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Socio-Legal Definitions of Family

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ABSTRACT

Recent decisions in family law cases suggest that some courts are ready to broaden the judicial definition of "family," and to create or accept a definition that extends the traditional notion of what constitutes a "family." This provides sociologists with an opportunity to work within or coordinate with the legal system in redefining "family" to provide a more inclusive concept which courts could then apply.

As "family" evolves in contemporary society, our definitions of family are expanding to include single-parent families, blended families, gay families, and various alternative constructions of the social reality of units of individuals who live together and take on financial and emotional responsibility for each other. Sociologists have been relatively willing and able to deal with, and in many instances have helped to create and legitimize, these expanding definitions of family. However, the definitions sociologists often create, accept, and use may not be those of the wider society; we are often on top of the wheel as it turns.

The law, as a basically conservative institution, is sometimes slower to recognize and incorporate new definitions of basic institutions. However, during the last decade, various courts have been wrestling with expanded definitions of "family." These definitions are important because courts are often the final arbiters of marriage arrangements, parenting arrangements, foster parenting

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arrangements, property division upon divorce, custody and visitation arrangements, and many other matters that affect individuals in families.¹

The purpose of this paper is to examine some ways in which courts have defined "family," and to explore the role that sociologists can have as consultants to lawyers and/or courts in educating the legal community to the sociological reality of what "family" might include. It also makes some suggestions as to how a new and expanded definition of family could be used to help nonstandard families gain some of the legal rights normally accorded without question to more traditional family units.

It is important to note that, while domestic relations law is a creature of statute in specific jurisdictions, and primarily a matter of state law and, therefore, state legislative action, the role of the judge is to interpret what legislatures create. Sociologists who wish to influence the emerging definitions of "family" under the law may find working with legislatures their most productive arena. In this paper, however, I am interested in what courts (judges) *do* with the statutory parameters they are given. Additionally, as will be evident from the cases cited, some issues that involve defining family are not a matter of domestic relations (state) law, but of interpretation of things such as zoning regulations that originate at a local rather than a state level. Thus, the types of official pronouncements that can affect how people are allowed to form and/or live in families are highly varied and differ tremendously by jurisdiction. It is not the intent of this paper to provide a compendium of current domestic relations statutes jurisdiction by jurisdiction; that can be obtained by perusing appropriate state law, which is available in most libraries. Rather, I am interested in the social reality courts construct as they attempt to interpret the meanings of statutes and ordinances that are involved when courts carry out their function of making case-by-case determinations of what a "family" is when confronted with a real case or controversy.

Emerging Case Law

The fairly recent case of *Borough of Glassboro v. Vallorosi*² provides an example of what courts have been up to lately in terms of defining "family." A group of ten male college students was held to constitute a "family" within the meaning of a restrictive zoning ordinance, by the Supreme Court of New Jersey. The borough of Glassboro had sought an injunction to prevent the students from using or occupying a home located in one of the borough's residential districts under a municipal zoning ordinance limiting residence in the borough's residential districts to stable and permanent "single housekeeping units" that constituted either a "traditional family unit" or its "functional equivalent." (With

statutes drafted in such language, it's no wonder sociologists can feel at home in the legal thickets; the legislator's aide who came up with the "functional equivalent" terminology was undoubtedly suffering from a relapse into SOC 100.) The house was owned by one student's parents through a real estate investment partnership. The students, most of whom were sophomores, shared the house's one kitchen, as well as household chores, grocery shopping, and yard work. They maintained a common checking account to pay for food and other household bills. The students all intended to remain tenants as long as they were enrolled at Glassboro State College. The court concluded that these facts reflected a plan by the students to live together for three years under conditions that corresponded substantially to the ordinance's requirement of a "stable and permanent living unit," and thus upheld a lower court's decision.

The recent decision in *Vallorosi* is in accord with a series of decisions. In *Carroll v. City of Miami Beach*³, a district court in Florida decided that a local ordinance's definition of family, based, as in *Vallorosi*, on the concept of a "single housekeeping unit," was broad enough to include a small group of novices who were to live together under the supervision of a Mother Superior in a house owned by the Roman Catholic Diocese of Miami. In *Village of Belle Terre v. Borass*,⁴ the Supreme Court held that a Long Island ordinance incorporating the "single housekeeping unit" definition of family would allow six students at SUNY Stony Brook to be a "family" for purposes of meeting zoning requirements, thus providing precedent for *Vallorosi* and suggesting that family can indeed be defined according to the concept of a functional equivalent.

Not all recent decisions, however, have accepted the precedent, and specific language can evade the intent signalled by the Court in *Borass*. In 1981, the Supreme Court of Maine held, in *Penobscot Area Housing Development Corp. v. City of Brewer*,⁵ that a group home population of six mentally retarded adults and rotating pairs of nonresidential supervisory employees who would be in the home in shifts did *not* meet the local zoning ordinance requirements for single-family dwellings, because the local ordinance defined "family" as follows:

"Family" is a single individual doing his own cooking, and living upon the premises as a separate housekeeping unit, or a collective body of persons doing their own cooking and living together upon the premises as a separate housekeeping unit in a domestic relationship based upon birth, marriage, or other domestic bond as distinguished from a group occupying a boarding house, lodging house, club, fraternity or hotel.

While the Maine court arguably could have seen the residents and staff of the group home as the functional equivalent of a family even under that language,

had it chosen to interpret the roles of the individuals with each other as comprising the functional equivalent of a "domestic bond," such a reading could be criticized as judicial activism since there is no mention in the statute of a "functional equivalent" of a domestic bond. Instead, the court chose, reasonably, according to judicial practice, to interpret the language according to its "plain meaning," which did not encompass the idea of functional equivalency. The court said, "the concept of 'domestic bond' implies the existence of a *traditional* [my emphasis] family-like structure of household authority," and that shift rotation of supervisory employees did not meet that criterion, as "[s]uch a structure would include one or more *resident* [my emphasis] authority figures charged with the responsibility of maintaining a separate housekeeping unit and regulating the activity and duties of the other residents." This resident authority figure's role, the court says, would by definition include "stabilizing and coordinating household activity in a way that is consistent with family values and a family style of life."

How can one reconcile *Penobscot* with the principle utilized in *Carroll*, adopted in *Borass*, and followed in *Vallorosi*? Certainly, one could argue that it is merely a matter of statutory interpretation, that is, a parsing of the language specifically adopted by appropriate legislative bodies in creating the ordinances in question. But, as I suggested above, there was also the possibility that the Maine court could have presumed the existence of the idea of functional equivalency when applied to "domestic bond" terminology in the Brewer statute because the idea of using the concept of functional equivalency had already been used in similar zoning restriction cases. Arguably, the Maine court was right; had the city of Brewer intended to recognize the concept of functional equivalency, it could have done so in the language of the statute itself. However, zoning statutes are often of long standing, and nothing prevents courts from introducing modern notions in their interpretations.

A less charitable, but perhaps more sociologically based, suggestion is that nuns and college students are perceived to make better neighbors than are mentally retarded adults and their supervisory personnel. Perhaps there is something different in the supervision of novices and the supervision of mentally retarded adults trying to adapt to independent living conditions.⁶ Perhaps what we have here is a judicially approved, and therefore more sophisticated and sanitized, version of "NIMBY" ("Not In My Back Yard").

What should be inducible from these examples is the power of courts to interpret, and therefore create, definitions of "family" as they go about their duty of determining the "true" meaning of the legislatively produced statutes and ordinances under which we live. If reality is a social construction, courts are doing their part.⁷

Given current legal definitions, what is requisite today to be a family? The aforementioned cases suggest some basic elements:

1. Live together, sharing one kitchen.
2. Have a joint checking account or some less formal but shared financial arrangement for handling household expenses.⁸
3. Do the work of the household together.
4. Intend to remain together as a family, at least for a while.

There is one other element that stems essentially from the common law:

5. "Holding oneself out to the community" as a family.

A case that examines this idea with regard to marriage and family is *Ellam v. Ellam*.⁹ Here is the court's opinion in that case, quoted somewhat extensively as an example of judicial socio-logic (and a slice of daily life):

Plaintiff instituted suit March 1, 1974, seeking a divorce on the grounds of separation. Defendant's amended counterclaim for divorce charges the plaintiff with desertion.

The parties, who are childless, purchased a home in Elizabeth and commenced moving into their home in June 1972. They were experiencing severe matrimonial difficulties at the time and, according to the plaintiff, he moved to his mother's home in nearby Roselle on or about July 5 and did not thereafter live with defendant.

Although his testimony that the parties thereafter never had sexual relations was not challenged, on cross-examination it developed that the parties nevertheless maintained many aspects of their relationship until May 1973.

On weekday mornings plaintiff's mother would drive him in her car from her home to the corner of his street in Elizabeth. He would walk to his house, let himself in, pet the dog, occasionally kiss his wife "good morning" and, as he put it, "make sure everything was OK." He would then leave the house, take his car out of the garage and proceed to work. When he finished work, or the night classes he was attending, he returned to the matrimonial home. He would play with his dog, converse with defendant and, after she retired, watch television until approximately 12:30 a.m. At that time his mother would arrive to pick him up in her car and take him to her home to sleep, leaving his car in the garage at the marital home. Plaintiff would spend weekends at the marital home doing housecleaning, cutting the lawn and performing similar household chores. He occasionally ate his meals

there, bringing the food with him. On other occasions the parties ate together at plaintiff's mother's home. During this period of time the parties as a couple continued to accept social engagements and once she accompanied him out-of-state to attend a convention lasting several days. They shared a hotel room but did not engage in sexual relations.

Plaintiff, in explaining his continued presence in the matrimonial home, stated that he loved his wife, loved his dog even more, felt obliged to maintain the premises, and, as he stresses, did not want the neighbors to know that he and defendant had separated.

The question presented is whether the foregoing constitutes living "separate and apart in different habitations" within the meaning of N.J.S.A. 2A:34-2(d).

The court construes the New Jersey statute in question by looking at similar cases involving similar and slightly different laws in sister jurisdictions.

In *DeRienzo v. DeRienzo*, 119 N.J.Super. 192, 290 A.2d 742 (Ch. Div.1972), it was held that the words "in different habitations" precluded the granting of a divorce where the parties occupied the same house, although plaintiff slept alone in a locked bedroom for which only he had the key. This language in our statute was the basis for the court distinguishing the holding in that case from cases holding to the contrary in jurisdictions which also recognize separation as grounds for divorce. Thus in Delaware, where the statute requires that the parties live "separate and apart without any cohabitation" (13 Del.C. §1522(11)), it was held that a divorce could be granted where the parties occupied the same residence, there being no provision in that statute mandating separate dwellings. *Heckman v. Heckman*, 245 A.2d 550 (Del.Sup.Ct.1968). A similar holding was reached under the District of Columbia statute which stated the grounds to be a "voluntary separation from bed and board for five consecutive years without cohabitation" (D.C.Code (1940) §16-403, 49 Stat. 539). *Hawkins v. Hawkins*, 89 U.S.App.D.C. 1968). In those jurisdictions the test is not separate roofs, but separate lives. See *Hurd v. Hurd*, 86 U.S.App.D.C. 62, 179 F.2d 68 (D.C.Cir.1949). Since every word and clause of our statute should be given effect, and a construction which renders any part superfluous must be avoided, *Hoffman v. Hock*, 8 N.J. 397, 86 A.2d 121 (1952), our statute clearly requires both. That is, the parties must occupy "different habitations" and must live "separate and apart."

Here plaintiff arguably resided with his mother, since he slept, took some meals and kept his clothes, all at her home. But with the additional exception of sexual intercourse, the parties continued their relationship substantially the same as prior to his moving. When he was not working or attending classes, basically all of plaintiff's waking hours were spent with defendant.

His plea that their social intercourse was strained and rife with arguments goes to the quality of their association, not its substance. Generally speaking, the policy of our present divorce law is to terminate dead marriages. *Brittner v. Brittner*, 124 N.J.Super. 259, 306 A.2d 83 (Ch.Div.1973). But the Legislature, following the recommendation of the Divorce Law Study Commission in requiring the objective proof of the lack of viability in the relationship, has laid down specific criteria in determining what marriages are eligible for dissolution. See Final Report of the Divorce Law Study Commission 73 (1970). Thus, if the parties were not in fact living separate and apart as required by the statute, a mere finding that their relationship was bereft of positive qualities is insufficient.

The court then offers its opinion as to what "social construction of reality" is required for a divorce to be granted, as representing an actual cessation of marriage:

In other jurisdictions, where the parties have continued some degree of relationship after they have ceased sexual cohabitation, divorces have been granted on grounds of separation, provided that it is nevertheless manifest to the community that the parties are in fact living separate lives and are not attempting to induce others to regard them as living together. *Young v. Young*, 225 N.C. 340, 34 S.E.2d 154 (Sup.Ct.1945); *Christiansen v. Christiansen*, 68 R.I. 438, 28 A.2d 745 (Sup.Ct. 1942); *Hava v. Chavigny*, 147 La. 330, 84 So. 892 (Sup.Ct.1920); *Brimson v. Brimson*, 227 Ark. 1045, 304 S.W.2d 935 (Sup.Ct.1957). Compare *Adams v. Adams*, 89 Idaho 84, 403 P.2d 593 (Sup.Ct.1965). See Annotation, 35 A.L.R.3d 1238.

It has been said that what the law makes a ground for divorce is the living separately and apart of the husband and wife continuously for a certain number of years. This separation implies something more than a discontinuance of sexual relations whether the discontinuance is occasioned by the refusal of the wife to continue them or not. *It implies the living apart for such period in such a manner*

that those in the neighborhood may see that the husband and wife are not living together. [17 Am.Jur., §162 at 232, cited in *Dudley v. Dudley*, 225 N.C. 83, 33 S.E.2d 489 (Sup.Ct.1945); emphasis supplied.]

Where, as here, it is apparent that the associations and dealings of the parties with each other after the alleged separation continue to include a substantial number of the many elements and ties which go into and make up the marital relationship and bind the parties together, it cannot be said that they are living “separate and apart” within the meaning of our divorce statute.

The court therefore holds that although plaintiff and defendant may have been residing in different habitations for more than 18 months, they were not living separate and apart.

A motion to dismiss the complaint at the conclusion of plaintiff’s proof is granted.

One wonders whether this gentleman’s love for his wife or his dog was more central to his wish to spend a great deal of time in the matrimonial home! What is important to note, however, is that he also desired to keep the neighbors from knowing the real state of matrimonial affairs in his household. And that involves one of the essential elements of marriage and family that any sociologist would identify: that it is a *public* status, often, though not necessarily, attested to by a public rite of passage that announces one’s change of status to the collectivity of concerned individuals—those family members, friends, and neighbors with whom one conducts social business.

Roles for Sociologists

As definitions of family change, one thing that may be important to some sociologists is that individuals living in various nontraditional families be able to claim equally legitimated public status. Sociologists can help in this effort by making the act of “coming out,” the act of public declaration, less dangerous and frightening for single-parent families, blended families, gay families, and other alternative family units. They can do this by encouraging an environment of tolerance and acceptance for members of nontraditional families and by aiding legal processes that broaden our definitions of family, not just legally, but, as a consequence, socially. In a sense, sociologists can continue to do what they have often done best over the past several decades: remind us of the costs of prejudice and discrimination and the necessity for building a society of inclusion rather than exclusion.

One primary option might involve consulting with legislators, both state and local, on drafting bills and creating statutory language and writing ordinances. Since much work of courts does involve interpretation of statutory language, how a bill is drafted and the definitions of concepts such as “family” which it adopts, are obviously crucial. Sociologists could offer to provide synopses of recent professional literature or statistical analyses to legislators. For instance, many legislators who make it a practice to eulogize the “traditional family” may not realize how few family units actually consist of one employed husband, a wife who does not work outside the home, two kids, and a dog. It might be productive to provide such information for legislators and to provide statistical analyses of their actual constituencies as well. Sociologists, as well as political scientists, have a long history of productive research in these areas.

What else can sociologists do? They can involve themselves in what the courts are doing on such an important matter as constructing the definition of family that will be utilized in official actions. One of the most important roles sociologists can fill is that of the expert witness. The role of the expert witness in legal proceedings is critical because expert witnesses may do what other witnesses are not allowed to do: offer opinions. Once an individual has been qualified in a case as an expert witness, that witness may, on the basis of professional expertise and judgment, offer opinions that can guide the court in its decision. One recent case provides an example of the sociologist at work as an expert witness. In *2-4 Realty Associates v. Pittman*,¹⁰ Dr. Peter Stein testified as an expert witness. His qualifications included an academic position and “five books and twenty articles in the area of his expertise, the family in America,” and the court stated that “Dr. Stein was an impressive addition to respondent’s case.”¹¹ Dr. Stein’s testimony enabled a mother and her son, who had created a nonmarital family unit with a man who died from diabetes at the age of 93, to continue to live in a rent-controlled apartment that had been held formally in tenancy only by the man who died. Under the law, only “family members” can continue to inhabit rent-controlled apartments. Dr. Stein offered the opinion that the three individuals constituted a family unit, and, on the basis of his testimony, the court agreed.¹²

Sociologists can make a strong effort to see that Sociology courses are suggested as part of undergraduate curricula defined as “pre-law” or appropriate to pre-legal education. The American Bar Association maintains a Commission on College and University Nonprofessional Legal Studies,¹³ which serves as a clearinghouse for syllabus material, runs national conferences,¹⁴ and generally concerns itself with what those who are to become lawyers will learn before they go to law school. Sociologists could become more involved in working with such organizations.

Another possibility would be for sociologists to offer noncredit workshops or even CEU-bearing courses for local lawyers in their vicinity. The Connecticut Bar Association recently offered a CEU-bearing six-week seminar in "Law and Literature" for its members. It is certainly as plausible to conceptualize a seminar in family issues for family law practitioners.¹⁵

An issue that has recently surfaced, as general recognition dawns that "family" is an emergent concept these days, is the idea of recognizing "domestic partnerships" as the functional equivalents of other, more traditional family structures. The concept of a domestic partnership generally involves two adults who are living together but are "unrelated" in the sense of birth, marriage, or adoption, and who form a household unit. Often these are heterosexuals who simply do not want to get married for various reasons of their own, but partnered gay people also fit this definition. There has been great interest lately, as the cost of health care has exploded, in bringing partners in under the umbrella of health care insurance coverage held by one partner only. Typically, one partner works for an agency or corporation that has good benefits, while the other may be self-employed or work for a small firm without adequate policies. A secondary issue is that coverage for "family" members under the plan of one partner is generally much less expensive than alternative separate private insurance arrangements for the uninsured partner. Legislation of this type has recently been passed for municipal employees in San Francisco, and has been hailed as a great advance by those who advocate recognizing homosexual and lesbian partnerships as "families." Those sociologists who see a definition of family as expansive enough to include such partnerships could provide a service by helping local and state gay task forces to draft and develop rationales for such legislation in their jurisdictions. Domestic partner legislation commonly includes a requirement that partners must agree to be held responsible for each other's incurred financial obligations, which may include medical costs, in order to be covered under a family premium arrangement. Sociologists could support attempts to create legislative recognition of domestic partnership arrangements, based on the fact that such partnerships fit a sociologically based definition of family. Such recognition represents good public policy at a time when leaving people uncovered by health insurance seems a major risk to the general health and well-being of the individual and the society as a whole.

Another area where sociologists may be able to expand the definition of family includes developing clauses in contractual arrangements covering terms and conditions of employment. For example, a contractual provision regarding sick leave, funeral leave, or family care leave often must include a definition of "immediate family." "Husband, wife, father, mother, sister, brother, or child, or any other person who is domiciled in the member's household" is the current

definition for purposes of funeral leave used in at least one faculty contract.¹⁶ This may be particularly relevant for sociologists employed at colleges and universities governed by collective bargaining or less formal faculty/administration negotiations, and who enjoy the chance to construct the definitions of reality that govern their day-to-day lives.¹⁷

Whatever the personal or political involvement that individual sociologists choose to undertake in regard to legislative or judicial activities involving families, it is clear that the discipline as a whole has at least an opportunity, and perhaps an obligation, to have sociologically refined definitions of family considered by those in policy-making positions. Legislatures and courts are going to go about their business regardless of whether we involve ourselves or not; as the cases presented here have demonstrated, definitional construction of reality proceeds apace. Perhaps our only question is the degree to which we wish to be included in the forces constructing the reality in which we live, and the ways in which we may implement our desire to be included, should that be our conclusion.

NOTES

1. While legislatures are responsible for creating the statutes that define many, if not most, issues in domestic relations law, courts interpret what legislatures create. Courts are therefore among our most important sources of the social constructions of reality, and it is for this reason that court decisions can prove especially interesting to sociologists.

2. NJ SupCt, 1/20/90.

3. 198 So.2d 643 (1967).

4. 415 U.S. 1 (1974).

5. 434 A.2d 14 (1981).

6. Perhaps it is an idiosyncratic notion, but it seems ironic that the mentally retarded adults are trying to become more independent and "adult," and to take their places as functioning members of the larger community, while the novices may be attempting to become less well-functioning members of the larger community, in that they are choosing in a sense to withdraw from it, and to submerge their independent thought and action into the accepted ideas and practices of the total institution which is their order.

7. It is worth noting that courts are not the only official entities engaged in this activity. The U.S. Census bases its count on "housekeeping units" defined by shared cooking facilities, and the recent (1990) form included the idea of "unrelated partners" as a possible definition of household membership.

8. The merging of finances need not be demonstrated by class-based practices such as joint checking accounts. In *2-4 Realty Associates v. Pittman* (523 N.Y.S.2d 7 (N.Y.City Civ. Ct. 1987); 137 Misc.2d 898 (1987); 547 N.Y.Supp.2d 515 (Sup. 1989)), the court accepted merged finances evidenced by a pooling of small amounts of money in a cookie jar as the functional equivalent of something like a joint checking account for household expenses. (Personal communication with Dr. Peter Stein, who served as an expert witness in the case. See further discussion of the role of sociologists as expert witness in the following pages.)

9. 132 N.J. Super. 358, 333 A.2d 577 (1975).
10. 523 N.Y.S.2d 7 (N.Y. City Civ. Ct. 1987); 137 Misc. 2d 898; 547 N.Y.S.2d 515 (Sup. 1989).
11. 523 N.Y.S.2d 9; 137 Misc. 2d 901.
12. The criteria for determining whether an unrelated group of individuals form a family, which Dr. Stein used and which he pointed out are widely agreed on by experts in this area, are: "(1) the longevity of relationships; (2) the level of commitment and support among its members. This support includes both material and emotional support; (3) the sense in which the individuals define themselves as a family unit, using terms such as 'son' and 'father,' for example, and also the way that neighbors and other institutions define them as a family unit; (4) the way in which members of the unit come to rely on each other to provide daily family services; (5) the shared history of the group as evidenced, for example, in the taking, displaying, and preserving of 'family' photos; and (6) the high degree of religious and moral commitment" (523 N.Y.S.2d 9; 137 Misc. 2d 902). Testimony from others provided some of the data on which Dr. Stein's opinion was based. A neighbor testified that the decedent had said about the younger man, "He's my son now." A worker in a local supermarket spoke of going "to see the family." A former employee at the rent-controlled building provided perhaps the central imagery in response to a question on cross-examination as to whether these three people were actually related: "I don't know if they were a family but they acted like one" (523 N.Y.S.2d 8; 137 Misc. 2d 900-01). I would like to thank Dr. Peter Stein for suggesting the use of this case, and discussing it with me, and to thank Lynn Martel of the NYU Law Clinic for providing the citation.
13. c/o American Bar Association, 750 North Lake Shore Drive, Chicago, Illinois 60611 [(302) 988-5725]. Staff Director: John Paul Ryan.
14. One very interesting recent conference, entitled "American Citizenship and the Constitution," was held in Lake Geneva, Wisconsin, May 3-5, 1990, and involved almost a hundred undergraduate faculty in many disciplines, including political science (*many* faculty from this discipline), history, sociology (with only one faculty participant!), and anthropology.
15. That particular seminar failed for lack of registrants. I do not believe that a seminar on family issues would meet a similar fate.
16. See, e.g., Article 12.1 of the Collective Bargaining Agreement between Connecticut State University American Association of University Professors and the Board of Trustees for Connecticut State University currently in force.
17. The author of this paper has served several different times on the American Association of University Professors negotiating team for the faculty of Connecticut State University, and has found the process open to sociologically derived definitional construction of relevant terms such as "immediate family."