: *The Exclusion of Kinship Caregivers from the Debate over Expansions of Parenthood*, 34 N.Y.U. REV. L. & SOC. CHANGE 595, 597 (2010); Elvia R. Arriola, *Law and the Family of Choice and Need*, 35 U. LOUISVILLE J. FAM. L. 691, 696-97 (1997); Gilbert A. Holmes, *The Extended Family System in the Black Community: A Child-Centered Model for Adoption Policy*, 68 TEMP. L. REV. 1649, 1658-67 (1995).

orientation towards liberty and freedom may affect our belief in an equality ideal and how underlying systemic forces contribute to inequality. I had the pleasure last summer of participating on a panel of child-welfare experts on the topic of kinship caregivers at the twentieth annual colloquium of the American Professional Society on the Abuse of Children. My criticism of statutory amendments that exempted from the jurisdiction of dependency court cases in which a relative minor was abandoned to the care of a grandparent, aunt, or other responsible relative was met by my co-panelists—one a family law and child-welfare scholar and the other a juvenile court judge—with something close to horror. The family law scholar was, and perhaps reasonably so, wary of increased state supervision of yet even more families, particularly poor families of color. The juvenile court judge objected to my critique, commenting that she would not wish involvement in the child-welfare system on her worst enemy. In their defense of the statute that left the vast majority of kinship-caregiving families to the vagaries of probate court—a system in which caregivers would not receive any of the support or assistance available in dependency court—my fellow panelists were essentially prioritizing liberty *from* the state over intimacy *with* the state, something I assert would help in creating meaningful equality among families.

I recall thinking then, as I do now, that perhaps the vehement defense of liberty expressed by the other panelists came from an insufficient understanding of the ways in which these kinship families were themselves understanding their relationship to the state and assessing the merits of liberty therefrom. My own understanding developed from years of working within this community and hearing time and again from kinship caregivers how they looked to the state for much needed instrumental support that was otherwise unavailable and usually made available only through subordination to the state—effectively, an abandonment of liberty. My assumptions about kinship caregivers' orientation to liberty are echoed in the work of Professor Dorothy Roberts whose small-scale survey research in the Woodlawn community of Chicago explored the sociopolitical impact of the spatial concentrations of child-welfare supervision in poor, black neighborhoods and, most importantly, highlighted paradoxical views about such families' relationships to the state.³⁹ When the women in Professor Roberts' study were asked to rate the child-welfare service involvement in their community as “too involved, not involved enough, or involved just the right amount,” she notes that she “expected everyone to shout, ‘Too involved!’ and demand that the agency leave them alone,” essentially, the same sentiment expressed by my

39. Dorothy E. Roberts, *Child Welfare's Paradox*, 49 WM. & MARY L. REV. 881, 882-85 (2007).

co-panelists.⁴⁰ To Professor Roberts's surprise, however, most of the women answered that the state agency's presence was *not* enough.⁴¹ Although they understood, and resented, the state's coercive role, these families, like the kinship-caregiving families with whom I have worked, desired *greater* state involvement⁴²—which can be read as diminished liberty—in order to assist them in meeting material needs.

Although not necessarily child or family law related, the heated debate sparked by MSNBC commentator Melissa Harris-Perry's "Lean Forward" advertisement also captures this aspect of the tension between freedom and equality. The advertisement, in which Dr. Harris-Perry highlights a collective responsibility for children's education, criticizes "a private notion of children" that she believes frustrates efforts to build community support for children.⁴³ She notes:

We have never invested as much in public education as we should have because we've always had kind of a private notion of children. . . . We haven't had a very collective notion of "these are our children." . . . So part of it is we have to break through our kind of private idea that "kids belong to their parents," or "kids belong to their families," and recognize that kids belong to whole communities.⁴⁴

The communitarian norm the advertisement espoused was roundly attacked by conservatives who regarded Dr. Harris-Perry as infringing on a deeply cherished individual liberty—a parent's right to care, custody, and control of his or her child. In addition to harsh criticism from conservative pundits including Sarah Palin who tweeted "Unflippingbelievable,"⁴⁵ Rush Limbaugh, who noted that Harris-Perry's beliefs were "as old as communist genocide,"⁴⁶ and Fox News' Eric Bolling, who likened the ad to a declaration of "war on the American fabric,"⁴⁷ the angry comments from ordinary readers posted in articles reporting on the story reflect the sharply differing

40. *Id.* at 892; Symposium, *Equality in Family Law*, MICH. ST. L. REV. (Apr. 11, 2013).

41. Roberts, *supra* note 39, at 892.

42. *Id.* at 893.

43. David Freedlander, *Melissa Harris-Perry and the Firestorm over 'Collective' Parenting*, DAILY BEAST (Apr. 11, 2013), <http://www.thedailybeast.com/articles/2013/04/11/melissa-harris-perry-and-the-firestorm-over-collective-parenting.html>.

44. Erika Benton-Martin, *Sarah Palin, Rush Limbaugh Bash Melissa Harris Perry's New Ad*, ATLANTA DAILY WORLD (Apr. 10, 2013), <http://www.atlantadailyworld.com/201304105177/Politics/sarah-palin-rush-limbaugh-bash-melissa-harris-perry-s-new-ad>.

45. Freedlander, *supra* note 43.

46. Benton-Martin, *supra* note 44.

47. Matt Wilstein, "MSNBC Has Declared War" On America: Fox's The Five-Team Goes Nuclear over Harris-Perry's Promo, MEDIAITE (Apr. 9, 2013), <http://www.mediaite.com/tv/msnbc-has-declared-war-on-america-foxs-the-five-team-goes-nuclear-over-harris-perrys-promo/>.

views we hold on this issue. Said one commenter, “What Mrs. Harris-Perry is saying leads [sic] the principle thought that parents should give up their rights and relinquish them to the community/government.”⁴⁸ Said another, “What Melissa said makes perfect sense to a person that does not believe in free will or individual liberty. She just lives in the wrong country.”⁴⁹ One article captured the underlying tension regarding freedom *from* or intimacy *with* the state in noting, “I think most Americans, particularly parents . . . probably don’t want to live in Harris-Perry’s fantasy-collectivist dream world where the lines of parent, neighbor, and state all blur together.”⁵⁰ The vitriolic response that this thirty-second promo generated reaffirms for me the belief that to better understand notions of inequality, one must examine the ways in which different communities conceptualize and experience liberty.

The notion of autonomy or freedom *from* the state—and perhaps how vociferously one embraces the concept of personal liberty—is a dimension of a social and economic hierarchy that carries over into family law. In communities where material needs are met privately with some distance from or only volitional involvement of the state, felt notions of freedom and liberty run strong and deep, perhaps even trumping notions of equality. This is not the case in communities with substantial unmet needs. Unlike families with resources, poor families are less likely to embrace as ideal the notion of freedom *from* the state and may indeed define dynamic equality as one that tempers liberty with tangible support delivered by the state.⁵¹ This is not meant to suggest that some families, because they do not prioritize liberty above intimacy with the state, value their children *less* than others. Rather, families for whom the state has been a source of instrumental support—the means by which they may see themselves as achieving equality—may be more willing to trade so-called liberty for equality. It remains to be explored whether the way in which families conceive liberty is a product of historical or sociological inequalities or a direct product of the systems to which certain families have been shunted.

48. Armyvet10, Comment to *Sarah Palin on Harris-Perrys’ ‘Kids Belong to Their Communities’ Comment: ‘Unflipping Believable,’* NEWSBUSTERS (Apr. 7, 2013), <http://newsbusters.org/blogs/noel-sheppard/2013/04/07/palin-harris-perrys-kids-belong-their-communities-comment-unflipping-> [hereinafter *Sarah Palin on Harris-Perry*].

49. Brian Barkley, Comment to *Sarah Palin on Harris-Perry*, *supra* note 48.

50. Garrett Quinn, *Lean Forward . . . Collectively: Melissa Harris-Perry’s MSNBC Ad Says All of Your Children Belong to Us*, MEDIAITE (Apr. 6, 2013), <http://www.mediaite.com/tv/lean-forward-collectively-melissa-harris-perrys-msnbc-ad-says-all-of-your-children-belong-to-us/>.

51. See Roberts, *supra* note 39, at 882.

CONCLUSION

However vaunted the values of equality and liberty as cherished principles underlying our ostensibly democratic systems, one may reasonably argue that when families find themselves in strikingly distinct fora governed by very different rights, rules, privileges, and protections, such segregation itself reflects a certain *inequality*. It is not surprising for us to see, but still troubling nonetheless, that such inequality is accompanied by diminished liberty or freedom. The strikingly different ways in which sometimes quite similar family matters are characterized and addressed reflect a hierarchy tied to marriage or quasi-marriage, privileging those whose marital ties bring them into family court rather than probate or dependency court. As the data reveals, such families are increasingly *less* likely to be poor families, particularly families of color.⁵² There are countless ways in which a more dynamic equality could be achieved, one in which Nana is accorded the same rights and protections as Nancy and perhaps addressed in the same forum with all the attendant benefits and responsibilities. Similarly, there are countless ways in which the diminished liberty experienced by poor families whose disputes are channeled into more punitive and/or less regulated fora might be addressed without poor families being coerced into trading liberty for some measure of economic equality. I leave for another day a longer discussion of the merits and costs of these proposals, but hasten to add that equality will not be a reality in family law without such changes.

52. DeParle, *supra* note 7.

