Against Functional Approaches

Author : Brian Bix

Date : January 12, 2022

Katharine K. Baker, *Equality and Family Opportunity*, __ **Univ. of Penn. J. of Const. Law** __ (forthcoming), available at SSRN.

As Katharine Baker recounts in her excellent article, *Equality and Family Autonomy*, functional analysis was once part of a positive progressive narrative within family law: it was through a functional analysis that scholars and courts (and some legislatures) found a way to give legal recognition – and legal protection – to individuals and families whom legal formalities would not protect. As Baker writes: "Contemporary family law scholarship … often assume[s] that a functional approach to family law … is the best way to secure equal treatment for people who live in relationships that have not been recognize legally as familial." (P. 2.)

However, functional approaches always had their disadvantages, and now that same-sex partners and parents can generally protect their interests through marriage or adoption after *Obergefell v. Hodges*,[1] Baker shows how those disadvantages – "pluralistic, self-determination and privacy values that can be lost" (p. 4) – often outweigh the benefits for the legal treatment of parenthood. Functional analyses require state evaluation of the family, which is too often "invasive, ineffective, and . . . damaging" (p. 4). Baker argues that "[a]s family forms grow more diverse, judges become ever less qualified and less capable of assessing what constitutes appropriate family behavior."[2] (P. 5.)

Baker emphasizes the tension within the doctrines of family privacy and family autonomy: The Constitution and the common law give certain protections to families, but do not define "family." Where once this was defined in terms of legal and traditional family forms, many scholars (and some courts and legislatures) urged a functional understanding of family – "those who act like a family should be treated as family" (p. 3, footnote omitted) – to protect LGBTQ families and the various "kinship structures" (p. 3) found in economically marginalized communities. Functional arguments are effectively equality arguments (if they act like a family they should be treated no different), but equality arguments have "an inevitable comparator problem."[3] (P. 3.) What do (unconventional) families need to *be like*, to warrant the special protections the constitution grants to families? The answer tends to be: conventional families ("dyadic, nuclear famil[ies]" (p. 4)).

To conclude under a functional analysis that someone is "acting like a parent," a couple is "acting like a married couple," or a household is "acting like a family," courts need a standard, an express or unstated understanding of what parents, couples, and families, act or look like. And the judiciary, which is often not especially diverse, may bring a fairly conventional (white, wealthy, suburban, middle-class) understanding to such things. So, family forms that may be common in some communities (e.g., BIPOC[4] and LGBTQ communities[5]), but less conventional according to establishment views, may be rejected by the courts.[6] Baker comments: "To assess whether a group functions as a family in order to decide whether they should be treated as other families invades the liberty families are supposed to enjoy as a unit." (P. 4.) Functional approaches are intrusive: to gain rights, couples claiming that their relationships were "like marriage" may need to testify in detail about their sexual, financial, and social life, and have all of these evaluated by strangers.[7] (P. 6.) This parallels the way that state benefit rules already authorize the state to intrude on the lives and domestic decision-making of poorer families.[8] (Pp. 23-24, 28-30.)

Under Baker's analysis, if functional analysis now has a better reputation than it deserves, the idea of family autonomy perhaps has a less good reputation than it deserves. The poor reputation comes in part from its association with the way it has been used to block abuse, neglect, and exploitation from public scrutiny. (P. 23.) As Baker (pp. 7-9), Frances Olsen,[9] and others have argued, it can also be misleading to speak of the government's "non-intervention" in

the family, as the government always sets the rules of engagement (e.g., what counts as abuse, neglect, abandonment, inadequate support, and grounds for divorce; and who controls property during the marriage and how is property divided on divorce and at the death of one spouse; etc.), and "non-intervention" may simply serve the more empowered spouse. (Pp. 22-23.) Still, there remains real value to family members being able to make significant decisions for the family, without those decisions having to be publicly justified or being subject to government overruling, and to have interactions in the family largely shielded from judicial or agency review. Also, Baker adds, "[r]especting family autonomy is a means of respecting diversity." (P. 26.)

Baker sees the high value of family autonomy reflected in many long-term trends in family law: *e.g.*, the demise of fault divorce (neither the judges nor the parties wanted the judges "interrogat[ing] the behavior in a marriage" (p. 14)), and the move towards less judicial discretion in property division, spousal support, and child support.[10] (Pp. 14-19.)

What then to put in the place of functional analysis? After all, there needs to be *some* definition of "family" for any doctrine of family autonomy or family privacy. Baker urges greater uses of formalities[11]: "Registration system for both parent-like and marriage-like relationships offer alternatives that can protect relative autonomy while honoring non-traditional families."[12] (Pp. 6-7, footnote omitted.)[13] Along with license-plus-ceremony for marriage,[14] some states have "opt in" registration to grant rights to nonmarried cohabitants, and there are "Voluntary Acknowledgement of Parentage" and guardianship papers for parental rights. (Pp. 38-39, 47.) These and similar straightforward forms could and should be expanded and (if possible) made more uniform across jurisdictions.

Of course, even granting Baker all the points she raises about the problems of functional approaches, it is far from clear that it would be wise to rid family law of *all* the functional and equitable principles relating to marriage and parenthood (which include important resources, like the putative spouse doctrine and the in loco parentis doctrine). Baker's work is best seen as a corrective, showing us the real benefits, both from the perspective of judges and that of affected families, of a *significant* retreat from functional approaches, and a higher valuation of formalities and family autonomy.

1. 135 S. Ct. 2584 (2015).
2. She concludes, from the child welfare system, that "when judges do not recognize what is before them as a family, they feel free to destroy it." (P. 5; see also Pp. 23-24, 28-30.) Baker sums up a detailed argument on court intervention in custody fights and determinations of abuse and neglect as follows: "in practice … courts are not effective caretakers of children." (P. 30.)
3. This is analogous to the point Catharine MacKinnon makes in critiquing sex equality doctrine. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 **Yale L. J.** 1281 (1991).
4. Baker observes: "For over 20 years, scholars of color have warned of the dangers of excessive state interference into the intimate lives of people in communities of color." (P. 5, footnote omitted.)
5. Baker notes that children in minority communities "are much more likely … to be raised in 'kinship groups,' which include multi-generational households related by blood or marriage and can also include 'fictive kin' …." (P. 44, footnote omitted.) She adds: "Studies indicate that 25 to 44% of Black Americans live in kinship groups, compared to only 11 percent of white Americans" (pp. 44-45, footnotes omitted), and that higher percentages are also found in LatinX and Native American communities. (P. 45.)
6. By contrast, as Baker and others — e.g., Mary Anne Case, *Marriage Licenses*, 89 **Minn. L. Rev.** 1758, 1765 (2005) — point out, married couples generally do not have to show that they live like conventional couples or conventional parents to have the attendant legal rights. (One of the few contexts where married couples may need to show that they are acting like a married couple is immigration, where the state can ask intrusive questions to determine whether the marriage in question is real or a sham, intended only to gain citizenship status for one of the spouses. See also Kerry Abrams, *Marriage Fraud*, 100 **Cal. L. Rev.** 1 (2012), discussing other contexts where the legal rights and duties can turn on the sincerity of the marriage (or the divorce).)
7. One might imagine one line of response: functional/equitable arguments are used when formal/legal arguments are not available, and those who use them want that option to be available and can hardly complain about its

intrusiveness. This response works when a couple is bringing a claim *together* (e.g., to have their relationship recognized or to have a partner recognized as a parent); however, often one member of a couple is resisting the claim (of a partner to property post-dissolution or to have parenting rights shared), and the resisting partner will *not* want the claim recognized and will almost certainly *not* want the intrusiveness of the inquiry.

8. *See, e.g.*, S. Lisa Washington, *Survived and Coerced: Epistemic: Injustice in the Family Regulation System*, **Colum. L. Rev.** (forthcoming, 2022) (describing state welfare and social services agencies as "an intrusive, disempowering surveillance system").
9. Frances E. Olson, *The Myth of State Intervention in the Family*, 18 **U. Mich. J. L. Reform** 835 (1985). Baker cites and quotes Olsen at p. 7.
10. While child custody decisions do involve judicial interference and evaluation, Baker concludes that our current practices continue because alternatives that might reduce judicial discretion are worse for other reasons. (Pp. 19-22.)
11. Until a registration processes is in place, Baker would continue to support functional approaches. (P. 38.)
12. Baker comments that "[a] full explication of how registration systems could work is beyond the scope of this article." (P. 7.)
13. Baker also argues that a combination of non-interference and a greater understanding of the nature of intimacy would justify the reluctance of courts to enforce "vague, oral and incomplete" (p. 34) agreements between spouses and cohabitants, and their reluctance to impose tort duties in those contexts. (Pp. 32-37.)
14. Baker is critical of common law marriage, treated it as another misguided functional approach to treating some nonmarital cohabitants as if they were married. (Pp. 55-58.)

Cite as: Brian Bix, *Against Functional Approaches*, JOTWELL (January 12, 2022) (reviewing Katharine K. Baker, *Equality and Family Opportunity*, __ **Univ. of Penn. J. of Const. Law** __ (forthcoming), available at SSRN), https://family.jotwell.com/against-functional-approaches/.