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Family Law Reimagined

One of the law's most important and far-reaching roles is to govern family life and family members. Family law decides who counts as kin, how family relationships are created and dissolved, and what legal rights and responsibilities come with marriage, parenthood, sibling ties, and other family bonds. Family law touches some of the most important aspects of our lives, including our most intimate relationships, our children, and our wealth. It structures both the details of daily life and the overarching features of society. Yet while there are wonderful scholars and lawyers working in family law, the field continues to attract much less critical attention than it deserves.

I wrote *Family Law Reimagined* (Harvard University Press 2014) to direct more scrutiny toward a field that is so significant and ubiquitous, yet remains relatively understudied. The book seeks to better understand family law by exploring how legal decisionmakers think about the subject.

The book focuses on the dominant stories that courts and legislatures use to explain family law and its governing principles. To a remarkable extent, these stories misdescribe the reality of family law, misdirect attention away from the actual problems that family law confronts, and misshape the policies that legal authorities pursue. In a nutshell, my book argues that much of the “common sense” that judges and legislators expound about family law actually makes little sense.

For example, judges and legislators routinely contend that family law is inherently local and use that argument as a reason to oppose federal family law as unprecedented and inappropriate. Declarations of family law's supposed localism played a key role in the Supreme Court's *United States v. Morrison* opinion striking down a provision in the Violence Against Women Act that created a federal civil right to be protected from gender-motivated violent crime.

But federal family law is in fact well established and extensive. A federal statute cannot be logically undermined simply by classifying it as a form of family law because federal law routinely determines who counts as a family member for federal purposes and establishes the federal rights and responsibilities that family members have. For example, the Defense of Marriage Act's exclusion of same-sex couples from federal definitions of marriage had such powerful effects precisely because there are so many federal benefits, burdens, rights, and responsibilities that hinge on marital status under federal law.

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Courts and legislatures also repeatedly assert that family law has removed all traces of its historic entanglement in married women's legalized subordination, and they use that vision of family law as an argument against focusing on persistent disparities between the status of women and men. Yet important legacies of the nineteenth-century regime governing married women's status remain in place. For instance, at least twenty-three states still treat marital rape more leniently than rape outside of marriage, and no state will enforce contracts between spouses providing that one spouse will pay the other for housework. Stories contending that family law has made a clean break from its history mask the perpetuation of rules and policies from the nineteenth century, direct attention away from examining how these rules and policies undermine women's equality, and obscure the case for further progress.

Courts and legislatures also ignore family law governing the poor. The family law applied to poor families is premised on inspection and interference, while the family law governing other families stresses the government's interests in protecting privacy and reducing intrusion—even when distributing financial benefits. For example, Temporary Assistance for Needy Families, a prominent federal-state welfare program, systematically scrutinizes families and freely employs punitive measures in attempting to reshape family life. In contrast, redistributive family law programs directed at families who are not considered poor, such as Social Security programs providing benefits for children, parents, and spouses, are structured to minimize their examination of families and interference with family relations. The exclusion of welfare law from standard accounts of family law has helped judges and lawmakers avoid acknowledging and explaining why the legal regulation of poor families is so different from the legal regulation of other families.

Similarly, legal decisionmakers regularly take family law's tight focus on marriage, parenthood, and (sometimes) their functional equivalents to be so commonsensical as to require no explicit acknowledgment or defense. Yet siblings, grandparents, grandchildren, aunts, uncles, nieces, nephews, cousins, and other relatives can also be central to family life and to the flourishing of family members. Family law's reflexive orientation around marriage, parenthood, and their equivalents has diverted attention and scrutiny from considering how the law should regulate and protect other family relationships. For instance, the law offers siblings only modest and sporadic protection, too often permitting adoption or parental divorce or death to separate siblings and sometimes leave them with no right to contact each other or even learn of each other's existence.

Changing how judges and legislators understand family law is difficult by definition. But uncovering and understanding the misdescription and misdirection in family law's dominant stories about itself is the first step on the path to reform. *Family Law Reimagined* challenges conventional answers and asks questions that judges and lawmakers routinely overlook.

Outline for Family Law Reimagined

Introduction: The Family Law Canon

I. Family Law Exceptionalism

- A. Federalism and the Family
- B. Family Law and Economic Exchange

II. The Family Law Canon's Progress Narrative

- A. Progress Narratives for Adults
 - 1. The Story of Coverture's Demise
 - 2. The Status to Contract Story
- B. A Progress Narrative for Children
 - 1. The Story About the Triumph of Children's Best Interests

III. What's Missing from the Family Law Canon?

- A. Sibling Ties and Other Noncanonical Family Relationships
- B. Family Law for the Poor

Conclusion: Recasting the Family Law Canon