

JAZZ AND FAMILY LAW: STRUCTURES, FREEDOMS, AND SOUND CHANGES

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Comparisons help us learn, and thanks to the Midwest Family Law Conference, “Jazzing up Family Law,” we can learn what jazz teaches us about family law. Studying law through music is not a new idea. In fact, it has been around since Plato.¹ Also, jazz has been a source of comparison in studying democracy,² adjudication,³ critical race theory,⁴ property law,⁵ and mediation.⁶ At least two jazz musicians have described their dedication to music in terms of family status.⁷ Thus, exploring family law through jazz provides insight into what is already known.

Jazz is more American than apple pie because we invented this particular apple. Jazz is an art form born in the United States around the early 1900s,⁸ and its impact goes well beyond the time and place of its origin.⁹ Jazz is hard to

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1. Alfred C. Aman, Jr., *Studying Music, Learning Law: A Musical Perspective on Clinical Legal Education*, 13 CORNELL L.F. 8, 9 (1987) (suggesting that studying law in the way we study music, both learning the theory and putting it to work, could be beneficial); Desmond Manderson & David Caudill, *Modes of Law: Music and Legal Theory—An Interdisciplinary Workshop Introduction*, 20 CARDOZO L. REV. 1325, 1325 (1999) (citing PLATO, THE REPUBLIC OF PLATO (Allan Bloom trans., 2d ed. 1991)).

2. Lani Guinier, *More Democracy*, 1995 U. CHI. LEGAL F. 1, 1-3 (discussing the participatory and cooperative nature of baseball and jazz as similar to democratic ideals).

3. Christopher A. Bracey, *Adjudication, Antisubordination, and the Jazz Connection*, 54 ALA. L. REV. 853, 856 (2003) (discussing free jazz as a guide for how the judiciary should value expression of all voices).

4. See generally Jonathan A. Beyer, *The Second Line: Reconstructing the Jazz Metaphor in Critical Race Theory*, 88 GEO. L.J. 537 (2000).

5. See generally Amy Leigh Wilson, *A Unifying Anthem or Path to Degradation?: The Jazz Influence in American Property Law*, 55 ALA. L. REV. 425 (2004).

6. See generally John W. Cooley, *Mediation, Improvisation and All that Jazz*, 2007 J. DISP. RESOL. 325.

7. Louis Armstrong said, “When I picked up that horn, that’s all. . . . That’s why I married four times.” NAT HENTOFF, *JAZZ IS* 69, 71 (1976). Martye Awkerman said, “This guy wanted to marry me. He said, ‘It’s me or the horn.’ I said, ‘Well, it ain’t you, babe.’” SHERRIE TUCKER, *SWING SHIFT: “ALL-GIRL” BANDS OF THE 1940S*, at 317 (2000).

8. FRANK TIRRO, *JAZZ: A HISTORY* 51-52 (1977) (arguing that an exact birthday for jazz is hard to determine, because some consider blues and ragtime to be early forms of jazz).

9. HENTOFF, *supra* note 7, at 122-23. For being 100 years old, jazz still gets around pretty well. The freedom of jazz was felt in the Soviet Union. See generally S. FREDERICK STARR, *RED*

define, but improvisation is its central focus.¹⁰ This improvisation provides a freedom of expression for the musician and an expectation that the individual performer has a message.¹¹ This freedom of expression is a stark contrast to Western “classical” music which, while allowing for some interpretation, restricts a musician to the written notations of the composer.¹² But freedom in most jazz is not complete freedom. In most jazz there is some foundation, structure, or center.¹³ The continual tension between structure and freedom in jazz has produced distinct historical eras in jazz.¹⁴ At times, highly structured jazz was the norm.¹⁵ In response to a perception of too much structure, formats with more freedom have since prevailed.¹⁶

The tension between restriction and freedom is central to family law as well. As we create and undo family relationships, we value individual decisions. We are comfortable with some indeterminacy. But we also make our individual decisions within some centrally controlled boundaries, such as fair resolution of financial relationships, and protections against harm to individuals. As with jazz, the tension between freedom and control produces changes over time.

Jazz and family law share one other trait: disrespect of the field based on the players. African-American men and women created most of what is known as jazz.¹⁷ The players in family law are predominantly female, whether they are practitioners¹⁸ or teachers.¹⁹

This Article examines the many parallels between jazz and family law and explores how an understanding of jazz can help us better understand family law. Part I looks at the history of jazz and how jazz forms have changed over the years. Part II compares jazz forms to the structures and freedoms in family law. Part III looks at who the creators of jazz were, and considers how that has influenced the perception of jazz. Part IV discusses the players in family law and how they, like the makers of jazz, may be disregarded. The Article concludes with a discussion about the values of freedom and individuality and how outsiders may be in an ideal position to make changes.

AND HOT: THE FATE OF JAZZ IN THE SOVIET UNION 1917-1980 (1983). Jazz has also gone to Latin America and come back again in the form of artists such as David Sanchez and Danilo Pérez. Howard Reich, *Fans Await Perez, Sanchez Reunion*, CHI. TRIB., May 11, 2008, § 7, at 6.

10. HENTOFF, *supra* note 7, at 110; BEN SIDRAN, TALKING JAZZ: AN ORAL HISTORY 475 (1995).

11. HENTOFF, *supra* note 7, at 283; ALYN SHIPTON, A NEW HISTORY OF JAZZ 778 (2001).

12. SHIPTON, *supra* note 11, at 6-7.

13. HENTOFF *supra* note 7, at 278-79.

14. *See generally* SHIPTON, *supra* note 11.

15. *Id.* at 269.

16. HENTOFF, *supra* note 7, at 123-24; SHIPTON, *supra* note 11, at 420.

17. PAUL LOPES, THE RISE OF A JAZZ ART WORLD 50 (2002).

18. CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 102-03 (1983) (citing James J. White, *Women in the Law*, 65 MICH. L. REV. 1051, 1062-63 (1966-67)).

19. Marjorie E. Kornhauser, *Rooms of Their Own: An Empirical Study of Occupational Segregation by Gender Among Law Professors*, 73 U.M.K.C. L. REV. 293, 313-14 (2004).

I. THE HISTORY AND FORMS OF JAZZ

Jazz is difficult to define.²⁰ It has been described as “the sound of surprise,”²¹ and “heat, spirit, heart, adrenaline,”²² which only helps define the music if you know what kind of heat, spirit, and heart are required. Jazz is a conversation between musicians with the audience as an active participant.²³ Jazz has also been defined in terms of time and place as “that music which came into being in the southern part of the United States during the late nineteenth century and first blossomed in the vicinity of New Orleans at the turn of the twentieth century.”²⁴ One author lists the most significant musical elements as groups and solo improvisation, and a focus on the performer, rather than on the composer, of the music.²⁵

One reason jazz is hard to define is that jazz itself has changed many times.²⁶ There are no sharp boundaries, but jazz can be roughly split into the following categories: precursors to jazz, classic jazz, big band and swing, bebop, and a variety of post-bebop developments.²⁷

If we could do genetic testing on early jazz we could identify at least two direct ancestors: ragtime and the blues.²⁸ “Ragtime” comes “from the syncopated or ‘ragged’” rhythm of the music.²⁹ We know how ragtime sounded

20. SHIPTON, *supra* note 11, at 4.

21. HENTOFF, *supra* note 7, at 25 (citing the definition of Whitney Balliet, jazz critic for the *New Yorker*).

22. SHIPTON, *supra* note 11, at 4.

23. INGRID MONSON, SAYING SOMETHING: JAZZ IMPROVISATION AND INTERACTION 1-2 (1996).

24. TIRRO, *supra* note 8, at 55.

25. The list of factors is:

1. improvisation, both group and solo; 2. rhythm sections in ensembles (usually drums, bass, and chordal instrument such as piano, banjo, or guitar); 3. metronomical underlying pulse to which syncopated melodies and rhythmic figures are added . . . ; 4. reliance on popular song form and blues form in most performances; 5. tonal harmonic organization with frequent use of the blues scale for melodic material; 6. timbral features, both vocal and instrumental, as well as other performance-practice techniques which are characteristic of particular jazz substyles, such as vibratos, glissandi, articulations, etc.; and 7. performer or performer-composer aesthetic rather than a composer-centered orientation.

TIRRO, *supra* note 8, at 55-56.

26. SHIPTON, *supra* note 11, at v-vii.

27. *Id.*

28. TIRRO, *supra* note 8, at 53.

29. SHIPTON, *supra* note 11, at 31. To get a sense of the rhythmic change, think of John Philip Sousa’s “Stars and Stripes Forever,” written in 1896, then think of “The Entertainer,” a Scott Joplin rag published in 1902 that was featured in the soundtrack of the movie “The Sting.”

because we have sheet music published during that period.³⁰ In contrast, we know about the blues primarily from oral tradition.³¹ Outside of oral tradition, blues were preserved by recordings starting in the 1920s.³² Blues characteristically share a pattern of chords that repeats regularly.³³ The blues are usually built from a particular scale where two notes of the scale are flattened into what are now known as "blue notes."³⁴ Both the complexity of the rhythms in ragtime and the flattened blue notes can be traced to Western African musical traditions.³⁵

Ragtime and blues were in the air in New Orleans in the early 1900s, but the city was big enough to include other musical influences. African American "songsters" performed music that had elements of "Irish reels" and Appalachian folk songs.³⁶ British and French popular songs and sailors' shanties were also heard in New Orleans at the time.³⁷ The music may have mixed more easily than the groups of people at the time. French New Orleans included "Creoles of Color," who lived in one area, while non-French Americans, particularly newly freed slaves, lived in another area.³⁸ Law stirred the mix of people when post-reconstruction politics disenfranchised African American citizens.³⁹ Without a voting African American community, strict local segregation codes were passed in 1894, forcing the "Creoles of Color" to move out of the French section of town and into the African American uptown area.⁴⁰ The musicians from the different sides of town had no immediate interest in fusing their divergent styles,⁴¹ but over time their European music, ragtime, and blues intermingled.

Jazz bands emerged before the term jazz.⁴² Their style often combined the coronet or trumpet of local brass bands to play a melody and a complex rhythm played on a drum set and guitar, and often a clarinet, saxophone, or trombone.⁴³ As jazz became an identifiable style of its own, it spread through traveling bands⁴⁴ and through the latest technology: sound recording.⁴⁵

In the 1920s, jazz grew in popularity and the bands grew in size. Big bands

30. TIRRO, *supra* note 8, at 52. Publication of the sheet music for the "Maple Leaf Rag" in 1899 was a commercial success for Scott Joplin. *Id.*

31. *Id.* at 115.

32. *Id.* at 117.

33. *Id.* at 119.

34. *Id.* at 121.

35. *Id.* at 38-39.

36. SHIPTON, *supra* note 11, at 6-7.

37. *Id.*

38. TIRRO, *supra* note 8, at 73.

39. SHIPTON, *supra* note 11, at 76.

40. TIRRO, *supra* note 8, at 73.

41. SHIPTON, *supra* note 11, at 77.

42. *Id.* at 96.

43. *Id.* at 89.

44. *Id.* at 96.

45. *Id.* at 105-06.

and swing bands were headed by, among others, Duke Ellington,⁴⁶ Cab Calloway,⁴⁷ Count Basie,⁴⁸ and Benny Goodman.⁴⁹ The sound was similar to the early jazz of New Orleans, but there were more reed instruments performing more and faster solos.⁵⁰ With more musicians in the band, a more central arrangement was required, often in the form of written music.⁵¹ Despite the popularity of the music, some musicians bristled at this loss of freedom of expression.⁵²

Bebop was a reaction to the controlled sounds of swing. Bebop is characterized by broader thinking in terms of both melody and rhythm.⁵³ The bands became smaller and the room for solos expanded.⁵⁴ As one musician noted, "Music theory . . . could be a guide, but was certainly not law."⁵⁵ The rhythm changed from a smooth dance pace to more harshly accented beats, with the onomatopoeic reference to the rhythm giving bebop its name.⁵⁶ Bebop provided more complexity than dance band music⁵⁷ and required more musical skill.⁵⁸ Performing without the rigidity of written music was the norm in bebop.⁵⁹ Bebop expanded the limits of jazz so much that the next developments in jazz were not a straight route but multiple branches, each with its own sounds.⁶⁰

The multiple descendants of, and reactions to, bebop include classical revival, cool jazz, hard bop, free jazz, and fusion. A revival of classic jazz focused attention back on early band sounds,⁶¹ with Louis Armstrong as a human bridge from the early years.⁶² The sound of cool jazz was light and soft, focusing more on complexity than on a sense of drive.⁶³ The drive belonged to hard bop.⁶⁴ Hard bop emphasized speed, volume, and emotion and was sometimes labeled

46. *Id.* at 259.

47. *Id.* at 284.

48. *Id.* at 305.

49. TIRRO, *supra* note 8, at 233.

50. *Id.* at 235.

51. SHIPTON, *supra* note 11, at 311; TIRRO, *supra* note 8, at 259.

52. TIRRO, *supra* note 8, at 259, 263.

53. *Id.* at 263, 266.

54. SHIPTON, *supra* note 11, at 408.

55. *Id.* at 420 (citing LEWIS PORTER, LESTER YOUNG (1985)).

56. TIRRO, *supra* note 8, at 266.

57. *Id.* at 266-67.

58. *Id.* at 268-69 (citing MARSHALL WINSLOW STEARNS, THE STORY OF JAZZ 157 (1970)).

Dizzie Gillespie is quoted as noting that a band would change keys in the middle of a song just to test the abilities of a new musician who wanted to sit in. *Id.*

59. *Id.* at 273.

60. *Id.* at 293.

61. SHIPTON, *supra* note 11, at 607.

62. *Id.* at 629.

63. *Id.* at 692.

64. TIRRO, *supra* note 8, at 302.

funky.⁶⁵ Free jazz took freedom a step farther than bebop. Ornette Coleman, the performer most closely associated with free jazz, created performances without a planned tune, chord progression, or structure.⁶⁶ Fusion combined jazz with elements of rock.⁶⁷

Jazz may have had all of these changes because of its original and spontaneous nature. Not knowing where the music will go in any given performance can be challenging for both the musician and the audience. But the indeterminacy is what appeals to so many. The development of jazz shows a challenging and changing line between individuality and orchestration. We see this same theme in the development of family law.

II. FREEDOM AND CONTROL IN FAMILY LAW

The term “family” can be as hard to define as jazz. Biological and legal relationships are a starting point, but many relationships with neither of those ties are regarded as familial. Law about families is also a broad topic. The U.S. Supreme Court has considered definitions of family in cases on topics ranging from housing,⁶⁸ welfare benefits,⁶⁹ wrongful death,⁷⁰ paternity,⁷¹ and visitation.⁷² Loosely defined, family law is the law governing the creation and dissolution of significant interpersonal relationships.⁷³

Family law has tensions between control and freedom that are similar to the complexities of jazz. When constructing family relationships, legislatures and courts have struggled over what relationships are protected and how.⁷⁴ When dissolving family relationships, individuals have had increased freedoms in many areas, with control remaining steady where protection of individuals is required. The decisions weighing control and freedom are difficult and seem subject to continued change.

Building a family is an extraordinarily individual decision. Children have little choice about what family they will join, but adults choose partners and decide whether to reproduce. These are decisions in which Americans rarely welcome intervention.

65. *Id.*

66. *Id.* at 345 (citing CHARLES HAMM, *Changing Patterns in Society and Music: The U.S. Since World War II*, in CONTEMPORARY MUSIC AND MUSIC CULTURES 35, 68 (1995)).

67. CHRISTOPHER MEEDER, *JAZZ: THE BASICS* 213 (2008).

68. *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 732-33 (1995); *Moore v. City of East Cleveland*, 431 U.S. 494, 498-500 (1977).

69. *Anderson v. Edwards*, 514 U.S. 143, 146-47 (1995).

70. *Glonn v. Am. Guarantee & Liab. Ins. Co.*, 391 U.S. 73, 75-76 (1968).

71. *See generally* *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

72. *Troxel v. Granville*, 530 U.S. 57, 69-71 (2000).

73. BLACK'S LAW DICTIONARY 621 (7th ed. 1999).

74. *See, e.g.*, Lynn Marie Kohm, *Family and Juvenile Law*, 42 U. MICH. L. REV. 417, 423-24 (2007) (discussing the struggle to define rights of same-sex couples between state legislatures and judiciaries).

The Supreme Court has recognized that these decisions should have some guarantee of privacy. When a Connecticut law criminalized the use of contraceptives, the Supreme Court found that married people had a right to privacy, a right to be free of State control of their reproductive decisions.⁷⁵ The Court later determined that the right to privacy was not exclusive to married couples, but is also guaranteed to an individual choosing to use contraception.⁷⁶ The decision to have an abortion was also within the right of privacy, but here the court allowed some State control of health and prenatal life.⁷⁷ The tension between individual decisions and State regulation has continued to be assessed,⁷⁸ and the current Supreme Court may seek to further change the law.

The Supreme Court supported freedom for individuals when it found a Virginia ban on interracial marriage unconstitutional.⁷⁹ One generation later, the case of *Loving v. Virginia* is settled law and unlikely to be challenged. But at the time, public opinion was anything but settled in the direction of individual freedom in this area.⁸⁰

Although we have had a guarantee of privacy in marital relationships and in heterosexual activity, homosexual conduct has not been protected from State control until recently. When the Supreme Court considered a Georgia prosecution for sodomy in 1986, the majority saw this consensual contact as more closely akin to sex crimes⁸¹ than to protected private activity as in the earlier contraception cases.⁸² In 2003, the Court reframed the question as whether adults were free to engage in private, consensual, sexual conduct.⁸³ The Court reexamined the history of regulation of homosexual activity in the United States,⁸⁴ cited European Court of Human Rights opinions,⁸⁵ and found that the activity was protected. The Court wrote, “[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”⁸⁶

Tensions between regulation and freedom are currently most visible in the state-by-state question of who may marry. In 1999, the Vermont Supreme Court

75. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

76. *Eisenstadt v. Baird*, 405 U.S. 438, 448-50 (1972).

77. *Stenberg v. Carhart*, 530 U.S. 914, 921-22 (2000); *Roe v. Wade*, 410 U.S. 113, 154-55 (1973).

78. *See generally* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

79. *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967).

80. Criminal prosecution of interracial marriages continued in some states up to the date of the *Loving* decision. PHYLNEWBECK, VIRGINIA HASN'T ALWAYS BEEN FOR LOVERS: INTERRACIAL MARRIAGE BANS AND THE CASE OF RICHARD AND MILDRED LOVING 63 (2004).

81. *Bowers v. Hardwick*, 478 U.S. 186, 195-96 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

82. *Id.* at 190.

83. *Lawrence*, 539 U.S. at 564.

84. *Id.* at 572.

85. *Id.* at 576.

86. *Id.* at 579.

held that the state's constitution required that same sex couples be able to enjoy the benefits of marriage.⁸⁷ The court left the mechanism for how these benefits could be established to the state legislature,⁸⁸ which chose to establish a civil union system.⁸⁹ In 2003, the Massachusetts Supreme Court found that the State could not prohibit marriage between people of the same sex under the Massachusetts Constitution.⁹⁰ And most recently in California, which had a system of recognizing same-sex domestic partnerships,⁹¹ the state's high court ruled that the California Constitution guarantees same-sex couples the same rights to marriage as opposite sex couples.⁹² After the California ruling, New York Governor David Paterson directed New York agencies to revise state policies and recognize same-sex marriages from other jurisdictions.⁹³ All this comes in an environment where federal law defines marriage as only between a man and a woman⁹⁴ and does not require states to recognize a marriage from any other state between people of the same sex.⁹⁵

There is an intuitive understanding of the need for freedom in building a significant interpersonal relationship. That freedom comes in the form of privacy and equality guarantees in the U.S. Constitution, and in a variety of guarantees in state constitutions. The freedoms have not been automatically granted, and many have come in response to criminal prosecution for what was later held to be protected activity.⁹⁶ The freedoms have come slowly, and often only after a long-held understanding of the ability of the State to restrict or prevent the conduct.

Dissolving family relationships presents the same tensions between individual freedoms and governmental control. The competing interests are evident in grounds for divorce, domestic violence, child custody, financial support, and child abuse and neglect cases.

Grounds for dissolution of marriage show tight governmental control giving way to more individual freedom. In 1897, a manual on domestic relations noted that adultery was grounds for divorce, and, in some jurisdictions, conviction of a crime could also justify divorce.⁹⁷ No other grounds were contemplated.⁹⁸ In

87. *Baker v. Vermont*, 744 A.2d 864, 867 (Vt. 1999).

88. *Id.* at 886-87.

89. CONN. GEN. STAT. ANN. §§ 46b-38aa to -38pp (West 2004 & Supp. 2008).

90. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003).

91. *In re Marriage Cases*, 183 P.3d 384, 397-98 (Cal. 2008), *superseded by const. amend.*, CAL. CONST. art. 1, § 7.5.

92. *Id.* at 433-34, 453.

93. Jeremy W. Peters, *New York Backs Same-Sex Unions from Elsewhere*, N.Y. TIMES, May 29, 2008, at A1.

94. 1 U.S.C. § 7 (2006).

95. 28 U.S.C. § 1738C (2006).

96. *See Loving v. Virginia*, 388 U.S. 1, 11-12 (1967).

97. MARSHALL D. EWELL & JAMES W. LA MURE, A MANUAL OF THE LAW OF DOMESTIC RELATIONS 53-54 (1897).

98. *See id.*

the last 100 years, grounds requirements have loosened greatly. In Illinois, for example, there are multiple grounds, including extreme and repeated mental cruelty and living separately after an irretrievable breakdown of the marriage.⁹⁹ The trend increasing access to divorce has had one interesting twist, covenant marriage. Three states currently allow covenant marriage, where a couple can choose to limit their grounds for divorce in the future.¹⁰⁰ The covenant marriages are certainly a restriction, but a voluntary one, and are not imposed by the state. Covenant marriages are, in an odd sense, an extension of freedom, because they give couples an option they may choose to use in forming their marriage.

Resolving child custody disputes is another part of the law where rigidity has given way to more options. In the early history of our country the father was presumed to be the custodian of children after divorce. At that time, many States adopted a "tender years" presumption, which favored the mother as custodian.¹⁰¹ Now custody decisions focus on the best interests of the child, determined through circumstances unique to the family.¹⁰² The change has been from predictability based on gender to indeterminacy based on a focus on individual families.

Financial support after dissolution of a family is one area that retains central control and orchestration. Child support in particular is subject to a variety of formulae for calculation, with some input from federal law.¹⁰³ Spousal support is less rigid, with recent decisions taking into account factors as diverse as home schooling of children, rental income, stock market losses, fault, and need.¹⁰⁴

Removing a child from a family due to abuse or neglect is another area where state control and family independence clash. The widely publicized case in which Texas child welfare removed children from the Yearning for Zion Ranch illustrates the tensions well.¹⁰⁵ A trial court allowed the children's removal, but the appellate court and the Texas Supreme Court found that the children's removal was not warranted.¹⁰⁶ It is difficult to determine whether court and public attention are focused more on the allegations of sexual abuse or the

99. 750 ILL. COMP. STAT. ANN. 5/401 (West 1999). As a family law practitioner in Illinois, the author's experience has been that "extreme" mental cruelty is not required to be extreme at all.

100. ARIZ. REV. STAT. ANN. §§ 25-901 to -906 (2007); ARK. CODE ANN. §§ 9-11-801 to -811 (West 2004); LA. REV. STAT. ANN. § 9:307 (2008).

101. See *Ex Parte Devine*, 398 So. 2d 686, 686 (Ala. 1981), for a discussion of the history of these presumptions, along with a rejection of any gender-based presumption.

102. For example, see the factors that Illinois requires a court to consider in determining the best interests of the child. 750 ILL. COMP. STAT. 5/602 (West 1999 & Supp. 2008).

103. See generally Jo Michelle Beld & Len Biernat, *Federal Intent for State Child Support Guidelines: Income Shares, Cost Shares, and the Realities of Shared Parenting*, 37 FAM.L.Q. 165 (2003).

104. Linda Elrod & Robert G. Spector, *A Review of the Year in Family Law 2006-2007: Judges Try to Find Answers to Complex Questions*, 41 FAM.L.Q. 661, 671-72 (2008).

105. See generally *In re Tex. Dep't of Family & Protective Servs.*, 255 S.W.3d 613 (Tex. 2008).

106. *Id.* at 615.

interest in polygamy.

Taking apart a family requires a balance of State control and individual autonomy. In general, the law has moved away from rigid central control and toward individual autonomy. Physical and financial protection of children are still subject to state control, but increased power for individuals is evident in access to divorce and options for child custody. Overall, in both creating and dissolving a family, the trend in American law is increased opportunity for individuals to make their own choices.

The trend toward individuality in family law reflects the best of jazz. In both fields there is a tension between control and individualism. In early jazz, there was the beginning of musical freedom, and then the pendulum swung to swing, with more restrictions on rhythm, melody, and harmony. Bebop was the revolution back to greater improvisation, which in turn led to a branching out of musical possibilities. Individual expression is the essence of jazz.

Similarly, family law struggles with the balance between central control and improvisation. Like a steady rhythm that is the foundation of some jazz, the law offers protections to children. But when dealing with adults in the process of building and taking apart families, the law reflects the expanded possibilities of bebop and post-bebop. Expanded freedoms allow us to be who we are, and contribute our best to a free market and democracy. Our families are not just what we do along the way, but who we are. Families are the most important area for humans to be able to express themselves.

III. JAZZ CREATORS AND THE COLORING OF PERCEPTION

Art forms are all about perception and who the artist is can have an impact on how that work is perceived. Jazz has been created predominantly by African American men and women,¹⁰⁷ and that has helped to make jazz suspect by society at large.¹⁰⁸ This is seen in the words used to describe this art and the reactions to developments in jazz.

The word jazz, sometimes spelled jass, was used in print starting in 1917.¹⁰⁹ The origins of the word are entirely unclear. It is possibly of African or Arabic origin, or possibly a derivation of the French word *jaser*, which refers to an animated conversation.¹¹⁰ It may have originated from the West Coast of the United States, where it referred to sex and enthusiasm.¹¹¹ It is also possible that the word is derived from the Irish *teas*, pronounced “jazz,” which is a reference to heat and passion.¹¹²

Singers in many musical genres use nonsense syllables, but in jazz it is called

107. LOPES, *supra* note 17, at 50.

108. TIRRO, *supra* note 8, at 266.

109. SHIPTON, *supra* note 11, at 31; TIRRO, *supra* note 8, at 51.

110. TIRRO, *supra* note 8, at 53.

111. SHIPTON, *supra* note 11, at 100.

112. DANIEL CASSIDY, *HOW THE IRISH INVENTED SLANG: THE SECRET LANGUAGE OF THE CROSSROADS* 65-67 (2007).

scat, a term that also means animal excrement.¹¹³ And unlike the term bebop, which is onomatopoeic,¹¹⁴ there is no indication that the word scat is reflective of the sound produced by the singer. At least one current jazz singer rejects use of the word scat because of its origins.¹¹⁵

Another earthy term has been attached to one mode of post-bebop jazz: funk. Funk was originally a term for a strong smell, particularly one coming from sexual activity.¹¹⁶ Musician Quincy Jones has stated a preference for the term soulful to avoid the embarrassment associated with funk.¹¹⁷

With jazz, scat, and funk, some fundamental concepts of this art form are references to bodily functions and smells. These ideas show that the music was not well regarded. This lack of respect is made possible because the artists themselves are disregarded.

Jazz has had its critics from the start, with many of the criticisms fading away long before the music. The oldest critiques are overtly racist, such as this passage that appeared in the August 1921 issue of *The Ladies Home Journal*:

Jazz originally was the accompaniment of the voodoo dancer, stimulating the half-crazed barbarian to the vilest deeds. The weird chant . . . has also been employed by other barbaric people to stimulate brutality and sensuality. That it has a demoralizing effect upon the human brain has been demonstrated by many scientists.¹¹⁸

If jazz as created by African American men earned little respect, jazz created by African American women barely came to the public's attention. For example, in the 1930s, Cab Calloway stood out as one of the few musicians who was both a vocalist and a bandleader.¹¹⁹ His sister Blanche performed the same roles,¹²⁰ but is rarely mentioned in jazz histories. Only slightly less obscure is the International Sweethearts of Rhythm, the most popular all-female swing band of the 1940s.¹²¹ These all-female bands were expected to be both glamorous and musically talented.¹²²

But even after jazz as a genre had established itself, there were criticisms of

113. RANDOM HOUSE WEBSTER'S DICTIONARY (2d ed. 1987).

114. TIRRO, *supra* note 8, at 266 (citing THE NEW YORKER 158 (Nov. 7, 1959)).

115. *All Things Considered: Esperanza Spalding: Voice of the Bass* (NPR radio broadcast May 15, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=90478162>.

116. SHIPTON, *supra* note 11, at 671 (citing JEAN-PAUL LEVET, "Funky," in TALKIN' THAT TALK: LE LANGUAGE DU BLUES ET DU JAZZ (1992)).

117. *Id.*

118. LOPES, *supra* note 17, at 51. Paul Whiteman, an orchestra conductor around the same time wrote of a medical director at a girls' school who found jazz, "as harmful and degrading to the civilized races as it has been among the savages from whom we borrowed it." SHIPTON, *supra* note 11, at 205 (citing PAUL WHITEMAN & MARY MARGARET MCBRIDE, JAZZ (1926)).

119. SHIPTON, *supra* note 11, at 287.

120. *Id.*

121. *Id.* at 355-56.

122. TUCKER, *supra* note 7, at 11-12.

new developments within jazz. At each stage of jazz development, certain sounds were considered off-limits, or were at least regarded as a lesser product.¹²³ For example, in 1965, Duke Ellington was nominated for a Pulitzer Prize, recommended by the award's jury, but rejected by the final board because his music was not serious enough.¹²⁴ Ornette Coleman, who is now considered a great jazz innovator,¹²⁵ was said to have driven people out of clubs when he and his group played.¹²⁶ Jazz critic Nat Hentoff acknowledges that his early criticism of John Coltrane as strident and unpleasant missed the mark, and that Coltrane was in fact an amazing innovator, "one of the most persistent . . . in jazz history."¹²⁷ The musicians themselves shared a feeling that jazz was not respected as it should have been.¹²⁸ Dizzy Gillespie noted, during the height of jazz's popularity:

[J]azz . . . has never really been accepted as an art form by the people of my own country. . . . I believe that the great mass of the American people still consider jazz as lowbrow music. . . . To them, jazz is music for kids and dope addicts. Music to get high to. Music to take a fling to. Music to rub bodies to. Not "serious" music. Not concert hall music.¹²⁹

Race has certainly played a role in the public perception of jazz. Outright racism attacked the early development of the genre. Later developments were greeted with hostility or disregard. Even the vocabulary of the art shows a low regard. Because jazz is not just a set of musicians but a cultural movement,¹³⁰ it can be hard to identify why jazz has been disregarded. But somewhere at the intersection of race, change, and indeterminacy, American culture has struggled with giving jazz full credit as an art form.

IV. PLAYERS IN FAMILY LAW AND THE IMPACT OF GENDER

Just as jazz has been viewed as less serious music, based at least in part on race, family law is viewed as less significant because of gender. Where law was once an exclusively male field,¹³¹ women are now a significant part of the field.

123. HENTOFF, *supra* note 7, at 207-08.

124. Peter Margulies, *Doubling Doubtless, and All That Jazz: Establishment Critiques of Outsider Innovations in Music and Legal Thought*, 51 U. MIAMI L. REV. 1155, 1155 (1997).

125. SHIPTON, *supra* note 11, at 774.

126. *Id.* at 773.

127. HENTOFF, *supra* note 7, at 207-08.

128. LOPES, *supra* note 17, at 1.

129. *Id.* (quoting Dizzy Gillespie, *Jazz Is Too Good for Americans*, ESQUIRE, June 1957, at 55, 55).

130. *Id.* at 2; see also UPTOWN CONVERSATION: THE NEW JAZZ STUDIES 2 (Robert G. O'Meally et al. eds., 2004).

131. Even the U.S. Supreme Court agreed that Illinois could prevent women from obtaining law licenses. Justice Bradley, in a famous concurring opinion, wrote, "The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of

But women are not distributed evenly throughout areas of practice. Family law is one of the areas where women have concentrated, both in practice and in teaching.

As women began to practice law, many were steered into areas where the practice fit the image of a woman lawyer.¹³² One of the areas where women were seen as a good fit by the legal gatekeepers was family law, with almost half of all women lawyers practicing some family law in 1967.¹³³ Male attorneys viewed family law as a less than ideal practice area because so much of the practice involves interpersonal issues rather than strictly legal issues.¹³⁴ Family law is also considered a lesser field because it is associated with a smaller income.¹³⁵ Steering women into family law continues. In a 2004 American Bar Association publication on women in law, in a section on career choices, the author notes, “[F]ields involving representation of women and children, like family law, have been considered naturally suited to women lawyers.”¹³⁶ A later chapter in the same book, “Appearances Are Everything,” addresses topics including shoes, hemlines, and pants.¹³⁷

Women have found a place not just in the practice of family law, but also in teaching family law. A 2002 study found that although thirty-one percent of the nation’s law school faculty are women, fifty-eight percent of family law teachers are women.¹³⁸ Family law is in a class of only five subject areas that are taught more by women than men.¹³⁹ The other subjects are juvenile law, women and the law, legal research and writing, and poverty law.¹⁴⁰ These courses are perceived as being lower in status than other courses.¹⁴¹ This drop in status and or pay is commonly associated with entrance of a large number of women into a particular job field.¹⁴²

Women may choose to work in family law, and they have lots of encouragement to do so. Family law fits with the societal perception of women’s roles and skills. As a special reward for practicing or teaching in this area, women receive less status and pay.¹⁴³

Jazz musicians, who were predominantly African American, were often

the Creator.” *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872).

132. EPSTEIN, *supra* note 18, at 102-03.

133. *Id.* (citing James J. White, *Women in the Law*, 65 MICH. L. REV. 6 (1967)).

134. *Id.* at 110.

135. *Id.*

136. PHYLLIS HORN EPSTEIN, *WOMEN-AT LAW* 75 (2004).

137. *Id.* at 128-43.

138. Kornhauser, *supra* note 19, at 302, 329-31.

139. *Id.* at 313.

140. *Id.*

141. *Id.* at 297 (citing Deborah Jones Meritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199, 217 n.60 (1997)).

142. *Id.* at 317.

143. EPSTEIN, *supra* note 18, at 102-03; Kornhauser, *supra* note 19, at 317.

disregarded and criticized. Women jazz musicians had it even harder, being more easily ignored even while wearing glamorous gowns. Family law practitioners and teachers, predominantly female, have received similar treatment. This feminized area of law is regarded as lower status partly because of gender. Tossing on high heels and glamorous gowns does not seem to have worked for anyone.

CONCLUSION: ENDING ON A RESOLVING NOTE

Jazz and family law share a tension between structure and freedom. Some structure allows musicians and family members to work together. But too much structure can inhibit expression of who we are as musicians and humans. Restrictions on expression will predictably be met with attempts to secure more freedom.

We learn from the history of jazz that expansion of freedoms is treated with disdain, at least initially. Jazz pioneers of different eras could count on a lack of respect for their artistic work. There are a number of reasons why there has been a lack of respect for jazz pioneers. Jazz is unpredictable, and part of the pleasure is listening for change in a melodic or rhythmic line. This unpredictability and change can be uncomfortable for some listeners. Discounting a new idea is easier, especially when the new idea comes from a person who occupies a lower societal status.

Pioneers in family law can expect the same kind of reaction to new ideas they propose. Family law starts with a great amount of indeterminacy, requiring information on particulars of each family before a legal conclusion can be reached. In addition to that lack of predictability, which alone can make people uncomfortable, practitioners and teachers of family law can expect to be treated as lesser citizens of the legal world. We can expect our ideas to be discounted or criticized with ease.

In jazz, the earliest improvisations were followed by a more rigid swing sound, which was then followed by renewed emphasis on improvisation. Family law may have to follow a similar course. We have seen a history of expansion of freedoms, but the current Supreme Court could retract some of those freedoms which were previously guaranteed. We can expect that we will have to continually work to protect and expand our freedoms.

We can predict how our ideas will be received. Because those who work and teach in the area of family law occupy a lower status within the legal profession, we cannot assume that we will have credibility. Like jazz pioneers, we can expect critiques that may be open and stinging, and that may be retracted later.

But we can also use our status as outsiders as an edge. African American musicians, many of them outsiders to European musical training, have been the builders of jazz. Being outside an acknowledged tradition can mean being outside of those restrictions on that tradition as well. Outsiders built a new musical culture, and similarly, outsiders can build family law in ways that move beyond previous limitations. For example, Professor Melanie Jacobs suggests

that our legal construction of paternity may be too restrictive.¹⁴⁴ She argues that in some cases, children may benefit from having a legal relationship with both their biological fathers and the stepfathers who want to adopt them.¹⁴⁵ This is an extraordinarily creative idea. It is one that would work for many families, but would not be easily accepted in most county courthouses.

Jazz is musical freedom—freedom to change, grow, and communicate. These freedoms have threatened the musical establishment, but each new development has added to our musical culture. Family law struggles to achieve the freedom found in jazz. Changes from restrictive, central control to individualism are met with resistance, but ultimately those freedoms allow us to be who we are and contribute to the development of our law and culture.

144. Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. ST. L.J. 809, 813 (2006).

145. *Id.* at 851-52.

