



Preface

Changing Families and Family Law

Through the last several decades, families and family law in the United States have changed in fundamental ways. Families have been, simultaneously, reshaped by egalitarian law reform and riven by economic and racial inequality. Families thus have become both more *and* less equal. Each of these changes is unprecedented and calls for a casebook that centrally reflects their significance.

Throughout much of U.S. history, family law doctrines formally reinforced gender inequality, white supremacy, and heterosexuality. Marriage across racial lines was, in many jurisdictions, a criminal offense, a prohibition meant to signify the inferiority of non-whites. Married women had no independent legal identity and instead were controlled through law by their husbands. Children were treated as property. Adults who dared to form families without marrying were invisible in the eyes of the law and given few of the legal entitlements that marital families took for granted. These hierarchies—white over non-white, men over women, heterosexuals over LGBTQ individuals, adults over children, and married over unmarried—were written into formal law.

Now, thankfully, the law has, in significant ways, repudiated these status hierarchies. The law, formally at least, accords more equality and autonomy than ever before. People are now freer to form the families they want, without their choices being devalued or disfavored. Same-sex couples are permitted to marry. Penalties and prohibitions no longer attach to loving across racial lines. Women no longer sacrifice their legal identity when they marry. Individuals no longer must marry to be recognized as legal parents, and the law protects the rights of nonmarital children.

Even as egalitarian aspirations infuse family law doctrines, legally enforced inequality persists, and, as importantly, social and economic inequalities dramatically shape families. The inequalities of the broader society are now acutely reflected in family patterns. As our society grows more economically unequal, so too do family patterns diverge. Mass incarceration, the opioid epidemic, the intensification of economic inequality and residential segregation, the persistence of the privatization of care, and even advances in reproductive technologies all contribute to disparities in the family patterns between the advantaged and the marginalized.

Some inequalities reflect the fact that traditional status hierarchies have been only partially repudiated. The law continues to privilege marriage and to extend rights and benefits to marital families that it withholds from nonmarital families. This has consequences beyond the married-unmarried divide, given the race and class dimensions of marriage and nonmarriage in contemporary society and the pressures placed on families to undertake caregiving work without public support. Within families, status hierarchies—some connected to caregiving work—continue as well. In disadvantaged communities, adults, compared to their more affluent counterparts, are less likely to marry, and more likely to bear and raise children without being married, often while in an intimate relationship with a nonmarital partner. The consequences are multigenerational. Children in disadvantaged families are more likely than children in privileged families to come into contact with the child welfare system and to have parents who have been incarcerated, indigent, or unhoused. Given the government's relatively limited role in directly supporting families and children, these children grow up with limited opportunities and resources—a reality that shapes their own family lives as adults.

These arrangements are not natural or self-evident. Rather, law shapes them, participating in the production and perpetuation of inequality even as, along some dimensions, it aspires to and generates equality. Accordingly, this book aims to illuminate the complicated and dynamic relationship between family law and family life by attending to law's role in both producing and challenging growing equality *and* inequality in American society.

Organizational Structure

These reconfigurations of family law and life inform our approach to this casebook. We aim to enable students to understand the nature of the shifts that remade families and family law, and to appreciate the sources and consequences of these shifts. Thus, the casebook is interdisciplinary, highlighting the social, legal, and economic influences that shape families.

We depart from other casebooks in our conceptual approach. Rather than append new developments onto existing frameworks, we took the opportunity, when we first created this casebook a few years ago, to start fresh. In our account of existing law, we deliberately reject the centrality of the dominant organizing principle of past eras: heterosexual marriage. Our goal is to structure the materials in a way that highlights law and family patterns as they are now, rather than as they were decades ago, in part to give a better sense of the challenges and choices ahead.

Rather than accord centrality to marriage, we organize the presentation of the law around (1) adult relationships and (2) parent-child relationships. Within each category, we integrate types of cases that previously would have been separated. With adult relationships, for example, we do not treat marriage as the unquestioned starting point and then, as most casebooks do, separately consider “non-traditional” relationships. Instead, we deliberately situate marriage as a social

institution, as one of a series of legally legitimate adult relationships, and as a legal institution among many potential ways of regulating intimate relationships. Moreover, we consider divorce, for example, as part of a broader discussion about relationship dissolution.

The aim of this approach is not to deny or overlook the legal and social significance of marriage, for it unquestionably remains an important legal and social institution. Instead, we hope to highlight, rather than presume answers to, the normative questions posed by the intersection of the traditional centrality of marriage, on one hand, and the unprecedented changes of recent decades, on the other. The materials prompt students and instructors to consider: What significance, if any, should be accorded the fact of marriage when, say, a couple's relationship dissolves? Are the rationales for preferring marriage to alternative ways of regulating intimate relationships persuasive, such that marriage will and should persist?

With parent-child relationships, we view nonmarital, nonbiological, and same-sex parenting as central, rather than peripheral. We group the material based not on the status of the parents, but instead on the nature of the legal decision at issue: identifying a parent, custody, visitation, child support, and abuse and neglect determinations.

Just as the changes of the last several decades put into question the long-standing legal centrality of heterosexual marriage, so too have latent assumptions about the legal regulation of the parent-child relationship been put into question. These changes highlight provocative and fundamental inquiries: What makes a person a parent in the eyes of the law? What *should* make one a parent? And how are the legal entitlements that flow from being a parent limited by the interests of children, or of other adults?

Scope and Sources of Law

We assembled materials that expose students to the myriad sources of family law. Just as we depart from the tendency to privilege marriage, so too do we decline to privilege constitutional law, which is one among many sources shaping legal regulation of the family. Rather than supply an overarching constitutional framework at the outset, we incorporate constitutional law into relevant substantive areas. Doing this allows us to challenge the idea of constitutional law and family law as separate spheres and to resist the temptation to view constitutional law as shaping family law in a top-down, one-way direction.

We emphasize the importance of statutory law and analysis throughout the casebook. We include relevant federal legislation, representative state statutes, and Uniform Acts. In addition, we integrate questions of ethics and practice. At various points, we consider questions of professional responsibility and lawyering, and we address systemic issues shaping family law collaborative practice and other forms of alternative dispute resolution. We also selectively address family law in comparative perspective to illuminate distinctive aspects of our American system.

As important as courts and legislatures are, the law takes shape outside of those domains, too. This casebook addresses a range of legal actors, not only lawyers, legislators, and judges, but also administrators of various sorts, caseworkers, and ordinary people who decide to work to improve our society.

As part of our effort to consider how the system shapes the lives of some of the most disadvantaged people in our society, we include materials on abuse and neglect proceedings, foster care, and reunification. And we address the child welfare system's troubling race, gender, and class dimensions.

In devoting significant attention to the child welfare system, we deliberately expand the scope of what constitutes family law. We do so as well by including legal questions at the intersection of work and family, to illuminate the privatization of care as a central family law concern. This leads us to include materials on the Family and Medical Leave Act, paid leave, workplace discrimination, and the gendered division of labor.

The casebook includes various practical problems and exercises (typically based on actual cases or events) that explore the implications of existing doctrine and illuminate gaps and tensions in the law. Many of the problems give students an opportunity to evaluate or formulate new rules to govern particular situations. They help students to develop a range of legal analytical skills by encouraging them to occupy a rich mix of roles: judge, litigator, legislator, institutional decisionmaker, activist. By assuming such diverse roles, students will develop a deeper appreciation of the multifaceted nature of particular controversies.

Ultimately, we have two broad goals for this book. We aim to equip students who want to practice family law with knowledge about the law and institutions that regulate the family. For these students, as well as those who do not intend to practice family law, we also want the book to provide an opportunity to think deeply about some of the fundamental conceptual, doctrinal, and practical problems that arise where law meets life.