

2015 AALS Midyear Meeting

Workshop on Shifting Foundations in Family Law:
Family Law's Response to Changing Families

June 22 – 24, 2015 | Orlando, Florida



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PROGRAM



Association of American Law Schools

AALS.ORG/MIDYEAR2015



Workshop on Shifting Foundations in Family Law: Family Law’s Response to Changing Families

June 22 - 24, 2015 - Orlando, Florida

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IMPORTANT

The Evaluation Form is not included in this booklet.
It will be emailed to you soon after the conclusion of the Workshop.
Your comments will assist us in planning future events.

Welcome to the Workshop

We are excited to welcome you to the 2015 AALS Workshop on *Shifting Foundations in Family Law: Family Law's Response to Changing Families*. The name of the meeting says it all: we live and work in an era in which the demographics of the family are changing and so is the law's approach to families. The very definition of family itself has been transformed over the past decades. Families are both more diverse and more unequal. This Workshop considers foundational questions about Family Law.

The speakers, in our plenary sessions and concurrent breakout sessions, along with our luncheon speakers will explore various aspects of this Workshop's theme. We will take up such issues as: How has family life changed? How should Family Law respond to the changing shape of families and to the implications of rising inequality for families? What, today, is Family Law anyway? What are its "essential" foundations and how are they evolving? How should these changes in family life and family law affect and inform our teaching? By necessity, the matters being addressed in these different forums will themselves overlap, illustrating the pervasiveness of blurred boundaries in our work. The number of breakout sessions allows for smaller group exploration of all of these important issues.

Moreover, although the Workshop centers on the formal program, it is, of course, only a part of the overall experience. The receptions on Monday and Tuesday evenings, the refreshment breaks, the open time for meals at the conclusion of the scheduled events on Tuesday and Wednesday, and the deliberate coordination with the Workshop on Next Generation Issues of Sex, Gender, and the Law and with the Family Law Scholars and Teacher Conference, provide all of us with the opportunity to network in a variety of ways. AALS workshops are often formative experiences in professional development—especially for junior scholars. We hope that you take advantage of the opportunity to approach and interact with colleagues during these times.

We want to take this opportunity thank the many people who have shaped this conference. We appreciate the incredible work of the group that initially proposed this Workshop: Jill Hasday (Minnesota), Alicia Kelly (Widener), Linda McClain (Boston University), J. Thomas Oldham (Houston) and Jessica Dixon Weaver (SMU). And we owe a special debt of gratitude to the AALS staff members, without whom there would be no Workshop! Please remember to thank these folks for their hard work when you see them here.

When the five of us began meeting more than a year ago, we were excited to be able to develop this Workshop. The program is the result of our collaboration with each other, with you, and with the support of AALS. The Planning Committee looks forward to the program and is grateful to all of the participants who have so generously agreed to share their work, knowledge, and observations with us during the Workshop.

Thank you for being here!

Brian H. Bix, University of Minnesota Law School
Naomi R. Cahn, The George Washington University Law School, **Chair**
Solangel Maldonado, Seton Hall University School of Law
Linda C. McClain, Boston University School of Law
Sean H. Williams, The University of Texas School of Law

Planning Committee for AALS Workshop on Shifting Foundations: Family Law's Responses to Changing Families

Workshop Schedule

Monday, June 22, 2015

4:00 – 8:00 p.m.

AALS Registration

Convention Registration Desk, Lobby Level

6:00 – 7:30 p.m.

AALS Reception

Convention Registration Lobby, Lobby Level

Tuesday, June 23, 2015

8:45 – 9:00 a.m.

Seminole B, Lobby Level

Welcome

Judith Areen, Executive Director, Association of American Law Schools

Introduction

Naomi R. Cahn, Chair, Planning Committee for AALS Workshop on Shifting Foundations in Family Law: Family Law's Response to Changing Families and The George Washington University Law School

9:00 – 10:30 a.m.

Plenary Session - Changes in Families and Family Law

Seminole B, Lobby Level

Katharine T. Bartlett, Duke University School of Law
Isabel V. Sawhill, Senior Fellow, Brookings Institution, Washington, D.C.

Moderator: Linda C. McClain, Boston University School of Law

This opening plenary session will provide a foundation for the rest of the workshop by detailing major demographic changes in family life and patterns of family formation, including generational trends, and major changes in family law that have facilitated or responded to changes in family life. The plenary will preview significant issues concerning family inequality and the role of law and policy in addressing it.

10:30 – 10:45 a.m.

Refreshment Break

Convention Registration Lobby, Lobby Level

10:45 a.m. – 12:15 p.m.

Plenary - Family Law and Inequality

Seminole B, Lobby Level

Margaret Friedlander Brinig, Notre Dame Law School
June Rose Carbone, University of Minnesota Law School
Lily Kahng, Seattle University School of Law
Robin A. Lenhardt, Fordham University School of Law
Elizabeth L. MacDowell, University of Nevada, Las Vegas, William S. Boyd School of Law

Moderator: Sean H. Williams, The University of Texas

This plenary considers numerous aspects of inequality in family law. Panelists will discuss growing family economic inequality and its reproduction from one generation to the next as well as other inequalities across a number of categories related to family law, including race, sexuality, gender, access to justice, and the treatment of juveniles and children. Law and society continue to grapple with critical questions: what is the meaning of equality, does the law reinforce inequalities, and how can equality be advanced to best serve families?

12:15 – 2:00 p.m.

AALS Luncheon

Seminole A, Lobby Level

W. Bradford Wilcox, Director, National Marriage Project, University of Virginia, and Senior Fellow, Institute for Family Studies, Charlottesville, Virginia

Professor Wilcox's lecture, "The Marriage Divide in America," will explain why the growing marriage divide in the nation matters, what has caused it, and what can be done to bridge the divide. He will focus on the economic, cultural, civic, policy, and legal sources of this divide. Dr. Wilcox will conclude by reflecting on the ways in which civic institutions, public policy, and family law might be reformed to strengthen marriage in America.

2:00 – 3:30 p.m.

Plenary – Family Options and the Law

Seminole B, Lobby Level

Cynthia G. Bowman, Cornell Law School

John G. Culhane, Widener University School of Law

Maxine S. Eichner, University of North Carolina
School of Law

Martha M. Ertman, University of Maryland Francis King
Carey School of Law

Melissa E. Murray, University of California, Berkeley
School of Law

Moderator: Solangel Maldonado, Seton Hall University
School of Law

The plenary on Family Options and the Law explores how family law currently addresses family diversity and how it should respond to growing family diversity. Topics to be addressed include the future of marriage, the reasons why people seek statuses like civil unions and domestic partnerships, the regulation of cohabitants, and the proper role of the state in promoting or privileging certain family forms.

3:30 – 3:45 p.m.

Refreshment Break

Convention Registration Lobby, Lobby Level

3:45 – 5:15 p.m.

**Concurrent Sessions – Relationship
Pluralism**

**Panel 1: Assisted Reproductive
Technologies**

Seminole B, Lobby Level

Michael Boucai, SUNY Buffalo Law School
Is Assisted Procreation an LGBT Right?

Courtney Cahill, Florida State University Law School
Rethinking Reproductive Discrimination

Deborah L. Forman, Whittier Law School
*Exploring the Boundaries of Families Created with Known
Gamete Providers: Who's In and Who's Out?*

Joanna L. Grossman, Hofstra University, Maurice A. Deane
School of Law
*Men Who Give it Away: The Perils of Free or Non-
Anonymous Sperm Donation*

Facilitator: Susan F. Appleton, Washington University in
St. Louis School of Law

**Panel 2: Cohabitation, Domestic Partner
Registries, Civil Unions, and Alternate
Statuses**

Duval Room, Lobby Level

Albertina Antognini, University of Kentucky College of Law
When Cohabitation Ends

Jessica R. Feinberg, Mercer University School of Law
Gradual Marriage

Pamela Laufer-Ukeles, University of Dayton School of Law
Family Formation and the Home

Facilitator: Jill Hasday, University of Minnesota Law School

**Panel 3: Freedom of Contract within
Family Law**

St. John's Room, Lobby Level

Sarah Abramowicz, Wayne State University Law School
Parenthood by Contract

Erez Aloni, Whittier Law School
Mistaking Neoclassicism for Pluralism in Family Law

Kaiponanea Matsumura, Arizona State University Sandra
Day O'Connor College of Law
Paradigms of Marital Choice

Facilitator: Cynthia G. Bowman, Cornell Law School

Panel 4: Parenthood and Child Well-Being

Sarasota Room, Lobby Level

Nancy D. Polikoff, American University Washington
College of Law
Parentage after Marriage Equality

Catherine E. Smith, University of Denver Sturm
College of Law
Is Focusing on Children Bad for the Movement?

Dara E. Purvis, Pennsylvania State University The
Dickinson School of Law
Parenthood without Biology

Bela August Walker, Roger Williams University
School of Law
*Parental Status & the State: From Property Rights to
Fundamental Rights*

Facilitator: Katharine T. Bartlett, Duke University
School of Law

Wednesday, June 24, 2015

Panel 5: The Impact of Same Sex Marriage

Hillsborough Room, Lobby Level

Suzanne A. Kim, Rutgers University School of Law, Newark
Marriage Equalities: Gender and Social Norms in Same-Sex and Different-Sex Marriage

Mary M. Penrose, Texas A&M University School of Law
The Fundamental Right to Divorce (or, Family Law and the Fundamental Right to Travel)

Edward D. Stein, Benjamin N. Cardozo School of Law
Marriage and Sexual Fidelity

Allison Tait, The University of Richmond School of Law
Between Marriage Privilege and Economic Partnership

Facilitator: Martha M. Ertman, University of Maryland
Francis King Carey School of Law

5:15 – 6:30 p.m.

AALS Reception - Including Speed Mentoring for Scholarship

Seminole A and Foyer, Lobby Level

During this session, mentees will be able to spend up to five minutes explaining an ongoing research project. Once the mentee has finished, the mentor will provide comments on the project. After 10 minutes, the mentee will move to the next mentor for more comments.

9:00 – 10:30 a.m.

Plenary Session – Core Family Law

Seminole B, Lobby Level

Barbara Ann Atwood, The University of Arizona
James E. Rogers College of Law

Ann M. Cammett, City University of New York,
School of Law

Cynthia L. Starnes, Michigan State University
College of Law

Merle H. Weiner, University of Oregon School of Law

Moderator: Ann Laquer Estin, University of Iowa
College of Law

During this plenary, panelists will explore foundational principles of family law and analyze how they are evolving in response to contemporary families. Topics to be addressed include shared parenting, alimony/property division, child support, and intrafamilial contracts.

10:30 – 10:45 a.m.

Refreshment Break

Convention Registration Lobby, Lobby Level

10:45 a.m. – 12:15 p.m.

Concurrent Sessions – Family Law and ...

1. Family Law and . . . Family Violence

Seminole B, Lobby Level

Cynthia M. Godsoe, Brooklyn Law School
Offensive Victims: Mothers at the Intersection of Criminal and Family Law

Laurie S. Kohn, The George Washington University
Law School
False Remedies: The Ephemeral Relief of Custody and Visitation Provisions in Civil Protection Orders

Joan S. Meier, The George Washington University
Law School
Pitfalls in Differentiation of Domestic Violence Types

D. Kelly Weisberg, University of California, Hastings
College of the Law
Teen Dating Violence: The Limits of the Law

Facilitator: Clare Huntington, Fordham University
School of Law

2. Family Law and . . . Aging/Family Care

Duval Room, Lobby Level

Alicia B. Kelly, Widener University School of Law
Aging or Multigenerational Family Relationships

Nina A. Kohn, Syracuse University School of Law
Valuing Care

Jessica Dixon Weaver, Southern Methodist University,
Dedman School of Law
Vulnerability, Resistant Assets, and Reciprocal Exchange

Facilitator: Margaret Friedlander Brinig, Notre Dame
Law School

10:45 a.m. – 12:15 p.m.

Concurrent Sessions – Family Law and ...
Continues

3. Family Law and . . . Parentage/ Parenthood

St. John's Room, Lobby Level

Cheryl E. Amana-Burris, North Carolina Central University
School of Law
*Time to Consider—Expanding the Definition of Family for
the 21st Century*

Kim Pearson, Gonzaga University School of Law
Addie Rolnick, University of Nevada, Las Vegas, William S.
Boyd School of Law
*Gender, Race, and Ideal Parenthood in Adoptive Couple v.
Baby Girl*

Facilitator: June Rose Carbone, University of Minnesota
Law School

4. Family Law and . . . Children's Rights/ Clashes with Children's Rights

Sarasota Room, Lobby Level

Josh Gupta-Kagan, University of South Carolina
School of Law
The New Permanency

Catherine J. Ross, The George Washington University
Law School
*Limits to Parental Control: Student Speech Rights and the
Collision of Values in Public Schools*

Lynn Dennis Wardle, Brigham Young University,
J. Reuben Clark Law School
*Images and Illusions of Progressive Change in American
Family Law*

Jonathan Will, Mississippi College School of Law
*Religion as a Controlling Interference in Medical Decision
Making by Mature (?) Minors*

Facilitator: Barbara Ann Atwood, The University of
Arizona James E. Rogers College of Law

5. Family Law and . . . Employment Law/ Employment Discrimination

Hillsborough Room, Lobby Level

Jessica Clarke, University of Minnesota Law School
Employing the Family

Courtney G. Joslin, University of California at Davis
School of Law
Marital Status Discrimination Revisited

Naomi Schoenbaum, George Washington University
Law School
*Coworkers in Law: Alternative Forms of Support and
Intimacy Outside of the Family*

Facilitator: Maxine S. Eichner, University of North Carolina
School of Law

6. Family Law and . . . Status (Culture, Immigration, etc.)

Pinellas Room, Lobby Level

Wendy A. Bach, University of Tennessee College of Law
The Hyperregulatory and the Submerged State

Kari Hong, Boston College Law School
Famigration (Fam-Imm): The Next Frontier in Family Law

Marcia A. Zug, University of South Carolina School of Law
Mail Order Marriages

Facilitator: Elizabeth L. MacDowell, University of Nevada,
Las Vegas, William S. Boyd School of Law

12:15 – 1:30 p.m.

AALS Luncheon: Focus on Teaching

Seminole A, Lobby Level

Jamie Rene Abrams, University of Louisville, Louis D.
Brandeis School of Law

Mary P. Byrn, William Mitchell College of Law

Marsha M. Mansfield, University of Wisconsin Law School

1:45 – 3:00 p.m.

Concurrent Sessions - Resources for Family Law Teaching and Practice

1. Teaching:

Duval Room, Lobby Level

Deirdre Bowen, Seattle University School of Law
Teaching and Clinical Class Collaboration

Deeya Haldar, Drexel University Thomas R. Kline
School of Law

Sarah Katz, Temple University, James E. Beasley
School of Law

Teaching Trauma-Informed Practice Through Family Law

Janet M. Heppard, University of Houston Law Center

Tasha Willis, University of Houston Law Center

How to Teach Immigration and Family Law Course

Nancy Ver Steegh, William Mitchell College of Law

Three New Learning Opportunities for Family Law Students

Facilitator: Marsha M. Mansfield, University of Wisconsin
Law School

2. Practice:

St. John's Room, Lobby Level

Marcia Canavan, University of Connecticut School of Law

Does the Use of Social Media Evidence in Family Law

Litigation Matter?

Jane C. Murphy, University of Baltimore School of Law

Jana B. Singer, University of Maryland Francis King Carey
School of Law

Dispute Resolution for Diverse Families

Rachel Rebouche, Temple University, James E. Beasley

School of Law

Against Collaboration

Facilitator: Merle H. Weiner, University of Oregon School
of Law

3:00 – 3:15 p.m.

Refreshment Break

Convention Registration Lobby, Lobby Level

3:15 – 4:45 p.m.

Plenary: Preparing Family Law for the Future

Seminole B, Lobby Level

Susan F. Appleton, Washington University in St. Louis
School of Law

R. Richard Banks, Stanford Law School

Barbara A. Glesner Fines, University of Missouri-Kansas
City School of Law

Jill Hasday, University of Minnesota Law School

Moderator: Jessica Dixon Weaver, Southern Methodist
University, Dedman School of Law

“Preparing Family Law for the Future” will offer a series of overviews on likely developments in family law and family law teaching. The topics will include family law pedagogy, the canons of family law, and assisted reproductive technologies.

5:00 – 6:30 p.m.

Joint Plenary Session with Workshop on Next Generation Issues of Sex, Gender, and the Law: Marriage Equality and Inequality

Mangrove Room, Lobby Level

Marsha Garrison, Brooklyn Law School

Clare Huntington, Fordham University School of Law

Darren Lenard Hutchinson, University of Florida Fredric G.
Levin College of Law

Holning S. Lau, University of North Carolina School of Law

Moderators:

Solangel Maldonado, Seton Hall University School of Law

Linda C. McClain, Boston University School of Law

This closing plenary will explore multiple dimensions of the relationship between marriage and equality, by considering “marriage equality” as more states open up civil marriage to same-sex couples alongside “marriage inequality,” the growing, class- and race-based marriage divide. Panelists will address a range of topics, including how family law should respond to the growing separation of marriage and parenthood and the intersection of marriage equality with concerns for family diversity and pluralism.

Committees

AALS Workshop on Shifting Foundations in Family Law: Family Law's Response to Changing Families

Brian H. Bix, University of Minnesota Law School
Naomi R. Cahn, The George Washington University Law School, **Chair**
Solangel Maldonado, Seton Hall University School of Law
Linda C. McClain, Boston University School of Law
Sean H. Williams, The University of Texas School of Law

2015 Task Force on Professional Development

I. Bennett Capers, Brooklyn Law School
Susan D. Carle, American University Washington College of Law, **Chair**
Sheila R. Foster, Fordham University School of Law
Shauna I. Marshall, University of California Hastings College of Law
Elizabeth E. Mertz, University of Wisconsin Law School
Carol A. Needham, Saint Louis University School of Law
Jason Palmer, Stetson University, College of Law
Barbara A. Schatz, Columbia University School of Law
Michael E. Waterstone, Loyola Law School

2015 AALS Executive Committee

Blake D. Morant, George Washington University School of Law, **President**
Kellye Y. Testy, University of Washington School of Law, **President-Elect**
Daniel B. Rodriguez, Northwestern University School of Law, **Immediate Past President**

Devon Wayne Carbado, University of California, Los Angeles
Darby Dickerson, Texas Tech University School of Law
Guy-Uriel E. Charles, Duke University School of Law
Vicki C. Jackson, Harvard Law School
Wendy C. Perdue, The University of Richmond School of Law
Avi Soifer, University of Hawaii, William S. Richardson School of Law

Biographies of Planning Committee Members, and Speakers

ABRAMOWICZ, SARAH, Wayne St. *Admitted:* NY, 2010. Rev. & Essay Editor, Columbia Law Review. *Subjects:* Stories of Adoption in Law and Literature (S); Family Law; Contracts.

ABRAMS, JAMIE RENE, Louisville. *Admitted:* MD, 2002; NJ, 2003; DC, 2004. Associate, Beveridge & Diamond, PC, 2002-2004; Associate, Willkie Farr & Gallagher, 2004-2007; Litig. Associate, Willkie Farr & Gallagher LLP, 2004-2007; Instructor, Am. Univ. Washington Coll. of Law, 2006-2010; Legal Rhetoric Instructor, Am. Univ. Washington Coll. of Law, 2007-2010; Vis. Ass't Prof., Hofstra University, 2010-2012; Ass't Prof., Univ. of Louisville, since 2012. , Am. Univ. Int'l Law Review. *Subjects:* Legislation; Sex-Based Discrimination; Family Law; Torts I; Torts II; Legal Rhetoric. *Books and Awards:* Women's Bar Assoc. of DC Shining Star Award, 2008; Am. Univ. Washington Coll. of Law, Innovations in Teaching, 2011. *Member:* Phi Beta Kappa. *Consultantships:* Secretary, Women's Bar Associations of DC, 2009-2010; Bd. Member, Kentucky Equal Just. Center, 2013-2014.

ALONI, EREZ, Whittier

AMANA-BURRIS, CHERYL E., Prof., No. Car. Central. BA, 1973, Rutgers, Camden; JD, 1977, Pennsylvania; MA, 1990, Columbia. *Admitted:* PA, 1984. Sr. Ass't, Speaker Willie L. Brown San Fran., 1980-1983; Jud. Clerk, Ct. of Common Pleas Phila., 1984-1985; Lect., No. Car. Central, 1985-1988; Vis. Prof., 1990-1991; Ass't Prof., 1991-1993; Assoc. Prof., 1993-1998; Prof., since 1998. *Subjects:* AIDS and the Law (S); Bioethics (S); Family Law; Children and the Law (S); Reproductive Rts. (S); Property. *Member:* SALT. *Consultantships:* Minority Pop. Task Force, Gov's Comm. on Reduction of Infant Mortality, 1992-1993; Dir., Legal & Family Servs., Cntr. for Child & Family Health, NC, 1997-98, since 1999.

ANTOIGNINI, ALBERTINA, Kentucky.

APPLETON, SUSAN F, Lemma Barkeloo & Phoebe Couzins Prof. of Law, Wash., St. Louis. BA, 1970, Vassar Coll. *Admitted:* MO, 1973. Clerk, Hon. Wm. H. Webster U.S.C.A. 8th Cir., 1973-1975; Ass't Prof., Wash. U. St.

Louis, 1975-1979; Assoc. Prof., Wash. U. St. Louis, 1979-1981; Prof., Wash. U. St. Louis, 1981-2000; Assoc. Dean, Wash. U. St. Louis, 1998-2003; Lemma Barkeloo & Phoebe Couzins Prof., Wash. U. St. Louis, since 2000; John S. Lehmann Res. Prof., Washington University, 2009-2010; Vice Dean, Washington Univ. Sch. of Law, 2013-2014. Calif. L. Rev. *Subjects:* Reproductive Control (S); Regulating Sex (S); Educational Policy & the Law; Adoption & Assisted Reproduction; Conflict of Laws; Family Law. *Books and Awards:* Adoption & Assisted Reproduction: Families Under Construc. (with D.K. Weisberg), 2009; Modern Family Law: Cases & Materials (with D.K. Weisberg), 1998, 5th ed. 2013, 2013. *Member:* ALI (Coun., since 1994, Sec'y, 2004-13); Order of the Coif. *Consultantships:* Consult., NJ Bioethics Comm., 1988-1989; Bd. of Dirs., ABF, 2004-2014.

AREEN, JUDITH, Paul Regis Dean Prof. of Law, Georgetown. AB, 1966, Cornell University; JD, 1969, Yale; JD, 1969, Yale. *Admitted:* MA, 1971; DC, 1972. Prog. Planner for Higher Educ., Budget Bur. Off. of the Mayor NYC, 1969-1970; Fel. & Dir., Educ. Voucher Study Cntr. for the Study of Public Policy Cambridge MA, 1970-1972; Assoc. Prof., Georgetown, 1972-1976; Vis. Assoc. Prof., Michigan, 1975-1976; Prof., Georgetown Law Center, since 1976; Dir., Fed. Leg. Rep. Proj. Pres.'s Reorg. Proj. Off. Mgt. & Budget DC, 1977-1979; Gen. Counsel & Domestic Reorg. Coord'r, 1979-1980; Prof., Community & Fam. Med. Georgetown Med. Cntr., 1982-1989; Assoc. Dean, Georgetown, 1984-1987; Fellow, Woodrow Wilson Int'l Cntr. for Scholars DC, 1988-1989; Exec. V.P. & Dean, Georgetown, 1989-2004; Interim Dean, Georgetown Univ. Law Center, 2010-2010; Dean Emer., since 2010; Exec. Dir., AALS, since 2014. Mem. of Bd. of Editors, Yale L.J.. *Subjects:* Family Law; Jurisprudence; Educ. Law. *Books and Awards:* Educ. Vouchers: A Report on Financing Educ. By Grants To Parents (with Jencks et al.), 1970; Cases and Materials on Law, Sci. and Med. (with King, Goldberg, Gostin & Jacobson), 3d ed., 2005; Cases and Materials on Family Law (with Spindelman and Tsoukala), 6th ed., 2012; Higher Educ. and the Law (with Lake), 2d ed., 2014. *Member:* ALI; ABF (Fellow). *Consultantships:* Gov'r, DC Bar, 1979-1982; Exec. Com., AALS, 1998-00, 2005-07, Pres., 2006, 2005-2007; Bd. Member, Pro Bono Institute, since 2004.

Speaker Biographies

ATWOOD, BARBARA ANN, Univ. of Ariz. *Admitted*: AZ, 1976. Clerk. U.S.D.C. Dist. of AZ Tucson, 1976-1978; Trial Att’y, Dep’t of Just. Civil Rts. Div. DC, 1978-1979; Vis. Assoc. Prof., Univ. of Ariz., 1980-1981; Ass’t Prof., Houston, 1981-1986; Prof., Univ. of Ariz., since 1986; Acting Assoc. Dean, 1988-1989; Assoc. Dean, 1989-1991. *Subjects*: Family Law; Civil Procedure. *Books and Awards*: A Courtroom of Her Own, 1998; Children, Tribes, and States: Adoption and Custody Conflicts Over Am. Indian Children, 2010. *Member*: COIF. *Consultantships*: Mem., Disciplinary Comm., AZ Sup. Ct., 2001-2007; Reporter, Unif Rep. of Children in Abuse, Neglect, & Custody Proceeding Act, 2004-2007; Comm’r, Nat’l Conf. Comm’rs on Unif St. Laws, since 2006.

BACH, WENDY A., Tennessee. *Admitted*: NY, 1997. Staff Attorney, The Legal Aid Society, 1996-2001; Dir., Homelessness Outreach and Preven. Project, The Urban Just. Center, 2001-2005; Clin. Instructor, The City Univ. Sch. of Law, 2005-2010. Articles Editor, New York Univ. Rev. of Law and Social Change. *Subjects*: Advocacy Clinic (S). *Books and Awards*: Order of the Coif, 1996; Eric Dean Bender Public Interest Prize, 1996.

BANKS, R. RICHARD, Stanford. MA, 1987, Stanford; JD, 1994, Harvard. *Admitted*: CA, 1995. Att’y, O’Melveny & Myers San Fran., 1994-1995; Reginald Lewis Fellow, Harvard, 1996-1997; Jud. Clerk, Hon. Barrington D. Parker Jr. U.S.D.C. S.D. NY, 1997-1998; Ass’t Prof., Stanford, 1998-2001; Assoc. Prof., 2001-2004; Prof., since 2004. *Subjects*: Race and the Law (S); Family Law; Const’l Law (S).

BARTLETT, KATHARINE, T., A. Kenneth Pye Prof. of Law, Duke. BA, 1968, Wheaton Coll; MA, 1969, Harvard University; JD, 1975, UC, Berkeley; JD, 1975, UC, Berkeley. *Admitted*: CA, 1975; NC, 1980. Clerk, CA Sup. Ct. San Fran., 1975-1976; Staff Att’y, Legal Aid Soc. of Alameda Cty. Oakland, 1976-1979; Prof., Duke, since 1983; Vis. Prof., U.C.L.A., 1985-1986; Vis. Prof., Boston Univ., 1990-1990; Fellow, Nat’l Humanities Cntr. Res. Triangle Park NC, 1993-1994; Dean, Duke Univ. Sch. of Law, 2000-2007; Vis. Prof., New York Univ. Sch. of Law, 2007-2008; Vis. Prof., Columbia Law Sch., 2008-2008. Note and Comment Editor, California Law Review. *Subjects*: Law and Literature; Family Law; Emplmt. Discrimination; Women & the Law; Gender and Law; Contracts. *Books and Awards*: Gender and Law, 6th ed. (with D. Rhode & Joanna Grossman), 2012; Gender Law & Policy, 2d ed. (with D. Rhode & Joanna Grossman), 2013. Duke Univ. Scholar/Tchr. of the Yr., 1994; Just. R.

Ammi Cutter Rptr. Award, ALI, 1998; Equal Just. Works Dean John R. Kramer Award, 2006. *Member*: Phi Beta Kappa. *Consultantships*: Rptr., Principles of Fam. Dissolu., ALI, 1995-2002; Exec. Committee, Ass’n of Am. Law Sch., 2009-2012.

BIX, BRIAN H., Minnesota. *Admitted*: MA, 1994; CT, 1995; MN, 2002. Jud. Clerk, Just. Alan Handler NJ Sup. Ct. Trenton, 1986-1987; Jud. Clerk, Hon. Stephen Reinhardt U.S.C.A. 9th Cir. L.A., 1987-1988; Lect., King’s Coll. Univ. London, 1991-1993; Jud. Clerk, Hon. Benjamin Kaplan MA Ct. of App. Boston, 1993-1995; Assoc. Prof., Quinnipiac, 1995-1998; Prof., 1998-2001; Vis. Prof., Geo. Wash., 1999-1999; Vis. Prof., Georgetown, 2000-2000; Frederick W. Thomas Assoc. Prof. of Law & Phil., Minnesota, 2001-2002; Frederick W. Thomas Prof. of Law & Phil., Univ. of Minnesota Law Sch., since 2002. Notes Ed., Harv. J. on Legis. *Subjects*: Jurisprudence; Fed. Courts; Contracts; Family Law. *Books and Awards*: Law, Lang. and Legal Determinacy, 1993; A Dictionary of Legal Theory, 2004; Teoria del Derecho: Ambicion y Limites, 2006; Lenguaje, Teoría y Derecho, 2008; Jurisprudence: Theory and Context, 5th ed., 2009; Family Law: Cases, Text, Problems (with Ellman, Kurtz, Weithorn, Czapanskiy & Eichner), 5th ed., 2010; Contract Law: Rules, Theory, and Context, 2012; Family Law, 2013. *Member*: ALI. *Consultantships*: Reporter, Unif. Law Commission, Marital and Premarital Agreements Committee, 2010-2012.

BOWEN, DEIRDRE, Seattle *Admitted*: NY, 1991; MA, 1991; DC, 1991. Assoc. Prof. of Law, Seattle Univ. Sch. of Law, since 2007. *Subjects*: Dissolution and Related Issues; Legal Res. and Writing; Family Law, Crim. Law, Dispute Resolution; Crim. Law. *Books & Awards*: Adolf Homberger Award in Civil Procedure, 1990; Norman S. Haynor Award, 1995.

BOUCAI, MICHAEL, Buffalo. BA, 2002, Yale College; JD, 2005, Georgetown; Non US Advanced, 2009, Univ. of Cambridge. *Admitted*: NY, 2006. *Subjects*: Law & Sexuality; Law & Procreation (S); Crim. Law; Family Law.

BRINIG, MARGARET FRIEDLANDER, Fritz Duda Family Prof., Notre Dame. BA, 1970, Duke University, B.A.; JD, 1973, Seton Hall; PhD, 1994, George Mason University. *Admitted*: NJ, 1973; DC, 1976; VA, 1979. Clerk, Hon. Theo Botter St. of NJ Jersey City, 1973-1974; Ass’t Dep. Public Defender, St. of NJ Off. of Public Advocate Trenton, 1974-1975; Ass’t Prof., George Mason, 1975-1981; Assoc.

Prof., 1981-1992; Assoc. Dean, 1982-1984; Prof., 1992-1999; Dir., Legal Res. Writing & Analysis Prog., 1993-1995; Prof., Iowa, 1999-2001; William G. Hammond Prof., 2001-2006; Assoc. Dean, Fac. Dev., 2004-2006; The Fritz Duda Family Chair in Law, Notre Dame, 2006-2015; Assoc. Dean, Fac. Research, 2007-2011. Notes Ed., Seton Hall L. Rev. *Subjects:* Alternative Dispute Resolution; Family Law; Domestic Relations; Insurance. *Books and Awards:* From Contract to Contract: Beyond the Law & Economics of the Family, 2000; Family Law in Action: A Reader (with Schneider & Teitelbaum), 2000; An Invitation to Family Law (with Schneider), 3rd ed., 2005; Family, Law, and Community: Supporting the Covenant, 2010; Lost Classroom, Lost Community: The Importance of Catholic Schools in Urban America, 2014. *Member:* AALS; ALI; Am. Law & Econ. Ass'n (Exec. Coun., 2001-03); Exec. Council, Nwsltr Editor, Int'l Soc. of Family Law.

BOWMAN, CYNTHIA G., Cornell. PhD, 1972, Columbia; JD, 1982, Northwestern. *Admitted:* IL, 1982; NY, 2008. Ass't Prof., Pol. Sci. I.I.T. Chgo., 1972-1978; Jud'l Clerk, Hon. Richard D. Cudahy U.S.C.A. 7th Cir. Chgo., 1982-1983; Assoc., Jenner & Block Chgo., 1983-1988; Vis. Ass't Prof., Northwestern, 1988-1989; Ass't Prof., 1989-1992; Assoc. Prof., 1992-1995; Prof., 1995-2007; Dist. Vis. Professor, Cornell Law School, 2006-2007; Prof., Cornell, since 2007. Arts. Ed., Nw. U.L. Rev.. *Subjects:* Women & the Law; Torts; Feminist Legal Theory (S); Family Law. *Books and Awards:* Women and Law in Sub-Saharan Africa (with Kuenyehia), 2003; Unmarried Couples, Law, and Public Policy, 2010; Dawn Clark Netsch: A Pol. Life, 2010; Cases and Materials on Feminist Jurisp. (with Rosenbury, Tuerkheimer & Yuracko), 4th ed., 2010. AALS Scholarly Papers Competition, first prize, 1991; Women's Bar Assn of Illinois Woman of Vision, 2000. *Member:* SALT (Bd. of Gov'rs, 1992-00); COIF. *Consultantships:* Rptr., IL Task Force on Gender Bias in the Cts., 1988-1990; Chair, Com. on Gender Bias Free Legal Educ., Chgo. Bar Ass'n Alliance for Women, 1992-1994; Bd., IL Clemency Proj. for Battered Women, 1992-2002; President, Disciplinary Board, Episcopal Diocese of Central New York, since 2009.

BYRN, MARY P., Wm. Mitchell. *Admitted:* MN, 2003. Vis. Ass't Prof., Univ. of Minnesota, 2005-2007; Ass't Prof., William Mitchell Coll. of Law, 2007-2010; Assoc. Prof., William Mitchell Coll. of Law, 2010-2012; Assoc. Prof., since 2010; Assoc. Dean for Administration & Prof. of Law, William Mitchell Coll. of Law, since 2012. Editor-in-Chief,

Minnesota Law Review. *Subjects:* Family Law; Const'l Law: Liberties; Assisted Reproductive Tech. and the Law (S); Torts. *Books and Awards:* The Common Law Process of Torts, 2nd Ed., 2012.

CAHILL, COURTNEY, Fla. St. JD, 2001, Yale. *Admitted:* NY, 2002. Assoc., Simpson Thacher & Bartlett NYC, 2001-2002; Clerk, Hon. Harold Baer Jr. U.S. Cts. S.D. NY, 2002-2003; Ass't Prof., Toledo, 2003-2007; Assoc. Prof., Roger Williams University, Sch. of Law, since 2007. Essays Editor, Yale Law Journal. *Subjects:* Property; Const'l Law; Family Law; Sexuality and the Law.

CAHN, NAOMI R., Geo. Wash. JD, 1983, Columbia; MA, 1989, Georgetown. *Admitted:* NY, 1984; DC, 1984. Fellow, Harrison Inst. Georgetown, 1984-1986; Staff Att'y, Community Legal Servs. Phila., 1984-1984; Assoc., Dolkart & Zavos DC, 1986-1987; Assoc., Hogan & Hartson DC, 1987-1988; Ass't Dir., Sex Discrim. Clinic Georgetown, 1988-1993; Vis. Prof., 1991-1993; Assoc. Prof., Geo. Wash., 1993-1999; Prof., since 1999; Assoc. Dean, since 2006. Res. & Writing Ed., Colum. Hum. Rts. L. Rev. *Subjects:* Family Law; Juv. Law; Estates & Trusts; Clinic; Feminist Legal Theory; *Books and Awards:* Confinements (with Michie), 1997; Red Families v. Blue Families (with June Carbone), 2010; Contemporary Approaches to Trusts and Estates (with Gary, Borison, and Monopoli), 2011; Contemporary Family Law (3d ed. with Abrams, Ross and Meyer), 2012; The New Kinship, 2013. *Consultantships:* Sr. Fellow, Evan Donaldson Adoption Institute, 2009-2015; Reporter, Unif. Law Commission, UFADAA Drafting Committee, 2012-2014.

CAMMETT, ANN M., Prof. of Law, CUNY at Queens. JD, 2000, CUNY at Queens. *Admitted:* NY, 2001; DC, 2007. Skadden Fellow, Legal Aid Society, 2000-2004; Reentry Policy Fellow, NJ Inst. for Social Justice, 2004-2006; Vis. Ass't Prof./Fellow, Georgetown, 2006-2008; Assoc. Prof., Nevada, Las Vegas, 2008-2013. *Subjects:* Family Just. Clinic; Civil Proc. I and II; NY Domestic Rels. Law (S); Poverty Law (S); Family Law Practicum. *Books and Awards:* Skadden Fellowship, 2000; Law Prof. of the Year, 2011; CUNY BLSA Honoree, 2014.

CANAVAN, MARCIA, Connecticut.

CARBONE, JUNE ROSE, Minnesota. *Admitted:* DC, 1978. Trial Att'y, Dep't of Just. Civil Div. DC, 1978-1983; Ass't Prof., George Mason, 1983-1987; Assoc. Prof., Santa Clara, 1987-1996; Prof., 1996-2007; Assoc. Dean, Fac. Prof'l Dev.,

Speaker Biographies

2000-2007; Pres'l Prof. of Ethics & the Common Good, Santa Clara, 2001-2003; Prof., Mo.-Kan. City, since 2007; Vis. Prof., George Washington Univ. Sch. of Law, 2009-2009. *Subjects:* Family Law; Assisted Reproduction (S); Property; Bioethics (S). *Books and Awards:* From Partners to Parents: The 2nd Revolution in Family Law, 2000; Santa Clara Univ. Award for Recent Achievement in Scholarship, 2002; Family Law (with Harris & Teitelbaum), 3d ed., 4th ed., 2009; Red Families v. Blue Families: Legal Polarization and the Creation of Culture (with Naomi Cahn), 2010. *Member:* Phi Beta Kappa. *Consultantships:* Steering Com., Markkula Cntr. for Applied Ethics, 1993-2006; Co-ed., LSN Jour. of Family & Juv. Law, since 1999.

CARROLL, ANDREA B., LSU. JD, 2000, LSU. *Admitted:* TX, 2000; LA, 2001. Clerk, U.S.C.A. 5th Cir. New Or., 2000-2001; Assoc., Baker Botts L.L.P. Dallas, 2001-2003; Asst. Prof., L.S.U., 2003-2006; Assoc. Prof., L.S.U., 2006-2009. Assoc. Ed., La. L. Rev.. *Subjects:* Family Law; Comp. Law; Property; Community Prop. Law. *Books and Awards:* Stanford-Yale Jr. Fac. Forum Honoree, 2005; Louisiana Civil Jury Instruction Handbook, 2007. *Member:* COIF.

CLARKE, JESSICA, Minnesota

CULHANE, JOHN G., Dist. Prof. of Law, Widener. BA, 1978, Wm. & Mary; JD, 1982, Fordham. *Admitted:* NY, 1984. Clerk, Hon. Joseph M. McLaughlin E.D.N.Y. Brooklyn, 1982-1983; Assoc., Cahill Gordon & Reindel NYC, 1983-1986; Bigelow Tchg. Fellow, Lect. & Instr. Univ. of Chicago, 1986-1987; Ass't Prof., Delaware, 1987-1991; Assoc. Prof., Widener, 1991-1996; Prof., since 1996; Assoc. Dir., Grad. Progs., 1996-1997; Dir., Grad. Educ. & Int'l Progs., 1997-1999; Vis. Prof., Southern Methodist, 1998-1998. Assoc. Ed., Fordham L. Rev. *Subjects:* HIV/AIDS & the Law (S); Corporations; Public Health Law; Contemporary Tort Theory (S); Torts; Family Law.

EICHNER, MAXINE S., Univ. of No. Car. *Admitted:* DC, 1988; NC, 1991. Clerk, Hon. Louis Oberdorfer DC, 1989-1990; Clerk, Hon. Betty Fletcher U.S.C.A. 9th Cir., 1990-1991; Att'y, Patterson Harkavy & Lawrence Raleigh, 1991-1995; Fellow, Miller Cntr. for Public Affrs. Univ. of Va., 2001-2002; Assoc. Prof., Univ. of No. Car., 2002-2007; Prof. of Law, UNC Sch. of Law, since 2007. Arts. Ed., Yale L. J.. *Subjects:* Torts; Emplmnt. Discrim. Law; Sex Equality (S); Family Law; Legal Theory (S). *Books and Awards:* Family Law: Cases, Text, Problems (with Ellman, Kurtz, Weithorn,

Bix, and Czapansky), 2010; The Supportive State: Families, Government, and America's Pol. Ideals, 2010; Am. Pol. Sci. Ass'n Sexuality and Politics Sect. Best Paper Award, 2011. *Member:* Am. Pol. Sci. Assn..

ERTMAN, MARTHA M., Carole & Hanan Sibel Res. Prof. of Law, Maryland. BA, 1985, Wellesley Coll. *Admitted:* WA, 1990; CO, 1991. Jud. Clerk, Hon. Peter H Beer U.S.D.C. E.D. LA, 1990-1991; Assoc., Davis Wright Tremaine Seattle, 1992-1994; Vis. Ass't Prof., Denver, 1994-1995; Ass't Prof., 1995-2000; Vis. Prof., Michigan, 1999-2000; Vis. Prof., Connecticut, 2000-2000; Assoc. Prof., Denver, 2000-2002; Vis. Prof., Oregon, 2002-2002; Prof., Utah, 2002-2007; Vis. Prof., George Washington Univ., 2006-2007; Prof., Maryland, since 2007. *Subjects:* Contracts; Commercial Transactions; Contract, Status & Families (S); Sales. *Books and Awards:* Rethinking Commodification: Cases and Readings in Law & Culture (with J. Williams), 2005. *Member:* ALI. Chair, AALS Sect. on Sexual Orientation & Gender Identity Issues (2006); Chair, AALS Sect. on Contracts (2009).

ESTIN, ANN LAQUER., Iowa. BA, 1979, Dartmouth Coll. *Admitted:* CO, 1983; IA, 2002. Clerk, Judge Zita L. Weinshienk U.S.D.C. Denver, 1983-1984; Assoc., Bender & Treece P.C. Denver, 1985-1989; Assoc. Prof., Colorado, 1989-2000; Prof., Iowa, since 1999; Vis. Prof., Pennsylvania, 2005-2005. Art. Ed., U. Pa. L. Rev. *Subjects:* Fed. Indian Law; Family Law; Contracts; Int'l and Comp. Family Law; Legal Profession. *Books and Awards:* Cases and Problems on Domestic Rels. (with Clark), 7th ed., 2005; Global Issues in Family Law (with Stark), 2007. Global Scholar Award, 2009.

FEINBERG, JESSICA R., Mercer. *Admitted:* MI, 2008. Ass't Prof. of Law, Mercer Law Sch., 2011-2014; Assoc. Prof. of Law, Mercer Law School, since 2014. Articles Editor, Wash. U. L. Rev. *Subjects:* Contracts; Family Law; Elder Law.

FEINBERG, JESSICA R., Mercer *Admitted:* MI, 2008. Ass't Prof. of Law, Mercer Law School, 2011-2014; Assoc. Prof. of Law, Mercer Law School, since 2014. Articles Editor, Wash. U. L. Rev.. *Subjects:* Contracts; Family Law; Elder Law.

FORMAN, DEBORAH L., Whittier. BA, 1983, Brown Univ.; JD, 1987, Stanford. *Admitted:* CA, 1987. Clerk, Hon. Harry Pregerson U.S.C.A. 9th Cir. L.A., 1987-1988; Assoc., Kinsella Boesch Fujikawa & Towle L.A., 1988-1990; Ass't Prof., Whittier, 1990-1992; Assoc. Prof., 1992-1996; Prof., since 1996. Stan. L. Rev. *Subjects:* Family Law;

Crim. Procedure; Const'l Law Seminar (Privacy) (S); Torts; Contemporary Problems in Family Law (S). *Books and Awards*: Every Parent's Guide to the Law, 1998. *Member*: Phi Beta Kappa.

GARRISON, MARSHA, Bklyn. *Admitted*: NY, 1977. Staff Att'y, Leg. Aid Soc. NYC, 1976-1978; Ass't Counsel, NYS Exec. Adv'y Comm. on Sentencing NYC, 1978-1978; Ass't Prof., Brooklyn, 1979-1982; Assoc. Counsel, Dep. Mayor for Crim. Just. NYC, 1979-1979; Assoc. Prof., 1982-1986; Prof., since 1986. *Subjects*: Health Law; Trusts & Estates; Torts; Family Law. *Books and Awards*: Family Law: Cases, Comments and Questions (with Krause, Elrod & Oldham), 6th ed., 2007; The Law of Bioethics: Individ. Autonomy and Social Regulation (With C.E. Schneider), 2d ed., 2010. *Member*: ALI.; Phi Beta Kappa. *Consultantships*: Adv'y Bd., Jour. of Law & Fam. Studies, since 1998; Sec'y Gen., Int'l Soc. of Family Law, since 2005; Int'l Adv'y Bd., Child & Family Law Quarterly, since 2007.

GLESNER FINES, BARBARA A., Mo.-Kan. City. JD, 1983, Wisconsin; MA, 1986, Yale. *Admitted*: WI, 1983; MO, 2006. Vis. Instr., Cincinnati, 1983-1984; Vis. Ass't Prof., Univ. of Oklahoma, 1985-1986; Ass't Prof., Mo.-Kan. City, 1986-1992; Assoc. Prof., 1992-2002; Prof., since 2002. Assoc. Mng. Ed., Wis. L. Rev.; Sr. Arts. Ed., Yale J. Int'l L. *Subjects*: Family Law; Family Violence (S); Legal Aid Clinic (S); Civil Procedure; Prof'l Responsibility; Remedies; Family Law Ethics (S); Property. *Books and Awards*: Ethical Issues in Family Representation, 2010. *Member*: Inst. for Law Sch. Tchg. and Learning Co-Dir. 2004-06; Adv'y Bd. 2006-date); CALI, (Bd. of Dirs., 1998-06; Pres 2003-06).

GODSOE, CYNTHIA M., Bklyn. *Admitted*: CA, 2000; NY, 2001. *Subjects*: Fundamentals of Legal Drafting; Legal Res. and Writing; Public Interest Lawyering--Theory and Prac. (S); Children and the Law; The Legal Profession.

GROSSMAN, JOANNA L., Hofstra. *Admitted*: CA, 1995; DC, 1996; NY, 2002. Jud. Clerk, Hon. William A. Norris U.S.C.A. 9th Cir. L.A., 1994-1995; Staff Counsel, Nat'l Women's Law Cntr. DC, 1995-1996; Assoc., Williams & Connolly DC, 1996-1998; Assoc. Prof., Tulane, 1998-1999; Assoc. Prof., Hofstra, 1999-2004; Assoc. Dean Fac. Dev., Hofstra Law Sch., 2004-2008; Vis. Prof., Univ. of No. Car., 2005-2005; Vis. Prof., Vanderbilt Law Sch., 2008-2008. Arts. Dev. Ed., Stan. L. Rev.. *Subjects*: Contracts; Women & the Law (S); Estates & Trusts; Family Law. *Books*

and Awards: Gender Equality: Dimensions of Women's Equal Citizenship (eds., with Linda McClain), 2009. *Member*: Am. Law Institute; Order of the Coif; Law & Soc. Ass'n. *Consultantships*: Ed'l Bd., Perspectives, Comm. on Women in the Profession, ABA, 2002-2005.

GUPTA-KAGAN, JOSH, So. Carolina

HALDAR, DEEYA, Drexel

HASDAY, JILL, Minnesota. *Admitted*: NY, 1998. Clerk, Hon. Patricia M. Wald U.S.C.A. DC Cir., 1997-1998; Ass't Prof., Univ. of Chgo. Law Sch., 1998-2002; Assoc. Prof., Univ. of Chgo. Law Sch., 2002-2005; Assoc. Prof., Univ. of Minnesota Law Sch., 2005-2007; Prof., Univ. of Minnesota Law Sch., since 2007. Arts. Ed., Yale L.J.. *Subjects*: Sex Discrimination; Women's Legal Hist. (S); Family Law; Public Law Workshop (S); Const'l Law; Emplmt. Discrimination; National Security Law (S). *Books and Awards*: Family Law Reimagined, 2014. Centennial Prof. of law, 2013; Dist. McKnight Univ. Prof., 2014. *Member*: Phi Beta Kappa.

HEPPARD, JANET M. Houston. BS, 1981, Wright St. Univ. *Admitted*: TX, 1994. Fac., Houston, since 1995; Assoc., Prof. Clin. Prac., since 2002. *Subjects*: Clinic-Civil; Domestic Violence - Family Law.

HONG, KARI, Boston Coll.

HUNTINGTON, CLARE Fordham. BA, 1990, Oberlin Coll.; JD, 1996, Columbia; JD, 1996, Columbia. *Admitted*: NY, 1997; DC, 1999. Clerk, Hon. Denise Cote U.S.D.C. SD of NY, 1996-1997; Clerk, Hon. Merrick B. Garland U.S.C.A. DC Cir., 1997-1998; Clerk, Just. Harry A. Blackmun & Just. Stephen Breyer U.S. Sup. Ct. DC, 1998-1999; Att'y Adv'r, Off. of Legal Counsel U.S. Dep't of Just. DC, 1999-2004; Assoc. Prof., Colorado, 2004-2011; Assoc. Prof., Fordham Law Sch., 2011-2013; Prof., Fordham Law Sch., since 2013. Colum. L. Rev. *Subjects*: Comp. Family Law: US & India; Immig. Law; Poverty Law; Family Law; Legis. & Regulation. *Books and Awards*: Failure to Flourish: How Law Undermines Family Relationships, 2014. Elected to ALI, 2015. *Member*: Int'l Soc. of Family Law. *Consultantships*: Task Force on Respondent Parents' Counsel, CO Sup. Ct., 2005-2007; CO Sup. Ct. Standing Com. on Children & Families, 2007-2010; Vice Pres. Bd. of Dir., Women's Prison Assn, since 2012.

Speaker Biographies

HUTCHINSON, DARREN LENARD, Univ. of Florida. BA, 1990, Pennsylvania; JD, 1993, Yale. *Admitted*: NY, 1994. Clerk, Hon. Mary Johnson Lowe U.S.D.C. S.D.N.Y. NYC, 1994-1996; Assoc., Cleary Gottlieb Steen & Hamilton NYC 1993-94, 1996-1997; Ass't Prof., Southern Methodist, 1997-2003; Prof., American, since 2003. Ed., Yale L. & Pol'y Rev. *Subjects*: Critical Race Theory (S); Remedies; Const'l Law.

JOSLIN, COURTNEY G., UC, Davis. *Admitted*: CA, 1999. Clerk, Hon. Victoria Lederberg RI S. Ct., 1998-1999; Hon. Maine M. Chesney, N.D. CA, 1999-2000; New Voices Fellow, Nat'l Cntr. for Lesbian Rts., 2000-2002; Staff Att'y, Nat'l Cntr. for Lesbian Rts., 2002-2005; Sr. Staff Att'y, Nat'l Cntr. for Lesbian Rts., 2005-2006; Acting Prof. of Law, Univ. of California at Davis Sch. of Law, 2007-2012; Prof. of Law, Univ. of California at Davis Sch. of Law, since 2012. Exec. Ed., Harv. C. R.-- C. L. L. Rev.. *Books and Awards*: The Rts. of Lesbians, Gay Men, Bisexuals, and Transgender People: An ACLU Hdbk. (with Nan D. Hunter and Sharon M. McGowan), 2004; Lesbian, Gay, Bisexual, and Transgender Family Law (with Shannon P. Minter), 2009. Magna Cum Laude, 1998; AALS New Voices in Gender Studies Paper Competition, 2011. *Member*: Phi Beta Kappa.

KAHNG, LILY., Seattle. JD, 1984, Columbia; MA, 1991, New York Univ. *Admitted*: NY, 1986. Assoc., Simpson Thacher & Bartlett NYC, 1985-1989; V.P., Salomon Inc. NYC, 1989-1991; Acting Ass't Prof., New York Univ., 1991-1993; Assoc. Prof., Cornell, 1993-2001; Att'y Adv'r, Off. of Tax Policy Tres. Dep't DC, 1998-2001; Assoc. Prof., Seattle, since 2001; Vis. Assoc. Prof., Cornell, 2004-2004. J. L. & Soc. Change. *Subjects*: Fed. Taxation; Fed. Tax Policy (S); Estate & Gift Taxation. *Consultantships*: Com. Mem., WA St. Tax Struc. Study, 2001-2002; Vice Chair, WA St. Citizen Comm'n for Performance Measurement of Tax Preferences, since 2006.

KATZ, SARAH, Temple

KELLY, ALICIA B., Widener. *Admitted*: PA, 1992; CO, 1994. Assoc. Att'y, Hofstein & Widman P.C. Phila., 1992-1994; Assoc. Att'y, Feder Morris Tambllyn & Goldstein P.C. Denver, 1994-1996; Assoc. Att'y, Berryhill Cage & North P.C. Denver, 1996-1997; Abraham L. Freedman Tchg. Fel. & Lect., Temple, 1997-1999; Ass't Prof., Western State, 1999-2001; Assoc. Prof., Widener, since 2001; Prof., Widener

Univ. Sch. of Law, since 2011. *Subjects*: Property; Legal Profession; Trusts & Estates; Family Law; Taxation, Federal. *Member*: AALS chair, Family Sect.; Exec. Com., Women in Legal Ed.).

KIM, SUZANNE A., Rutgers – Newark. *Admitted*: CA, 2002. Litig. Assoc., Weil Golshal & Manges LLP NY, 2001-2003; Jud. Law Clerk, Hon. Denny Chin U.S.D.C. for the Southern Dist. of NY, 2003-2004; Lect.-in- Law, Stanford University, Sch. of Law, 2004-2006; Assoc. Prof. of Law, Rutgers University, Sch. of Law-Newark, since 2006. Sr. Arts. Ed., G'town J. of Gender & the L. *Subjects*: Gender and the Law (S); Gender and the Law (S); Family Law; Civil Procedure. *Books and Awards*: Cum Laude, 2001; AALS Women in Legal Education, New Voices in Gender Studies Co-Winner, 2011. *Member*: Feminist Legal Theory Collaborative Res. Network. *Consultantships*: App'td Member, New Jersey Sup. Ct. Com. on Minority Concerns, 2007-2009.

KOHN, LAURIE S., Geo. Wash. JD, 1996, Georgetown; JD, 1996, Georgetown; LLM, 2000, Georgetown; MA, 2001, Georgetown. *Admitted*: MA, 1996; DC, 1997. Assoc., Crowell & Moring LLP DC, 1996-1998; Women's Law & Public Policy Fellow, Women's Law Fellowship DC, 1998-1999; Clin. Fellow, Georgetown, 1999-2000; Assoc. Prof., since 2000; Dep. Dir., Domestic Violence Clinic, since 2004; Co-Dir., Georgetown Domestic Violence Clinic, since 2004; Assoc. Prof. of Clin. Law, George Washington Law Sch., since 2010; Assoc. Prof. of Clin. Law, George Washington Law Sch., since 2010. Art. Ed., Geo. J. of Legal Ethics. *Subjects*: Family Just. Litig. Clinic (S); Gender and the Law (S); Domestic Violence Law. *Books and Awards*: St. Thomas More Award, 1996. *Member*: *Consultantships*: Hearing Commissioner, Off. of Police Complaints, since 2003; Mayoral Appointee, DC Domestic Violence Fatality Comm., 2004-2008; Co-Chair, DC Bar Family Law Steering Committee, 2005-2008; Co-Chair, DC Superior Ct. Domestic Violence Unit Task Force, since 2006; Fellowship Chair, Frederick B. Abramson Memorial Foundation, 2007-2010; Member, DC Superior Ct. Family Ct. Trng. Committee, since 2008; Member, DC Superior Ct. Domestic Violence Unit Rules Committee, since 2009; Member, DC Domestic Violence Fatality Rev. Board, since 2010.

KOHN, NINA A., David M. Levy Prof. of Law; Assoc. Dean for Research, Syracuse. *Admitted*: VT, 2003; NY, 2003. Jud. Clerk, Hon. Fred I. Parker U.S.C.A. 2d Cir. Burlington VT, 2002-2003; Skadden Fellow, Legal Assist. of the Finger Lakes Geneva NY, 2003-2005; Ass't Prof., Syracuse, 2005-2008; Assoc. Prof., Syracuse Univ. Coll. of Law, since 2008. Solicitations Editor, Harvard Negotiation Law Review; Solicitations Editor, Harvard Negotiation Law Review; Solicitations Ed., Harv. Negotiation L. Rev. *Subjects*: Elder Law; Torts; Interdisciplinary Approaches to Aging Issues; Family Law; Trusts & Estates. *Books and Awards*: Elder Law: Practice, Policy, & Problems, 2014. Dist. Fellow, Canadian Cntr. for Elder Law Studies, 2007; Res Ipsa Loquitur Award for teaching, 2011. *Member*: Vice Chair, AALS Sect. on Law and Aging (2009 Chair); Co-Dir., Aging, Law, and Soc. Collaborative Res. Network. *Consultantships*: Adv'r to the Board, Assisted Living Consumer Alliance, since 2007; Adv'y Com. Member, AARP Power of Att'y Abuse Project, since 2008; Chair, Elder Rts. Com. of the ABA, since 2010; Adv'y Grp. Member, Law Reform Comm. of Ontario Older Adults Project, since 2011.

LAU, HOLNING S., Univ. of No. Car. Assoc. Prof., Hofstra University, 2007-2009; Assoc. Prof., Univ. of North Carolina - Chapel Hill, since 2009. Exec. Topics & Comments Ed., U. Chi. L. Rev.; Chi. J. Int'l L. *Subjects*: Children and the Law (S); Family Law; Law and Sexuality (S). *Consultantships*: Advisor, Diversity Factor, since 2009; Advisor, Univ. of Hong Kong Centre for Comp. and Public Law, since 2009; Bd. of Dir., ACLU of North Carolina, since 2010.

LAUFER-UKELES, PAMELA, Dayton. JD, 2001, Harvard. *Admitted*: NY, 2002. Ass't Prof., Dayton, since 2006; Overseas Vis. Prof., Interdisciplinary Center, 2009-2010. Art. Editor, Harvard Jour. of Law and Technology. *Subjects*: Interviewing, Counseling & Negotiation; Legal and Ethical Dilemmas of Parenthood (S); Torts I & II; Family Law; Gender and the Law.

LENHARDT, ROBIN A., Fordham. JD, 1995, Harvard; MA, 2004, Georgetown. *Admitted*: MA, 1996; NY, 1997; DC, 1998. Clerk, Hon. Hugh Bownes U.S.C.A. 1st Cir. Boston, 1995-1996; Clerk, Just. Stephen G. Breyer U.S. Sup. Ct. DC, 1996-1997; Skadden Fellow/Att'y, Lawyers' Com. for Civil Rts. Under Law DC, 1997-1998; Att'y/Adv'r, Off. of Legal Counsel U.S. Dep't of Just. DC, 1998-2000; Counsel, Wilmer Cutler & Pickering DC,

2000-2002; Lect.-in-Law, Univ. of Chicago, 2004-2004; Fellow, Georgetown 2002-03, 2004-2004; Assoc. Prof., Fordham, since 2004; Vis. Assoc. Prof., Columbia Law Sch., 2008-2008. Harv. C.R.-C.L. L. Rev. *Subjects*: Race & the Law; Family Law; Civil Procedure; Const'l Law (S). *Consultantships*: Bd. Mem., Nat'l Partnership for Women & Families, 2003-2006; Commissioner, U.S. Sup. Ct. Fellows Commission, since 2005; Fellow, Brown Univ. Corporation, since 2008; Member, President-Elect Barack Obama Transition Committee, DOJ Agency Review, Civil Rts. Team, 2008-2009.

MACDOWELL, ELIZABETH L., Nevada, Las Vegas. *Admitted*: CA, 1999. Recent Developments Editor, Berkeley Woman's Law Journal. *Subjects*: Family Just. Clinic; California Community Prop. Law; Advanced Family Law (S); Civil Procedure/ADR I. *Consultantships*: Ed'l Bd. Member, Jour. of Child Custody, since 2008; Exec. Member, Domestic Violence Committee, Am. Bar Association, since 2009.

MALDONADO, SOLANGEL, Seton Hall. *Admitted*: NJ, 1997; NY, 1997. Assoc., Kaye Scholer Fierman Hays & Handler LLP NYC, 1996-1997; Clerk, Hon. Joseph Greenaway U.S.D.C. NJ, 1998-1999; Assoc., Sidley & Austin NYC, 1999-2000; Ass't Prof., Seton Hall, 2001-2003; Assoc. Prof., Seton Hall, 2003-2006; Prof., Seton Hall, since 2006. Mng. Ed., Colum. J. Gender & L. *Subjects*: Int'l & Comp. Family Law (S); Race, Ethnicity & the Law (S); Family Law, Marriage & Divorce; Gender and the Law (S); Estates and Trusts; Torts. *Books and Awards*: Family Law in the World Community (with Blair, Weiner, Stark), 2009. *Member*: Am. Law Institute; Am. Law Institute. *Consultantships*: Comm'r, NJ Comm. on Higher Educ., 2004-2005; Member, Bd. of Trustees, New Jersey Law and Educ. Empowerment Project, since 2009; Member, New Jersey Sup. Ct. Com. on Women in the Courts, since 2010.

MANSFIELD, MARSHA M., Wisconsin

MATSUMURA, KAIPONANEA Assoc. Prof. of Law, Ariz. St. JD, 2007, U.C.L.A. *Admitted*: CA, 2008. Law Clerk, Hon. A. Wallace Tashima, Ninth Cir. Ct. of Appeals, 2007-2008; Assoc. Attorney, Gibson, Dunn & Crutcher LLP, 2008-2011; Vis. Ass't Prof./Fellow, Stanford, 2011-2014. Ch. Articles Editor, UCLA L. Rev. *Subjects*: Reproductive Technologies (S); Civil Procedure; Family Law.

MCCLAIN, LINDA C., Boston Univ. JD, 1985, Georgetown; MA, 1991, New York Univ. *Admitted*: NY, 1986. Assoc., Cravath Swaine & Moore NYC, 1985-1990; Assoc. Prof., Hofstra, 1991-1997; Vis. Assoc. Prof., Univ. of Va., 1993-1993; Prof.,

Hofstra, 1997-2004; Fac. Fellow, Cntr. for Ethics & the Professions Harvard, 1999-2000; Vis. Prof., Harvard, 2000-2000; Rivkin Radler Dist. Prof., Hofstra, 2004-2006; Vis. Prof., Pennsylvania, 2006-2006; Prof., Boston Univ., since 2007; Fellow, Religion Fellows Program, Boston University, 2010-2011. *Geo. L.J. Subjects:* Law & the Welfare St. (S); Jurisprudence; Property; Colloquium: Gender, Law, and Policy; Feminist Legal Theory (S); Children and the Law; Comp. Family Law (S); Family Law. *Books and Awards:* The Place of Families, 2006; Gender Equality, 2009. *Member:* Feminism & Legal Theory Conf.; Am. Soc. for Pol. & Legal Phil.; AALS (Exec. Com., Sect. on Family & Juv. Law). *Consultantships:* Adv’y Bd., Feminist Sexual Ethics Proj., since 2000; Ed’l Bd., Comm. on Women & the Profession, ABA, 2001-2002; Adv’y Bd, Georgetown, since 2007.

MEIER, JOAN S., Prof. of Clin. Law, Geo. Wash. *Admitted:* IL, 1983; DC, 1986. Assoc., Jenner & Block Chgo., 1983-1985; Fellow, Georgetown Women’s Law & Public Policy Fellowship DC, 1985-1986; Clerk, Hon Frank H. Easterbrook U.S.C.A. 7th Cir. Chgo., 1985-1985; Staff Att’y, Public Citizen Litig. Grp. DC, 1986-1987; Assoc., Winthrop Stimson Putnam & Roberts DC, 1987-1991; Clin. Assoc. Prof., Geo. Wash., 1991-1994; Prof. of Clin. Law, George Washington University, since 1995; Vis. Prof., Wash. & Lee, 1997-1997; Founding Director, Domestic Violence Legal Empowerment and App. Proj. DC, 2003-2014; Legal Director, Domestic Violence Legal Empowerment and App. Proj. (DV LEAP), since 2014. *Subjects:* Family Law; Domestic Violence Advocacy Project; Domestic Violence Emergency Dept Clinic; Domestic Violence Project. *Books and Awards:* Mary Byron Fdn. Celebrating Solutions Award, 2006; Just. for Children Leadership Award, 2007; Amer. Bar Assoc. Sharon Corbitt Award for Exemplary Legal Services to Victims of Domestic Violence, 2009; Sunshine Lady Peace Award, 2010; Hon. Mention, GWU Global Women’s Inst. Gender-Based Violence Sci. Fair, 2014. *Member:* AALS Clin. Law Section. *Consultantships:* Member, Bd. of Directors, Washington Coun. of Lawyers, 2006-2009; Member, Mayor’s Comm. on Violence Against Women, 1996-2000; Adv’y Bd., Nat’l Eval. of Domestic Violence Victims, Civil Legal Assist. Prog., 2001-2003; Ed’l Bd. Member, Jour. of Child Custody, 2005-2013; Lay Member, Bd. for the Advmt. of Psychology in the Public Interest, Am. Psychological Association, 2009-2011.

MURPHY, JANE C., Balt. *Admitted:* NY, 1979; DC, 1981; MD, 1984. Off. of the Sol., Fed. Energy Comm. DC, 1978-1981; Mng. Att’y, Community Law Off. DC, 1981-1983; Assoc., Rody & Polowy Balt., 1984-1987; Instr., Legal Res. & Writing Georgetown, 1987-1988; Ass’t Prof., Baltimore, 1988-1993; Assoc. Prof., 1993-1999; Prof., since 1999. Ed’l Board, Family Ct. Review. *Subjects:* Alternative Dispute Resolution; Family Med. Clinic; Family Law; Family Med. Prac. & Theory (S). *Books and Awards:* Increasing Access to Just. for Maryland’s Families (with Babb), 1992; Resolving Family Conflicts (with Singer), 2008; Family Mediation: Theory and Prac. (with Rubinson), 2009. *Member:* AALS (Chair, Sect. on Fam. & Juv. Law, 2001); Am. Bar Fdn. (Fellow). *Consultantships:* Proj. Dir., Att’y Gen’ls Adv’y Coun. on Family Law, since 1990; Consult., Ct. of App. Comm. on Family Ct., since 1993; Appointee, Att’y Gen./Lt. Gov’r Domestic Violence Comm., since 1998.

MURRAY, MELISSA E., Prof. of Law, UC, Berkeley. BA, 1997, Univ. of Virginia; JD, 2002, Yale; JD, 2002, Yale. *Admitted:* NY, 2003. Clerk, Hon. Stefan Underhill U.S.D.C. D. CT Bridgeport, 2002-2004; Clerk, Hon. Sonia Sotomayor U.S.C.A. 2d Cir. NYC, 2003-2005; Assoc.-in-Law, Columbia, 2004-2006; Ass’t Prof., Cal. Berkeley, 2006-2011. Notes Dev. Editor, Yale L.J. *Subjects:* Family Law; Crim. Law; Reproductive Rts. and Justice; Const’l Law. *Books and Awards:* Cases on Reproductive Rts. and Just. (with K. Luker), 2014. Phi Beta Kappa, 1997; AALS Derrick A. Bell Award, 2009; AALS Sect. on Women in Legal Educ. New Voices in Gender Studies Paper Competition Winner, 2010; AALS Scholarly Papers Competition Winner, 2010; Dukeminier Award, 2013. *Member:* Member, Am. Law Institute. *Consultantships:* Bd. Member, East Bay Community Law Center, since 2012.

PEARSON, KIM, Gonzaga. *Admitted:* NV, 2005. Sr. Editor, BYU Law Rev.

PENROSE, MARY M., Texas A&M. JD, 1993, Pepperdine; MA, 1999, Notre Dame. *Admitted:* TX, 1993. Sole Practitioner, Civil Rts. Self Dallas, 1985-1996; Sr. Clerk, Hon. Jerry Buchmeyer Ch. Judge U.S.D.C. Dallas, 1993-1994; Assoc., Thompson & Knight P.C. Fort Worth, 1994-1995; Staff Att’y, Pro Se Staff Att’y Hon. Jane J. Boyle U.S.D.C. Dallas, 1996-1998. Mng. Editor, Pepperdine Law Review. *Subjects:* Fed. Civil Procedure; Crim. Procedure; Int’l Human Rights; Gender Discrim. (S); Const’l Law. *Books and Awards:* Educ. Policy and

the Law (with James), 2009; An Introduction to Civil Procedure: Forum Selection and Choice of Law (with George), 2009. *Member*: Order of the Coif; Am. Law Institute. *Consultantships*: Legal Consult. on Issues of Sch. Safety & Educ. Law, U.S. Dep't of Just./Nat'l Cntr. for Missing & Exploited Children & Fox Valley Tech Coll., since 2001.

POLIKOFF, NANCY D., Am. Univ. JD, 1975, Georgetown. *Admitted*: DC, 1975; MD, 1976. Founding Mem., Feminist Law Collec. DC, 1976-1981; Staff Att'y, Women's Legal Defense Fund DC, 1982-1987; Ass't Prof., American, 1987-1990; Assoc. Prof., 1990-1993; Prof., since 1993; Vis. Prof. of Law, Univ. of Arizona James E Rogers Coll. of Law, 2004-2005. *Subjects*: Family Law; Civil Procedure; Sexuality and the Law (S); Family Theory and Policy Seminar (S); Clinic (S). *Books and Awards*: Beyond (Straight and Gay) Marriage: Valuing All Families under the Law, 2008. *Member*: Int'l Soc. of Family Law.; Coun. on Contemporary Families. *Consultantships*: Child Support Guidelines Com., DC Superior Ct., 1985-1989; Adv'y Bd., Nat'l Cntr. for Lesbian Rts., since 1989; Exec. Com., AALS Sect. on Gay & Lesbian Legal Issues, 1990-94, Chair, 1992-1993.

PURVIS, DARA E., Penn St. – Dickinson. JD, 2008, Yale. *Admitted*: NY, 2011. EIC, Yale L.J. *Subjects*: Family Law; Law and Sexuality

REBOUCHE, RACHEL, Temple

ROLNICK, ADDIE, Nevada, Las Vegas. *Admitted*: CA, 2005; CA, 2005; CA, 2005; CA, 2005; CA, 2005; DC, 2006; DC, 2006; NV, 2012. Attorney, Sonosky, Chambers, Sachse, Endreson & Perry, LLP, 2004-2008; Attorney, Sonosky, Chambers, Sachse, Endreson & Perry, LLP, 2004-2008; Adj. Prof., Am. Univ., 2005-2005; Adj. Prof., Am. Univ., since 2005; Fellow, Cal., Los Angeles, 2009-2011; Fellow, Cal., Los Angeles, 2009-2011; Assoc. Prof., Nevada, Las Vegas, since 2011; Assoc. Prof., Nevada, Las Vegas, since 2011; Assoc. Prof., Nevada, Las Vegas, since 2012. *Subjects*: Critical Race Theory; Crim. Law; Fed. Indian Law.

ROSS, CATHERINE J., Geo. Wash. JD, 1987, Yale. *Admitted*: CT, 1987; NY, 1988. Assoc., Litig. Paul Weiss Rifkind Wharton & Garrison NYC, 1987-1994; Vis. Assoc. Prof., Boston Coll., 1994-1996; Assoc. Prof., Geo. Wash., 1996-2005; Vis. Assoc. Prof., Pennsylvania, 2001-2001; Prof., Geo. Wash., since 2005. *Subjects*: Educ. Law;

Const'l Law (1st Amendment) (S); Family Law. *Books and Awards*: Contemporary Family Law (with Abrams, Cahn & Meyer), 2006; Contemporary Family Law 2d Ed. (with Abrams, Cahn & Meyer), 2009. Member, Inst. for Advanced Study, 2008. *Member*: AALS (Chair, Sect. on Law & Communitarian Studies, 2006-07.); ABF (Fellow). *Consultantships*: V-Chair, Wkg. Grp., Unmet Legal Needs of Children, ABA, 1993, Chair, Steering Com., 1994-1998; Mem., Coalition on Just., ABA, 1998-2002; Sr. Legal Consult., Cntr. Children's Policy Prac. & Res., Univ. of Pennsylvania, 2002-2004.

SAWHILL, ISABEL V., Sr. Fellow, Economic Studies, Brookings Inst., Wash., D.C. Ph.D. (1968), B.A. (1962), New York Univ. She serves as Co-Dir., Budgeting for National Priorities project and Co-Dir., the Center on Children and Families. In 2009, she began the Social Genome Project, an initiative by the Center on Children and Families that seeks to determine how to increase economic opportunity for disadvantaged children. She served as Vice Pres. and Dir., Economic Studies prog., 2003 – 06. Prior to joining Brookings, she was a sr. fellow at The Urban Institute. She also served as an assoc. dir., Office of Management and Budget, 1993 - 95, where her responsibilities included all of the human resource programs of the fed. gov't., accounting for one third of the fed. budget. Her research has spanned a wide array of economic and social issues, including fiscal policy, economic growth, poverty and inequality, welfare reform, the well-being of children, and changes in the family. In addition, she has authored or edited numerous books and articles. Dr. Sawhill helped to found The National Campaign to Prevent Teen and Unplanned Pregnancy and now serves as the Pres. of its bd. She has been a Vis. Prof., Georgetown Law Sch., Dir., Natl. Com. for Employment Policy, and Pres., Assn. for Public Policy Analysis and Management. She serves on a number of boards.

SCHOENBAUM, NAOMI, Geo. Wash.

SINGER, JANA B., Maryland. BA, 1977, Dartmouth Coll. *Admitted*: DC, 1981; MD, 1993. Jud. Clerk, Hon. Richard D. Cudahy U.S.C.A. 7th Cir. Chgo., 1981-1982; Assoc., Wilmer Cutler & Pickering DC, 1982-1984; Women's Law & Public Policy Fellow, Georgetown, 1984-1985; Ass't Prof., Maryland, 1985-1992; Assoc. Prof., 1992-1999; Assoc. Dean, Acad. Progs., 1999-2001; Prof., since 1999. Arts. Ed., Yale J. Int'l L. *Subjects*: Family Law; Juv. Law (S); Legal Method; Const'l Law; Contracts. *Books and*

Speaker Biographies

Awards: Family Law: Cases, Materials and Problems (with Swisher & Miller), 2d ed., 1998; Resolving Family Conflicts, 2008. *Member:* ALI.; AALS (Chair, Family Law Sect., 1999); SALT; *Consultantships:* Adv’y Bd., Family & Children’s Law Abstracts, since 1999; Ed’l Bd., Family Ct. Rev., since 2004; Comm. of Women in the Profession, ABA, since 2006.

SMITH, CATHERINE E., Denver. BA, 1991, Wofford Coll.; JD, 1996, So. Carolina. *Admitted:* SC, 1996. Jud. Clerk, Hon. William Catoe Jr. Greenville SC, 1996-1997; Jud. Clerk, Hon. Henry Politz U.S.C.A. 5th Cir. Shreveport LA, 1997-1998; Legal Fellow, Southern Poverty Law Cntr. Montgomery AL, 1998-2000; Ass’t Prof., Texas Southern, 2000-2004; Ass’t Prof., Denver, since 2004; Assoc. Dean for Inst’l Diversity and Inclus., Univ. of Denver Sturm Coll. of Law, since 2010; Prof. of Law, Univ. of Denver Sturm Coll. of Law, since 2012. *Subjects:* Crim. Law; Torts; Emplymt. Discrimination.

STARNEs, CYNTHIA L., Mich. St. JD, 1983, Ind., McKinney; MA, 1989, Columbia. *Admitted:* IN, 1984. Att’y, Women’s Legal Clinic Indpls., 1984-1984; Clerk, IN Ct. of App. Indpls., 1984-1986; Instr., Fla. State, 1986-1988; Assoc. Prof., Detroit Coll., 1989-1993; Prof., since 1993; Vis. Prof., Denver, 1994-1995; Vis. Prof., Michigan, 1998-1998. Note & Dev. Ed., Ind. L. Rev.. *Subjects:* Family Law; Contracts; Commercial Law.

STEIN, EDWARD D., Prof., Cardozo. BA, 1987, Williams Coll.; BA, 1987, Williams College; PhD, 1992, Massachusetts Inst. of Technology; JD, 2000, Yale. *Admitted:* NY, 2001. Ass’t Prof., New York Univ, 1992-1995; Ass’t Prof., Mount Holyoke College, 1995-1996; Ass’t Prof., Yale University, 1996-1997; Assoc. Prof., Cardozo, 2000-2005; Jud. Clerk, 3rd Cir. Ct. of App. U.S. Fed. Court, 2001-2002; Prof., Cardozo, since 2005; Vis. Prof., U.C.L.A., 2007-2007; Adjunct, New York Univ, 2008-2011. *Subjects:* Sexual Orientation, Gender and the Law; Evidence; Elements of Law; Family Law; Reproduction Law and Policy (S); Children, Psychology and the Law. *Books and Awards:* Forms of Desire (Ed.), 1992; Without Good Reason, 1996; The Mismeasure of Desire, 1999. Mellon Fellowship, Grad. Study in Humanities, Woodrow Wilson Foundation, 1987; Dukeminier Award, Best Sexual Orientation Law Rev. Article, 2001; Rockefeller Fdn. Residential Fellowship, 2008; Bauer Fac. Res. Fellowship, Cardozo Sch. of Law, 2008; Benjamin N. Cardozo Sch. of Law Award for Extraordinary Leadership, 2014. *Member:* LGBT Bar Ass’n; Lesbian & Gay Law Ass’n of NY; Am. Philosophical Association.

Consultantships: Spec. Adv’r to Prog. Com., Am. Phil. Ass’n, 2000-2001; Ed’l Board, Jour. of Homosexuality, since 2000; Mem., LGBT Com., Ass’n of the Bar of the City of NY, 2005-2009; Adv’y Board, Williams Inst. on Sexual Orientation Law & Policy UCLA Law Sch., since 2008.

TAIT, ALLISON, Richmond. JD, 2011, Yale. *Admitted:* NY, 2013. Post Graduate Associate, Yale Women Fac. Forum, 2011-2012; Law Clerk, Connecticut Sup. Ct., 2012-2013; Assoc. in Law, Columbia Law Sch., 2013-2014. Ed. in Chief, Yale Jour. of Law & the Humanities. *Subjects:* Trusts and Estates; Family Law.

VER STEEGH, NANCY, Wm. Mitchell. *Admitted:* MN, 1988. Staff Att’y, Legal Servs. E. MO St. Louis, 1979-1981; Sr. Staff Att’y, Land of Lincoln Legal Assist. East St. Louis, 1981-1988; Staff Att’y, Legal Aid Soc. Mpls., 1988-1988; Mediator, Erickson Med. Inst. Mpls., 2000-2002; Assoc. Prof., Wm. Mitchell Coll. of Law, 2002-2007; Prof., Wm Mitchell Coll. of Law, since 2007; Vice Dean for Acad. Programs, William Mitchell Coll. of Law, 2008-2014. *Subjects:* Poverty Law; Alternative Dispute Resolution; Family Law; Trial & Appellate Advocacy; Domestic Violence Law & Policy (S); Contracts: Transactional Law; Family Law Residency (S). *Books and Awards:* Family Law: Examples & Explanations (with Oliphant), 2004; Family Law: Examples and Explanations (with Oliphant), 2d. ed., 2007; Work of the Family Lawyer (with Oliphant), 2nd ed., 2008; Family Law: Examples & Explanations (with Oliphant), 2010; Work of the Family Lawyer (with Oliphant), 2012. *Member:* Family Ct. Rev., Bd. of Ed.; Family Law Quarterly, Bd. of Ed. *Consultantships:* Pres. & Mem. of Bd. of Dir., Ass’n of Family and Conc. Courts, 2006-2015; Member, Minnesota ADR Ethics Board, 2009-2012; Member, ABA Comm. on Domestic Violence, 2009-2012; Mem. of Bd. of Dir., Board, Ass’n of Family and Conc. Courts -- Minnesota Chapter, 2009-2015; Jt. Ed’l Board, Unif. Law Commission, since 2012.

WALKER, BELA AUGUST, Roger Williams Univ.

WARDLE, LYNN DENNIS, Brigham Young. JD, 1974, Duke. *Admitted:* DC, 1975; AZ, 1976; UT, 1981. Clerk, Judge John J. Sirica U.S.D.C., 1974-1975; Assoc., Streich Lang et al, 1975-1978; Ass’t Prof., Brigham Young University, 1978-1980; Assoc. Prof., Brigham Young University, 1980-1983; Prof., Brigham Young University, since 1983; Vis. Prof., Sophia Univ., 1988-1988; Scholar-in-Res., U.S. Dep’t of Just., 1989-1990; Vis. Profe., Howard Univ. Sch. of Law,

1990-1991; Vis. Lect., T.C. Beirme Univ of Queensland, 2000-2000; Vis. Lecturer, China Univ. of Pol. Sci. and Law, 2004-2004; Vis. Lecturer, Nanjing Agricultural University, 2004-2004; Bruce C. Hafen Prof., Brigham Young, since 2006. Duke L.J. *Subjects*: Biomedical Ethics & Law (S); Children & the Law (S); Civil Procedure; Origins of the Const. (S); Conflict of Laws; Family Law. *Books and Awards*: The Abortion Privacy Doctrine, 1981; A Lawyer Looks at Abortion (with Wood), 1982; Contemporary Family Law (with Blakesley & Parker), 4 vols., 1988; Revitalizing the Institution of Marriage for the Twenty-first Century (Ed. with Hawkins & Coolidge), 2002; Marriage and Same-Sex Unions: A Debate (Ed. with Strasser, Duncan & Coolidge), 2003; Fundamental Principles of Family Law (with L. Nolan), 2006; Marriage and Quasi-Marital Relationships in Central and Eastern Europe (with Loveless), 2008; What's the Harm? Does Legalizing Same-Sex Marriage Really Harm Individuals, Families or Society?, 2008; The Jurisp. of Marriage and Other Intimate Relationships (Ed. with FitzGibbon), 2010; Family and Succession Law, the United States of America, Int'l Encyclopaedia of Family Law (1998) with Nolan, 2d edition also published as Family Law in the USA, 2010. *Member*: ALI.; Int'l Soc. on Family Law (Past Pres.); Int'l Acad. for Study of Jurisp. of the Family. *Consultantships*: Bd. of Dirs., Americans United for Life Legal Def. Fund, 1982-1995; Adv'y Board, Issues in Law and Medicine, since 1994; Hon. Trustee, Nat'l Lawyers Ass'n, since 1995; Adv'y Board, Jour. of Law & Family Studies, since 1998; Adv'y Board, Kluwer Int'l Encyclopaedia of Law, since 1998; Adv'y Board, Canadian Jour. of Family Law, since 2003; Adv'y Board, Georgetown Jour. of Gender and the Law, since 2007; Mng. Editor, Int'l Jour. of Jurisp. of the Family, since 2010; Bd. of Dir., Univ. Fac. for Life, since 2010.

WEAVER, JESSICA DIXON, Southern Methodist.

Admitted: TX, 1996. Associate, Littler Mendelson, 1995-1996; Associate, Smith & Polewski, 1996-1997; Solo Practitioner, Law Offices of Jessica R. Dixon, 1997-2002; Dir. & Sr. Lecturer, W.W. Caruth, Jr. Child Advocacy Clinic, SMU Dedman Sch. of Law, 2002-2009. , Note Ed., Vir. L. Rev. *Subjects*: Prof'l Responsibility; Family Law; Children and the Law (S). *Consultantships*: Fac. Advisor, SMU Family Law Association, 2009-2012; Exec. Bd. Member, AALS Sect. on Fam. & Juv. Law, 2010-2012; Chair-Elect, AALS Sect. on Children and the Law, 2011-2012.

WEINER, MERLE H., Oregon. JD, 1990, Harvard.

Admitted: MD, 1991; DC, 1991; CA, 1993. Clerk, AK Sup. Ct. Fairbanks, 1990-1991; Staff Att'y, Sex Discrim. Clinic (Women's Law & Public Policy Fellow) Georgetown, 1991-1992; Assoc., Shearman & Sterling San Fran., 1992-1995; Assoc. Prof., Iowa, 1995-1997; Vis. Ass't Prof., Oregon, 1997-1998; Ass't Prof., 1998-2000; Assoc. Prof., 2000-2006; Prof., since 2006. Harv. Women's L.J. *Subjects*: Family Law; Torts; Int'l Law; Women & the Law (Domestic Violence) (S); Civil Procedure. *Books and Awards*: Family Law in the World Community: Cases, Materials, and Problems in Comp. and Int'l Family Law (with Blair), 2003; Family Law in the World Community: Conventions, Statutes, and Regulatory Materials (with Blair), 2003; Family Law in the World Community: Cases, Materials, and Problems in Comp. and Int'l Law (with Blair, Maldonado, and Stark), 2009; Family Law in the World Community: Cases, Materials, and Problems in Comp. and Int'l Family Law (with Blair), 2010. *Member*: Int'l Soc. Fam. Law. *Consultantships*: Exec. Committee, AALS, Family Law Section, since 2007.

WEISBERG, D. KELLY, Prof., UC, Hastings. JD, 1979,

UC, Berkeley. *Admitted*: CA, 1979. Ass't Prof., Wash. St. Louis, 1980-1982; Ass't Prof., Cal. Hastings, 1982-1983; Assoc. Prof., 1983-1986; Prof., since 1986; Vis. Prof., Boston Univ., 1990-1991; Vis. Prof., Hebrew Univ., 1997-1998; Dist. Vis. Prof, Univ. of Florida, 2010-2010. Calif. L. Rev.. *Subjects*: Juv. Law; Remedies; Women and the Law (S); Domestic Relations; Torts; Trusts & Estates; Juv. Just. (S); *Books and Awards*: Feminist Legal Theory: Foundations & Applications, 1993, 1996; The Birth of Surrogacy in Israel, 2005; Domestic Violence Law: Legal and Social Reality, 2012; Modern Family Law: Cases & Materials (with S. Appleton), 5th ed., 2013; Child, Family, State: Cases and Materials on Children and the Law (with R. Mnookin), 7th ed., 2014. *Member*: Phi Beta Kappa; Law & Soc. Ass'n; ALI. *Consultantships*: Consult., ABA, Women on Law Faculties Study, 1979-1980; Consult., Am. Just. Inst., since 1979.

Speaker Biographies

WILCOX, W. BRADFORD, Dir., Natl. Marriage Proj., Univ. of Virginia, and Sr. Fellow, Inst. for Family Studies; Vis. Scholar, Amer. Enterprise Inst. Jefferson Scholar, Univ. of Virginia ('92); Ph.D., Princeton Univ. Previously, he held research fellowships at Princeton Univ., Yale Univ., and the Brookings Inst. The coauthor of *Gender and Parenthood: Biological and Social Scientific Perspectives* (Columbia, 2013, with Kathleen Kovner Kline), Prof. Wilcox's research has focused on marriage, fatherhood, and cohabitation, especially on the ways that family structure, civil society, and culture influence the quality and stability of family life in the United States and around the globe. Now, Dr. Wilcox is exploring the contribution that families make to the economic welfare of individuals and societies. He is also the coauthor of *Whither the Child?: Causes and Consequences of Low Fertility* (Paradigm, 2013, with Eric Kaufmann), and the author of *Soft Patriarchs, New Men: How Christianity Shapes Fathers and Husbands* (Chicago, 2004). He has published articles on marriage, cohabitation, parenting, and fatherhood in *The American Sociological Review*, *Social Forces*, *The Journal of Marriage and Family* and *The Journal for the Scientific Study of Religion*. He is now writing a book with Nicholas Wolfinger titled, *Soul Mates: Religion, Sex, Children, & Marriage among African Americans and Latinos* (Oxford 2014). His research has been featured in The New York Times, The Wall Street Journal, The Atlantic, Slate, National Review Online, NPR, NBC's The Today Show, and many other media outlets.

WILL, JONATHAN, Mississippi Coll. *Admitted*: PA, 2005. Associate, Buchanan Ingersoll & Rooney, 2005-2009; Ass't Prof., Dir. Bioethics & Health Law Center, Mississippi Coll. Sch. of Law, since 2009. Exec. Editor, U. Pitt. L. Rev. *Subjects*: Spec. Topics in Bioethics (S); Bioethics & Law; Health Care Law; Civil Proc. I & II.

WILLIAMS, SEAN H., Univ. of Texas. JD, 2004, Univ. of Chicago. *Admitted*: CA, 2009. U. Chi. L. Rev. *Subjects*: Family Law; Contracts; Behavioral Law and Economics (S).

WILLIS, TASHA, Houston

ZUG, MARCIA A. So. Carolina. *Admitted*: NY, 2005. Law Clerk, 3d Cir. Ct. Phila., 2004-2005; Assoc., Steptoe & Johnson NYC, 2006-2007. Developments Editor, Yale Law and Policy Review; Yale L.J. *Subjects*: Family Law; Fed. Indian Law (S). *Books and Awards*: Phi Beta Kappa, 2000; ABA Family Law Award, 2004. *Member*: Emerging Family Law Scholars.

Speaker Abstracts and Outlines

Workshop speakers were invited to submit abstracts or outlines for those in attendance.
These materials are presented in sequence of the program.

The Shifting Foundations of Family Law: Legal Responses and Dilemmas

Katharine T. Bartlett
Duke University School of Law

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.

Family Law and Inequality

Margaret Friedlander Brinig
Notre Dame Law School

To the extent that family law is governed by statute, all families are treated as though they are the same. This is of course consistent with the equal protection guarantees of the US Constitution as well as those of the states. However, in our pluralistic society, all families are not alike. At birth, some children are born to wealthy, married parents who will always put the children's interests first and will never engage in domestic violence. Many laws benefit these children, while, according to some academics, they either further disadvantage other children or at best ignore their needs.

This presentation empirically explores these questions using a large sample of more than a thousand family dissolution case records (divorces, support and custody actions) from two counties in Arizona and five in Indiana. The cases were randomly selected from those initiated in January, April and September of 2008, and documents were collected for all file entries at least through the next five years and were coded to permit comparisons along more than a hundred variables.

The discussion involves differences—inequalities—based on income, parents' marital status, race and ethnicity, and the presence or absence of domestic violence. It also compares results based upon differences in the two states' parenting and child support laws, showing how presumptions and guidelines chosen to validate public policy can exacerbate inequalities. Time permitting, I will also discuss how the data also reveal differences (no doubt related to wealth) in cases handled by attorneys compared to the pro se.

The Purpose of Family Law in an Era of Inequality

June Rose Carbone
University of Minnesota Law School

The classic answer to the question what is the purpose of family law is Carl Schneider's "channeling function," which argued that family law institutionalized behavior by coordinating normative expectations and linking the creation of families to the institutions of marriage and parenthood. This presentation asks what is left of the channeling function in an era of inequality.

Focusing on the specific example of the marital presumption, the presentation will argue that the law today could still play a vital role in the redefinition of marriage, as the law has in fact played such a role in the context of marriage equality. It does not, however, first, because ideological division leads to disagreement about the way in which family norms are expressed even when there is elite agreement on the desired outcomes. And, second, with the exacerbation of class-based inequality, the understood meanings of behavior diverge, with the top, middle and bottom groups in American society moving in different directions.

The result could be a reinstitutionalization of shared expectations through a bright line demarcation between marital (and putatively equal) and non-marital (and putatively unequal) parental roles, but the presentation will explain why such a resolution is unlikely to occur. Without it, American family law becomes a system of rules and dispute resolution, but it loses what had been its distinctive role in forging the links between economic change and shared institutional meanings.

The Not-So-Merry Wives of *Windsor*: The Taxation of Women in Same-Sex Marriages

Lily Kahng

Seattle University School of Law

In *United States v. Windsor*, the Supreme Court invalidated the Defense of Marriage Act definition of marriage as “between one man and one woman” and is now poised to recognize a constitutional right to same-sex marriage. *Windsor* cleared the way for same-sex couples to be treated as married under federal tax laws, and the Obama administration promptly announced that it would recognize same-sex marriages for tax purposes. Academics, policymakers, and activists lauded these developments as finally achieving tax equality between gay and straight married couples. This Article argues that the claimed tax equality of *Windsor* is illusory and that the only way to achieve actual equality is to eliminate taxation on the basis of marital status.

Focusing on the taxation of women in same-sex marriages, the Article explores what lies beneath the putative equality gains that result from according same-sex married couples the same status as different-sex married couples. The Article predicts, based on demographic statistics and other sociological and economic research relating to income levels, wealth holdings, child rearing, and employment patterns, that women in same-sex marriages will be less likely than other married people to reap the benefits, and more likely to suffer the detriments, of marriage taxation. In analyzing why women in same-sex marriages are likely to suffer adverse consequences from their new tax status as married, the Article builds on prior critical and feminist tax literature showing how the tax law—though purportedly neutral in its treatment of married couples—privileged traditional marriages in which men were the primary income earners and wealth holders, and adversely affected married women’s incentives and abilities to be workers, income producers and wealth holders. The Article argues that the tax law, through the fictitious construction of the married couple as an irreducible economic unit, continues to reward this anachronistic model of marriage and to penalize other, more egalitarian models of marriage. The Article proposes that taxation on the basis of marital status be curtailed through the abolition of the joint return and other reforms. More broadly, the Article demonstrates how taxation is a powerful tool by which the state regulates intimate relationships, and highlights the need for a careful and critical evaluation of other marriage laws as they extend their reach to same-sex relationships.

The Color of Kinship

Robin A. Lenhardt

Fordham University School of Law

Family law scholars have been deeply engaged in recent debates about kinship recognition. Work in this area, however, has largely overlooked the relationship between such recognition and race. Indeed, there has been a curious taken-for-grantedness about kinship as it pertains to race. Existing research allows that kinship structures such as marriage may reflect racial inequality, but it has not yet engaged the ways in which conceptions of kinship themselves shape race – its meaning as well as how it is experienced. Kinship is presumed to be race-neutral when, in fact, it has long been racialized.

This presentation urges a greater focus on the relationship between race and kinship. It argues that, by failing more directly to address race in this context, family law scholars not only help to ensure the continued salience of race in this context, but run the risk of effectively endorsing the devaluation by courts and other family law decision makers of kinship connections essential to the functioning and survival of many families of color.

The first part the presentation will develop a theory of kinship and racial formation, drawing on the work of race scholars, but also that of anthropologists and others describing kinship as generative of cultural meaning and hierarchy. The second part of the presentation builds on this theoretical frame. It first makes the case, using the experience of African America as an example, that not attending to race in kinship study will only perpetuate the adverse race effects that non-normative kinship groups now experience in a host of contexts. The presentation then shifts to consider the benefits of a more expansive approach to kinship, one more responsive to and inclusive of the care networks and affective relationships in African America and other communities of color. It draws a direct link between normative kinship and the capacity to secure belonging in the broader community.

Family Court Regulation of the Poor & Access to Justice

Elizabeth L. MacDowell

University of Nevada, Las Vegas, William S. Boyd School of Law

This presentation will explore the nexus of family law with gender, race and class inequality in family courts, along the dimension of access to justice. Family law scholars have noted that class (especially as it intersects with race and gender) impacts the experience of family law, such that there are different systems of family law in operation for families of different economic status. The philosophy and culture of family courts is a core feature of this differential experience. Courts not only help create the conditions under which differential experiences take place, they help shape what constitutes family law. In order to address inequality, access to justice initiatives must therefore take the features of family courts into account.

The presentation will examine how family court reinforces hierarchies relating to race, gender and class in both private and state-initiated cases. I will explore the intersectional impacts and paradoxical nature of the problem-solving court paradigm, which was established to promote access to justice and maintain social hegemony—contradictory agendas that continue to fuel problematic state interventions into poor families. The deep historical connection of family courts to informalism, intervention, and intersecting state systems of subordination creates unique challenges. The problem with family courts to be addressed by those concerned with access to justice (and law reform) is not merely that many individuals are unrepresented and need assistance accessing court services, but that the routine operation of the court is hegemonic in nature. Therefore, the function of access to justice interventions in family law cases should include addressing the subordinating aspects of state power and ensuring accountability of judges and other court personnel. My presentation will highlight these issues with regard to nonsupport and domestic violence cases.

Cohabitants: What the Census Does and Doesn't Tell Us

Cynthia Grant Bowman

Cornell Law School

Our legal concepts struggle to keep up with the reality of family life. When they fail to do so, thus failing to address the problems experienced by today's families, this failure leaves many persons whom the law should protect in exceedingly vulnerable positions. Cohabitants, in particular, are often in such a position because they are treated in a punitive fashion by the law of most U.S. states, in contrast to the approaches in other countries, such as Canada, New Zealand, and even the U.K. Statistics about cohabitation in the United States show that it has been increasing at a steep rate for decades, and that large numbers of cohabiting persons fall into groups that are vulnerable in our society for other reasons as well – for example, low income and minority groups. I have previously proposed that cohabitants who have lived together for two years or have a mutual child should be treated as though they were married.

I am interested here in what the census does and doesn't tell us about how people live. Two groups of persons who live in ways the census does not reveal come to mind: (1) single mothers who aren't really single and (2) non-residential but conjugal partners. The first group has attracted some attention from American family law scholars, who point out that the statistics about single mothers are misleading because a large proportion of these mothers in fact live with the child's father although they are not married. My concern with respect to this group (in addition to remedies I have suggested for cohabitants) is primarily with the welfare of their children – their right to a continuing relationship and support from their cohabiting stepparent if the cohabiting couple separates or one partner dies, as well as to a variety of forms of posthumous support, such as inheritance in the absence of a will, social security survivors benefits, workers compensation benefits, and tort suits for wrongful death and loss of consortium. A variety of legal reforms are necessary to protect the children of cohabiting couples in these circumstances.

The second group, non-residential conjugal partners, is relatively unstudied in the United States, although it has attracted a good deal of attention in the U.K., where it is widespread enough to have been given a name — “LAT,” living apart together. How should the law treat these couples? Discussion of this question sheds a critical light on the remedies I have suggested for cohabitants and perhaps illuminates what the limits of those remedies should be.

After a brief discussion of the current legal treatment of heterosexual cohabitants in the United States and my proposals for reform, this presentation will focus on the legal treatment of the two groups concealed by census statistics. How should family law address their status? And what are the implications for equality?

Marriage Equality's (Bastard?) Children: Thoughts on Civil Unions, Domestic Partnerships, Designated Beneficiaries...

John G. Culhane

Widener University School of Law

Little noticed during the almost-concluded struggle for same-sex marriage equality has been a spotty but significant development: the establishment and subsequent flowering of several new forms of legally recognized relationships. These novel legal creatures take several names: domestic partnerships; civil unions; reciprocal beneficiaries; and designated beneficiaries. They were all created through compromises struck between those who opposed same-sex relationships and those who favored them. Now that marriage equality is likely at hand, will some or all of these continue to exist – perhaps even flourish – or will they spiral down into one of history's many oubliettes?

The question is more urgent than has generally been recognized, and a proper understanding of these legal relationships can lead to policy that stands to be helpful to many different kinds of families, including those whose relationships are still not recognized or protected by law. Once the verities and astonishing list of prerogatives of marriage are called into question by the demands of same-sex couples, the critical project doesn't end with the creation of new statuses. A necessarily quick survey of these statuses shows how they quickly came to transcend their origin in marriage compromise, and suggests a possible future in which the law continues to evolve to support the kinds of relationships that people are actually in – a category that is neither defined nor limited by marriage.

My presentation will focus on the three most significant of these new legal statuses: domestic partnerships; civil unions; and designated beneficiary agreements. I will briefly explain the origin of each, trace their development, and offer both predictions and suggestions for their future. The presentation will be highlighted by a focus on particular couples who have chosen these statuses, including quotations, summaries, and an audio clip or two (my technological prowess permitting). But the presentation will also consider families who have not been helped by these developments, either because they don't live in the "right" state, or because no legal status yet exists that would fully respond to their needs.

The laws should be reappraised and amended, supplemented, or discarded, as appropriate. New ones might be called for, drawing on the experiences of the current crop of statutes – especially the Designated Beneficiary Agreement Act in force in Colorado, which is the most useful of the lot. As lawmakers and lobbyists dig into the details, they should be sensitive to demographics, heedful of a rich diversity of voices, and responsive to the complexities of an ever-evolving nation.

After Same-Sex Marriage . . .

Maxine S. Eichner

University of North Carolina School of Law

It seems increasingly likely that the battle over same-sex marriage will be won in the near future – either because the U.S. Supreme Court will imminently declare that same-sex marriage bans violate the U.S. Constitution, or, if not, because the growing shift in public opinion will cause states to repeal same-sex marriage bans in the next years. But when it comes to a society premised on human dignity and equal justice for all, given that opposite-sex couples can marry, the question of whether to allow same-sex couples to marry has been an easy call. Once we move past that question, we confront more difficult issues about how the state should treat relationships among adults.

A number of possibilities have been proposed by commentators. Some call for disestablishing marriage and recognizing only domestic partnerships for those who want a formal relationship status. Some would get the state out of the business of formalizing adult relationships entirely, including not only eliminating marriage, but also domestic partnerships –leaving adult relationships to be regulated by contract. Others argue that all families – whether headed by one, two, or three adults – deserve respect and should be supported equally by the state. And a waning number of scholars argue that marriage should remain as the sole protected conjugal status for adults, even if the institution is opened up to same-sex couples.

In this talk, I set out principles that I argue should guide state regulation of relationships going forward. First, I make the case that the state should not be neutral to whether citizens enter relationships, but instead has an important interest in supporting certain relationships between adults – specifically, those that are long-term, mutual, caretaking relationships. This is because these relationships help meet the needs for caring and caretaking that must be satisfied for citizens to lead dignified lives and for a flourishing society. While the state could potentially support these relationships without providing any formalized statuses, it has become increasingly clear that the formal commitment to a long-term relationship itself helps facilitate the stability of these relationships, and that formalizing these rights increases partners’ understanding of the rights and responsibilities they are assuming.

Second, I argue that marriage should continue to be one of the formalized statuses offered by the state. I say this with significant reservations: Marriage certainly has many strikes against it in a society committed to equality. It was historically the marker for distinguishing between relationships considered legitimate from those considered illegitimate (indeed, this was literally the case with respect to children born inside and outside of marriage). It is an institution founded in sex inequality and that still sounds in gender complementarity, although that will hopefully wane in the wake of same-sex marriage. It has a long history of heteronormativity that has not yet been conquered. It was historically marked by racial exclusion and then racial separatism. Further, even as these formal exclusions have been removed, informal exclusions have begun to take their place: Marriage is being increasingly defined by class – disappearing among the poor and working classes while remaining healthy in the professional class and among the well-to-do.

Yet while some exclusive institutions should be eliminated in the interests of equality, others should be opened up and democratized. Marriage, I argue, falls into the latter category. It is still the best institution that we have for raising sound children, as well as for ensuring the wellbeing of adults. Of course, the state could scrap marriage and provide domestic partnerships as the only formalized status; to do so would certainly further the important principle of democratic equality. What we know from the low rate at which same-sex couples entered civil unions, however, is that marriage draws couples into it because of its specific cultural meaning; couples would not enter into an institution without this significance at nearly as high a rate.

Third, accepting my first two points, that the state should actively support relationships among adults, and that marriage should be retained as a status, I argue that four rules should govern the state's treatment of these relationships:

1. The state should support a broad range of caretaking relationships.
 - In that the state's interest is in long-term caretaking relationships, the category of relationships that the state has an interest in supporting is considerably broader than those whom the state allows to be married currently, including in those states that currently allow same-sex marriage. These include couples who are not necessarily monogamous, or, at the opposite end of the spectrum, those whose relationships are not sexual. It also includes groupings that involve more than two adults.
 - This requires that the state make available alternative forms of formal relationships, including domestic partnerships for marriage resisters and others who want to enter into this status.
2. Marriage should be retained, but democratized.
 - This means making marriage truly available across races and classes. Given that lack of economic security and job stability are a key factor that make marriage a privileged status, it is high time that the state does what it can to redress this situation.
 - Democratizing marriage not only requires that marriage be made more available across different sectors of society, it also requires that it be a more equal institution. This requires more of a push for gender equality in marriage. In the U.S. this means regulating job structures to accommodate family responsibilities in a more equal way.
3. Some rights and responsibilities should be accorded to those in long-term relationships that have not been formalized, both for the purpose of granting public support for caretaking (such as family leave), and for the purpose of ensuring fairness between members of the couple (such as some property sharing at the end of the relationship).
4. Supporting long-term caretaking relationships is only one of many important goals that a fair-minded state should pursue. Other goals, including the principle of assisting citizens most in need of aid, should limit the extent and manner of state support for those in caretaking relationships.

Contracts and Deals in Families and Family Law

Martha M. Ertman

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The state should and often does encourage connection. A child heading to school, an adult performing at work, and a heart attack victim all fare better if they have deep social connections. The child's backpack more likely contains a good lunch and completed homework, the adult likely has help paying for groceries and making that lunch, and the heart attack victim comes out ahead with a spouse's insurance coverage and a ride home from the hospital. Those benefits and many others lead most people to seek out connections with high levels of social, emotional, and financial enmeshment. Those relationships last longer, in part because it's hard to untangle all that "us-ness."

In parent-child relationships, legal parenthood protects social, emotional, and financial connections between adults and children. Contrary to conventional wisdom that condemns parenthood-by-contract through baby-selling statutes and other legal rules, people make enforceable legal agreements – contracts -- to terminate parental relationships and to become parents. Both adoption and alternative insemination arrangements involve these contracts. In addition, people make not-binding agreements – which I call "deals" in my book *LOVE'S PROMISES: HOW FORMAL AND INFORMAL CONTRACTS SHAPE ALL KINDS OF FAMILIES* (2015) – about topics like post-adoption visitation between birth families and adopted children. Rather than continue to mask the many contracts and deals in families, family law ought to more openly acknowledge the often-positive role of contracts in family life and family law. A contractual framework justifies the trend of states enforcing post-adoption contact agreements. More controversially, it could help family law move beyond the rules that allow a child to have only two legal parents and the all-or-nothing assumptions that prevent partial parenthood. In short, doctrine may develop rules that recognize a range of parent-child relationships, including, say, a man who provides sperm and plays an avuncular role with a child being raised by a married lesbian couple.

Among adults, marriage is shorthand for a high level of interdependence. Though marriage rates are declining and cohabitation rates are on the rise, the 2010 Census indicates that there are five married-couple households for every cohabiting-couple household. Opening up marriage to same-sex couples in much of the country has led marriage rates in that population to triple. Because marriage is the most common form of family, I call it Plan A in *LOVE'S PROMISES*. Yet lots of people opt for Plan B when law, luck, inertia, or preferences lead people to a road less travelled. A contractual view of family accommodates both Plan A and Plan B. It justifies both the current rule that treats marriage as the relationship with the most rights and duties and could protect a cohabiting couple's reasonable expectations regarding of property sharing.

Adopting a contractual lens can help both law and society craft a regime of options in family life and family law. As a normative matter, a contract/deal framework situates Plan B as a morally neutral variation of Plan A. Neutrality, however, is not an end point. Removing the clutter of moral judgment makes space for noticing the way that honoring family variety supports more people—especially children and vulnerable adults—as well as communities.

Rethinking Reproductive Discrimination

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Ten years ago, in language that today sounds increasingly archaic, an Indiana court upheld that state's same-sex marriage prohibition by drawing a clear distinction between "artificial" and "natural" reproduction.¹ The purpose of marriage, the court explained, was to provide a stable context for opposite-sex couples who "accidentally" procreated outside of marriage.² Because same-sex couples procreated—if at all—by design and therefore never by chance, they did not need the protections that marriage affords.³

This so-called "responsible procreation" argument flourished in the courts for years, justifying marriage prohibitions in left-leaning and right-leaning states alike.⁴ Indeed, it was not until the recent wave of marriage equality victories in the United States that courts started to reject the "responsible procreation" justification as a legitimate basis for marriage prohibitions. When Indiana tried to use that rationale once again in 2014 to justify its same-sex marriage prohibition, Judge Posner, with characteristic wit, promptly dismissed it. "Heterosexuals get drunk and pregnant, producing unwanted children; their reward is to be allowed to marry," he wrote.⁵ "Homosexual couples do not produce unwanted children; their reward is to be denied the right to marry. Go figure."⁶

While the responsible procreation argument, like the marriage prohibitions that it has long sustained, is fading into oblivion,⁷ the reproductive discrimination on which that argument rests persists. After *Lawrence v. Texas*, it is no longer constitutionally permissible for states to distinguish between certain sex acts because of what those acts look like, who is engaging in them, and which parts of the body they involve.⁸ By contrast, countless examples exist of the law's differential treatment of certain

1 Morrison v. Sadler, 821 N.E.2d 15 (Ind. App. 2005) (upholding Indiana's limitation of marriage to cross-sex couples).

2 *Id.* at 24-25.

3 *Id.*

4 See, e.g., Hernandez v. Robles, 794 N.Y.S.2d 579, 599 (Sup. Ct. 2005), *rev'd and vacated by* 805 N.Y.S.2d 354 (2005), *aff'd*, 855 N.E.2d 1 (N.Y. 2006) (stating that "recognition of marriage would not promote the State's interest in marital procreation, particularly unintended procreation from heterosexual intercourse"); Standhardt v. Superior Court, 77 P.3d 451, 463 (Ariz. App. Div. 2003) ("Because same-sex couples cannot themselves procreate, the State could reasonably decide that sanctioning same-sex marriages would do little to advance the State's interest in ensuring responsible procreation within committed, long-term relationships"). Procreationist logic emerges in marriage equality cases in forms other than the responsible procreation rationale. For instance, some courts have upheld exclusionary marriage laws by adverting to the necessary link between marriage and procreation and to the possibility that same-sex marriage will weaken that link. See Sevcik v. Sandoval, 911 F. Supp. 2d 996, 1016 (2012), *rev'd and remanded by* Latta v. Otter, 771 F.3d 456, 471 (9th Cir. 2014) (rejecting all forms of procreationist logic and holding that Idaho and Nevada's exclusionary marriage laws violate the federal Equal Protection Clause) ("The perpetuation of the human race depends upon traditional procreation between men and women. The institution developed in our society, its predecessor societies, and by nearly all societies on Earth throughout history to solidify, standardize, and legalize the relationship between a man, a woman, and their offspring, is civil marriage between one man and one woman"). As with decisions upholding marriage inequality on the basis of responsible procreation, these decisions posit a legally relevant distinction between sexual and non-sexual procreation. See Sevcik, 912 F. Supp. 2d at 1016 ("Human beings are created through the conjugation of one man and one woman. The percentage of human beings conceived through non-traditional methods is minuscule").

5 Baskin v. Bogan, 766 F.3d 648, 662 (7th Cir. 2014).

6 *Id.*

7 See, e.g., Latta, 771 F.3d at 471 (rejecting the procreation rationale for exclusionary marriage laws); Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 956-57 (N.D. Cal. 2010) (same).

8 The *Lawrence* Court criticized the *Bowers v. Hardwick* Court's obsessive focus on the mechanics of the sex act at issue there, reasoning that the intimate relationship, not the conduct that relationship entails, is the proper focus of a constitutional inquiry. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) ("To say that the issue in *Bowers* was simply the right to engage in *certain sexual conduct* demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse") (emphasis added); *id.* at 567 ("When sexuality finds overt expression in intimate conduct with another person, the conduct can be *but one element* in a personal bond that is more enduring") (emphasis added). Some commentators have argued that this and other language from *Lawrence* place constitutional limits around governmental regulation of alternative reproductive technology. See Amber D. Abbasi, *The Curious Case of Trent Arsenault: Questioning FDA Regulatory Authority over Private Sperm Donation*, 22 ANNALS HEALTH L. 1 (2013); Katheryn D. Katz, *Lawrence v.*

procreative acts—and the legal relationships those acts create—because of what those acts look like, who is engaging in them, and which parts of the body they may or may not involve. In fact, marriage equality jurisprudence aside, the overwhelming trend by courts, regulators, and scholars is to treat procreation differently depending on the manner in which it occurs.

For instance, the law in every state that has addressed the legal status of sperm donors⁹ makes a distinction between sexual and alternative reproduction in the laws of parentage: fatherhood can never be contractually waived by a man if he procreates with a woman sexually,¹⁰ even if his intention is to be a ‘mere’ sperm donor, whereas it can likely be waived by a man if he procreates with a woman anonymously and through alternative insemination under certain conditions.¹¹ Indeed, the rights and legal obligations of men who create children in non-coital ways are measured by the extent to which their non-coital reproduction approximates traditional reproduction, with more intimate procreation (even if of a non-sexual nature) resulting in a higher likelihood of rights and obligations.¹² In some cases, paternal obligations have even been imposed on men whose sperm was “stolen” by women following oral sex and used by those women to self-inseminate; in one case, a court reasoned that imposing child support on a man in that situation was justified on the ground that “he had *some sort* of sexual contact with [the] plaintiff around the time frame of alleged conception.”¹³

Similarly, the Food and Drug Administration (FDA) distinguishes between sperm donations that occur between “sexually intimate partners” (for instance, a man and his wife who are conceiving with third-party assistance but who are otherwise sexually intimate) and sperm donations that occur between non-sexually-intimate partners (for instance, an anonymous or known donor who facilitates conception but is not in a “sexually intimate” relationship with the recipient of his gametes).¹⁴

Texas: *A Case for Cautious Optimism Regarding Procreative Liberty*, 25 WOMEN’S RIGHTS L. REP. 249, 253 (2004) (arguing that *Lawrence* “gives reason to hope and a basis to argue that reproductive choices using ARTs are . . . entitled to recognition and protection”).

9 Surprisingly, not all states have addressed the legal status of sperm donors, whether anonymous/commercial or known, through either statute or case law. These states include Arizona, Georgia, Hawaii, Idaho, Kentucky, Louisiana, Maine, Michigan, Mississippi, Nevada, Tennessee, Vermont, and West Virginia. See Lauren Gill, *Who’s Your Daddy?: Defining Paternity Rights in the Context of Free, Private Sperm Donation*, 54 WM. & MARY L. REV. 1715, 1738 n.153 (2013).

10 See, e.g., Katharine Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 701 (2008) (stating that American law has “never allowed men and women to agree to waive parental status before or after the intercourse that led to conception”); Katharine K. Baker, *Bargaining or Biology?: The History and Future of Paternity Law and Paternal Status*, 14 CORNELL J.L. & PUB. POL’Y 1, 22-23 (2004).

11 Some states still follow the Uniform Parentage Act (UPA) of 1973, which provides that donors are not legal fathers if they provide semen to a physician for inseminating a married woman who is not the donor’s wife. See Gill, *supra* note 9, at 1738 & n.151; see also Unif. Parentage Act § 5(b) (stating that a male donor will not be considered a father of a child born of artificial insemination if the sperm is provided to a licensed physician for use in artificial insemination of a married woman other than the donor’s wife). Other states follow the Uniform Parentage Act of 2002, which provides that no donor will be considered a parent of any child that results from his donation, regardless of the marital status of the recipient and regardless of whether the insemination involved a physician. Gill, *supra*, at 1738 & n.152. For the 2002 Uniform Parentage Act, see Unif. Parentage Act § 702 (amended 2002) (stating that “[a] donor is not a parent of a child conceived by means of assisted reproduction”). The comments to § 702 clarify that this section of the revised UPA dispenses with the requirement that a recipient be married in order for the donor to avoid paternity, as well as with the requirement that the donor provide semen to a licensed physician. With respect to the first requirement, the amended UPA comments state that “[t]his requirement is not realistic in light of present ART practices and the constitutional protections of the procreative rights of unmarried as well as married women”). The revised UPA of 2002 also makes clear that the term “donor” applies only to assisted reproduction and therefore does *not* include someone who helps to create a child through sexual intercourse. See Unif. Parentage Act of 2002 § 701 (stating that “[t]his [article] does not apply to the birth of a child conceived by means of sexual intercourse”).

12 As this paper will show below, known donors, as well as anonymous donors who do not use third-party intermediaries (like doctors), tend to have more rights and obligations than unknown donors and/or known donors who use third-party intermediaries. See *infra* Part I.

13 *State v. Frisard*, 694 So. 2d 1032, 1036 (La. Ct. App. 1997) (emphasis added). For a fuller discussion of the “misappropriated sperm” paternity cases, see Michael J. Higdon, *Marginalized Fathers and Demonized Mothers: A Feminist Look at the Reproductive Freedom of Unmarried Men*, 66 ALA. L. REV. 507 (2015). For other cases where paternity has been imposed on men who were “deceived” into that legal status, see *Wallis v. Smith*, 22 P.3d 682, 682 (N.M. Ct. App. 2001) (holding that potentially deceitful behavior by woman before or during sexual activity does not void child support obligation); *In re L. Pamela P. v. Frank S.*, 449 N.E.2d 713, 715 (N.Y. 1983) (same); *Moorman v. Walker*, 773 P.2d 887, 889 (Wash. Ct. App. 1989) (same). Indeed, paternity has even been imposed on men who were incapable of giving legal consent to sexual activity. See, e.g., *County of San Luis Obispo v. Nathaniel J.*, 57 Cal. Rptr. 2d 843 (Cal. Ct. App. 1996) (holding that inability to give meaningful consent to sexual activity does not void any child support obligation that flows from that sexual activity); *Kansas ex rel. Hermesmann v. Seyer*, 847 P.2d 1273 (Kan. 1993) (same); *Mercer County Dep’t of Soc. Serv. ex rel. Imogene T. v. Alf M.*, 589 N.Y.S.2d 288, 289 (N.Y. Fam. Ct. 1992) (same).

14 See 21 C.F.R. § 1271.90(a)(2) (2012) (stating that “[r]eproductive cells or tissue donated by a sexually intimate partner of the recipient for reproductive use” are exempt from Part 1271’s requirements to screen, test, and conduct donor eligibility determinations).

Under current law, the former category of donations (those between sexually intimate partners) are exempt from the FDA's myriad—and costly—testing requirements for communicable diseases like HIV and West Nile virus, whereas the latter category of donations (those between persons who are not sexually intimate) are not.¹⁵ Making eligibility for the exemption turn on the nature of the relationship between donor and recipient, as the FDA regime does, has prompted criticism by commentators¹⁶ as well as a federal lawsuit by individuals who wish to avoid the added costs associated with mandatory testing.¹⁷

In addition to the legal regimes that currently exist that distinguish between sexual and alternative reproduction, commentators have recently advocated for the passage of laws that are predicated on a presumed difference between sexual and alternative reproduction—laws that would reform the fertility industry in radical ways. Some scholars, for instance, have argued that gamete banks ought to be discouraged from arranging donors in race-salient ways in order to import a norm of color-blindness into the private world of third-party reproduction.¹⁸ Others have variously argued that the law ought to eliminate anonymity in gamete donation,¹⁹ to place mandatory caps on the number of times that a donor can successfully donate gametes to third parties,²⁰ to limit the number of eggs that can be transferred to a woman during a single in vitro fertilization cycle,²¹ and to permit tort actions brought by children conceived from alternative reproductive technology (and “injured” because of that technology) against their parents.²² Like marriage equality's responsible procreation rationale, these suggested reforms rest on a perceived distinction between sexual and non-sexual reproduction, as their proponents sometimes argue that analogous regulations of sexual reproduction—for instance, regulations that eliminate anonymity and racial considerations from sexual reproduction—would likely be impermissible under the Constitution.²³

Rather than question the wisdom of these specific reforms, this paper instead interrogates the reproductive binary on which they rest: the sexual/alternative reproduction binary. It argues that this binary, which might be explained as the product of the very law that rendered alternative reproduction licit, finds no support either in fact or in law. Gay rights jurisprudence, it contends, starting with *Lawrence* and extending through the wave of marriage equality victories that has swept the nation since the Supreme Court's landmark decision in *United States v. Windsor*,²⁴ stands for much more than the proposition that the state cannot criminalize the sexual conduct of sexual minorities or withhold basic civil rights from them, including marriage. Rather, or in addition, those cases stand for the proposition that the state cannot ground laws that relate either directly or indirectly to reproduction on the way in which it occurs.²⁵ For these and other reasons, this paper contends, family law's reproductive binary warrants serious reconsideration, if not outright rejection. In 2008, Professor John Robertson wrote that “a fully theorized approach to reproductive liberty—particularly when one actively seeks to reproduce—still wants legal elaboration.”²⁶ This paper argues that such a “theorized approach” not only “still wants legal elaboration,” but also is even more necessary today than it

15 *Id.*

16 See Abbasi, *supra* note 8, at 27-28; Jacqueline M. Acker, *The Case for an Unregulated Private Sperm Donation Market*, 20 UCLA WOMEN'S L.J. 1 (2013).

17 *Doe v. Hamburg*, 2013 WL 3783749 (July 16, 2013) (dismissing a case brought by a woman who wished to engage in private sperm donation with a male provider of those services on the ground that she lacked standing to assert his constitutional claims).

18 See Dov Fox, Note, *Racial Classification and Assisted Reproduction*, 118 YALE L.J. 1882 (2009).

19 See, e.g., Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367, 413 (2012).

20 NAOMI CAHN, *THE NEW KINSHIP* 161 (2012).

21 Naomi R. Cahn & Jennifer M. Collins, *Eight is Enough*, 103 NW. U. L. REV. COLLOQUY 501 (2009).

22 Michele Goodwin, *A View from the Cradle: Tort Law and the Private Regulation of Assisted Reproduction*, 59 EMORY L.J. 1041 (2010).

23 See, e.g., Naomi Cahn, *Do Tell!: The Rights of Donor-Conceived Offspring*, 42 HOFSTRA L. REV. 1077, 1106 (2014) (arguing that sexual and alternative reproduction are “different enough” to justify different legal treatment of them); Goodwin, *supra* note 23, at 1091-92 (stating that “natural reproduction” and “clinical or assisted reproduction” are “distinctly different”); Fox, *supra* note 19, at 1182 (“Autonomy interests are implicated differently in assisted reproduction than they are in sexual reproduction or romantic dating”); Dov Fox, *Choosing Your Child's Race*, 22 HASTINGS WOMEN'S L.J. 3, 11 (2011) (same).

24 133 S. Ct. 2675 (2013).

25 For the argument that *Windsor* and contemporary marriage equality jurisprudence stand for a broader right to familial establishment, see Courtney Megan Cahill, *The Oedipus Hex: Regulating Family After Marriage Equality*, U.C. DAVIS L. REV. (2015, forthcoming); Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 818 (2014).

26 John A. Robertson, *Assisting Reproduction, Choosing Genes, and the Scope of Reproductive Freedom*, 76 GEO. WASH. L. REV. 1490, 1493-94 (2008).

was 2008, when marriage equality—and the robust ethic of familial and reproductive pluralism that that movement has come to represent—was still in its (relatively) nascent state. Indeed, this paper maintains that marriage equality jurisprudence necessarily prompts a rethinking of the panoply of regulatory regimes, either in existence today or that might emerge in the future, that turn on a factual and legal distinction between sexual and alternative reproduction.

After presenting numerous examples of the way in which the law treats procreation differently depending on the mechanics that it involves, this paper briefly offers three conceptual explanations, as well as a possible historical explanation, for that differential treatment. Conceptually, the law's persistent categorizing of reproduction as either "sexual/traditional" or "non-sexual/alternative" might be explained as derivative of another deeply-rooted binary: the commerce/intimacy binary. According to it, the world of commerce and the world of intimacy are separate and distinct domains—separate and distinct enough to justify laws that keep them apart, including laws that treat "commercial" family formation different from "intimate" family formation.²⁷ The sexual/alternative reproduction binary is also a conceptual by-product of the law's tendency to treat sexual conduct and its correlates—*e.g.*, sex crimes, sex offenders—as *sui generis*, different not just in degree but in kind from other species of conduct,²⁸ as well as its tendency to treat alternative reproduction as less private, and therefore more susceptible to regulation, than sexual reproduction.²⁹

In addition, the sexual/alternative reproduction binary might be explained as an artifact of the legalization of alternative insemination in the 1960s and 1970s. When states began to legalize alternative insemination in the 1960s,³⁰ and when the Uniform Parentage Act followed suit in 1973, they made clear that the legality of that procedure depended on whether a third-party intermediary—specifically, a doctor—participated in life creation.³¹ Before that time, courts routinely conceptualized alternative insemination in sexual terms, characterizing it as "adultery by doctor" and deeming the children that it created "illegitimate." Eventually, however, legislators and regulators legitimized this increasingly popular procedure—but only by de-sexualizing it and by drawing a clear distinction between sexual life creation and commercial/medical life creation.³² As Kara Swenson explains, "[t]he participation of a doctor did the cultural work of transforming what some considered a variation of adultery into a treatment for infertility, that is, 'sin into therapy.'"³³ This paper suggests that the very laws that transformed an illegal procedure into a legal one in the 1960s and 1970s might be partially responsible for the law's persistent reproductive binary, as those laws conditioned the legitimacy of alternative insemination on how unlike sexual reproduction it appeared to be.

Simply because conceptual and historical explanations for the law's reproductive binary exist, however, does not mean that the binary is immune to criticism or to the revisionism that this paper advocates. To that end, this paper contends that the binary warrants reconsideration—and rejection—for factual and constitutional reasons.³⁴ It first argues that the law's reproductive binary is factually inaccurate, obscuring the similarities that exist between sexual and alternative reproduction. Consider, for instance, the similarities that sexual procreation shares with its "assisted" form. On the most basic level, all reproduction is assisted reproduction, as parthenogenesis, like Athena springing from Zeus' head, is a human impossibility. Moreover, two individuals conceiving the "old-fashioned way" often have third-party assistance: surveys suggest that a not insignificant number of individuals are thinking of someone else while having sex and are doing so in order to have sex,³⁵ and whole

27 For a discussion of how this binary shapes contemporary legal norms surrounding alternative procreation, see Martha M. Ertman, *Unexpected Links Between Baby Markets and Intergenerational Justice*, 8 L. & ETHICS OF HUM. RTS. 271 (2014); Martha Ertman, *What's Wrong with a Parenthood Market?: A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1 (2003).

28 For a rich discussion of the pervasive, and often privileged, status of sex in American legal culture, see Elizabeth F. Emens, *Compulsory Sexuality*, 66 STAN. L. REV. 303 (2014).

29 See Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457, 1473-74 (2008).

30 *People v. Sorensen*, 437 P.2d 495 (Cal. 1968).

31 Unif. Parentage Act § 5(b).

32 For a discussion of this history, see Kara W. Swanson, *Adultery by Doctor: Artificial Insemination, 1890-1945*, 87 CHI.-KENT L. REV. 591 (2012).

33 KARA W. SWANSON, *BANKING ON THE BODY: THE MARKET IN BLOOD, MILK, AND SPERM IN MODERN AMERICA* 225 (2014).

34 For commentators who have similarly questioned the law's reproductive binary, see Ertman, *supra* note 27; Susan Frelich Appleton, *Between the Binaries: Exploring the Legal Boundaries of Nonanonymous Sperm Donation* (unpublished manuscript on file with author).

35 See, *e.g.*, Harold Leitenberg & Kris Henning, *Sexual Fantasy*, 117 PSYCH. BULL. 469 (1995); The American Sex Survey: A Peek Beneath

industries exist—sex aid pharmaceuticals, pornography, sex toys, sex therapy—for the purpose of facilitating sexual desire and sexual intercourse.³⁶ To the extent that procreation is the by-product, whether intentional or not, of that intercourse, it simply cannot be said that alternative reproduction is radically different than sexual procreation because of the third-party assistance and commerce that it involves. All of the above-mentioned industries throw into relief the commercial character of sexual reproduction, as well as the role that third-party intermediaries often play in facilitating it.

Just as sexual procreation shares fundamental aspects with alternative procreation, so too does alternative procreation share essential attributes with sexual procreation—or, to be more precise, so too does alternative procreation share what commentators typically posit are the essential attributes of sexual procreation. For instance, much of what we call “assisted” or “alternative” reproduction is intimate and sexual. As a *Slate* article recently reports, lesbian couples are increasingly opting for at-home inseminations that can be “romantic,” “intimate,” and “sexual.”³⁷ In addition, the women who have conceived children with the semen of Trent Arsenault, the sperm donor who was the subject of the above-mentioned constitutional challenge to the FDA’s mandatory testing exemption for “sexually intimate partners,” have argued in federal court that they are “sexually intimate” with Mr. Arsenault, even though they do not have sexual intercourse with him.³⁸

Finally, the growing practice of “one night stand” or “natural” inseminations—where a man “donates” his sperm by sexually inseminating a woman for free—suggests that in some sense the boundary between “sexual” and “assisted” reproduction has blurred completely.³⁹ Courts have refused to treat natural inseminators like anonymous sperm donors, finding instead that sexual insemination invariably creates a legal relationship between the sexual donor and any children whose creation he facilitates.⁴⁰ Nevertheless, the men and women who enter into natural insemination agreements regard the sexual aspect of the “donation” as irrelevant to the legal status of the child that results from it, preferring instead to conceptualize sex as merely one among many different—but morally and legally equivalent—life-creating mechanisms.

The law’s reproductive binary makes no more sense constitutionally than it does factually. The text of the Constitution does not support different legal treatment of sexual and alternative reproduction; nor does constitutional history or constitutional doctrine. The Constitution makes no reference to a procreative right, let alone to a sexually procreative right. Moreover, Supreme Court doctrine on the right to procreate nowhere explicitly links sex and procreation. Finally, the historical context surrounding the landmark case that appeared to establish a right to procreate in 1942, *Skinner v. Oklahoma*,⁴¹ supports a right to procreate through either sexual or assisted means, as alternative reproduction was available, even if not altogether legal, at the time that *Skinner* was decided.⁴²

In addition, and more problematic still, the law’s reproductive binary is in tension with Supreme Court landmarks like *Lawrence v. Texas* as well as with the constitutional norms that are emerging—or have emerged—from contemporary marriage equality

the Sheets, available at <http://abcnews.go.com/images/Politics/959a1AmericanSexSurvey.pdf>.

36 See generally DAGMAR HERZOG, *SEX IN CRISIS: THE NEW SEXUAL REVOLUTION AND THE FUTURE OF AMERICAN POLITICS* (2008).

37 Jillian Keenan, *Beyond the Turkey Baster*, SLATE, Aug. 26, 2013, available at http://www.slate.com/articles/double_x/doublex/2013/08/intrauterine_insemination_at_home_midwives_are_performing_iuis_without_formal.html.

38 Doe v. FDA, First Amended Complaint, available at http://causeofaction.org/assets/uploads/2013/01/ECF-No-33_First-Amended-Complaint.pdf; Abbasi, *supra* note 8, at 38 (arguing that “sexually intimate relationships can involve a broad range of physical and emotional intimacies, only some of which are contained within the [sexually intimate partner] definition advanced by the FDA”).

39 Jeff Schneider, Muriel Pearson, & Alexa Valiente, *Meet the Men Having Sex with Strangers to help them have Babies*, ABC News, Nov. 13, 2014, available at <http://abcnews.go.com/Lifestyle/meet-men-sex-strangers-babies/story?id=26870643>

40 See, e.g., *Straub v. BMT*, 645 N.E.2d 597 (Ind. 1994).

41 316 U.S. 535 (1942).

42 Because the *Skinner* Court relied on the Equal Protection Clause when striking down Oklahoma’s mandatory criminal sterilization law, some commentators maintain that the right to procreate is not an expansive privacy/liberty right but rather a more constrained equality right. See Rao, *supra* note 30, at 1462 (arguing that “the ‘liberty’ protected under the Due Process Clause of the Fourteenth Amendment doesn’t appear to include a fundamental right to use ARTs”). In Rao’s view, *Skinner* ought to be read to stand for the proposition that the state cannot single out particular groups (like gays and lesbians) when regulating alternative reproduction but it may regulate alternative reproduction for everyone. See *id.* Other scholars read *Skinner* as establishing a more expansive liberty right. See Robertson, *supra* note 27, at 1493 (arguing that “[a]lthough [*Skinner*] couched its decision in the language of equality . . . the rhetoric of a liberty right to reproduce . . . explains the frequency with which the case is now cited”).

jurisprudence. In prioritizing social, rather than biological, kinship, and in dismantling the link between sexual procreation and marriage, the marriage equality precedent throws into serious question legal regimes that continue to distinguish between sexual and non-sexual reproduction and to privilege one variety of family formation over another.⁴³ In so doing, the marriage equality precedent suggests the deep constitutional and normative deficiencies of the law's reproductive binary; at the same time, that precedent invites reflection on what reproduction in a de-binarized world—one where the robustness of the procreative right does not depend on the manner in which reproduction occurs—might look like.

This paper proceeds as follows. The first two Parts are descriptive in scope. Part I reveals the law's sexual/alternative reproduction binary as it exists in judicial decisions, state and federal legislation, and academic commentary, and Part II offers conceptual and historical reasons for it. Part III, which moves from the descriptive to the normative, subjects the law's reproductive binary to factual, constitutional, and normative critique. Here, this paper exposes the law's reproductive binary as a false one by revealing the similarities and convergences between sexual and alternative reproduction; this Part also contends that neither a textual nor a historical reading of the Constitution, nor marriage equality jurisprudence or the trajectory of family law more generally, supports differential legal treatment of procreation depending on the way in which it occurs. Part IV concludes by considering the consequences of the approach here advocated, specifically, how parity of treatment (of sexual and alternative reproduction) might affect myriad legal issues in family law and constitutional law, including, respectively, parentage determinations and the viability of religious conscience objections that arise in the third-party reproduction setting.

⁴³ See generally Cahill, *supra* note 26; Douglas NeJaime, *Before and After Marriage: Toward a Family Law Account of Marriage Equality*, *passim* (unpublished manuscript on file with author).

Exploring The Boundaries Of Families Created With Known Gamete Providers: Who's In And Who's Out?

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- I. INTRODUCTION

- II. A TAXONOMY OF THE CASES
 - a. Single Women
 - b. Lesbian Couples
 - c. Insights from the Cases

- III. VALUES AND ESSENTIAL PRINCIPLES FOR GAMETE DONATION LAWS
 - a. The law should provide clear and comprehensive rules governing the rights and responsibilities of parties using gametes from known providers
 - b. The law should not discriminate against unmarried opposite-sex couples or co-parents
 - c. The law should respect the integrity of single parents and same-sex parents
 - d. The law should accommodate the diversity of family arrangements created through gamete donation
 - i. Intentions are important, but they are not everything; preserving functional parenthood
 - ii. “Role models” do not equal “fathers”
 - iii. The law should provide limited legal recognition to active sperm providers
 - iv. The law should make room for families contemplating more than two parents
 - e. The law should be functional: recommendations
 - i. Written agreements should be enforceable
 - ii. Using forms to define status
 - iii. Physicians are useful but not essential
 - iv. Rules for in-home insemination
 - v. Default rules in the absence of a written statement of intent

- IV. CONCLUSION

When Cohabitation Ends

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There is little doubt that non-marital cohabitation is not just “preliminary to marriage,”¹ but rather an alternative to marriage for a growing number of American families. How does the law regulate this increasingly popular family form? An expanding body of literature investigates the ways that these “non-traditional” families fit – or fail to fit – into the current legal regime, identifying various shortcomings of the law in the process.² Missing, however, is an account of how the law engages with these relationships at the moment they end. That is the task of this Article. In particular, the Article examines how courts allocate property, including palimony, when cohabitation ends.³

Focusing on the end of a relationship provides insight into the relationship itself. Just as divorce helps us to better understand the law’s construction of marriage, separation helps us to better understand the law’s conception of non-marital relationships in the first instance. This line of inquiry is especially important, given that the couple’s separation is one of the few moments legal actors have to participate directly in the relationship.⁴

What types of relationships are included under the rubric of non-marital cohabitation? One of the challenges of engaging in this inquiry is developing a working definition of the relationships without imposing a particular vision of what the relationships ought to look like. In an attempt to address this problem, this Article examines the relationships that couples assert for themselves in seeking a particular property distribution before the court. Accordingly, the Article focuses on relationships that typically involve two partners who have lived together, at least one of whom has chosen to seek property rights at the end of the relationship. The relationships may be either homosexual or heterosexual, and can take the form of civil unions or domestic partnerships, although they need not receive any statutory recognition. There are, of course, obvious limits to this definition.⁵ An important part of this Article will be to consider what those limits are, how they are imposed, and assess which relationships are excluded – those that are not sexual in nature, for instance; or those that involve more than two partners.

This Article is structured in three parts. Part I begins by canvassing the various ways that courts allocate property in deciding claims brought by separating couples.⁶ The relevant legal responses can be categorized into three general approaches, with more than one approach possibly existing in any one state at a given time. The first response – the most “traditional” – is to impose a common law

1 Marvin v. Marvin, 18 Cal. 3d 660, 683 (1976).

2 See, e.g., Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167 (2015) (identifying the disjuncture between family life and family law and offering ways that family law can change to facilitate effective co-parenting); Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276 (2014) (revealing the asymmetrical recognition provided non-marital cohabiting relationships, which often bear the burdens but receive none of the benefits of marital relationships, with disproportionate effects on already vulnerable populations).

3 Death is another event that may occasion legal intervention. This Article focuses only on separation by choice. Other scholarship, including my own, has addressed some of the legal repercussions for a couple when one of the individuals dies. See, e.g., Laura Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227 (2005); Albertina Antognini, *Family Unity Revisited: Divorce, Separation, and Death in Immigration Law*, 66 S.C. L. REV. 1 (2014).

4 They do so in deciding whether, and how, property should be divided. Custody decisions are another opportunity for courts and legislatures to engage with the relationship. Custody decisions between unmarried parents lies beyond the scope of this Article, but forms the basis of a related project I am working on.

5 It does not, for instance, capture the variety of couplings that exist outside of the legal system, such as polyamorous or polygamous relationships. This is an issue related to both the self-selecting sample of couples that decide to bring claims in court and to their desire for success – they must define themselves such that their requests have legal valence as set forth either by statute, or case law.

6 There has been a proliferation of websites geared towards attempting to clarify the rights and responsibilities that arise from a cohabiting relationship. See, e.g., Unmarried Couples and the Law available at <http://www.palimony.com>, last visited on March 21, 2015 (attempting to “provide a one-stop source of resources and information for unmarried couples (heterosexual or homosexual) who are living together as domestic couples or are considering doing so” and announcing that it was established by the law firm responsible for defending Lee Marvin in *Marvin v. Marvin*); Unmarried Equality available at <http://www.unmarried.org>, last visited on March 21, 2015 (asserting “that marriage is only one of many acceptable family forms, and that society should recognize and support healthy relationships in all their diversity” and providing information for a wide variety of family relationships outside of marriage).

marriage on the relationship, which a number of states continue to do in varying degrees. This section will also include decisions that have refused to consider property claims between non-marital couples, based on the concern that it would essentially reinstate common law marriage by another name in states that have otherwise abolished it. The second approach is statutory. This may take the form of applying divorce rules to a non-marital couple that seeks to separate, or interpreting regulations that specifically address non-marital couples where they have been enacted. The final approach is to rely on a number of different common law doctrines to deal with non-marital partners in the absence of any regulation on the topic.

Part II then turns to whether, and how, palimony is awarded. Many states deny the award of palimony outright, a phenomenon that also takes place in the context of alimony. This discussion provides a perspective outside of the legal responsibilities imposed by marriage for exploring the traditional arguments in support of, or against, the notion of the obligation theory of partnership. It may be that courts prefer most versions of privatized support to a state support alternative.

Part III unpacks some of the consequences that follow from the law's treatment of non-marital relationships for the purpose of property division. Considering the various legal responses *in toto* reveals a number of deep-seated assumptions about how the law conceives of non-marital relationships, and the distributive consequences such assumptions further. In particular, this Part will discuss the underappreciated perils inherent in cohabitation, and identify who may be harmed by the decision not to marry.

Engaging in a more granular analysis of the law surrounding cohabitation helps identify how the legal system constructs who is part of the family, and who is excluded from that account. Dealing with the separation of non-marital couples provides the law with an occasion to be expansive in recognizing different types of relationships between consenting adults.⁷ These moments can also, however, create spaces where traditional norms of what families ought to look like are uncritically reinforced. Assessing how the law handles decisions regarding property allocation helps identify the law's construction of adult relationships outside of marriage; it also helps define the contours of marriage itself. This project aims to contribute to the strand of legal scholarship that considers areas outside of the formal reach of marriage as essential participants in establishing its meaning.⁸

7 See, e.g., *Marvin*, 18 Cal. 3d 660 (recognizing the existence of cohabiting couples in the context of a separation between one such couple).

8 See, e.g., Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CAL. L. REV. 87, 163-65 (2014) (discussing the dialogic relationship between marriage and nonmarital relationships and identifying “how the construction of nonmarital spaces influenced the changing contours of marriage”); Ariela Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1646-47 (2003) (noting that “understanding the meaning of marriage requires further foray, beyond marriage’s margins and into the territory outside of its formal borders”); HENDRIK HARTOG, *MAN AND WIFE IN AMERICA* 1 (2000) (“It is through separations, through close examination of struggles at the margins of marital life and marginal identities, that we come to a historical understanding of core legal concepts: of wife, of husband, of unity”).

Gradual Marriage

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The time has come to reform the law governing marriage. In determining the rights and obligations between spouses arising from marriage, current law does not adequately account for the way in which spousal behaviors and expectations change over the course of a marriage. With regard to intact marriages, under the existing legal framework the spousal rights and obligations enjoyed by couples in intact marriages arise all at once, at the moment a couple is granted a marriage license, and do not change as the years of marriage pass or as children are born to the marriage. In terms of dissolving marriages, with few exceptions, all marriages are subject to the same broad default rules for determining post-dissolution spousal rights and obligations without regard to the length of the marriage or the presence of children within the marriage. Moreover, the substantial discretion granted to judges in the marital dissolution context often leads to unpredictable and inconsistent results. Perhaps as a result of the law's problematic approach to determining spousal rights and obligations, marriage rates have declined significantly over the past several decades and the institution of marriage has come to occupy an increasingly perilous place in U.S. society. This Article sets forth a comprehensive proposal for an improved legal framework governing marriage that is based upon the concept of spousal rights and obligations arising gradually over the course of a marriage. Under the proposed system, various marriage levels would be established, each providing a package of spousal rights and obligations tailored to marriages that had reached that particular level under the default rules. Ascension among the levels would be based primarily upon the length of the marriage and the presence of children within the marriage, factors which play a strong role in shaping spousal conduct and expectations. Implementation of the proposal would result in a significantly improved legal framework governing marriage.

Family Formation and the Home

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Intergenerational families, voluntary kin groups, non-conjugal adult room-mates, and unmarried couples with or without children, all build domestic family lives together without formal and consistent legal recognition. The variety of families that provide benefits to dependents and mutual support to adults is constantly evolving; but, living together and creating a joint home has always been a central aspect of family life. As traditional family life tied to marriage and biology is continuously challenged, and alternative forms of family formation are developed, the significance of the role of the home plays in creating legally significant ties has been largely overlooked. While domesticity has been intermittently used as a tool in defining family, we will demonstrate that how home sharing creates family rights and obligations is riddled with inconsistencies and conflicts. On the one hand, certain welfare-based entitlements and zoning cases use flexible standards for determining family based on domesticity. However, on the other hand, even the rare recognition of private rights and obligations among those who cohabit occurs when sexuality or reproduction are also involved in a manner that more closely mimics traditional marriage. Generally, domesticity is assumed to include sexuality and the focus on family formation has centered on the sexuality involved. However, in this article we consider how joint lives that are based under a common roof whether or not they include sexual relations can include many of the supports and normative benefits of family life. We will demonstrate based on social science studies and taking into account both the benefits and risks of home sharing, how domesticity has its own normative benefits and ways of creating emotional and physical bonds apart from sex. Finally, this article will lay out different possibilities for how the law can recognize and support the role home sharing plays in creating familial lives that provide mutual support, stability and other important benefits over an extended and stable period of time. Keeping in mind both the desire to foster diversity and autonomy and protect those who are most vulnerable, this article considers options for legal recognition of the status of domesticity in family formation. These alternatives include consideration of how vulnerability could justify the imposition of obligations and rights upon sexual or non-sexual cohabitants and how registrations systems can provide solutions to those seeking legal recognition of the mutual support systems and family lives they create in a diverse manner by sharing a home with loved ones and/or long-term trusted friends.

Parenthood by Contract

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Intended parents often turn to contract to formalize their ties to their intended children. Would-be parents draw up co-parenting agreements, surrogacy agreements, and agreements terminating the parental status of gamete donors. Yet courts are typically reluctant to permit parties to determine parental status through contracts other than the marriage contract. Even courts that do consider parenthood contracts in assessing parental status will often insist that they are not enforcing the contract at issue, but rather, looking to the agreement to determine an element of parentage such as parental intent (in the context of surrogacy or other assisted reproductive technology) or consent to share parental status (in the context of co-parenting agreements). And in the minority of cases to permit outright enforcement of parenthood contracts, enforcement is often conditioned on a judicial finding that the contractual arrangement is consistent with the best interests of the affected child.

To better understand why courts resist parenthood contracts, even in the face of the private turn to such contracts, this Article traces the early history of such resistance. It examines a similar dynamic between legal practice and judicial response in nineteenth-century Anglo-American case law, when courts were first confronted with attempted contractual transfers of parental rights in the form of both adoption agreements between parents and third parties and separation agreements allocating custody from husband to wife. In the nineteenth century, as today, courts displayed considerable resistance to parenthood by contract. Parents repeatedly turned to contract to formalize their ties to their children, only to learn, upon attempting to enforce such agreements, that they had no legal force. The result, then as now, was to produce a conflicted and largely inconsistent body of law under which intended parents had no certainty about whether their contractual rights would be enforced.

The Article finds that the early judicial resistance to parenthood by contract was driven by two, often overlapping concerns: a commodification concern and a family-regulation concern. The commodification concern was that enforcing parenthood contracts treated children as chattel that parents could buy and sell, which, in turn, destabilized parental status, overlooked children's welfare, and improperly suggested that money rather than love is the foundation of a healthy parent-child tie. The family-regulation concern was that enforcement of contracts transferring parental rights would undermine marriage by making it easier for mothers to raise children outside of the marital home, and would undermine the patriarchal hierarchy within marriage by making marital exit more viable for women. Intertwined with both the commodification concern and the family-regulation concern was a judicial reluctance to cede the traditional judicial power to police how and by whom children were raised, especially when the traditional family had broken down.

The Article explores the extent to which the commodification and family-regulation concerns still animate the continued resistance to parenthood by contract today, and brings this inquiry to bear on whether parenthood contracts should be enforced. It argues that to the extent that the commodification concern is compelling, this concern can be addressed and mitigated. The family-regulation concern, by contrast - the desire of the state to promote some family forms over others, and, in particular, to promote marital over other forms of relationships - is not a persuasive reason for refusing to enforce parenthood contracts, and often produces results at odds with child welfare. By deeming only state-sanctioned families worthy of recognition and protection, we create a two-tier system in which non-sanctioned families are denied the relationship security and freedom from state intervention that state-sanctioned families enjoy, to the detriment of children and parents alike.

The Article concludes by questioning the continued reluctance to countenance parenthood by contract. In an age of serial divorce, unmarried parentage, and assisted reproductive technology, contract should be permitted to work alongside marriage to determine parental status. Rather than force parent-child relationships into a marital paradigm that is increasingly out of touch with current realities, we should permit all potential parents to use contract to create a status that would confer the same degree of certainty, stability, and autonomy that we grant to traditional families consisting of two married parents and their biological children.

Mistaking Neoclassicism for Pluralism in Family Law

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Scholarship has generally celebrated the emerging pluralistic structure in family law, including the increased growth of private ordering. The proposition appears self-evident: diverse types of families should be allowed to shape the legal implications of their relationships as they choose. So, family and contract law scholarship celebrate private ordering as expressing diverse valuations and potentially tolerating a nearly limitless range of partnerships. But a perilous implication of this “pluralism” has gone unnoticed.

This article conducts a functional analysis of prenuptial and cohabitation agreements to excavate these hidden implications. It finds that the legal regimes in family law that appear to express pluralistic values are, in fact, ushering in a neoclassic approach to intrafamilial contracts—a theory that adopts formalist, binary, and proceduralistic principles for the creation of valid legal obligations, and is premised primarily on vindicating autonomy over other values. The neoclassical approach in intrafamilial contracts plays a double role: in the doctrines governing prenuptial contracts, it serves to protect the freedom *of* contract of the economically stronger party, while, in the law of cohabitation contracts, it functions to protect the freedom *from* contract of the economically empowered partner.

Viewing the system as a whole—at least in the context of selected jurisdictions—it becomes apparent that the overall regulatory structure systematically provides significant freedom for the wealthier party to skirt his financial responsibility to support an ex-partner, while limiting protections for the less-well-off partner. These implications are graphed in the following chart. The emerging menu of options thus does not adequately reflect the variety of values that are extrinsic to family law and cannot be considered as embodying the principles of value pluralism.

The question remains, however: can pluralist theory—one that is not based on neoclassicism—serve as a normative foundation to family law? In evaluating that, the article critiques the plasticity of pluralistic theory and exposes the risk that it will function as a fig leaf covering the embrace of free market policies.

	Default Rules	Rules of Formation and Enforcement
Informal cohabitation	<ul style="list-style-type: none"> ▪ No automatic financial obligations between the partners (opt-in requirement) ▪ Entrenches possible informational asymmetry ▪ Protects freedom from contracts ▪ Helps the economically stronger partner to avoid obligations 	<ul style="list-style-type: none"> ▪ Writing requirement or express contract ▪ Could result in reducing availability of other theories of liability (unjust enrichment) ▪ Protects freedom from contracts ▪ Favors party with knowledge of the law and the means to execute contract
Cohabitation with written or express contract	<ul style="list-style-type: none"> ▪ Bargaining in the shadow of default rules that assume no financial obligations between the parties can serve as a limit to achievement and entrenching devaluation of housework and care work 	<ul style="list-style-type: none"> ▪ Strict enforcement, even if unfair ▪ Likely to exclude the option of other theories (such as unjust enrichment)

Marriage	<ul style="list-style-type: none">▪ Default rules that generally disadvantage the primary caregiver (short-term alimony, no division of enhanced income from professional degree)	<ul style="list-style-type: none">▪ Public-policy doctrine warrants that bargains about nonmonetary terms during the marriage will likely not be enforced—disadvantaging the primary caregiver
Marriage with prenuptial	<ul style="list-style-type: none">▪ Bargaining in the shadow of default rules that disfavor the primary caregiver can result in limited success for the bargain	<ul style="list-style-type: none">▪ A trend toward strict enforcement, without second-look provisions▪ Emphasis on procedure and informed decision-making over substantive review

Paradigms of Marital Choice

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In 2012, the Washington State legislature legalized marriage between same-sex couples. The legislation, which survived a voter referendum in November of that year, provided registered same-sex domestic partners approximately a year-and-a-half to either marry or dissolve their partnerships. Any partnerships in which a member was not over the age of 62 and that were not dissolved by the summer of 2014 would automatically be converted to marriages.

This was not the first time that same-sex couples in alternate family statuses have found themselves married without having made a deliberate choice. Parties to civil unions in the states of Connecticut, Delaware, and New Hampshire similarly saw their unions converted to marriages without any action on their part. It is true that these parties, like the domestic partners in Washington, theoretically had the option to dissolve their unions, so they did not entirely lack agency regarding their nuptials. But the dissolution process in most of these states is not unlike a divorce: partners must negotiate or adjudicate property division, custody, and support. The choice to do anything but accede to automatic conversion to marriage would therefore be costly on a practical and emotional level, as perfectly happy couples would have to become legal adversaries in order to avoid marriage. It would be hard to characterize such a choice—opting out of marriage on pain of dissolution—as freely made.

The institution of marriage is in a historical moment of transition. In the coming months and years, many other jurisdictions will have to decide what the arrival of same-sex marriage, often the product of court decisions, will mean for the continued existence of their alternate statuses. These decisions will impact tens of thousands of registrants, and could result in significant numbers of coerced marriages.

The legalization of same-sex marriage will give rise to other vexing transition problems. Separate from the question of conversion, states must decide whether to extend marriage rights retroactively to the date the parties formalized an alternate status. Relatedly, some states, like Hawaii, have premised statuses on the unavailability of legal marriage. Reciprocal beneficiaries are two adults who are prohibited by law from marrying; what is the validity of a reciprocal beneficiary status between two people of the same sex now that same-sex marriage is legal? And people who would have married but for the opposite sex requirement may assert legal rights premised on the nature of their relationship before same-sex marriage was legalized in their states. People in a common law marriage state, for example, may argue that they would have satisfied the requirement that they hold themselves out as married except for the fact that marriage was legally unavailable to couples of the same sex.

Each of the transition problems above potentially involves conscription/ascription—the act of bringing someone within the status of marriage in spite of some sort of formal limitation or deficiency at an earlier time. And this conscription can be voluntary—in the sense that all involved, including the partners, State, and third parties agree that the couple should be deemed married—or involuntary as the case may be. Choice, and what we mean when we invoke it, will be central to the resolution of these transition problems.

The value of formal, *ex ante* choice has become more prominent in the rhetoric of the marriage and the family. Court decisions talking about marriage have enshrined the choice to marry as one of the most important that a person will make. They have noted that the choice changes a person's relationship to society and even his own conception of himself. They have therefore characterized interference with that choice as a grievous injury.

But the transition problems that have accompanied the legalization of same-sex marriage reveal that the law may simultaneously create, facilitate, and even deny choice within the context of marriage. These transition problems therefore present a timely opportunity to consider the broader relationship between choice and marital status. Looking at these transition problems collectively reveals that choice has taken on a variety of meanings in different contexts, often in tension with each other. This Article brings together these paradigms of choice in the attempt to answer two questions: do these paradigms point in the direction of a unified theory of marital choice; and, if so, is that theory one we are willing to live with?

Marriage as Blindspot: What Children with LGBT Parents Need Now

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Lesbian and gay parents figured prominently in the most visible gay rights issue of our time—access to marriage. Although only about 16-18% of same-sex couples are raising children, of the plaintiff couples in the cases decided by the Supreme Court in 2015, about 68% were parents. Opponents argued, largely without recent success, that gay and lesbian couples should not be allowed to marry because their children don't turn out as well as children of married biological parents, and because same-sex marriage hurts the prospects of all children. Supporters argued that same-sex couples had to be allowed to marry for the benefits that marriage would confer on their children. The disproportionate number of parent plaintiffs in the litigation showed that supporters expected this argument to be quite persuasive.

With marriage equality now a legal mandate, advocates for LGBT families will need to turn their attention to supporting the needs of all children with lesbian, gay, bisexual and transgender parents. Because arguments about children became intertwined with marriage, this will sometimes prove difficult. In this paper, I explain how we arrived at this moment and make suggestions for moving forward.

Support for a wide diversity of family forms and relationships was a tenet of the LGBT rights movement for four decades. This included advocacy for unmarried same-sex couples adopting children together; for access to assisted reproductive technology regardless of marital status or sexual orientation; and for the ability of lesbian and gay parents who come out after a heterosexual marriage ends to continue raising their children, often with new, same-sex partners.

Inherent in such advocacy was opposition to the claim that there was anything intrinsically superior about marriage as a family form for adult relationships or for raising children. But during this same period, conservatives began blaming the decline of life-long heterosexual marriage, and especially the increase in nonmarital childrearing, for a vast array of social problems, including poverty, violence, homelessness, illiteracy, and crime. They posited marriage as the solution to those problems. They targeted women raising children outside of marriage, a group that is disproportionately women of color, for the greatest disapproval.

Initially, opposition to same-sex marriage was part of the conservative canon. But over time, some conservatives revised their position to encompass support for same-sex marriage precisely because it was *marriage*. To capture or solidify this support, LGBT advocates made decisions both about the rhetoric they would employ and the legal positions they would assert. Often, explicitly or implicitly, both the rhetoric and the legal positions acquiesced in a preference for childrearing by married parents—as long as same-sex couples could marry.

In the first part of this paper, I argue that the focus on marriage as a way to improve the lives of children raised by LGBT parents disrespected other family structures and especially disregarded the circumstances of LGBT parents of color and those with limited economic resources. Attributing greater social welfare to married families is tantamount to blaming Black and Latina women and their unmarried male partners for social problems. This serves as a wedge within LGBT activism itself, whereby LGBT parents of color, who overwhelmingly live in neighborhoods with those unmarried heterosexual parents of color, are bound to feel alienated from rhetorical arguments antithetical to the communities in which they are embedded. In addition, LGBT people of color are substantially more likely to be raising children than their White counterparts, and they are significantly more likely to be living in or close to poverty. The wellbeing of children within those families is therefore indelibly bound up with issues of racial and economic justice, which marriage equality will not bring.

Most children living with same-sex couples were born in prior heterosexual relationships, and LGBT parents of color are disproportionately raising those children. The parents among the marriage equality plaintiffs, however, were disproportionately White and well-off, and disproportionately raising either adopted children or children conceived through donor insemination. The narratives about children told in the context of same-sex marriage advocacy, therefore, overlooked the family circumstances of the majority, and the most disadvantaged, children being raised by gay and lesbian parents. Future advocacy should put the needs of these children at the forefront.

My second set of criticisms center on the conflation of the legal definition of parentage with marriage. The law must accurately identify a child's parents, as numerous critical consequences flow from parentage. Some involve economic well-being, including the obligation of a parent to support a child; the ability of the child to inherit; the availability to the child of state support through child social security payments if a parent becomes disabled or dies; and the ability to recover in tort for a parent's wrongful death. Others involve the parent's right to care for a child; control the child's upbringing; and make decisions on behalf of the child. For the past three decades, advocates for gay and lesbian parents and their children have been developing legal theories for accurately defining who is a parent in such families.

Conflation of marriage and parentage constituted a detour from those three decades of progress in two distinct ways. Arguments for marriage equality, and court opinions overturning marriage bans, emphasized the importance to the children of having two parents. But the benefits to children of having two parents flow from legal recognition of the two adults as parents. For more than 40 years, government policy and constitutional law have demanded that the legal benefits of parentage for children not depend upon their parents' marriage. Until recently the LGBT movement has fervently advocated for the ability to adopt irrespective of marriage and for parentage rules grounded in the parent-child relationship, not in the relationship between the two adults. Marriage equality advocacy changed course by demonstrating a willingness to accept distinctions based on marriage as long as same-sex couples can marry.

At the same time that advocates for lesbian and gay families became more accepting of marriage as necessary to establish parentage, they portrayed marriage as sufficient to establish parentage. In doing so, they made a sweeping and unqualified promise they will be unable to keep. The argument that same-sex couples should be allowed to marry so that their children will have two parents misled those who heard such arguments, including the couples themselves. This rhetoric presupposed that the child born to a married same-sex couple would be considered the child of both spouses. While that will be true in some states under some circumstances, it will often, perhaps usually, not be true.

Marriage in every state creates the presumption that the birth mother's husband is the child's other parent, but the applicability of the presumption to a female spouse will turn on the resolution of numerous questions. These include whether the presumption ever attaches to a spouse who cannot be the child's biological parent; whether the applicability of the presumption varies based on method of conception or the presence of an identified man whose sperm contributed to the child's conception; whether, even if the presumption attaches, it can be rebutted by factors that will be routinely present when the spouses are both women; and whether there are statutes governing assisted conception and what they say. Furthermore, because the marital presumption attaches to the spouse of a woman who gives birth, it has no bearing on parentage for male same-sex couples. It also has no bearing for the large number of stepfamilies in which same-sex couples are raising a child born in a previous heterosexual context.

The focus on marriage led many gay rights advocates to take their eyes off twin goals that are critical to the wellbeing of children being raised by lesbians and gay men: ensuring that no child faces either deprivation or discrimination due to the form of his or her family, and accurately determining who counts as legal parents. Now that marriage equality is the law, those are the goals to which advocates for lesbian and gay families should return.

Is Focusing on Children Bad for the Movement?

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In the quest for marriage equality, the harms to children have become increasingly more relevant. In *United States v. Windsor*, Justice Kennedy's majority opinion cited the economic and psychic harm to the children of same-sex couples as one reason for invalidating the federal Defense of Marriage Act ("DOMA"). The impact on children as a justification to strike down marriage bans, however, may not be the most effective approach to remedy discrimination on the basis of sexual orientation. In the 1970's, feminist scholars criticized a children's rights approach to challenging non-marital laws as "[leaving] the door open for laws discriminating against out of wed-lock-parents based on persistent race and sex stereotypes."¹ It is clear that same-sex marriage bans detrimentally impact children, however, this essay explores whether the focus on the interests of children, even if beneficial in the short-term, leaves intact pernicious gender stereotypes and anti-gay beliefs and practices.

¹ Martha Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73 (2003).

Parenthood Without Biology

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What would a world without biological parenthood look like? Although genetic relationships loom large in many current ideas of parenthood, genetics have historically played a more tenuous role in legal parentage regimes, particularly as to fathers. This paper pushes against the law's use of genetic ties to identify legal parents by conducting a thought experiment: taking biology off the menu of available rules, what would legal parentage become?

The paper begins with a discussion of the perceived power genetic relationships have in legal parent/child relationships, and explains some of the ways that genetics counterintuitively do less work than might be assumed. This section outlines the current operation of genetics in parentage determinations, identifying two contexts in which genetics are determinative: unwed biological fathers and same-sex couples who live in states that do not yet legally recognize their relationship.

The next section discusses possible ways to reverse-engineer parental recognition for these two groups. Assuming, in other words, that current rules of parentage identify the "correct" parents, could other theories of parentage such as functional and intent-based rules still reach the same population? Or are genetic links the sole way of reaching these groups?

The paper concludes by addressing some of the potentially problematic uses of genetics, such as the varying roles genetic links play in the context of assisted reproductive technologies or use of genetic links to displace functional relationships.

Social Rites of Marriage

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The legal consequences for same-sex couples who have married in the United States are numerous and profound. As legal rhetoric and scholarly research on marriage suggest, the social dimension of marriage—apart from the concrete legal benefits marriage affords—is significant. Despite what we understand about law’s impact on people’s lives and people’s influence on legal institutions, scholars know little about the ways in which same-sex couples socially experience legal marriage, since it has become a reality in a majority of U.S. states.

This paper, the first in an ongoing, mixed-methods research project that examines the intersection of law and the social domain in the context of same-sex marriage, begins to fill a critical gap in socio-legal literatures on marriage and formal recognition of same-sex relationships. We discuss here early themes emerging in our exploratory research that is part of a larger project entitled *Marriage Equalities: Gender and Social Norms in Same-Sex and Different-Sex Marriage*.

We focus in this paper on couples’ perceived changes in their lives from marriage and negotiations surrounding discursive practices associated with marriage—for the latter, taking up two language-based domains in marriage. These domains are decision-making concerning surnames and terminology used to refer to one’s marital partner.

Perceived change and modes of self-presentation provide a window into the interplay of legal status, social norms, concepts of tradition, and gender, and reveal a richly diverse picture of transition to formal legal recognition in the context of longstanding—and continued—marginalization and discrimination. We situate our early findings in relation to fundamental questions we explore about relationships between marriage, hierarchy, and gender, as well as about intersections of legal and social recognition.

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“The Fundamental Right to Divorce” Family Law and the Fundamental Right to Travel

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On April 28, 2015, the United States Supreme Court heard historic arguments in a case asserting the federal constitutional right to same-sex marriage. Currently pending before the Court, and likely to be decided prior to this workshop, are two discrete questions:

- (1) Whether states must issue same-sex marriage licenses (the “right to marry” question); and,
- (2) Whether states must recognize same-sex marriages legally entered into in states that permit same-sex marriage (the recognition question).

While many are hopeful, even expecting, that the Court will broaden the rights of same-sex couples by finding an affirmative constitutional right to same-sex marriage, my presentation concerns the dilemmas couples have been facing prior to the Court’s decision relating to the second question – namely, what happens when a state refuses to honor a same-sex marriage entered into in another state where the marriage is legal. This latter question will likely be moot by the time my talk is delivered. Nonetheless, the issue of recognition has proven quite difficult for couples, their children and even their employers as many same-sex couples have been hesitant to leave a recognition state and move to a state where the legality of their family status was uncertain or, worse yet, unrecognized.

Based on the fact that the Supreme Court is literally addressing the concerns I have raised in past writings, *See Something to (Lex Loci) Celebrationis: Federal Marriage Benefits After U.S. v. Windsor*, 41 CON L. QUARTERLY 41 (2013); *Unbreakable Vows: Same-Sex Marriage and the Fundamental Right to Divorce*, 58 VILLANOVA LAW REVIEW 169 (2013), I anticipate my presentation will seek to explain the Court’s June, 2015, decision on same-sex marriage and how its resolution impacts same-sex couples’ fundamental right to travel.

I hope to have an updated abstract provided as soon as the Court issues its ruling.

Marriage and Sexual Fidelity

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Couples consisting of two men (whether married or not) seem to be more likely than other couples to have “consensual non-monogamous relationships,” that is, relationships in which it is explicitly agreed that, at least in some circumstances, a partner can have sex with people other than his spouse/partner. Advocates of the legal recognition of same-sex relationships have not focused on this difference between same-sex relationships and other relationships (choosing instead to focus on the *similarities* between same-sex and different-sex couples). In contrast, some opponents of such recognition have deployed this difference (unsuccessfully, for the most part) as an argument against same-sex marriage.

A significant percentage of people who are *not* in consensual non-monogamous relationships (whether with a person of the same or different sex) will at some point in their relationship have sex with someone other than his/her partner. Such non-consensual non-monogamy (that is, infidelity) occurs despite social stigma against it and despite the persistence of adultery as a legal concept in both criminal and family law. Specifically, adultery remains illegal in twenty-two states, adultery continues to be a ground for divorce in thirty-two states, and, in some states, the fact that one spouse has committed adultery has financial implications upon divorce or death and may affect parental rights. Not only do states endorse and incentivize sexual exclusivity among married people, states may discourage consensual non-monogamy by not enforcing agreements to have a consensual non-monogamous relationship.

I argue that the state should not endorse sexual exclusivity through laws and policies, in part, for privacy reasons and, in part, because monogamy is, practically speaking, an unattainable goal for many people and setting such an unattainable goal may serve to undermine relationships that might otherwise survive. Further, I argue against disincentivizing consensual non-monogamy, in part, because doing so incentivizes *non-consensual* non-monogamy. Instead, I suggest that, insofar as the state has an interest in the maintenance of “good” marriages and relationships, the state should encourage open communication about sexual exclusivity and to enforce at least some agreements that spouses make about such matters.

Divorce Equality

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The battle for marriage equality has been spectacularly successful, producing great optimism about the transformation of marriage. If we are looking to same-sex marriage to revolutionize marriage, however, the real struggle has yet to begin. This is the battle for divorce equality. With the initial wave of same-sex divorces starting to appear on court dockets, this Article is the first to address the distinctive property division problems that have begun to arise and, in the absence of rule reform, will both amplify and reinscribe problems with the conventional marital framework. The central problem is that courts have, in the context of opposite-sex marriage, failed to realize the cornerstone concept of equitable distribution rules – the idea of marriage as an economic partnership. Same-sex divorce highlights the ways in which courts and property rules have failed to actualize this guiding principle. Accordingly, this Article uses same-sex divorce as a lens through which to reexamine the untapped potential of equitable distribution statutes.

Two questions drive the analysis. One question, made salient by same-sex “hybrid” cases in which the spouses have been long-term cohabiting partners but short-term marital partners, is when an economic partnership begins. I propose that courts use the category of “pre-marital” property in order to count assets and income acquired outside of the marriage itself. Another question is what assets count as marital property and how courts should value one spouse’s contributions to the other spouse’s career success. I propose that courts begin characterizing enhanced earning capacity as marital property and properly counting indirect spousal contributions to business assets, otherwise courts fail to both capture the nature of marital partnership and correctly compensate contributions made by non-earning spouses. Addressing these questions is critical to the reformation of marriage because property rules impact how spouses bargain with one another, how diverse roles get valued in marital bargains, and how we assign and perform gender within marriage. Moreover, correct compensation for spousal contributions rewards individuals for making choices that benefit the couple rather than the individual, which is normatively positive behavior. These proposals for rule reform will provide a blueprint not only for courts as they encounter an increasing number of same-sex divorces but also for advocates who seek to continue the work of marriage equality.

Private Ordering in Family Law – Moving Between Status and Contract

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This presentation explores the challenges facing law reform in the realm of intimate partner contracting, focusing specifically on cohabitation contracts, premarital and marital agreements, and agreements to submit family law disputes to binding arbitration. Through these agreements, people typically contract out of the default regime of property rights and support or, in the case of cohabitation agreements, contractually create property and support rights that don't otherwise exist. Despite a trend toward gradual acceptance, intimate partner contracting continues to confound courts and legislatures. Across the United States, the law vacillates between status and contract – that is, between the goals of protecting vulnerable individuals and affirming the institution of marriage or marriage-like relationships, on the one hand, and the goals of furthering individual choice, predictability, and reliance, on the other. As a commissioner with the Uniform Law Commission, I chaired a drafting project to improve on the Uniform Premarital Agreement Act – an act everyone loves to hate. With the indefatigable Brian Bix as reporter, we ultimately produced an act (the Uniform Premarital and Marital Agreements Act) that is a fairer structure than the UPAA and does a better job of promoting informed consent. It has met with a cool reception in the states and the practicing bar, to put it mildly. I'm currently chairing a drafting project to produce a family law arbitration act, again a contentious process. In addition to the ever-present challenge of ensuring voluntary and informed consent, the arbitration project raises another question: to what extent should we permit people to opt out of family law and the court system itself? In this era of marriage equality, diminishing gender norms, and a growing marriage gap, does it make sense to protect any element of marriage from being contractually swept off the table? I will examine the policy tensions that underlie these questions in explaining why changing family law is so hard to do.

Core Family Law (Child Support)

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The foundational principles of child support doctrine are predicated on a normative framework of personal responsibility. These values are based on parents' assumed participation in an outdated family wage model that is increasingly irrelevant and even counterproductive for many low-income families. In the current context of burgeoning economic inequality it is time to reexamine the purpose of federal and state child support systems.

According to the federal Office of Child Support Enforcement (OCSE) the child support program's stated goals are to engender wellbeing for children by providing economic resources and fostering parental engagement. However, many of the rules that govern the program, especially aggressive enforcement, fail to reflect both changing families and the economics of a postindustrial nation. Low income and especially incarcerated parents serve as canaries in the coal mine for the destructive consequences of modern child support policies.

Alimony and Property Distribution – Trends and Contemporary Approaches

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Does alimony have a place in the contemporary marital script? Do changing demographics; more egalitarian family models; increasing numbers of married women in the labor market and decreasing numbers of full-time homemakers; normative visions of marriage as a partnership of equals; and the availability of unilateral no-fault divorce – do all these changes make alimony obsolete? Is alimony an old-fashioned remedy that encourages full-time homemaking and rewards elite wives? Is it time to scrap this disdained tool and fully embrace the clean break model—divide marital property at divorce and give each spouse a fresh start on a new life, free of financial entanglements with a dead marriage?

Attractive as it is, the clean break model overstates the ability of the property distribution to single-handedly address the complex financial entanglement of married parties through a simple split of existing assets. Moreover, because most divorcing spouses have few assets, property distribution tools give courts little to work with. Alimony offers an additional tool, and a far less crude one, for equitably ending spouses' economic interdependence.

But alimony cannot survive in its current form. Alimony is a broken tool—unpredictable, uncertain, without a modern rationale, and increasingly the target of reform legislation. If alimony is to survive, it must be recharacterized. Contemporary scholars have long sought to reimagine alimony, often drawing on a vision of family teamwork in which a primary caregiver frees a primary breadwinner to enhance his human capital, while the caregiver foregoes opportunities to enhance her own. At divorce, alimony ensures that human capital gains and losses from this arrangement are shared. While these models offer a compelling basis for alimony in a thriving economy, they miss many marriages in a stagnant one.

Other scholars have based alimony on pooling principles, most recently Cynthia Starnes in *THE MARRIAGE BUYOUT*. Starnes's model begins with the marital commitment to pool labor, time, and talent in the expectation that pooling will generate shared value. As marriage endures, increasing portions of each spouse's human capital become a collective resource, creating a pool of shared (marital) human capital that generates shared benefits. If the couple divorces and one spouse reaps disproportionate post-divorce benefits from what has become marital human capital, that spouse must buy out the interest of the other spouse. After divorce, the pooling principle reverses, as individual effort gradually converts marital human capital into human capital that is predominately, and then totally, a separate resource. When disentanglement is complete, marital human capital disappears and so does the basis for buyout payments. This pooling model offers a new rationale for alimony, a new name (buyouts), and a sliding-scale formula that presumptively quantifies the amount and duration of a buyout.

The pooling principle is not new to family law—it is an integral part of the dual-property regimes that describe the divorce law of most states. These regimes reject the common-law notion that individual efforts during marriage produce individual rights at divorce, instead generally characterizing all property acquired through the efforts of *either* spouse during marriage as *marital* rather than individual property. Individual spousal efforts thus generate a pool of shared (marital) property. The ALI takes this sharing concept a step further, suggesting that a spouse's separate property should be gradually recharacterized as marital property at a designated percentage for each year of marriage. The longer the marriage, the more extensive the pooling of property that would otherwise belong to one spouse alone. Starnes's buyout model builds on both current property law and the ALI proposal, expanding the concept of pooling to include human capital and recasting alimony as a much-needed tool for equitably disentangling the economic interdependence of contemporary spouses.

Moving Beyond Custody Law to Achieve Shared Parenting: Making Child Custody Disputes Less Common, Less Contentious, and Less Central to Defining Parents' Legal Relationship to Each Other

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The law of child custody has always been a core component of family law. This area of the law has undergone tremendous change over time. Since the 1970s, law reform has focused on increasing noncustodial parents' involvement in their children's lives. "Shared parenting," which emphasizes that both parents should have a substantial amount of time with their child after the parents' romantic relationship breaks up, has gained considerable attention lately. Unfortunately, however, proposals for "shared parenting" have not been about helping parents co-parent as a cooperative and supportive team. Yet psychologists warn that the quality of the parents' relationship can be critically important to their child's well-being.

The creation of supportive partnerships requires more than end-of-relationship custody rules. At present, too few parents are supportive co-parents after their relationships break up, despite the fact that "friendly parent" and "domestic violence" factors are part of the best-interest inquiry and despite the availability (and sometimes requirement) of parenting education and mediation as part of court proceedings. While these provisions and practices have been helpful, the extent of father disengagement in unmarried and divorced families as well as the amount of parallel parenting after breakup among couples who are capable of better arrangements suggest that a different approach is required.

In fact, without broader legal and social change to encourage more supportive co-parenting relationships from the outset of parenthood, a shared parenting law will exacerbate tension for some couples, create custody arrangements that are prone to relitigation, and pose real risks for some children. In contrast, fostering strong parent-partnerships from the time of the child's birth might significantly decrease the importance of custody laws for all but highly conflicted couples; others might readily agree to arrangements that work best for their families regardless of the background custody law. Using the law to improve co-parenting relationships first, i.e., before changing custody law further, is also warranted because gaps exist in the empirical knowledge about which custody law best meets children's needs and because people's reactions to reform proposals are too often clouded at present by proposals' gender implications.

Increasing the number of supportive parenting partnerships after the end of parents' romantic relationships requires society to take account of several facts as part of any law reform effort: co-parenting is embedded in a broader relationship to which society must attend; caregiving patterns during the romantic relationship affect parents' willingness to share parenting after the romantic relationship ends; and society's expectations about the nature of the parents' relationship could affect the parents' behavior. Consequently, to the extent that society wants both parents to have a substantial amount of time with their child after they dissolve their romantic relationship *and* wants the parents to have a supportive co-parenting arrangement, lawmakers should set up a legal structure that will strengthen parents' relationships generally, encourage shared caregiving during the romantic relationship, and convey norms about cooperation and support. Such a regime should cause more parents to agree to share parenting, a result that most people would find desirable.

To accomplish this end, this paper recommends, consistent with the proposal in this author's book, *A PARENT-PARTNER STATUS FOR AMERICAN FAMILY LAW* (Cambridge University Press forthcoming 2015), that the law impose an automatic status on parents upon the birth of their children to govern their *inter se* relationships. The purpose of the status would be to create a new social role of "parent-partner" that would encourage parents to treat each other as supportive partners, among other things. This social role would come with expectations that parents exhibit fondness, acceptance, togetherness, empathy, and flexibility in their interactions with each other, from the outset of parenthood until their child reaches eighteen years old, regardless of whether the

parents' own romantic relationship ends. The status should include a legal obligation that would encourage both parents to share caregiving during their romantic relationship. With these changes in place, custody disputes might then become less common and less contentious. That outcome would be one of many benefits that a parent-partner status might have for children, parents, and society.

This paper concludes by raising some questions that help the reader imagine what the law of child custody might look like in a world transformed by a parent-partner status.

Offensive Victims: Mothers at the Intersection of Criminal and Family Law

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Despite significant gains in acknowledging battered or abused girls and women as victims, many go unrecognized as such and some are even punished as offenders. More likely to be deemed offenders are women who do not conform to societal norms of femininity, particularly those who violate the fundamental role of self-sacrificing maternal care. In this fashion, a woman's family status changes her criminal law status as a victim or offender and, more broadly, family law and criminal law interact to police gender roles and impose a particular normative vision of family.

I argue that this dynamic minimizes female victimhood and overstates female offending. It also undermines the goals of both the child welfare and criminal systems by arguably deterring women, particularly battered women, from seeking help and by according disproportionate punishment to mothers over fathers. Although these concerns are not new, the rapid changes in family law, as well as the increasing variation in families' lived experiences, render this a particularly propitious time to examine motherhood at the intersection of criminal and family law. In so doing, I also plan to build on recent criminology work, addressing this issue through the lens of the victim-offender overlap. I conclude by calling for a more nuanced framework of victim and offender status, as well as suggesting several concrete policies to encourage child abuse prevention.

The Victim-Offender Overlap & Failure to Protect Cases

The victim-offender overlap is "the link between victimization and the perpetration of crime and delinquency." Put simply, offending is victimogenic and vice versa, and victims and offenders share many demographic characteristics. Although the overlap plays out in gendered ways, its application to women is undertheorized. Yet female offending is very different than male. Most women in the criminal justice system have been victimized in the past, usually at home, and women convicted of violence are overwhelmingly alleged to have harmed someone in their family (broadly defined)—a husband, partner, or child. Family roles accordingly function both as a major pathway into the criminal justice system for women, and as a significant site of their victimization.

Although this plays out in numerous ways, I focus here on "failure to protect" cases—where parents and caregivers are prosecuted for failing to protect their children from abuse by another. It is one of the very few areas of omissions liability, with the vast majority of defendants being women. In a comprehensive study of the interaction of family status and criminal law, scholars described failure to protect cases as "the most common scenario" where family status, almost always motherhood, led to criminal liability. (They termed it a "family penalty").

Even women who are themselves victims, either at the hands of the same abuser or as children, are more often deemed offenders. For instance, some courts have precluded expert testimony on battering in failure to protect trials. Women are often accused as offenders when they seek help for domestic violence or housing. Maternal status not only creates criminal liability but also leads to particularly harsh sanctions. As Naomi Cahn notes, "[b]ecause women are so closely identified with their children, they are treated particularly harshly for alleged crimes against [them]." Fathers, on the other hand, are held to a much lower standard—the "draftees versus volunteers" family framework seeps into the criminal law. Indeed, numerous women found guilty of failure to protect are more severely punished than the person to be protected against—the abuser or murderer himself.

Role Policing

The designation as an offender or victim does not, however, turn only on family status. Women who do not conform to role expectations based on race, class, sexual orientation and, particularly, gender stereotypes, are more likely to be deemed offenders. One particularly robust stereotype is the mother as all-sacrificing caregiver. Liz Schneider has pointed out that this essentialist construct ignores “any social context and. . . any understanding of social, economic, or psychological constraints.” Women who do not meet this expectation are deemed unnatural, “monsters.” Some women, particularly low-income women of color, are punished most severely for their deviation from white, middle-class norms. Dorothy Roberts has persuasively argued that the women most frequently punished are those who resist their gendered subservience, with the perverse result that those mothers who do not protect their children because they “appear pathetically weak or deranged” are treated more leniently.

Costs of the Overidentification of Offenders

Role policing leads to an overidentification of offenders and underidentification of victims, bringing significant costs for individual women and society as a whole. On an individual level, it prevents the recognition of harm to non-normative victims. The overidentification of mothers as offenders also impedes punishment of those actually committing violence. On a societal level, punishing mothers for failure to protect does not prevent or diminish child abuse. On the contrary, it arguably worsens the options for some children as removing their mothers may traumatize them or increase their exposure to harm. Additionally, this practice justifies state surveillance of certain types of mothers and families, invariably those already marginalized. This bias deters women from seeking help, and undermines the legitimacy of the criminal and child welfare systems. Finally, the overidentification of offenders masks the lack of a social-safety net for families, bolstering the myths that child abuse and family violence are private problems.

Towards A Continuum of Victims and Offenders

The solution, however, is not to designate all women who have been abused or battered as victims. This approach, and the larger framework of dominance feminism, can have significant negative impacts on women and gender equity. For instance, findings that women are “helpless” victims in failure to protect cases can harm these mothers in custody disputes. On a broader scale, positing trauma and victimhood at the core of female identity denies women autonomy and can be used to further subordinate them in the name of protection.

Instead, I argue here that the antipodal binary of victim and offender itself must be dismantled and call for a continuum of criminal liability for child abuse. This framework would recognize the complexity of families and more fairly apportion fault by incorporating a broader, more functional definition of parenthood for men and women, as well as presumptions or affirmative defenses for parents who are themselves victimized. I also suggest several concrete policy proposals to encourage child abuse prevention including the provision of services without a “litmus test” of worthy victimhood, and a level of amnesty for parents who seek help.

Who Holds the Power? The Enforcement of Custody Provisions for Abuse Survivors

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In all fifty states and the District of Columbia, victims of domestic violence can obtain protection orders by petitioning the court. The protection offered in these orders not only directs the abusive party to refrain from further abuse, but across the nation, courts are empowered to also adjudicate custody and visitation within these injunctions. If parties share a child, the court, in an expedited hearing, may resolve issues of physical and legal custody for the duration of the order. Because domestic relations cases that adjudicate permanent custody and visitation can take substantial time to be resolved in court, this expedited relief can be essential to the safety of domestic violence victims and to the wellbeing and stability of children during this tumultuous time in a family's life.

Under protection order statutes, within several weeks parties can leave court with a protection order that establishes which parent has physical and legal custody and when, where, and how often visitation or parenting time will occur with the nonresidential parent. Physical custody, which dictates where the child will live, provides children and parents with concrete expectations about a child's primary residence. Legal custody, also critically important, determines who will make essential decisions for the child that include issues related to schooling, religion, and medical care. A parenting time order establishes routines and expectations for parents and children about when and how a nonresidential parent will spend time with the children.

If the order is breached, criminal enforcement can follow. Statutes around the country criminalize the violation of a protection order as a misdemeanor crime. The order also can be enforced through criminal or civil contempt actions, authorized either through specific statutory or generally through equitable principles. For violent breaches of protection orders and even for failure to make payments required in protection orders, this enforcement system has been fairly reliable. The government holds the power to enforce orders criminally and exercises that power quite reliably. Aggrieved parties themselves or the government are authorized to enforce orders requiring payment, such as child support. As long as party has the means to make the payment, a party can coerce that payment.

What is unclear is where the power resides to enforce the custody and visitation provisions of the protection order. Legally, the power to enforce those remedies resides with same actors who have the power to enforce other relief. However, in practice, the power to enforce those remedies is often declined or is elusive, leaving the remedies themselves without value. This Article explores the absence of deployable power to enforce the custody provisions of a protection order. This gap in enforceability has been previously unrecognized and analyzed. This Article seeks to surface the issue and to explore ways to locate and reify that power so that the family law provision of protection orders are more than ephemeral.

In Part I, this Article first introduces Mrs. Jones, whose case illustrates the unpredictability of custody and parenting time relief in protection orders. Against this backdrop in Part II, the Article considers the three avenues of enforcing family law remedies in protection orders that include criminal prosecution, and criminal and civil contempt. Part III interrogates the central question of where the power actually resides to enforce the domestic relations provisions of protection orders through criminal contempt looking specifically at protected parties, the court, and at the prosecutors. This Part ultimately considers the implications that the actors who hold truly reliable power to enforce the family law remedies of the order have either little incentive to do so or are severely curtailed in their ability based on resources. In Part IV, the Article looks specifically at the power to enforce domestic relations provisions of protection orders through civil contempt, looking at why the power, which is officially held by the aggrieved party, is often nearly impossible to deploy.

In Part V, the Article considers the problem from a larger context, considering whether the power to enforce other civil orders is similarly elusive. In acknowledging that civil orders often pose enforcement challenges, this Part considers the use criminal and civil contempt to enforce other types of civil orders and also analyzes the enforcement mechanisms that apply to longer term domestic relations orders. Finally, the Article concludes by considering avenues that might make the power to enforce domestic relations provision of protection orders more meaningful.

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I. Problem in Context.

Mrs. Jones fled in the middle of the night. Her husband had been beating her and isolating her from her friends and family for many years. One time she loaded the dishwasher wrong. A mug had flipped and filled with water; in response her husband punched her in front of her children. The night she fled he had held her at gunpoint in their bedroom. He told her he would kill her for her suspected infidelity. They lived in a rural county in which the closest sheriff's station about a hundred miles away. When her husband finally fell asleep, she called the sheriff and asked where the closest domestic violence shelter was located. She asked them if she should bring her children with her. They told her children were not allowed in the shelter. So, she left them with their father.

The next day Mrs. Jones filed for a protection order. She sought an order that directed Mr. Jones to stay away from her, to refrain from contacting her, to not abuse her, and to grant the parties joint custody. Mrs. Jones had no idea where she would live now that she had left her husband's home. Indeed the shelter she had found did not permit children to stay. As a further complication, her youngest child of the four had an immune disorder. He could live only in the most sterile environments. Though Mr. Jones had abused and denigrated her, he had never been violent with the children and had successfully homeschooled them for several years. She sought an order that would allow her husband to keep the children until she had permanent, safe housing. And an order that would grant her 10 hours of visitation each week.

At court, Mr. Jones agreed to the protection order granting the stay away and no abuse provisions. The parties would share joint legal and physical custody, with the children living with Mr. Jones for the next three months. The parties set a court hearing for three months hence to reassess physical custody. Mr. Jones would bring the children to Mrs. Jones who would have twice weekly visitations amounting to 10 hours each week. During one of those visitations, she would take all four children to the hospital to obtain medical treatment for the youngest son.

The first visitation date finally arrived. Mrs. Jones waited at the designated location. She couldn't wait to see her children. They were late. Very late. She emailed, texted, called. No response. They never came. Three days later the next visitation day occurred. But visitation didn't happen that day either. Despite repeated calls, promises, plans, and disputes, Mr. Jones did not bring the children to see their mother for the entire three months leading up to the scheduled court hearing. During that time, Mr. Jones also decided that the youngest child did not need further medical treatment but instead would get acupuncture. He enrolled the two oldest children in school near his home. Mrs. Jones did not know about any of these decisions but only learned of them many months later.

At court, Mrs. Jones reported to the judge that Mr. Jones had failed to comply with the Order by preventing her from having visitation for three months. When questioned, Mr. Jones agreed that he had not brought the children for visitation. He said he didn't want the children to see their mother. The judge warned him that he was under court order to deliver the children for visitation. He said he understood but that he did not intend to produce the children the following weekend as ordered. The judge suggested Mrs. Jones file for contempt. She did.

The prosecutors reviewed her motion for contempt as a motion for criminal contempt. They declined to prosecute. Under her jurisdiction's law, she had no private right of action for criminal contempt. The judge didn't, himself, initiate any contempt proceedings. She filed for civil contempt. At the hearing on the civil contempt motion, the judge asked Mrs. Jones if she had seen her children for visitation since they had last been in court. She said that she had. Mr. Jones had brought the children to her as ordered since she had filed her motion. The judge was pleased and told the parties that the case was dismissed. Mrs. Jones was baffled and dismayed. She asked the judge what he was going to do about the three months of visits that had been denied to her. The judge explained that now that Mr. Jones was in compliance, he had no authority to do anything about the past violations. She asked for increased visitation to compensate her for the lost hours. He refused. She asked what is to keep Mr. Jones from starting to violate the order again since it's clear that he can escape any type of repercussions by merely coming into compliance after the contempt motion is filed. The judge shrugged his shoulders.

Mr. Jones did not show up for the next visitation. Or the next. Again, Mrs. Jones filed for contempt. Once again, the case was dismissed after Mr. Jones complied with the visitation pending trial. And once again, he stopped delivering the children for visitation. During the year and half following her escape from her abusive husband, Mrs. Jones saw her children a handful of times for only an hour or two at a time. She repeatedly questioned her decision to have fled in the first place. Ultimately, the parties fought for custody in a different jurisdiction and, with the assistance of expert testimony on Mr. Jones' abuse of Mrs. Jones and of the system, the judge granted her sole legal and physical custody.

Mrs. Jones's story,¹ though complex, captures elements of the court experiences of a sizeable number of women coming seeking protection for themselves and their children. As one commentator notes "[t]hreatened or actual litigation regarding custody or visitation can become a critical avenue for the batterer to maintain control after separation."² Further, experts on fathers who abuse the mothers of their children note the prevalence of custody litigation in the context of domestic violence.³ They also note their frequent success⁴ at strategically manipulating the system to use custody litigation to their advantage.⁵ Flaunting custody and visitation provisions granted in a protection order may well represent a robust and successful tactic of abusive partners in controlling and harassing the other parent.

1 The vast majority of the facts in this story are attributable to one client whom I worked with in D.C. Superior Court and who wanted very much to share her experiences to assist other women facing similar circumstances. For her safety, I have changed her name and identifying facts in this vignette.

2 Tarr at 38 citing Bancroft and Silverman, *BATTERER AS PARENT*.

3 Bancroft and Silverman, *BATTERER AS PARENT*, p. 98 and 113.

4 See Bancroft at 98 (noting abusive fathers are more likely than non-battering fathers to seek custody and that they have an advantage over battered women in winning in a contested custody case).

5 Bancroft and Silverman, p. 122-128.

Pitfalls in Differentiation of Domestic Violence Types

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I would like to present a critique of a popular new approach to domestic violence called “differentiation,” which is premised on the assertion that there are at least two primary types of domestic violence and that they are profoundly different in ways that require recognition in all contexts. While the idea of different domestic violence “types” is not entirely new, Johnson’s differentiation theory has been widely and rapidly accepted in large part because of its claim to empirical proof. In my view, this theory is a case study in the unreliability of empirical “proof” of DV types (or more broadly any interpersonal definitions) - and is a powerful example of how social science informs (sometimes for better, often for worse) family law. The theory has already done damage in the custody context, in sadly predictable ways.

In brief, Johnson’s theory is that there are different types of domestic violence and that differentiating is essential to any valid discussion (including adjudication) of domestic violence. His types are based on the degree to which the relationship violence is part of a dynamic of domination and control (“intimate terrorism”) or is instead, merely “situational.” Based on these core distinctions he asserts numerous potential differences in motivation and impact. While his descriptions of the two categories have changed over time and become increasingly fluid and indistinct, in general, as is reflected in its name, “situational” or “common” couple violence is portrayed as less serious, less dangerous, and less troubling than “intimate terrorism,” which is impliedly far more dangerous and violent.¹

This typology has been rapidly and uncritically adopted by custody evaluators and judges as well as both family court and some domestic violence professionals and even scholars. Its appeal may stem not only from its claim to empirical support, but also its resolution of the seemingly irreconcilable battle between feminists and non-feminists over whether domestic violence is truly a gender-based problem. By *simultaneously* validating *both* the feminist paradigm of power and control - typically male on female violence - and the non-feminist paradigm of non-gendered, non-control based violence, Johnson’s typology has found many adopters across the politics of this field. Loretta Frederick, *Questions about Family Court Domestic Violence Screening and Assessment*, 46 Fam. Ct. Rev. 523–30 (2008). Ver Steegh, *Differentiating Types of Domestic Violence: Implications for Child Custody*, 65 La. L. Rev. 1379, 1399-1400; Appellant’s Opening Brief in *E.J. v. D.J.*, No. 10-FM-375 at n. 26, p. 39 (on file with author); *Malenko v. Handrahan*, 979 A.2d 1269 (2009); *C.A. v. J.B.*, 2011 Ind. App. Unpub. LEXIS 957 (Ind. App. 2011). If Johnson had merely asserted that there are two (or more) types of domestic violence and that the control context of the relationship differentiates them in important ways, the theory might be debatable but would be less destructive in its applications in court. However, Johnson uses his empirical analysis to argue that situational couple violence is the vast majority of domestic violence (70-80%); and that control-based “intimate terrorism” is quite rare (10-20%). Michael Johnson, *A TYPOLOGY OF DOMESTIC VIOLENCE: INTIMATE TERRORISM, VIOLENT RESISTANCE, AND SITUATIONAL COUPLE VIOLENCE* (Northeastern University Press: 2008).

Unfortunately, albeit predictably, by validating the idea that most domestic violence is not gender-based, is merely “situational,” and is not terribly serious, the typology has already contributed to troubling decisions in custody cases, by facilitating courts’ minimization of domestic violence which is raised in the course of litigation. Frustratingly, after 30 years of reformers’ combating courts’ treating domestic violence as “just a relationship problem,” a “mutual” problem, and not a serious concern, Johnson’s “situational couple violence” (or “common couple violence”) has suddenly resurrected and validated exactly those paradigms. Coming from a self-avowed feminist, who has worked in domestic violence shelters, and having won some respect from the domestic violence field, the theory has the potential to undo thirty years of reform advocacy in one fell sweep.

¹ Some of the limited critiques to date recognize that since much coercive control abuse is not overtly very violent, the name “intimate terrorism” may be misleading – although the dangerousness signaled by coercive control is largely undisputed. Evan Stark, *Rethinking Custody Evaluation in Cases Involving Domestic Violence*, 6 J. Child Custody 287, 312 (2009).

This article critiques Johnson's theory from both analytic and empirical perspectives. It first examines the typology's empirical "proof" and finds it wanting. Johnson does not do his own empirical research – rather, he re-analyzes previously collected data from earlier studies, most of which were not asking the same questions he is. Significantly, Johnson's claim that the vast majority of domestic violence is situational couple violence is based - not on objective data - but rather, on his own arbitrary choice of "cut-points" to create two groups among the data he is looking at. A different choice of cut-point which treated fewer control behaviors as representing controlling abusive relationships would lead to the opposite numerical conclusion: that situational (non-control based) violence is far *less* common than control-based violence. Since whichever "type" of domestic violence is seen as the "norm" will have substantial implications in custody litigation – where family courts are already inclined to believe that fathers fighting for custody are presumptively decent people – this choice of "cut-point" is critical.

In addition, the theory is subject to the critique that the categories are potentially contradictory and also potentially convergent rather than distinct. Situational couple violence may become "intimate terrorism" over time. Situational couple violence which is not mutual but perpetrated by only one partner, is implicitly going to develop "control" within the relationship. Even Johnson's empirical analysis of the different populations contradicts his theory – that only "intimate terrorism" cases would be found in shelters and the legal system. For all these reasons, as well as Johnson's admitted lack of information or even theory about how the types relate to custody and children's welfare, the theory should be excluded from the custody context unless and until true empirical support linking the typology to custody emerges.

Teen Dating Violence: The Limits of the Law

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Family law scholars have long ignored the “book-ends” of domestic violence that occur at either end of the life cycle: teen dating violence (TDV) and elder abuse. This presentation focuses on the former phenomenon.

Intimate partner violence is surprisingly common among teenagers. Research reveals that from 10-20% of high school youth who are in a dating relationship are victims of physical violence by their dating partners. TDV is a particularly appropriate area of study for family law scholars because it is society’s first indication of the intimate partner violence that takes such a heavy toll on family relationships and children’s well-being.

The law responds to TDV in two ways: (1) state laws that make protection orders available to teens in some circumstances, and (2) state laws that provide for teen dating violence prevention education in the schools. Empirical research sheds light on the effectiveness of these approaches and reveals multiple flaws in each legal remedy.

This presentation will explore the law’s response to TDV and its shortcomings. It will first shed light on the scope of the problem. Second, it will highlight the law’s response in the form of teen protection orders and the TDV prevention education movement. Next, it will identify the primary shortcomings in each of these legal approaches. Finally, it will propose suggestions for law reform.

Intergenerational Family Economies

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Families continue to be a cornerstone of support for the health and welfare of individuals and of society. Multi-generational family relationships are an increasingly important part of this system. Yet such relationships have not been the subject of sustained or systematic attention in American laws and policies. This article is a step toward that goal.

This article focuses on the legal regulation of economic and social collaborations in families between the generations. Increasingly so, families are building a web of economic and affective connections between older and younger generations. Now that people are living longer, these ties are long lasting, with multi-generational relationships spanning many decades, and cycling through several phases. For example, many aging parents are being cared for by their adult children or other family members. Conversely, many elder family members (G1) help support the younger generations by providing care for grandchildren (G3) and support for the middle generation (G2). The demands on the middle generation are particularly high, and are unsustainable for many, especially for poorer families. Along with providing care of G1 who are living longer, with years of dependency, G2 adults also now often provide care and financial support for their children well into adulthood. At the same time, the middle generation is expected to work full time, to produce income to support themselves and their loved ones, to balance work and family, and to save for their own future retirement and end of life care.

This kin network is becoming a critically important resource in light of changing and varied family structures today that include more single parent households with children, more single people; skyrocketing elder care needs, and a prolonged economic downturn. Intergenerational family relationships contribute significantly to the economic and social welfare of each generation. For example, intergenerational family care networks are incredibly valuable and necessary for human flourishing, from elder care, to child care, to supporting the middle generation through many challenges. Such collaborations also frequently come with costs. Caregivers may reduce their employment and sacrifice earnings and other benefits. Consumption costs also may increase, necessitating reallocation of family spending to care recipients. Additionally, in some families the lines dividing property ownership between the generations are blurred, and property that starts out as belonging to one generation may be transformed into a resource available for another.

Looking at multi-generational relationships as a web of financial and social connections, this article advocates that American laws and policies should recognize and support economic collaborations between the generations to enhance the benefits and also fairly distribute the costs that these ties produce. The paper explores a few key areas of law, including some aspects of elder care and family property law, to evaluate the degree of support in our system for encouraging intergenerational family connections, and suggest improvements.

Valuing Care

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Much has been written in the family law literature about how the law supports, undermines, and values the care that family members provide to children and young adults. Consistent with the field's historical tendency to focus on the concerns of younger persons, the family law literature is examining how the law treats care provided to older adults is much less developed.

This study therefore seeks to understand how elder care is valued in the modern era. It does so by examining a concrete situation in which the state is called upon to declare if care provided to older adults has monetary value and, if so, what value. Specifically, it examines how state regulations, administrative law judges, and the courts assess the value of personal care contracts entered into by older adults who subsequently apply for Medicaid coverage of long-term care services. The number such contracts is skyrocketing because, in the wake of the Deficit Reduction Act of 2005, personal services contracts have become a popular Medicaid planning techniques. Using this technique, an older adult enters into a personal service contract with an adult child (or other person whom he or she wishes to benefit) to provide certain caregiving services. If the older adult pays fair market value for the services, then he or she is effectively able to give money to the care provider without incurring a Medicaid eligibility penalty that would result from an outright transfer. In many cases, state departments of social services nevertheless impose a penalty on older adults who have entered into such contracts, claiming that the payment was a "gift" or that the services rendered had no monetary value.

By determining the conditions under such state regulations require payments for elder care to be deemed gifts, and when administrative judges and the courts affirm denials of Medicaid coverage on the grounds that alleged care payments were impermissible gifts, this study helps paint a picture of how elder care is valued—or is not valued—in modern America.

The study is guided by, and builds upon, a study that Hendrik Hartog published in his book *SOMEDAY ALL THIS WILL BE YOURS* which analyzed court decisions determining whether to enforce a promise by an older adult to give land to a caregiver in return for care and/or company. Hartog used these cases to show how people in the 19th and early 20th century perceived their moral and legal responsibilities to family and the aged. Notably, he found that courts' willingness to enforce such promises varied significantly based on the gender of the care provider. Because such cases were rarely brought after the early 20th century, however, the study was unable to assess how such caregiving might be valued today and whether such gender discrepancies persist. This project therefore uses a very different set of cases to try to explore these questions in a modern context.

The study's early findings suggest that all three categories of legal actors examined (state regulators, administrative law judges, and state courts) attach little or no monetary value to elder care in most cases. Many states are adopting regulations that presume that that elder care delivered by family members lacks monetary value. When confronted with cases in which such presumptions might be rebutted by the facts, administrative law judges routinely hold that personal care services provided by family members—even when significant and necessary to keep an older adult out of a nursing home—were either gratuitous or simply lacked monetary value. The result is that, in the name of combatting Medicaid fraud, states are preventing older adults from entering into binding contracts to pay for their own care. They are also penalizing older adults who attempt to do so by rendering them ineligible for critically needed services.

While public distaste for Medicaid planning may partially explain these patterns, it cannot fully explain the state's willingness so profoundly devalue personal services provided to older adults. Rather, the language used both in state regulations and in case decisions suggests that these patterns reflect entrenched, gendered stereotypes about personal care work.

Vulnerability, Resistant Assets, and Reciprocal Exchange

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This article will explore how the theory of vulnerability and the theory of reciprocal exchange can be utilized to form the basis for a solution to the caregiving dilemma of the sandwich generation. Most state laws and public policy provide that the private family is both the nurturer of the very young and the safety net for the very old. While there is some assistance from the government in terms of daycare and healthcare, the majority of mid-life parents struggle with the financial and time costs associated with daily care of young children, as well as long-term care of elderly relatives. Notwithstanding parental duties and filial laws, caregiving among family members is altruistic, based on notions of cooperation and reciprocity. This article will argue that the common dependent care interests of young children and senior citizens can be conflated to create a unified approach for family caregiving in the United States. New trends in housing, such as homesharing and multi-family homes, as well as intergenerational day care centers for children and the elderly can provide the foundation for this unified approach.

This article further explores the question of whether altruism defeats efforts to expand public government support for families. It is vital to examine the role of the state within the family care framework. This article introduces the concept of 'resistant' assets. Resistant assets are those structures or social constructs used by the state to reinforce the status quo or resist change that would positively address vulnerability. For purposes of this article, they are usually laws or public policies that support the normative family construct, and can include social mores that rely upon racial and gender stereotypes associated with caregiving. Resistant assets can work in concert with families' resilience to life's unfortunate circumstances to negate state responsibility for vulnerability. This article analyzes whether altruistic caregiving is a resistant asset of the state, and if so, what would justify additional state support of both child and elder care for poor and middle-class families. Finally, this article concludes that the successful amalgamation of the two theories of vulnerability and reciprocal exchange will require a deconstruction of certain resistant assets of the state to achieve a unified approach to intergenerational caregiving going forward into the twenty-first century.

Time to Consider—Expanding the Definition of Family for the 21st Century

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During the 2012—2013 United States Supreme session, the court heard two important cases on marriage equality, *Hollingsworth v. Perry* and *United States v. Windsor*. Its decisions in those cases, along with a major shift in public sentiment towards same sex marriage, dramatically changed the landscape on this issue. By the time the Court heard arguments in *Obergefell v. Hodges* concerning whether there is a fundamental right to marry for same sex couples, a majority of states and the District of Columbia recognized such a right. Hopefully this question will be resolved when the Court renders its decision in June (2015).

Social science literature regarding child well-being was used within these cases. My paper is focused on reviewing this and additional literature to determine how children raised in same sex relationships fare when compared to those raised in different sex relationships. It has been my hypothesis, for a number of years now, that children raised in loving, stable supportive families will fare well without regard to sexual orientation. Fortunately, the studies in this area are much more definitive and there are many more available than when I last visited this issue some ten years ago. Earlier research in this area employed nonprobability studies and were criticized as having too small sample sizes or being biased. More recent studies have used national probability studies such as the National Longitudinal Study of Adolescent Health and the Early Childhood Longitudinal Study—Kindergarten Cohort (ECLS-K) to compare academic achievement of children growing up in various structures. Although there are still criticisms that the studies are biased, the overwhelming accumulated empirical evidence supports a conclusion that a child's well-being is not dependent on parental gender or sexual orientation.

In Part I of my paper I provide some context for the discussion. The availability of ART (Assisted Reproductive Technology) and the right to adopt in most states has resulted in many more same sex families. Although literature on family structure has focused primarily on married heterosexual, unmarried heterosexual and (presumably heterosexual) single mothers, for at least the last fifteen years there have been a number of articles and several longitudinal studies on children raised by same-sex couples. Moreover, enough time has passed to provide sufficient data on the well-being of these children from birth through their minority.

Part II forms the bulk of my paper and is focused on the children and the factors that contribute to their wellbeing. At this point it is uncontested that child well-being is tied largely to stability, the quality of the relationship between the child and the parent/significant adult in his/her life and socioeconomic status, not the sexual orientation of the parent. There is a modest advantage for children raised by married biological parents, which lends some support to arguments for marriage equality. However, there are some studies which discount the relevancy of a biological connection to a child's well-being.

Well-being metrics such as academic performance, social and psychological health, early sexual activity and substance abuse will be considered in my analysis. At the end of the day it appears that as the court stated in *DeBoer v. Snyder*, “[G]ay couples no less than straight couples, are capable of raising children and providing stable families for them.”

Part III of the paper addresses some studies dealing with stigmatization and its impact on a child's well-being. I also review some of the studies used by marriage opponents to argue that children of same sex couples fare worse and in fact may be harmed by these relationships. I critique their methodology and discuss their conclusions.

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I conclude with my findings based on the overwhelming empirical data indicating that there is no negative impact on a child's well-being based on the sexual orientation of the parent, that children raised by same sex couples fare as well as and in some areas better than those raised by opposite sex couples. Consistent with the Sixth Circuit's recognition in *DeBoer*, it appears that the quality of the relationship, and the capacity to raise children within them, turns not on sexual orientation but on individual choices and individual commitment [to each other and the family].

Given that based on the 2010 Census, over 111,000 households in the United States are headed by same sex partners with children under 18, I find this topic particularly compelling as we consider definitions of family and family structures. (*note that this figure is widely assumed to underestimate the actual number of same sex couples who are raising children since the Census does not directly assess the reporter's sexual orientation; rather, it reflects households headed by cohabiting same sex partners who voluntarily report their relationship status).

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The New Permanency

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In recent decades, as assisted reproductive technology and same-sex parenting have spurred private family law to begin recognizing multiple parenthood arrangements, and wrestle with the implications of those arrangements, a parallel development has emerged in public family law. Permanency options for foster children have diversified significantly and now reflect multiple parenthood statuses as an essential means for helping children leave foster care to stable and permanent family arrangements. Indeed, the child welfare field has embraced such multiple parenthood arrangements far more fully than private family law, and they now occur with great frequency and regularity.

This article analyzes those trends in child welfare law, and explains ongoing barriers to realize fully the promise of these diverse permanency options. Child welfare law differs from private family arrangements in at least one crucial way – the state plays an even stronger role, because the state has removed a child from her family of origin, created a new foster family arrangement, and (in the cases on which this article focuses) pressured all individuals involved to accept a permanency option other than reunification with the child’s family of origin. This article will identify and propose solutions to some of the challenges that this state role creates.

Permanency is a pillar of child welfare law. It has long been agreed that children generally do better with legally permanent caretakers, rather than in foster care, which is by definition a temporary legal status. For the past several decades, permanency options have mostly been assumed to be limited to reunification with biological parents or adoption by new parents. Historically (and in many states, to this day), adoption has been understood to require termination of biological parental rights and of all legal relationships between biological parent and child.

That binary—reunify or terminate and adopt—has faced significant criticism for overly relying on terminations, creating legal orphans,¹ and unnecessarily excluding permanency options which maintain a legal relationship between parent and child or seek to place children permanently with caretakers who did not want to adopt. Assuming permanency required terminating parental rights, many states terminated many thousands of parents’ rights, but failed to find adoptive families for all children whose legal relations with their parents were severed. This created legal orphans, and critics complained that states served these children poorly – states raise these children in foster care, then “emancipate” them when they reach majority, and these children fare poorly on important life outcomes.² Critics explained how child welfare law subordinated permanency options such as guardianship to adoption and demonstrated empirically that guardianships are just as stable and lasting as adoptions. Simultaneously, child welfare agencies began placing increasing numbers of children with extended family members, many of whom did not want to terminate their relative’s parental rights, even if the kinship caregivers would raise them to adulthood. And research demonstrated that kinship care provided foster children with more stable placements and facilitated better permanency outcomes.

The result has been significant changes in permanency policies and, less significantly, in practice. Today, when foster children cannot reunify with parents, their permanency choices fall along a continuum: children can be adopted and have their legal relationships with birth parents terminated; children can be adopted and have court-enforceable rights to visit with birth parents; children in one state can be adopted without terminating birth parents’ rights (non-exclusive adoption); children can live with a permanent guardian—either a family member or close family friend (“kinship guardianship” in child welfare jargon) or with

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1 A legal orphan is a child whose biological parents remain alive, but who has no legal parents because state action has terminated their biological parents’ rights and the state has not formed a new parent-child relationship via adoption. Martin Guggenheim coined the term. Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121, 122 (1995).

2 See, e.g., MARK E. COURTNEY, ET AL., MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 26, 6 (2011) (summarizing the “disquieting” conclusion that youth who emancipate from foster care are “faring poorly . . . [a]cross a wide range of outcome measures, including postsecondary educational attainment, employment, housing stability, public assistance receipt, and criminal justice system involvement . . .”), available at http://www.chapinhall.org/sites/default/files/Midwest%20Evaluation_Report_4_10_12.pdf.

others (non-kinship guardianship). This continuum represents a dramatic shift in permanency law and should lead to dramatic shifts in practice. Many options along this continuum do not require terminations of parental rights and so this continuum challenges reliance on terminations. Choosing among those options requires delicate decision-making, and should empower families—especially children and their new permanent caregivers—to determine the best legal status for their particular situation. This is the new permanency.

A milestone in the development of this new permanency was the 2008 Fostering Connections to Success and Increasing Adoptions Act (“Fostering Connections”). Through Fostering Connections, Congress provided federal funds to reimburse states for kinship guardianship subsidies. This reform rectified a long-standing inequity in child welfare law—the federal government had helped states pay adoption subsidies for foster children since 1980, but had not done so for guardianship. But as the permanency continuum developed in the intervening decades, and as research firmly established that guardianship was just as lasting and stable as adoption, this inequity was increasingly untenable.

In an ideal world, Fostering Connections would have ushered in the new permanency. Adoption and guardianship would be treated as equal permanency options, which research predicts would, most importantly, lead to improved permanency outcomes overall as more children leave foster care to guardianships. There may also be somewhat fewer adoptions, because families would have a greater ability to choose which legal status best suited their situation, and some families would choose guardianship over adoption. Such private family choice should be viewed as a normative good—respecting the private ordering of family life as preferable to state agencies or the law imposing their preferences on families.

This ideal world has not been realized. Six years after Fostering Connections, the number of guardianships and adoptions remain roughly the same as they were in 2008. Permanency outcomes have not improved, and in many states families have no greater ability to choose the best option for them than before 2008.

This article is the first to explore the reasons for Fostering Connections’ failure to spark major practice changes, to explore a jurisdiction in which the expected changes appear to be taking shape, and to propose further legal reforms to achieve Fostering Connections’ promise. Fostering Connections failed to have as broad of an impact as possible because of problems built into its structure. It provides federal funding for guardianship, but only for kinship caregivers—even though non-kin caregivers may be just as willing to choose guardianships. It requires states to rule out adoption before being eligible for a guardianship subsidy, and thus establishes a permanency hierarchy that subordinates guardianship to adoption. This provision reinforces an ideology that permanency requires something legally binding and that adoption is more binding than guardianship because it is legally hard to undo. This argument, however, ignores the empirical reality that adoption and guardianship are equally permanent.

The permanency hierarchy also reinforced a child welfare legal culture that continues to subordinate guardianship to adoption. Family courts nationally celebrate “Adoption Day”—not “Guardianship Day” or “Permanent Families Day.” State and federal agencies track detailed data regarding adoptions, but only limited data regarding guardianship. Reports about adoptions, but not guardianship, are emphasized in policy briefs. Adoption remains the focus in law school casebooks which describe guardianship as something less than permanent, if they address it at all. And the hierarchy is reinforced every time a case is litigated to conclusion via adoption or guardianship. Adoption cases involve terminations of parental rights, which trigger a host of procedural protections due to the seriousness of the issues at stake. Guardianships, in contrast, are treated as lesser cases, often with lower standards of proof, less clear statutory guidance, and often procedures from probate court rather than family court.

These shortcomings are particularly concerning because of the immense authority in child welfare agencies have in most cases. They determine when they will place children with kin or with strangers, whether and under what conditions they will pay guardianship subsidies, and when they will inform families that guardianship is an option. Court oversight of these decisions is weak. Agencies’ wide discretion permits them to continue practicing under the old permanency—without giving due deference to kinship placement possibilities and continuing to subordinate guardianship as a permanency option.

Permanency practice does vary across jurisdictions, and the District of Columbia provides a partial counter-narrative. The District has more fully embraced equity between adoption and guardianship, especially since it enacted legislation in 2010 providing guardianship subsidies both for kin and non-kin. Since then, the number of annual guardianships has surpassed the number of adoptions, the number of termination of parental rights filings has sharply declined, and the number of foster children who emancipate from foster care rather than leave to permanent families has declined. District foster children appear to be getting better permanency outcomes to fit their particular situations, with fewer unnecessary terminations. The District thus represents the promise of what the new permanency could do nationally (albeit with a somewhat extreme balance between guardianships and adoptions).

The District, however, also illustrates one national obstacle to the new permanency—the wide agency discretion and limited judicial review of kinship placement decisions early in cases. This has led to a series of cases reversing adoption decrees due to the child welfare agencies' failure to consider a potential kinship placement adequately. Because agency placement decisions are not easily challenged early in cases, these cases have undone adoptions granted after children lived for years in one foster home—a result that would be unnecessary if the issue were resolved early in a case.

This article proposes a set of reforms that would help fully implement the new permanency nationwide, achieving the benefits and avoiding the pitfalls evident in the District of Columbia. First and most obviously, the law should no longer impose a hierarchy among permanency options and should instead treat adoptions and guardianships as equal. When reunification is not an option, all potential permanent caregivers should understand the full continuum of permanency options available to them. The law should provide similar procedural and substantive protections to the parent-child relationship before guardianships as are provided before adoptions. And agencies and policy makers should track adoption and guardianship data more equitably.

If any hierarchy exists, it should reflect the better outcomes that children have in kinship rather than stranger foster care. The law should establish a strong kinship care preference, requiring agencies to place children with kin unless the agency can establish good cause why that would be unsafe or otherwise detrimental to the child. And children and parents should be able to challenge that decision in court early in a case, rather than leaving the issue to nearly unfettered agency discretion. Such reforms could increase the number of children benefitting from kinship care, resolve disputes over kinship care placements early, and avoid the challenges evident in the District.

The law should also place greater emphasis on the effective procedures for the selection of permanency plans. Making the best choice along the permanency continuum for each child is essential because that choice will shape the negotiating field that will lead many parents and caregivers to reach agreement on one option along the permanency continuum. Evidentiary hearings in appropriate situations and the right to an expedited appeal of permanency hearing decisions will improve permanency plan decision-making substantially.

Finally, to facilitate the above reforms, a greater emphasis on quality counsel for parents, children, and, once reunification is ruled out, potential permanent caregivers is essential. Quality representation for parents and children can speed permanency by helping parties negotiate permanency agreements by consent, and by ensuring all options on the permanency continuum are explored. The same is true for counsel for caregivers, who can ensure that all caregivers are aware of all possible permanency outcomes, even if individual caseworkers are loath to share such information with foster families.

Limits To Parental Control: Student Speech Rights and the Collision of Values in Public Schools

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My paper further develops a theme that runs through my forthcoming book – *LESSONS IN CENSORSHIP: HOW SCHOOLS AND COURT SUBVERT STUDENTS’ FIRST AMENDMENT RIGHTS* (Harvard University Press, available Oct. 19, 2015). When schools censor and punish student expression, officials are often inhibiting viewpoints that students learned from and share with their parents. The silencing of student speech not only violates the students own First Amendment rights, but squarely challenges parents’ constitutional right to inculcate their offspring with their own values, a right that is central to an understanding of family law in the United States.

Educators’ efforts to cultivate intolerance for intolerance in elementary and secondary schools confront another inherent tension. In order for schools to “reproduc[e] the regime of toleration,” political theorist Michael Walzer has observed, the state must foster behavior that conflicts with the illiberal messages some children receive in their homes and religious and cultural communities. Moreover, young people of every age commonly campaign at school on behalf of less inclusive values often learned at home. This “competition” between viewpoints, Walzer argues, provides valuable lessons: “The children presumably learn something about how toleration works in practice and . . . something also about its inevitable strains.”¹

The character of liberal democracy in the United States limits how we carry out such civic education. The Constitution reins in educators’ powers to inculcate mutual respect because the state must also accept the divergent voices, even illiberal ones, reflecting the beliefs of students, their families, and their communities. Schools can expose students to cultural preferences, but they may no more insist that every student or family subscribe to the same viewpoints than they can insist that everyone worship the same God. Above all, schools are limited by the countervailing constitutional value of respecting the expressive rights of young people and the First Amendment. Schools may also run up against constitutionally protected parental liberty interests inherent in childrearing.

This paper explores the conflict between parental rights to inculcate children with familial values and the state’s efforts to impose boundaries around what student expression is deemed acceptable. No ideological or philosophical camp has been immune from censorship. Schools have stripped conservatives and progressives, secularists and the pious, of their right to speak.

Do parents or educators get to decide when hate speech, vulgarity or purely verbal bullying protected by the Speech Clause goes too far? And even if parents and school officials agree that protected speech has crossed a behavioral line, should the coercive power of the state be brought to bear, or is authority reserved to parental discretion?

I focus on battles that unfold in legal and social skirmishes over constitutionally protected student speech involving war and peace; civil rights; rights for LGBT students; the Confederate flag; abortion; evangelical proselytizing; immigration; teasing and verbal bullying; sexting; personal prayer in public spaces; courses in tolerance that sometimes verge on thought reform; and the increasingly expansive efforts of school officials to control student speech that takes place off campus, online, and outside school hours. This last development, endorsed by federal agencies and state legislatures in violation of the Speech Clause, brings jurisdictional disputes over the ultimate responsibility for acculturating the young to a head.

1 Michael Walzer, *On Toleration* (New Haven: Yale University Press, 1997), 71–72.

Images and Illusions of Progressive Change in American Family Law

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Recent changes in the definition and structure of relationships recognized legally as family relationships often are portrayed as images of significantly progressive, egalitarian, and beneficial social advances. My paper will present a critical analysis of such interpretations. It will consider, for example, whether *United States v. Windsor* altered substantially the traditional structural allocation of family-regulating authority as between the states and the federal government, and, if so, how? Also, have *Windsor* and the subsequent federal courts that have mandated the legalization of same-sex marriage in the states altered the basic principle of federal judicial deference to state regulation of family relations, and, if so, how? Have those recent judicial rulings significantly changed the meaning of marriage in the United States, and, if so, how? Such changes often have been justified or supported by claims that they will benefit children raised by parents in such relationships; is there evidence clearly supportive of that claim, or is the evidence contrary, or ambiguous, or incomplete? Finally, my paper will provide comparative international perspectives matching and contrasting a comprehensive review of such recent family law developments in the United States with the status and trends in family law in other nations.

We are witnessing the redefinition of marriage and family relationships in many nations. The legalization of same-sex marriage is the most well-known, but hardly the only significant change in family demographics in industrialized nations. For example, in the USA today almost half of children in single-mother homes live with never-married mothers; four decades ago, that figure was one in 16, just one-seventh of today's figure.

The percentage of couples living together without marriage has increased ten-fold, from slightly more than one percent of all couples in 1960 to nearly 12 percent in 2011. The percentage of adults who are married has fallen - from about 70% in 1960 to about 44% in 2010. The percentage of marriage that last 20 years has dropped from 67% to about 56% in just twenty years (through 2005). Marriage is not a priority for either Gen-X-ers or for Millennials. The percentage of children who are born out of wedlock has stabilized at about 40% for all Americans. These indicators suggest that the traditional male-female marital family is in decline in the United States, and other family forms are replacing it. The implications of that family demographic shift for life as we and our children and grandchildren know it and expect it to be, for the economy, for the well-being of future generations has not been considered much by family law scholars.

Demographers have been predicting a "demographic winter" is coming in many affluent nations as birth rates have fallen below replacement level (far below in some nations) while the aged are living longer. Additionally, an economic seismic shift may occur when the ratio of workers to non-workers in a given society falls below levels capable of sustaining retirement, pension, social security and welfare programs as they are now operated.

Many other social influences - including immigration, education, employment, generational work-ethic, and religiosity, to name a few - can magnify or minimize the potential detrimental effects of these family demographic factors. Put them all together - and you have the makings of a demographic-socio-economic-political "perfect storm." If preparations are not made now to deal with the confluence of such developments, the consequences for the next four generations may be devastating.

This paper will consider the possibilities and implications of these developments. It also will discuss what legal policies might be adopted now that would help future generations of Americans to be prepared to cope with and not be overwhelmed by these coming developments.

Religion as a Controlling Interference in Medical Decision Making by Mature(?) Minors

Jonathan F. Will

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It is well settled that an adult, one over the age of eighteen, is legally permitted to refuse life-saving medical treatment, and a great deal of literature exists on the ability of adult Jehovah's Witnesses to refuse blood transfusions in accordance with their religious beliefs. But it is equally-well settled that adults may not refuse life-saving blood transfusions on behalf of their children. As the Supreme Court noted in *Prince v. Massachusetts*, "[p]arents may be free to become martyrs themselves. But it does not follow they are free . . . to make martyrs of their children."

Because parents cannot make this decision for their children, in cases involving adolescents and religious refusals, the argument is often asserted that the decision is being made by the minors themselves. And several jurisdictions have adopted the so-called mature minor doctrine, which, in effect, creates a rebuttable presumption as to the legal incompetence of those under the age of eighteen. Theoretically speaking, competence goes hand in hand with the principle of respect for autonomy; competent individuals are thought to make decisions based on adequate understanding while remaining free from controlling interference that would prevent autonomous choice.

But there is a gap in the existing literature regarding what role religion ought to play in evaluating the competence of adolescents refusing life-saving medical treatment based on their asserted religious beliefs. After all, religion plays almost no role when assessing medical decisions made by adults. This paper offers an answer to that normative question. When adolescents seek to refuse medical treatment based on religious beliefs, the determination of whether such adolescents have rebutted the presumption of incompetence must include an assessment of whether religion is posing a controlling interference that prevents autonomous choice.

Anecdotes abound of courts allowing teenagers to refuse life-saving medical treatment based on their asserted religious beliefs. Courts seem satisfied that these decisions have been made by competent minors after careful consultation with their parents and religious leaders. But often, these teenagers are isolated from friends and family who are not associated with the given religion. It is not surprising that these minors make medical decisions in line with their parents (who, again, cannot make the decision for their children), and in accordance with the only religious beliefs to which they have been exposed. Religious beliefs, as in the case of the Jehovah's Witness Faith, which might eschew individual autonomy in favor of deference to church authority.

Adults have the ability to choose with which religion(s) to associate. They also have the constitutional right to raise their children in accordance with those beliefs. Minors often have no choice in the matter; though all is well until such minors are presented with life and death decisions regarding medical treatment. In these situations the law must enforce a mechanism pursuant to which it can be determined whether these minors are making decisions based on a controlling interference associated with that religion.

Employing the Family

Jessica A. Clarke

University of Minnesota Law School

This project examines ways in which employment law constructs and reinforces normative visions of how individuals should arrange their intimate lives. Many judicial decisions related to employment disputes implicitly privilege a concept of the family as anchored by a monogamous, stable, procreative domestic union. Employment discrimination law often protects these families from disruption, for example, by permitting an employer to fire a pregnant but unmarried employee, employees who commit infidelity, or an employee whose attractiveness tempts her employer with infidelity and threatens his marriage. The law may prevent or disrupt non-normative relationships, for example, by refusing to extend state statutes that prohibit discrimination on the basis of off-duty conduct to include dating relationships, or by enforcing contracts in which employees sign away their rights to cohabit or to engage in consensual intimacy with coworkers. One potential objection to these employer practices is gender-based discrimination. But laws against gender-based discrimination may not apply when rules favoring certain types of family forms apply to both men or women. Another potential objection is sexual-orientation based discrimination. But the legalization of same-sex marriage is increasingly rendering that objection moot. I argue for explicit consideration of how law employs the family in these contexts, and suggest reconfigurations of doctrine to avoid privileging certain forms of consensual intimacy over others.

Marital Status Nondiscrimination and its Relationship to Marriage

Courtney G. Joslin

University of California Davis School of Law

Among those who support equality for lesbian and gay people, there is an ongoing debate about the wisdom and efficacy of the marriage equality movement. Some argue that the marriage equality movement derailed earlier efforts by LGBT activists, feminists, and others to destabilize the supremacy of marriage. To support the claim that marriage was in the process of being destabilized, scholars cite a number of developments during the second half of the twentieth century, including but not limited to the emergence of newly recognized rights regarding procreative freedom; court decisions invalidating laws that discriminated against nonmarital children and their parents; no-fault divorce laws that made it easier to exit marriage; and case law protecting the property rights of nonmarital partners upon the dissolution of their relationships.

Other scholars, including Doug NeJaime and Serena Mayeri, push back against this description and present a more complex view of the role and view of marriage in earlier reform efforts. While it is surely true that attitudes about nonmarital sex and cohabitation were changing during the second half of the twentieth century, these scholars contend that marriage continued to hold a central and privileged place in the narrative. As NeJaime argues, “[e]ven if advocates wished to destabilize marriage—and certainly some did—they were constrained by a legal, policy, and cultural framework that prioritized marriage[.]”

This piece adds to this historical exploration by examining the movement to prohibit discrimination on the basis of marital status. During the 1970s and 1980s, 21 states and the federal government enacted statutes prohibiting this form of discrimination in a variety of areas. On first glance, these statutes seem to lend support to the claim that a core purpose of this earlier advocacy was to destabilize marriage. A closer look at the previously unexplored history of these statutes tells a more nuanced account both with regard to what these statutes actually do, and, critically, with regard to how advocates pressed for their enactment and how these laws were perceived by policymakers and by the public.

Coworkers In Law

Naomi Schoenbaum

George Washington University Law School

Like “in laws” in the family, coworker relationships are “in law” in that they are created by a legal relationship—the one between employer and employee—but coworker relationships themselves are not recognized in law. This Article critiques the legal status of coworkers by arguing that coworkers are at the heart of work life and work law, that work law fails, and indeed undermines its own purposes, in its blindness to this important reality, and that coworkers must be “in law” to fulfill the goals of work law.

While scholars have focused on the tensions between labor law and employment law, this Article unites work law under a relational theory that highlights the central role of coworkers to the success of work law. Coworker social bonds provide support that enhances employee leverage, promotes collective action, facilitates worker voice to register complaints, and even prevents legal violations from occurring in the first place. In this way, coworkers are instrumental to achieving the equal, fair, and safe workplace that work law envisions. But the law’s blindness to coworker relationships limits workers’ ability to harness the power of these bonds. Across a wide swath of doctrines—from unit determinations, to discrimination, to retaliation, and beyond—work law erects barriers to coworker bonding, discourages the exchange of coworker support, and permits employers to rupture coworker bonds. This means, for example, that employees are without standing to complain that discrimination harmed coworker bonds, and that employers can fire workers who support their coworkers.

This Article proposes a new relationship model—a law of limited-purpose support—that would recognize coworker bonds. This model would take a two-pronged approach. First, time-tested doctrines would be adapted to the reality of coworker relationships. So, for example, in assessing standing under antidiscrimination law, coworker bonds would count among the interests the law protects. Second, coworker bonds would enjoy new protections, such as a blanket protection against retaliation when coworkers exchange work-related support. Under the law of limited-purpose support, coworker bonds could fulfill their promise of achieving a better workplace.

Poor Support, Rich Support: Re(viewing) The American Social Welfare State

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This article focuses on disparities in the way that the state either supports or undermines families. These disparities fall along class and race lines, and manifest structurally in profound differences in both the amount of support families receive and the balance between support and punishment inherent in the governing structures of the various programs. The effect of these disparities is to both perpetuate subordination and to reinforce privilege along race and gender divisions.

In a recent article (*The Hyperregulatory State: Women, Race, Poverty and Support*, 25 YALE J. LAW & FEMINISM 319 (2014)) I attempted to engage, in some senses, at the intersection of work by Dorothy Roberts and Martha Fineman. In that article I argued that, if we are to conceptualize a road to, “a more active and responsive state” (Fineman) it is productive to start the conversation by looking closely at the lived institutional realities of those who are, by virtue of race, class, gender and place, rendered particularly vulnerable. For poor women and disproportionately for poor African American women, it is largely inaccurate to describe the mechanisms of state support social support as passive or non-responsive. Instead I argued that they are *hyperregulatory*, meaning that, “the mechanisms of social support are targeted, by race, class, gender and place, to exert punitive social control over [disproportionately] poor, African-American women, their families and their communities.”¹ Although that paper points to inequalities in administration between the *hyperregulatory state* and other mechanisms of social support in the American context, the focus was on the mechanisms of the *hyperregulatory state* and not on the contrast between those mechanisms and the mechanisms of support that lend assistance to those with class, race and gender privilege.

This paper begins that analysis. Part I provides a theoretical frame for this project, defining what I am arguing are two conceptually separate forms of assistance: the first is the *hyperregulatory state* and the second is the *submerged state*. My definition of the *hyperregulatory state* draws on my previous work. The hyperregulatory state stands in sharp contrast to what Suzanne Mettler has termed the *submerged state*. In her book bearing the title, Mettler argues that vast swaths of the American social welfare state are, in effect, invisible to the American public.² In these programs, which include tax expenditures, student loans and even Medicare and Medicaid, the government’s extensive support role is obscured from view. The use of the tax code and the role of private entities (banks, insurance companies, health care providers) render the presence of the government invisible. Obscured within these programs are two key facts: first, people across class receive extensive financial support from the government and second huge swaths of the current social welfare state distribute benefits upward and exacerbate income inequality.

Part II focuses on the provision of housing support across class and race lines as an example and delves into the issues of structural inequalities between these two social welfare states. Part II describes two related phenomena. First, as a nation we provide extensive financial assistance across class lines in a way that often exacerbates income inequality by distributing support upward. Second, the structures and means of support function in very different ways across class, race, gender and place. Support given to those through the *submerged state*, to those who are comparatively wealthy (in this example the Home Mortgage Interest and state and local property tax deductions) comes with little visibility and few risks. In contrast, support for poor disproportionately African American single women (in this example public housing, project-based Section 8 and the Housing Choice Voucher Program) comes enmeshed within the *hyperregulatory state* -- at the price of startling deprivations of privacy and significant punitive risk.

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1 Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty and Support*, 25 YALE LAW AND FEM. 319(2014).

2 Suzanne Mettler *THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE DEMOCRACY* 2011.

Part III begins to explore, in the particular world of social welfare provision, how we might begin to move from these structural inequalities towards a more universally responsive state. The remedy I propose that we consider has to do with rights. Primarily, at least for now, I am referring to rights with a small r – rights embedded in regulatory and statutory schema that both protect the integrity of the recipient of social welfare and rights that demand some level of support. Small r rights in my scheme also refers to statutory anti-discrimination rights that are sometimes effective at addressing the targeting at the heart of the hyperregulatory state. I also begin to explore how naming structural inequalities in social support might inform our conceptions of Roberts’ right to privacy,³ or Fineman’s idea that vulnerability theory gives rise to a “demand” for support.⁴

3 As she frames it, “merely ensuring the individual’s ‘right to be let alone’—may be inadequate to protect the dignity and autonomy of the poor and oppressed.” Indeed, a better notion of privacy “includes not only the negative proscription against government coercion, but also the affirmative duty of government to protect the individual’s personhood from degradation and to facilitate the processes of choice and self-determination.” Dorothy E. Roberts, Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy, 104 HARV. L. REV. 1419, 1478-79 (1991).

4 Martha Albertson Fineman, The Vulnerable Subject and the Responsive State, 60 Emory L.J. 251, 255-56(2010) ([C]onsideration of vulnerability brings societal institutions, in addition to the state and individual, into the discussion and under scrutiny The nature of human vulnerability forms the basis for a claim that the state must be more responsive to that vulnerability. It fulfills that responsibility primarily through the establishment and support of societal institutions.”).

Famigration (Fam-Imm): The Next Frontier in Family Law

Kari Hong

Boston College Law School

For over twenty-five years, scholars have observed how family law intersects with immigration law. What can happen if scholars systematize critical family law concepts into the conception and practice of immigration law. Just as Crim-Imm scholarship successfully identified the ways in which the (purported) civil proceedings of immigration law needed the extra constitutional protections found in criminal law, Famigration offers the potential to transform the way in which immigration law operates. Famigration invites the possibility for immigration law to incorporate heightened constitutional protections, a means to resolve conflicts between federal and state law, and universal, transcendental values such as the best interest of the child, when defining and recognizing family.

Mail Order Marriages

Marcia A. Zug

University of South Carolina School of Law

This article is the final chapter in my book *BUYING A BRIDE*, which traces the legal history of mail order marriage from the Jamestown colony to the present. The book examines the reasons for mail order marriage through the centuries and demonstrates that these relationships were often beneficial and empowering for many of the women. This final chapter seeks to determine whether modern mail order marriages also benefit the participants and if the widespread claims that large numbers of mail order brides are abused and exploited are accurate. This chapter also evaluates the equally common claim that mail order marriage undermines the purpose of marriage and that it perpetuates gender inequality.

The chapter argues that the harms associated with mail order marriage have been exaggerated and that the benefits of these unions have been underappreciated. Mail order marriages help both women and men by increasing their marital options and their value as potential spouses. This chapter demonstrates that modern mail order participants choose mail order marriage for many of the same reasons that men and women turned to these marriages in the past and it shows that these marriages serve an important purpose, particularly for men and women who are disadvantaged in the current marriage market.

AALS Luncheon

Focus on Teaching: Marrying Assessment Tools to Learning Outcomes in Course Design

Jamie Rene Abrams

University of Louisville, Louis D. Brandeis School of Law

Mary P. Byrn

William Mitchell College of Law

Marsha M. Mansfield

University of Wisconsin Law School

This program will highlight methods and approaches to the effective use of learning assessments and outcomes in family law courses that are consonant with and further the goals of the new ABA standards. Applying “backwards design,” the presenters will demonstrate how effective assessment tools reinforce learning outcomes in course design. The presenters will share examples from an introductory family law course, an in-house family law clinic, and an external field placement residency.

Multi-Course Collaboration and Skills Development in the Family Law Classroom

Deirdre M. Bowen
Seattle University School of Law

Law schools have undergone severe criticism as of late for their failure to teach enough practical skills. While schools have worked to innovate with new courses and programs and have certainly created public relations campaigns suggesting that skills are now “the thing” and that students can expect practical skills across the curriculum beginning in year one, deans and faculty alike have been challenged on how exactly to deliver on this promise. This presentation offers a unique approach to incorporating skills in a Family Law classroom—even when the classroom includes upwards of 70 students.

In this presentation, I will describe and demonstrate how family law professors can collaborate with legal writing classes and clinical classes to create a richer, skills based doctrinal class. I have worked successfully with large family law classes in which students act as expert consultants to their peers working on memos in legal writing and clinical classes involving actual clients.

The presentation includes step-by-step instructions and lesson plans and supporting documents for the family law class as well as the collaboration tools to work with other classes to bring about this successful venture. The students in the family law class act as subject matter consultants to one L students. Below, is an overview of how the process works and how I achieved the goal by working with the domestic violence clinic, but the skills and documents and lesson plans can be adapted to work solely within the family law classroom as well as with one or more clinics.

The collaboration is a three way process in which I work with the domestic violence clinic, and legal writing students, all of whom are one Ls . The professor provides me with a set of potential cases that he or she will be working on with his or her students for the semester. In reviewing the cases, the professor “hires” my family law and legal writing classes to work on some component of the case that needs additional research and legal analysis. In turn, I work with my legal writing class to actually conduct the research and writing of the memo. Because legal writing is a one L class, the students do not have the substantive expertise for the family law case that the clinical professor has hired my classes for. That is where my family law class comes in.

My family law class breaks up into mini consultant firms. In turn, members of these firms partner up with a firm from my one L legal writing class. After the clinic professor, our client, has presented the issue that he or she needs assistance with, the family law “consultants” meet with the one Ls to brief them on the substantive background of the law. The briefing often included cases that we may have covered in class, in addition to other cases that outside research has produced. The family law “firms” meet with the one L firms again to discuss the research that the one L firms have uncovered. The family law firms consult with the one Ls to assist them in learning how to critically evaluate what the cases mean, whether they might be helpful, and what additional questions need to be answered.

The next step in the process is to introduce the family law students to an additional set of skills. At this point in the process, these “firms” have a good sense of the substantive law and the relevant cases. However, the practice of law requires creativity and curiosity in order to be strong advocates. Therefore, I encourage the students to develop a set of fact questions that would be helpful in developing the cases. These facts are facts that are both specific to the case—i.e. facts that they may have overlooked initially—but have new importance in light of the research that they have uncovered and empirical facts that may challenge the assumptions that underlie a court’s rationale.

The students then consult with the one L's again to explain why they have generated the set of case fact questions and empirical fact questions. The fact questions are relayed back to the client, the clinical professor and his or her class, and answers given, if possible. The empirical fact questions are answered by engaging in a search of the relevant social scientific literature. I review/teach/remind students how to go about gathering social scientific studies from the non-law library databases. (Some students recall this process from their undergraduate or graduate studies, while others have no experience in this arena.)

The family law students consider all the relevant databases, they learn how to read titles and abstracts, conduct different types of searches, and how to cultivate further studies that may be on point. Once students have studies that they think are on point, I teach them how to become empirically literate. This process involves asking a series of questions about the article to ensure that it is not only relevant to the legal analysis we are exploring, but also that the article the validity and reliability criteria to ensure its legal credibility. In essence, students learn to examine articles with a critical eye for legal purposes and scientific quality control purposes. We discuss how these articles may help or hurt certain legal arguments or assist in the creation of new ones. We consider how we might use them if we were actually trying the case.

Next, the family law "firms" consult with the one L's showing what they have found and why the articles are key to the case. The family law students teach the one L's the basics of critically reading the empirical articles and explain how the article could be used in the memo for the client. At this point, the one L's are ready to write the memo for the client. They write a first draft and hand it, not to me, but to their consultant family law "firms" for feedback.

This collaborative process has proven incredibly fruitful for all the students involved. The collaboration across three different classes creates terrific community. Each class has a different level of expertise, which allows for sharing of knowledge, exercising teamwork, understanding supervisory roles, giving constructive advice, learning empirical literacy, reinforcing skills learned from prior years, directly applying substantive material, all within the context of working on a real case.

Last spring, I worked with the domestic violence clinic on a case involving civil protection orders for adult members of a household related to the victim of a domestic violence incident. The law in Washington is not clear as to whether a civil protection order can extend to other members of the household beyond the victim. We used this problem in my Family Law class to explore that statute, the legislative history, and case law in other states, relevant empirical studies, and possible case law and policy arguments that might work. However, the students also learned how to deliver this kind of information in a sensitive and respectful manner—and they treated the case with urgency because it wasn't a hypothetical. It was a real person (and class) counting on them.

Teaching Trauma-Informed Lawyering Through Family Law Clinics - Abstract

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Sarah Katz

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“Trauma-informed practice” is an increasingly prevalent approach in the delivery of therapeutic services, social and human services, and now legal practice. Put simply, the hallmarks of trauma-informed practice are when the practitioner, puts the realities of the clients’ trauma experiences at the forefront in engaging with clients, and adjusts the practice approach informed by the individual client’s trauma experience. Trauma-informed practice also encompasses the practitioner employing modes of self-care to counterbalance the effect the client’s trauma experience may have on the practitioner.

The practice of family law, by necessity, often results in clients sharing some of the most intimate and/or painful details of their lives. Clients frequently seek legal assistance at a time when they are highly vulnerable and emotional. As Clinical professors who each supervise a family law clinic, we of course teach our students how to connect with their clients, while drawing the appropriate boundaries of the attorney-client relationship. Equally challenging and important is helping our students cultivate insight into identifying and addressing trauma and its effects. Many of our Clinics’ clients are domestic violence survivors or have experienced other significant traumatic events (such as witnessing their children being abused, or their own childhood abuse experiences) that are relevant to their family court matters. Law students should learn to recognize the effects these traumatic experiences may have on their clients’ actions and behaviors. Further, law students should learn to recognize the effect that their clients’ stories and hardships are having on their own advocacy and lives as a whole. It is particularly crucial that we educate our law students about the effects of vicarious trauma and help them develop tools to manage its’ effects as they move through their clinical work, and ultimately into legal practice.

This article argues that there are four key characteristics of trauma-informed lawyering: identifying trauma, adjusting the attorney-client relationship, adapting litigation strategy, and preventing vicarious trauma. Specifically, the article discusses how to teach trauma-informed lawyering through direct examples of pedagogical approaches. Although these pedagogical methods have been developed in the context of our clinical teaching, they hold direct relevance for doctrinal family law classes as well.

How to Teach Immigration and Family Law Course

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Tasha Willis

University of Houston Law Center

Family law continues to evolve and we must keep up with this rapidly changing area of law. Family life and family law are changing as families become more diverse in a variety of ways and we must keep that in mind as we teach family law to our students. More and more we are recognizing the many ways that family law interacts and affects other areas of law. More and more of our students are working for small firms or as solo practitioners and, because of the time and expense involved in getting new clients, firms do not want to refer a client because they don't understand the family law issues or they recognize there is a family law issue and that may need to co-counsel with a family law attorney.

Because of these changes, our law school has studied courses where adding a family law component makes the class better. One example of a course that was developed with these goals in mind is titled "Immigration and Family Law" and was taught by two faculty: one is a colleague in the Law Center's Immigration Clinic who is an expert in Immigration law and the other from the Civil Practice Clinic who is a family law expert. We decided to do this class because of the amount of intersection we see between Immigration and Family law. Our Immigration Clinic students often work with our Civil Practice Clinic students because of the intersecting issues. This class was taught from a hands-on perspective because of the importance of making the students more practice ready as they become lawyers and begin their own practices. The students were not required to have taken any immigration or family law courses prior to taking this class. The course included Immigration topics ranging from how Immigration Law defines marriage and the family vs. how our family code (in this case Texas) defines marriage and the family to looking at the Violence Against Women's Act (VAWA) and Protective Orders. We also discussed the Hague Convention as it applies in various family law cases and how Immigration and Family Law knowledge are both required to represent an unaccompanied undocumented minor.

In addition, our mediation clinic, as a way to give our students a more diverse education related to family law, has added a new type of mediation to their repertoire. The UHLC Mediation Clinic now serves as a resource for the International Parent Child Abduction Department of the U.S. Department of State. Clinical students trained in mediation may be a useful tool where international child abduction has taken place and the abducting parent has been located for the purposes of mediating visitation or return of the child. The mediations may be conducted by telephone, videoconference, or other suitable means of communication, as the parties are certain to not be in the same location. Additionally, it is not uncommon to have co-mediators that are in separate locations. Skype and Google Chat have become preferred means for the mediation clinical students. This is especially useful in international custody matters, as the parents may be in different countries and may not be able to travel for the purpose of mediation. Once an agreement is reached, the document can often be filed in court as an enforceable order.

Both of these courses also include information and teaching about the importance of cultural competence and the need to understand the client (or the parties) in-order to give them the best representation or to help them mediate an agreement.

A third way that our law school has changed how it teaches family law is by adding a lab component to our Children and the Law course. The lab complements what the students learn in the classroom by giving the students real-world practice in the area of juvenile law. Only students in the course are permitted to register for the lab which is currently a two credit hour course. The students, under the supervision of an adjunct family law attorney who is the court appointed attorney in each case, represent children in permanent foster care by meeting with the children and representing their interests during the court permanency hearings. The students learn to interview children and witnesses and to appear and participate in court hearings as the student attorney representing the child (along with their supervising attorneys).

These classes which include a family law skills component have enriched our law school curriculum and can be important in giving students the skills to be more practice ready when they graduate. Family law is an important part of any law school curriculum whether or not students plan to practice in that area; it is a good area of law in which to incorporate practice skills. This combination of doctrinal and practice skills learning provides the students with a richer learning experience which they can transfer to the practice of law.

Three New Learning Opportunities for Family Law Students

Nancy Ver Steegh
William Mitchell College of Law

William Mitchell College of Law has created three new learning opportunities for family law students.

First, Mitchell's survey family law course is offered as a hybrid or blended course. The three-credit class meets face-to-face for two hours per week and students engage in online learning activities as a replacement for one hour of face-to-face class.

Second, Mitchell offers a Family Law Residency Program. During the final semester of law school, students work in legal aid settings and other law offices for four or five days each week. Development of MacCrate skills is intentionally cultivated and tracked at the sites. The students are simultaneously enrolled in a weekly professional development seminar.

Finally, in January 2015 William Mitchell began offering the only ABA-approved hybrid J.D. program. Students meet on campus for one week each semester, during which they engage in intensive practice simulations combining the areas of law being studied that semester. During the other weeks students participate in online learning activities.

This session will provide an overview of these new opportunities with an emphasis on backward design curriculum, online teaching techniques, and skills and professional development training.

Does the Use of Social Media Evidence in Family Law Litigation Matter?

Marcia Canavan

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The use of social media evidence in family law litigation has increased exponentially over the last several years. However, evidence of Bad Behavior¹ has been an integral part of these disputes, probably since the beginning of time. Arguments that “he did this” and “she did that” are omnipresent in most divorce cases, litigated or not. In the past, the evidence presented in court was mostly limited to he said/she said testimony, and the use of physical evidence such as income tax returns, paycheck stubs, bank statements, bills, letters, and photographs. Nowadays, evidence of Bad Behavior can be supported through the use of social media such as Facebook, MySpace, YouTube, Twitter, LinkedIn, Instagram, text messages, and email, just to name a few.

This Article examines whether or not social media evidence has made a difference in the final outcome of family law cases. In other words: Does the use of social media evidence actually have a noticeable impact on family law litigation? Simply said, does the use of social media evidence matter; is the ultimate outcome of the case any different from pre-social media days? Is the decision a court makes actually influenced by the introduction of social media evidence in a hearing or trial?

The main thesis of this Article is that the use of social media evidences in family law cases changes nothing. Family law cases, and all of the blaming and shaming testimony and evidence, continue on the same path they always have, with or without the introduction of social media. Litigants still need to “tell” on the other side to the judge. Litigants still want to see the court punish the other side for what he or she did or did not do. Litigants continue to expect the judge to understand how the other side wronged them and why they deserve some retribution.² Social media evidence is definitely more sophisticated and more technologically impressive than a bank statement or a paycheck stub, but the reality is that it also falls into the age-old category of evidence used to prove Bad Behavior. And, this continued use of Bad Behavior evidence means that litigated domestic relations cases will stay on the same road that they have been on for decades.

Evidentiary concerns regarding social media evidence, such as hearsay, authentication, relevancy, materiality, and any other admissibility issues are not the focus of this Article. Similarly, discovery issues and concerns are also beyond the scope of this Article. Instead, the focus remains on social media’s *impact*. That is, assuming all evidentiary and discovery issues are resolved, what relationship or impact, if any, does the use of social media have on the outcome of a family law case?

¹ We are loosely defining Bad Behavior as anything a party puts before the court that is intended to denigrate, shame or embarrass the opposing party, somehow implicate the opposing party, and/or otherwise harm the opposing party’s chances of winning the battle.

² See, e.g., Barbara Bennett Woodhouse, *Sex Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 62 Geo. L.J. 2525, 2545-48 (1994). Among other issues, the author discusses how fault based divorce puts the parties in a position of creating a narrative of their marriage.

Dispute Resolution for Diverse Families

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Excerpted from: *DIVORCED FROM REALITY: RETHINKING FAMILY DISPUTE RESOLUTION* (NYU Press 2015)

Family law practice has changed dramatically in recent years. Lawyers have moved beyond their traditional role as zealous advocates for individual clients to become planners, healers and dispute resolution advocates. Even when lawyers continue to act as client representatives, the new paradigm invites more active client participation and a more equal sharing of decision-making authority. Many family lawyers have also become dispute resolution neutrals, and have taken on some of the functions traditionally associated with judges. At the same time, the role of family court judges has also changed. Judges are no longer just “neutral umpires;” instead they have become active managers of cases and dockets, as well as leaders or members of interdisciplinary teams. They have also become settlement advocates and have taken on functions traditionally associated with lawyering. This reconfiguring and blurring of attorney and judicial roles has challenged existing ethical rules, as well as the concepts of lawyering and judging on which these ethical rules are based. Our presentation will explore the implications of these changes for family lawyers and family law practice.

A. Representing Clients in a Settlement Culture: Redefining Goals, Managing Dispute Resolution Choices, and Advocating for Resolution

Although lawyers continue to represent clients in the new paradigm, they do so within a changed dispute resolution framework. Instead of assuming that disputes will be resolved by an argument over rights before a third-party decision-maker, the new paradigm assumes that resolution will generally occur through problem solving and negotiation in which parties play an active role. This shift from third-party adjudication to negotiations in which parties are active participants has significant implications for the role of lawyers as client representatives.

1. The Lawyer as Counselor: Redefining Client Goals, Needs, and Interconnected Interests

The new paradigm has changed the obligations of attorneys as client representatives, redefining the meaning of competence and requiring a broader understanding of different ways to resolve disputes. Traditionally, a lawyer’s role as counselor in family law was viewed quite narrowly. The client would communicate his or her goals and the lawyer would help the client “win” by achieving those goals. The lawyer viewed the client in isolation, with interests largely antagonistic to those of other family disputants. When deciding about dispute resolution options, the lawyer viewed litigation as the primary option, with settlement negotiation between lawyers as a stage in the litigation process. Under this traditional model the lawyer generally deferred to the client in framing goals but was the primary decision maker and actor in achieving those goals.

Under the new regime, the family lawyer takes a much more active role in refining the client’s goals and reorienting the client from a short-term to a long-term perspective. For example, a divorce client might articulate her goals to the lawyer as a “clean break” with her ex-spouse and sole custody of the children. Rather than simply asserting sole custody as the client’s legal position, the lawyer might explore with the client the interests behind her request for sole custody and the impact of her immediate goals on her children, perhaps with the help of a mental health professional. As a result of this discussion, the client might adjust her short-term position to support her longer-term interest in preserving the children’s relationship with both

parents and thereby fostering the well-being of the children. This attention to long term interests is an outgrowth of the lawyer's reconception of the client as a part of a family system with interests that overlap with those of other family members. It also reflects the primacy of settlement in the new paradigm and thus the need to work toward solutions that meet the needs of both parties, as well as the interests of their children.

The new lawyer also takes a more active role in counseling the client about dispute resolution options, encouraging participation in those processes that promote settlement and client self-determination.

2. The Lawyers as Dispute Resolution Advocate: Supporting Client Self-Determination

In a traditional adversarial model, the family lawyer plays the central role in the "advocacy" stage of the proceeding, either in pre-trial negotiation or, less often, in court. Clients are consulted about terms of settlement but generally are not present during settlement negotiations. If a case goes to court, the lawyer tells the client's "story," while the client plays a relatively minor role as witness. In the new regime, clients play a much more active role in the dispute resolution process. For example, client self-determination and party empowerment are at the core of both mediation and collaborative law. In the mediation context, this client role usually translates to active participation in the mediation, with the parties, rather than their lawyers, directly expressing their needs and interests. It also means that parties are the primary decision-makers not only about the terms of the ultimate agreement, but also about how their interests will be expressed and framed. Collaborative law similarly emphasizes the centrality of the client's role. Indeed, leading collaborative authorities stress that responsibility for resolving a dispute "rests firmly on the shoulders of the client." To achieve a comprehensive and durable agreement, collaborative practitioners insist that clients, rather than their lawyers, assume responsibility for considering, weighing and deciding among the available options.

Lawyers play a more limited role in most of the settlement-focused dispute resolution settings. In mediation, lawyers play a supporting, rather than a primary role. Lawyers help prepare clients to articulate their needs and interests in mediation through the counseling process described above. Once parties reach mediation, the lawyer may or may not be present. If present, the lawyer is expected to defer to the party's voice. The lawyer's principal role during mediation is to review, and in some cases, draft agreements reached by their clients.

Another way that lawyers share responsibility with clients in the new paradigm is by providing "unbundled" legal services or limited task representation rather than full representation. These services may be related to traditional litigation—conducting legal research, drafting or reviewing pleadings, accomplishing service of process, or preparing clients for or attending court appearances. Discrete task representation can also support clients in the newer dispute resolution alternatives. A client may engage a lawyer to discuss dispute resolution options, to prepare for mediation, to coach or "script" the client's role in the negotiation process, to attend a mediation or negotiation session or to review or draft an agreement reached during mediation or direct negotiation with the other party.

3. The Lawyer as a Planner: Preventing Conflict and Harm

The lawyer client relationship in family law traditionally began after a serious dispute between families members occurred. The client would consult a lawyer when her husband or live-in partner moved out or, more likely, when she wanted to commence a legal action or was served with court papers. The lawyer and client would then engage in what has been called "legal triage for acute legal problems." In the new regime, by contrast, family lawyers increasingly play a role before a conflict occurs. This pre-dispute planning emphasizes the lawyer's roles as a planner and "peacemaker." Lawyers in this role help clients by proposing a plan for the careful private ordering of affairs as a method of avoiding the high costs of litigation and ensuring desired outcomes and opportunities." While the concept of preventive law has been around for decades, it has gained new currency with the changed focus in family dispute resolution. Today's preventive and therapeutic lawyers counsel individuals to use legal mechanisms to anticipate and plan for family transitions. This kind of planning is particularly helpful to clients such as non-

marital partners or de facto parents, who may be unprotected by the law in the absence of an agreement. Lawyers can anticipate and resolve issues, ranging from establishing or limiting parentage to delineating post-separation obligations. Family lawyers also advise clients to designate dispute resolution methods in advance of conflicts.

4. The Lawyer as a Healer: Restoring and Improving Family Relationships

Family lawyers who represent clients in the new paradigm may also seek to expand their role from advocacy to “healing.” For decades, prominent lawyers and academics have urged lawyers to use their skills as problem-solvers to reduce conflict and help clients to heal rather than fight. More recently, a comprehensive framework for the lawyer as “healer” has emerged in the “comprehensive law movement.” This movement takes “an explicitly...integrated, humanistic, interdisciplinary, restorative, and often therapeutic approach to law and lawyering. It is the result of a synthesis of a number of new disciplines within law and legal practice...collaborative law, creative problem solving, holistic justice, preventive law, problem solving courts, procedural justice, restorative justice, therapeutic jurisprudence, and transformative mediation.

Lawyer’s practice “healing” when they work with clients—often in partnership with other professionals—to frame goals and make dispute resolution choices that “maximize the emotional, psychological and relational well-being of the individuals and communities involved.” Lawyers also help families heal from conflict and (re)build a parenting partnership when they encourage non-adversarial dispute resolution options such as mediation and collaborative practice. Similarly, a lawyer who assumes the role of a neutral may choose a process that focuses on healing over short-term dispute resolution or other goals.

B. Lawyers as Dispute Resolution Neutrals

In addition to transforming the role of the family lawyer when representing clients, the new regime offers enhanced opportunities for lawyers to serve as neutrals that facilitate agreements, evaluate competing claims or, in some instances, resolve disputes. Although many lawyers now serve as mediators, lawyers were largely absent in the early days of the family mediation movement. The new regime allows lawyers to combine client representation with work as a dispute resolution neutral and to shift back and forth from one role to the other.

The new paradigm also offers lawyers other opportunities to serve as neutrals. For example, some lawyers have assumed the role of parenting coordinators who serve as a “combination educator, mediator, and limited purpose arbitrator in parenting disputes.” Lawyers have also assumed the role of “early neutral evaluator (ENE),” most often in court-based programs. Drawing on elements of mediation, arbitration and case management, a number of family courts now require or permit parties to participate in a process in which an ENE evaluates child access or financial issues. Finally, family lawyers can serve as neutrals for parties with financial resources, who retain them as arbitrators or private judges. In both instances, the lawyers derive their authority to serve as neutrals from the agreement of the parties.

C. Expanding Access to Legal Services through New Lawyering Modes

Whether dispute resolution takes place in a court, an agency or a community based resource, access to legal information and advice is critical to ensuring that the interests of all family members are protected during the process. Contrary to the views of some early reformers, the shift from adversary to non-adversary dispute resolution has not eliminated the need for lawyers, nor diminished the importance of legal advice. It has, however, changed the roles and responsibilities of lawyers.

Although a majority of disputants in today’s family courts proceed without legal representation, both courts and court reformers have been slow to respond to the needs of unrepresented parties. Initially some judges discouraged any such reform efforts, reasoning that making court more accessible would encourage parties to dispense with lawyers even where parties could afford legal assistance. More recently, courts have offered limited supports for unrepresented parties. These include standardized family law pleadings available online or in court clerks’ offices, court-based *pro se* offices that provide legal information to unrepresented parties, and telephone hotlines. Some court systems have also used technology to expand access to legal information and advice through court websites, videos and podcasts.

But for many families neither this limited *pro se* support nor simplified processes are enough. Many parties in complex or high conflict disputes need individualized assistance from a lawyer. Moreover, when lawyers get involved early as planners or problems solvers, conflicts can be avoided or reduced, thus decreasing the numbers of cases where full representation is needed. The availability of unbundled legal services—when clients engage lawyers for discrete tasks—can expand family members’ access to affordable legal services at critical points.

Bar associations and legal service providers have recognized the need for discrete task representation by endorsing the practice, modifying ethical rules and providing public funding for *pro se* advice clinics in courthouses. But more comprehensive change is needed to fully establish discrete task representation in family practice. These changes include standardizing retainer agreements that conform to ethical rules permitting limited representation, modifying ethical rules to address permissible communication with clients receiving limited representation and clarifying the extent of disclosure required for ghostwritten pleadings. Court should also adopt rules that facilitate withdrawal for lawyers who agree to make limited appearances in court. Standardizing practices and clarifying ethical rules should encourage more lawyers to offer unbundled services in family cases.

The legal profession should also develop structures to make limited task representation more accessible and more affordable. Government funded legal service providers should consider redirecting legal services budgets now used almost exclusively for either brief advice and referral or full representation to expand limited task representation, particularly in court houses and other locations designed to bring legal services to the people who need it. Unbundled services should include representation before, during, and after court or community based-mediation. Community and court based advice clinics should also serve the large influx of low income parents in court as a result of the changes in paternity and child support policy.

Policy-makers should also consider allowing attorneys to serve as “lawyers for the family” in limited situations involving divorce or parental separation. The legal profession has traditionally frowned on joint representation in the context of divorce, with many authorities viewing it as presenting a non-waivable conflict of interest. But such a view seems anachronistic in an era of no-fault divorce, when voluntary agreement is encouraged and many couples are able to resolve the financial and parenting consequences of their dissolution without resort to litigation. In her recent article entitled *Counsel for the Divorce*, law professor Rebecca Aviel explains that many divorcing parents both want and seek joint counsel, “understanding that they have profound shared interests in minimizing transaction costs, maximizing the value of the marital estate and reducing the hostility and animosity that are harmful to their children.”¹ She argues persuasively that these couples are poorly served by the profession’s insistence that they each retain their own lawyer or forego legal representation altogether. Aviel concedes that joint representation would not be appropriate or ethically permissible in all situations, for example where domestic violence exists or where the parties have markedly different interests or earning capacities at the time of the divorce. But she suggests that “[p]articularly in domestic relations matters, where the adversarial paradigm is rapidly losing relevance for most families, it is time to consider whether lawyers can serve as ‘counsel for the divorce,’ bringing to bear their skills as advisors, mediators, drafters, problem-solvers, and process managers.”²

1 Rebecca Aviel, *Counsel for the Divorce*, 55 B.C.L. Rev. 1099, 1099 (2014).

2 Aviel, 55 B.C.L. Rev. at 1147.

D. Implications of New Roles for Lawyers and Judges

The expanded roles of lawyers and judges in the new paradigm hold significant promise for families. But these transformed roles also present challenges for lawyers, judges and family disputants. For example, the changed roles of both lawyers and judges have diminished the importance of legal norms and blurred the previously distinctive functions of each of these critical players in the legal system. The lawyer, who once focused primarily on the client's legal interests and the judge, formerly focused on adjudicating the dispute, are now engaged in the common task of "problem-solving" and family reorganization -- often as part of an interdisciplinary team that includes an array of non-legal players.

These blurred roles raise challenges in preserving the integrity and fairness of the family dispute resolution system. Accountability may be diminished in a system where lawyers and judges share roles. It may be unclear who has made decisions and what standards apply to those decisions. When a client is unhappy with decisions reached as a result of team "problem solving," who is responsible? When judges actively promote settlement, the parties' perception of the judge's traditional decision-making role may compromise the voluntariness of the decision to settle. Having the same judge serve as both settlement advocate and adjudicator may also raise due process concerns, given the difficulty of ignoring inadmissible information received during unsuccessful settlement discussions.

These new roles also challenge the ethical norms that have traditionally governed the conduct of judges and lawyers. Lawyer's ethical rules generally assume the full representation model. As a result, discrete task representation may challenge notions of competency, loyalty to client, and the lawyer's obligations to the administration of justice. On a more practical level, providing unbundled legal services, particularly in a high volume, court-based setting, may result in inadvertent violations of rules governing actual, potential or imputed conflicts of interest. When limited representation involves court appearances or drafting documents, there may be uncertainty about the lawyer's obligation to disclose his or her assistance or withdraw from the case after the end of the lawyer's involvement.

The practice of collaborative family law has also posed challenges to traditional notions of professional responsibility. For example, the disqualification requirement that is at the heart of collaborative practice was initially challenged as contrary to traditional ethical standards that limit attorney withdrawals that prejudice clients. This concern is particularly acute for low-income clients who may not have other options for representation if a collaborative lawyer withdraws because litigation is needed. Opponents of collaborative practice also argued that a lawyer who signs a four-way collaborative participation agreement may assume duties to another party to the agreement, whose interests conflict with those of the lawyer's client—a result that could raise ethics concerns. Allowing lawyers to serve as "counsel for the divorce" raises similar ethical concerns, given the profession's traditional reluctance to countenance joint representation of parties involved in court proceedings.

Lawyers who serve as mediators may also confront ethical challenges. In particular, a lawyer acting as a mediator or other neutral may run afoul of conflict of interest rules if the mediator's discussion of legal information is considered the practice of law or constitutes dual representation of the two family members. Similar concerns arise when the lawyer mediator drafts or memorializes an agreement reached during mediation, particularly when the parties are unrepresented.

These tensions between traditional ethical rules and the evolving roles of family lawyers do not warrant a return to the past. Rather, they highlights the need to rethink existing ethical norms to accommodate contemporary family practice and to tailor dispute resolution options to conform to ethical norms that are worth retaining. While some of this work has started, much remains to be done.

A Case Against Collaboration

Rachel Rebouche

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For divorcing couples who can afford it, collaborative divorce offers the promise of emotional healing and the opportunity to circumvent an adversarial, court-based process. All negotiations occur before filing for divorce and each party's lawyer pledges to withdraw from any future representation if collaboration fails. Collaborative divorce depends on the expertise of an array of professionals, such as financial neutrals, parenting coordinators, and divorce coaches. Proponents of collaborative divorce herald it as a way to reduce the uncertainty of indeterminate spousal support and custody laws and to focus on the emotional well-being of the parties. In some ways, collaborative divorce resembles other mechanisms of alternative dispute resolution that attempt to avoid over-burdened courts. But aspects of collaborative divorce, such as the team approach, distinguish it from mediation or arbitration.

Commentators have questioned if contracts to withdraw from representation might violate professional responsibility rules or if the collaborative process might contradict duties of zealous advocacy and confidentiality. This article, by contrast, examines the growing support for collaborative divorce among family law practitioners and the therapeutic focus in the collaborative process. The article situates collaborative divorce in broader feminist politics of managing and responding to foundational changes in divorce law.

The transition from fault to no fault divorce was, in part, an effort to equalize the status of husbands and wives in marriage. This happened concurrently with changing ideas of marriage – from a patriarchal institution defined by coverture to an egalitarian and expressive partnership. But gender-neutral, factor-based custody and alimony laws that structure the no-fault regime sometimes work against wives, as oft-cited studies of women's post-divorce poverty attest. And in no-fault proceedings, marital misconduct does not establish a ground for divorce as it did in a fault, which had financial advantages for the wronged spouse. Some family law scholars began to argue that the move to no-fault divorce had left wives, and mothers specifically, worse off.

In collaborative divorce, one purported goal is to heal the relationship between divorcing spouses and to understand divorce as a “primarily a social and emotional process.” This therapeutic approach, however, may emphasize spouses' transgressions in the dissolution of marriage. Said another way, support payments may help ex-spouses forgive those transgressions and build trust.

But often the hypotheticals or case studies in collaborative manuals and handbooks describe a husband behaving badly and a wife that is innocent. The emotional healing offered in collaborative divorce may entrench stereotypes that were common in the fault era – the long-suffering wife and philandering husband. As such, the collaborative process may reduce marriage to gendered, heteronormative roles that were the very source of feminist objection.

The article examines some of the discursive and bargaining consequences of a collaborative approach. Collaborative divorce's therapeutic process may work against, as fault did, the “wronging” wife, who is not “innocent” and does not conform to expected roles of wifely or motherly behavior. And it invites the sort of “story-telling” about the end of a relationship, loosely analogous to the collusive explanations of marital failure in a fault regime, by encouraging couples to describe their marital breakdown as a simplistic narrative that aids in concluding the divorce process. Finally, building emotional trust with a soon-to-be ex-spouse in exchange for financial concessions or financial gains may be a bad trade. Successful emotional outcomes are difficult to demonstrate; discovery of financial information is entirely voluntary; and couples nonetheless may end up in court, and in conflict, over modifications to the settlement agreement and custody arrangements.

This research is in conversation with contemporary feminist scholarship calling for consideration of marital misconduct in settlement negotiations and in divorce proceedings. This article also builds on scholarship examining the bargaining consequences for parties when they pursue divorce options outside of courts. Collaborative divorce shifts the management of couples' financial obligations from state oversight to a self-defined, and arguably self-interested, bar of collaborative lawyers and collaborative professionals.

Assisted Reproductive Technologies and Family Law’s Enduring Foundations

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The rise of assisted reproductive technologies (ARTs) provides an amazing gift for family law scholars, teachers, and students—whatever our differing positions on the merits. Even as science and medicine develop new reproductive interventions and permutations, the exhilarating change that marks this area offers valuable opportunities to recognize, explore, and challenge family law’s enduring foundations, especially those elementary matters too often taken for granted because we see them as “natural.”

ARTs expose how family law does not just regulate family life but also constructs its basic underpinnings. As ARTs illustrate, family law defines fundamental relationships and personal identity; shapes sex, sexualities, and gender as well as race and class; determines the significance of various connections (from genetics and biology to formalities, conduct, and affective ties); disassociates intimacy from economic exchange; conceptualizes dependency as private; and controls the very meaning of family autonomy and privacy.

ARTs thus offer a lens for examining family law’s functions, goals, and underlying assumptions. As we look ahead to “family law of the future,” ARTs can ensure that we grapple with both continuity and change.

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Family Law Reimagined

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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 decision-makers 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.

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

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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

The Changing Face of Marriage

Marsha Garrison

Brooklyn Law School

Across the industrialized world, young adults are marrying later and increasing numbers may not marry at all. With the decline of marriage has come a shift in its meaning. Traditional, “institutional” marriage based on fixed, gender-based roles has given way to marriage based on companionship or, more recently, personal fulfillment. Reflecting these trends, public opinion is now neutral or positive toward non-marital and same-sex relationships, with or without children; in 2015, 63% of surveyed Americans supported a constitutional right to same-sex marriage. But, in 2011, 39% said that marriage is becoming obsolete.

These complex trends pose important challenges for policy makers, and neither the experts nor the public has reached consensus on the right response. The result is highly divergent policies on marriage and cohabitation. In considering the relative merits of these approaches, policymakers must keep in mind that marital status has long served as the basis for a variety of legislative assumptions about relational expectations and equities. Increased family diversity presents the possibility that formal marriage no longer provides an accurate marker of expectations and equity. But before abandoning marriage as a classificatory tool, we need to be confident that another means of fairly classifying couples, across a wide range of obligations and entitlements, is available.

Marriage is also associated with personal and public benefits. Most significantly, marriage is, everywhere, more stable than cohabitation, and unstable relationships are associated with a serious risks to children. Of course, family policy must also take account of the fact that many couples will continue to live together and have children outside of marriage. Family law and policy should support autonomous relational choices; it must not discriminate against nontraditional families or ignore their needs and interests.

In sum, policy makers face a complex challenge. Family law and policy should accurately classify couples to ensure that relational expectations and equities are met, minimize risks to children, and support the full spectrum of children and their families. That is not an easy task.

**Joint Plenary Session with Workshop on
Next Generation Issues of Sex, Gender, and the Law:
Marriage Equality and Inequality**

Clare Huntington
Fordham University School of Law

In family law, the marital family serves as a misleading synecdoche for all families, not only marginalizing nonmarital families but also actively undermining their already tenuous bonds. Addressing the needs of both marital and nonmarital families requires a new theory of state regulation as well as new doctrines, institutions, and norms in practice. Some feminists argue that the state should privilege caregiving between parents and children instead of marital relationships, while other commentators advocate marriage primacy—the elevation of marriage above other family forms—despite the evidence that marriage promotion fails. These responses fundamentally misunderstand nonmarital family life, in which dynamics between parents deeply affect children, yet parents are unlikely to marry. We must instead understand that it is possible to separate marriage from parenthood but not relationships from parenthood. Accordingly, the state should help unmarried parents become effective co-parents, especially after their relationship ends, so both parents can provide children with the healthy relationships crucial to child development.

The Ecology of Paternal Caregiving

Holning S. Lau

University of North Carolina School of Law

It is widely expected that same-sex marriage will soon become legal nationwide. This moment in history will be a major milestone in the state's journey in repudiating gender-specific roles in families. Yet, there is still much more that the state could, and should, do to reject the notion that family roles are gendered. My presentation will address a particular aspect of this claim: I will explore ways the state can foster an environment that better supports men who undertake childrearing responsibilities traditionally associated with women.

My presentation will proceed in three parts. First, I will briefly review the reasons why enabling male caregivers advances the principles of liberty and sex equality—benefiting both women and men—as well as children's well-being. I will then turn my attention to a series of policy proposals. Most proposals to date focus on workplace parental leave. All too often, fathers choose not to take parental leave due to a mix of financial considerations and cultural biases against stay-at-home dads. To encourage more fathers to take parental leave, many scholars have advocated reforming the law to institutionalize paid parental leave and “daddy quotas.” In my presentation, I encourage scholars to take a broader view, examining the social ecology that surrounds fathers beyond the workplace. While I do not dispute that reforming parental leave policies is desirable, I believe there are benefits to scrutinizing the environment in which parental leave policies are situated, as well as the role of law in shaping that environment. Specifically, I will explore potential policy reforms such as reframing “Mommy and Me” classes at state-funded schools, libraries, and hospitals; regulating men's access to diaper changing tables at public accommodations; and developing public-private partnerships in education campaigns aimed at reshaping perceptions of fatherhood. While these proposals target discrete areas that may appear small on their own, the collective force of such proposals could be profound. I will examine the pragmatic benefits of focusing attention on these reform proposals, which may produce small social effects independently, but large effects cumulatively. In the third and final part of my presentation, I will discuss how taking this broader approach to paternal caregiving fits into recent patterns in family law scholarship.

Hotel Floor Plan

SERVICES

- S1 Bell Desk
- S2 Business Center
- S3 Fitness Center
- S4 Front Desk
- S5 Game Room
- S6 Gift Shop
- S7 Guest Laundry
- S8 Universal Desk
- S9 Rent a Car Desk
- S10 Valet Desk

MEETING ROOMS

- | | |
|---------------------------------|---------------------------------|
| M1 Broward Room | M14 Osceola Room |
| M2 Cape Canaveral Room | M15 Palm Beach Room |
| M3 Convention Registration Desk | M16 Pinellas Room |
| M4 Cypress Board Room | M17 Sarasota Room |
| M5 Dade Room | M18 Sawgrass Room |
| M6 Duval Room | M19 Seminole A Room |
| M7 Flager Room | M20 Seminole B Room |
| M8 Florida Keys Room | M21 St John's Room |
| M9 Hillsborough Room | M22 Universal Center |
| M10 Indian River Room | M23 Universal Office |
| M11 Lake Room | M24 Universal Registration Desk |
| M12 Mangrove Room | M25 Volusia Room |
| M13 Orange Room | |

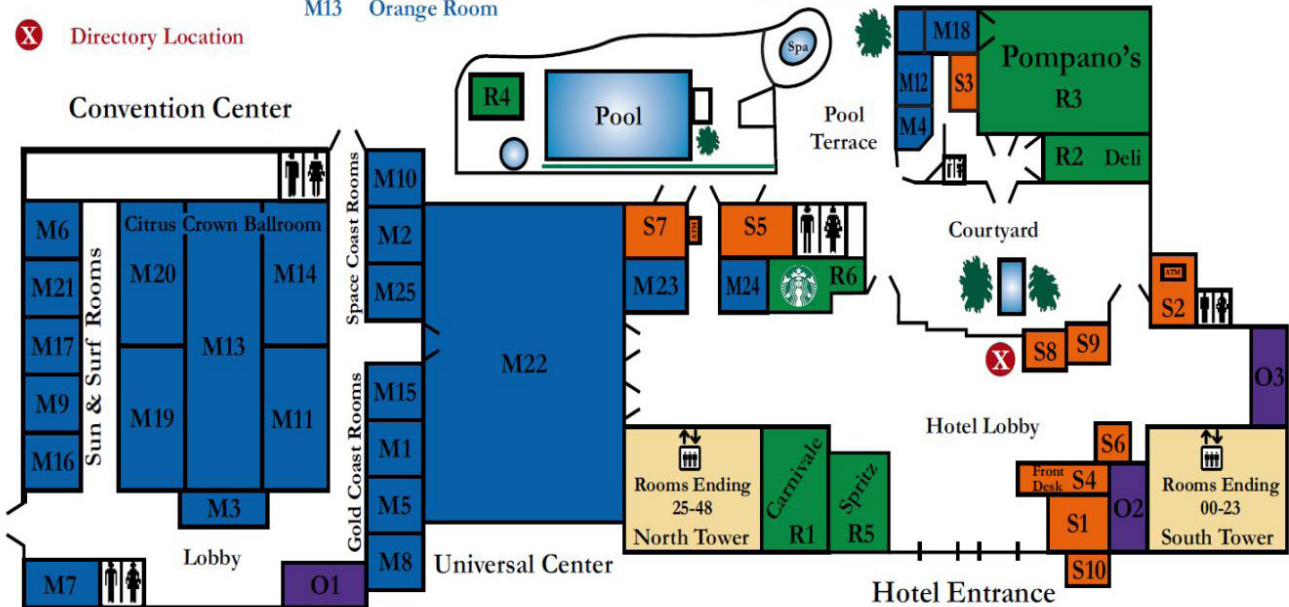
OFFICES

- O1 Convention Service Office
- O2 Executive Offices
- O3 Sales Office

RESTAURANTS/BARS

- R1 Carnivale
- R2 Deli
- R3 Pompano's
- R4 Pool Bar
- R5 Spritz
- R6 Starbucks

X Directory Location



AALS Calendar

Midyear Meeting

Orlando, FL

Workshop on Shifting Foundations in Family Law: Family Law's Response to Changing Families

Monday, June 22 – Wednesday, June 24, 2015

Workshop on Measuring Learning Gains

Monday, June 22 – Wednesday, June 24, 2015

Workshop on Next Generation Issues of Sex, Gender, and the Law

Wednesday, June 24 – Friday, June 26, 2015

Faculty Recruitment Conference

Thursday, October 15 – Saturday, October 17, 2015, Washington, DC

Conference on Clinical Legal Education

Saturday, April 30 – Tuesday, May 3, 2016, Baltimore, MD

Future Annual Meeting Dates and Locations

Wednesday, January 6 – Sunday, January 10, 2016, New York, NY

Wednesday, January 4 – Sunday, January 8, 2017, San Francisco, CA

Wednesday, January 3 – Sunday, January 7, 2018, San Diego, CA

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