

The Shifting Foundations of Family Law: Legal Responses and Dilemmas

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ABSTRACT/OUTLINE

I. Legal Responses

Legal responses to demographic shifts in the American family have been segmented, and sent somewhat mixed messages. I will review family law developments with a view toward highlighting cross-currents in family law reform. For example:

- The legal privileging of the marital unit through an array of benefits and protections, the momentum toward state recognition of same-sex marriage (which may be complete by the time of the conference), and visible public investments in healthy marriage initiatives, among other things, show a continued commitment toward marriage as the societal ideal. Yet the commitment to this ideal has lessened in some areas, in part due to changing family structures and norms which the legal responses has arguably accelerated. Many states now recognize legal alternatives to marriage (although these alternatives were not intended primarily to address the issues of low income cohabitants, and the continued status of these legal alternatives is uncertain); consensual adult sexual relationships have been deregulated; the law has reduced the availability of spousal support at divorce; and efforts to turn back the clock on no-fault divorce have not yet gained significant traction.
- Family law increasingly allows couples to set or revise most of their family obligations toward one another by agreement, which presupposes a model of contract autonomy. Yet in some spheres (e.g., domestic violence), the law has expanded the protections provided to individual family members from harm by the other—whether or not they want it.
- In deciding who is a parent, the law gives increasing weight to the intentions of the parties, or to the parental functions they have actually performed; yet custody law has strengthened its commitment to shared parenting, regardless of a person's intention or previous functioning as parent.

II. Dilemmas

These cross-currents in family law reflect the existence of a number of overlapping tensions and conflicting goals. For example:

- Family pluralism vs. preference for two-parent families. This society is committed to family pluralism. Yet, based in part on empirical research concluding that children do better in two-parent households, many proposals aim to strengthen a specific, two-parent family structure. Will state measures to steer people toward two-parent, marital households further deplete support for, or otherwise weaken, households that do not have two parents? Conversely, to the extent that the state makes its support of families independent of family structure, as other reformers urge, does it further accelerate the trend away from two-parent families?
- A supportive vs. an intrusive state. Most feminist analyses of the family call for a more supportive state. Yet, when the state becomes involved in families, it tends to be intrusive, especially with respect to minority families and the poor. To what extent can the state be more supportive without also increasing its regulatory hold over poor families?
- Autonomy (private) vs. protection (public). Two key values in family law are the autonomy to make one's own choices and protection of the vulnerable from harm. These values are sometimes in tension with one another, as when it comes to determining what legal default rules should govern marriage and marriage-like relationships, and how easy or hard it should be for parties to change those defaults. How should the state weigh its public (sometimes highly contested) interests relating to marriage against the parties' interests in ordering the terms of their own private relationships? (And do we have a situation in which the default rules fit best the circumstances of couples who can contract around them, and do not correspond well to the circumstances of couples least likely to plan?)

Domestic violence regulation implicates similar trade-offs. Feminist analyses have long demanded that the state treat domestic violence as a public problem that the state has an obligation to prevent or reduce. Yet some legal responses to these demands have taken away women's control over the nature of this protection. Can victims of domestic violence expect to have the protection of the state while also controlling the terms of that protection?

Similarly, to what extent do efforts to steer women's family decisions toward marriage and later childbearing in order to serve certain public goals (including the well-being of children and women themselves) have the effect of eroding women's private reproductive autonomy?

- The ideal vs. the real. Gender equality in families is a critical goal on behalf of children, who are thought to benefit from strong relationships with both parents, and also women, whose life choices have traditionally been constrained by having to bear the primary responsibility for childrearing. But achieving gender equality requires consideration of both the ideal and the real. For example, a custody preference for shared parenting seems to state the strongest possible gender equality ideal and increases the likelihood of both parents' involvement with the child when parents no longer live (or never lived) together. Yet continuity is also very important to the child and may be compromised if the reality of the child's existing relationships is not given priority.