

Denaturing the Family

Author : Katharine Bartlett

Date : February 25, 2014

Clare Huntington, [Staging the Family](#), 88 N.Y.U. L. Rev. 589 (2013).

Legal scholarship has been increasingly attuned to the role of performance in constructing legal norms. In *Staging the Family*, [Clare Huntington](#) brings this sensitivity to family law. Accordingly to Huntington, people act out the “collective understandings of mother, father, child, and the family itself.” These collective understandings reflect and perpetuate the law’s definition of the family and the rights and responsibilities of its members. Through this mutually reinforcing process, the law’s participation is “normatively narrowing” because it recognizes and thus reinforces only the prevailing, “dominant” images of the family. A consequence, Huntington argues, is that the law has ignored “seismic demographic changes in family form” such as nonmarital families, cohabitation, same-sex couples, and assisted reproduction. In replicating dominant family forms, the law has also idealized them. By reproducing “[o]verwhelmingly positive images of the family,” Huntington writes, the law has approached child sexual abuse “as a problem of strangers lurking in the shadows” rather than a problem within families themselves. (P. 595.)

At the root of the law’s conservatism is that it treats the dominant image of the family as the “natural” one. Huntington’s proposed solution is to “decenter ” or “denature” those dominant images. Operationally, this means “recognizing broader social fronts so that no one performance takes precedence over all others” (P. 640), giving “far greater leeway to parties to decide for themselves whether they constitute a family” (P. 641), and, in the child welfare arena, moving away from “set scripts that reinforce dominant images of family.” (P. 644.)

This is an important article. In it, Huntington focuses on the important ways in which people perform family roles in the shadow of the law, are judged and limited by that law, and at the same time reinforce it. While this may seem a familiar point about the social construction of law, surprisingly little recent scholarship has focused on family role performance as a primary vehicle in the legal construction of the family. In any case, the point has not yet seeped deeply into the public’s consciousness. Given the continued resilience of beliefs that family norms are God-given and natural, this point deserves all the attention that it can get.

But what are the normative implications of Huntington’s observations? Here the issue gets more complicated. In the article, Huntington makes two significant moves. First, she suggests that the recognition that laws come from people, not nature, should make decisionmakers more flexible about the options for family formation and open to alternative family forms. Second, she argues that if decisionmakers are flexible about the options, they will accept the more inclusive and progressive family law agenda that she supports.

On the first point, Huntington is right. When the definition and treatment of families must be justified apart from age-old assumptions about what is given by nature or mandated by God, everything is open for debate. When no policy argument can be trumped by an authority that need not answer to reason or argument, more alternatives are possible.

But is it clear that if the link between the current legal conception of the family and nature could be broken, a progressive family law agenda would prevail? This remains to be seen. We cannot be sure that denaturing the family takes us anywhere *in particular*. If no single state definition of family is the natural one, this leaves the state free to expand, or limit, the definition in any direction—toward the most restrictive, two-parent married heterosexual family, as well toward the more diverse, modern families Huntington wishes the state to recognize. What kinds of families the state will recognize has depended, and will continue to depend, upon the state’s values and priorities, even as the justifications change. As we have seen, especially in the abortion arena, these values and priorities can waver back

and forth; they do not evolve in one single, progressive direction. To the extent that individuals “perform” their family roles in ever more non-conforming ways, these performances may well influence the state, but they can also create perceived “excesses” to which the state may respond with disapproval.

It seems to me that denaturing the family leads to Huntington’s more progressive family law policies only if, once the concept of the natural is abandoned, the family goals and policies that make sense to Huntington are also the ones that make sense to state decisionmakers. I hope they do. The hard work continues.

Cite as: Katharine Bartlett, *Denaturing the Family*, JOTWELL (February 25, 2014) (reviewing Clare Huntington, *Staging the Family*, **88 N.Y.U. L. Rev.** 589 (2013)), <http://family.jotwell.com/denaturing-the-family/>.