

# FAMILY LAW BY THE NUMBERS: THE STORY THAT CASEBOOKS TELL

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*This Article presents the findings of a content analysis of 86 family law casebooks published in the United States from 1960 to 2019. Its purpose is to critically assess the discipline of family law with the aim of informing our understandings of family law's history and exposing its ideological foundations and consequences. Although legal thinkers have written several intellectual histories of family law, this is the first quantitative look at the field.*

*The study finds that coverage of marriage and divorce in family law casebooks has decreased by almost half relative to other topics since the 1960s. In contrast, pages dedicated to child custody and child support have increased, more than doubling their relative share. At the same time, the boundaries of family law appear to remain quite stubborn. Notwithstanding sustained efforts by family law scholars and educators to restructure the field of family law so that it considers additional domains of law affecting families (such as tax, business, employment, health, immigration, and government benefits), the core of the academic field of family law has remained relatively static in the past 60 years. Marriage, divorce, child custody, and child support continue to dominate the topics presented in family law casebooks, representing 55% to 75% of their content since the 1960s.*

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*This study may prove useful to law school educators and reformers concerned with ensuring that law schools prepare students for contemporary family law practice, as well as scholars concerned with the ways that legal education reproduces a particular set of ideologies of the family and society.*

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### INTRODUCTION

In the beginning the Law created the patriarch; he was master, husband, and father. The treatise writers saw the legal order and said it was good.<sup>1</sup> The Law divided the master from the servant, the husband from the wife, and the father from the child. It was called “the law of persons”—the first day.

And the Law said, “Let servants and slaves be free<sup>2</sup> and let there be contracts that define free men and divide men from women and children.” So the Law made contracts, defining free men and dividing men from

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1. See I WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765); TAPPING REEVE, THE LAW OF BARON AND FEMME, OF PARENT AND CHILD, OF GUARDIAN AND WARD, MASTER AND SERVANT, AND OF THE POWERS OF COURTS OF CHANCERY (New Haven, Oliver Steele 1816).

2. U.S. CONST. amend. XIII (1865); U.S. CONST. amend. XIV (1868).

women and children. And it was so. The treatise writers called it “the law of contracts.”<sup>3</sup> And there was the market and the family, the public and the private—the second day.

And the treatise writers said, “Let the law of contracts be collected together in one place so that the law of husbands, wives, and children may be seen.”<sup>4</sup> And it was so. They called the law of husbands, wives, and children “domestic relations.”<sup>5</sup> And when the treatise writers saw how good it was, they said, “The contract of marriage is the most important of all human transactions. It is the very basis of the whole fabric of civilized society.”<sup>6</sup> And the Law declared marriage as the most important of all social relations<sup>7</sup>—the third day.

And the Law said, “Let there be equality across the expanse of the field of domestic relations, to separate wives from husbands and increase wives’ equality,<sup>8</sup> and let sex- and (eventually) sexuality-based

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3. 1 THEOPHILUS PARSONS, *THE LAW OF CONTRACTS* (1853).

4. *Id.*

5. JAMES SCHOULER, *A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS* (1870).

6. JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS* § 109, at 101 (1834); *see also* 1 JOEL PRENTISS BISHOP, *COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE* § 8, at 6 (5th ed. 1873) (“Marriage . . . establishes fundamental and most important domestic relations.”).

7. *See, e.g.,* *Maynard v. Hill*, 125 U.S. 190, 210–11 (1888) (“[Marriage] is the foundation of the family and of society, without which there would be neither civilization nor progress.”); *Reynolds v. United States*, 98 U.S. 145, 165 (1878) (“Upon [marriage] society may be said to be built . . .”).

8. *See* Richard H. Chused, *Married Women’s Property Law: 1800-1850*, 71 *GEO. L.J.* 1359, 1397–1412 (1983) (linking coverture’s reforms to economic and equality considerations).

rules in marriage be eliminated.”<sup>9</sup> And it was so. Thus, the Law created two great spouses; although, in practice, a greater spouse governed the workplace, and a lesser spouse governed the home and the children.<sup>10</sup> The treatise writers, who now pronounced the law in casebooks, called it “family law” and said it was good<sup>11</sup>—the fourth day.

And the Law said, “Let children fly through society as free creatures. Let the law sever carnal relationships from kinship ties that lash parent to child and parents to one another.” The treatise writers called it “child law” and said it was good.<sup>12</sup> The Law then blessed the children, saying, “Family law shall exist mainly for your benefit and protection”<sup>13</sup>—the fifth day.

And then some treatise writers imagined a future when the Law would say: “Let family law expand so that it is everywhere. Let family law have dominion over every area of law that touches on sex,

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9. See, e.g., *Orr v. Orr*, 440 U.S. 268, 271 (1979) (holding that a sex-based spousal support law violates equal protection); *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015) (holding that sex- and sexuality-based marriage entrance and interstate recognition laws violate constitutional guarantees of equality and dignity); *Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017) (per curiam) (holding that a sex- and sexuality-based presumptive parenthood law violates constitutional guarantees of equality and dignity); *Griswold v. Connecticut*, 381 U.S. 479, 480, 486 (1965) (holding that married couples have a constitutional right of privacy to use contraceptives).

10. See CYNTHIA LEE STARNES, *THE MARRIAGE BUYOUT: THE TROUBLED TRAJECTORY OF U.S. ALIMONY LAW* 9 (2014).

11. E.g., JUDITH AREEN, *CASES AND MATERIALS ON FAMILY LAW* (1978); HARRY KRAUSE, *FAMILY LAW: CASES AND MATERIALS* (1976); MORRIS PLOSCOWE, HENRY H. FOSTER, JR. & DORIS JONAS FREED, *FAMILY LAW: CASES AND MATERIALS* (1972).

12. See, e.g., DOUGLAS E. ABRAMS & SARAH H. RAMSEY, *CHILDREN AND THE LAW: DOCTRINE, POLICY, AND PRACTICE* (2000); ROBERT H. MNOOKIN & D. KELLY WEISBERG, *CHILD, FAMILY, AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW* (1989); WALTER WADLINGTON, CHARLES H. WHITEBREAD & SAMUEL M. DAVIS, *CASES AND MATERIALS ON CHILDREN IN THE LEGAL SYSTEM* (1983).

13. MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 84, 230–33 (1995); MERLE H. WEINER, *A PARENT-PARTNER STATUS FOR AMERICAN FAMILY LAW passim* (2015).

reproduction, and care. Let it have dominion over constitutional law and contract law, property law and criminal law, over torts and tax law, employment law and immigration law, over government welfare law, over every area of law that touches on sex, reproduction, care, and the economics of the family, over all the law.” This body of law will create a new field called “the law of intimate relations.” It will not be centered on marriage; it will erase the market/family and public/private distinctions; and it will include a multitude of human connections involving sex, reproduction, and care.<sup>14</sup> And the treatise writers saw this emerging new field, the “law of intimate relations.” And, behold, it was very good!—the sixth day.

**A. Background: Family Law’s History and Future**

What is the history of family law? What are its defining principles and purposes, past and present? What relationships constitute the field’s core? What is family law’s future? These questions have occupied treatise writers, teachers, and leaders of the bar since the field of domestic relations emerged as a distinct branch of legal knowledge in the 19th century. Many legal thinkers have traced the field’s history and predicted its future. Out of these histories, a consensus has emerged that contemporary family law resulted from a series of transformations, however overlapping, contested, and incomplete.

In the first transformation, the law of master and servant was transformed into the law of productive labor (“from status to contract”)<sup>15</sup> and thereby separated from the law of the household. This development roughly coincided with the end of chattel slavery in the United States and the rise of the classical era of contract law, which imagined individuals as autonomous, rational agents operating in the public sphere of free markets.<sup>16</sup> The husband/wife and parent/child relationships were skipped over in this emancipatory transformation, remaining firmly within the law

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14. See, e.g., NANCY POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* *passim* (2009); Laura T. Kessler, *New Frontiers in Family Law*, in *TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY* 226, 226–42 (Martha Albertson Fineman ed., 2011) [hereinafter Kessler, *New Frontiers*].

15. HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* 168–69 (1861).

16. See *FEMINISM CONFRONTS HOME ECONOMICUS* xiii–xiv (Martha Albertson Fineman & Terence Dougherty eds., 2005); see also Emily Hough, *Sketches of a Redemptive Theory of Contract Law*, 66 *HASTINGS L.J.* 951, 956 (2015).

of the household and the domain of status-based, hierarchical relationships.<sup>17</sup> Through this separation, the legal definition of the husband/wife and parent/child relationships crystallized into the opposite of contract—as relationships whose essential ideas are affection, care, duty, and dependency, rather than consent and the equal right that exists between person and person.<sup>18</sup>

In the second and third phases, which unfolded over roughly 100 years, feminist reformers remade family law. Specifically, in a second transformation, feminists challenged the separation of the family from the market, seeking to bring contract principles into the family, primarily through the joint marital property demands of the women’s rights movement in the second half of the 19th century.<sup>19</sup> Yet this movement did not succeed in fully emancipating women from the common law of marital status.<sup>20</sup> And so, in a third transformation, almost a century later, feminist reformers worked to systematically revise the law of marriage to embrace gender equality as its defining principle and to exorcise patriarchy as the ordering structing of the field. In this phase, which we can delineate as the birth of modern family law,<sup>21</sup> judges and legislatures instantiated formal equality as a guiding

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17. See MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 22–23 (1984); AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* 16 (1998); Janet Halley, *What is Family Law: A Genealogy Part I*, 23 *YALE J.L. & HUMAN.* 1 (2011) [hereinafter *Halley I*]; DUNCAN KENNEDY, *The Transformation of Contract, in THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* (1975); Maria Rosaria Marella, *Critical Family Law*, 19 *J. GENDER SOC. POL’Y & L.* 721 (2011).

18. See Laura T. Kessler, *Reynolds v. United States, Rewritten*, in *FEMINIST JUDGMENTS: FAMILY LAW OPINIONS REWRITTEN* 24, 31 (Rachel Rebouché ed., 2020) (discussing the idea of marriage-as-status in Joseph Story and Francis Lieber’s 19th century treatises on the family).

19. See Reva B. Siegel, *Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850–1880*, 103 *YALE L.J.* 1073, 1076–78 (1994).

20. See *id.*; see also Andrew J. King, *Constructing Gender: Sexual Slander in Nineteenth-Century America*, 13 *L. & HIST. REV.* 63, 63–64 (1995) (“Married women’s property acts . . . were often subject to hostile judicial scrutiny. Divorce legislation received an equally chilly reception. This cautious reaction to women’s rights stands in contrast to judicial eagerness to recast rules that dealt with economic relations. . . . Domestic-relations law developed according to its own special purpose—protection of the republican family and male governance . . .”).

21. For efficiency’s sake, I have skipped in this recounting a phase in the field’s development in the 1920s and 1930s, when a group of curricular reformers, primarily at Columbia Law School, sought to expand the field by drawing together diverse laws touching on family relationships. These efforts, which were part of a larger reform agenda aimed at broadening legal studies to include the social sciences, sought to connect the law of the family with the law of the market, criminal law, and the administrative state. See Brainerd Currie, *The Materials of Law Study*, 8 *J.L. EDUC.* 1, 22, 28–38 (1955); Janet Halley, *What is Family Law: A Genealogy Part II*, 23 *YALE J.L. & HUMAN.* 189, 192, 220–27 (2011) [hereinafter *Halley II*]. It was in this period one first sees efforts to change the field’s nomenclature from “domestic relations” to “family law.” *Halley II, supra*, at 192. But the Columbia reformers’ efforts to remake the field as “family law” were not realized, *see id.* at 192. Perhaps reflecting this failure, the new nomenclature did not seep into family law casebook titles until the early 1960s. A review of the titles of family law casebooks published in the 1950s and 1960s reveals

principle in the field and transformed marriage into a legal relationship that is largely terminable at will.<sup>22</sup> With these reforms, family law thus became principally focused on the economics of marriage termination and the obligations of parents to children upon marital dissolution. Since the 1970s, feminists have continued their critique of marriage to further disrupt the ideological building blocks of traditional marriage, including ideologies holding that marriage is not meant for women's sexual pleasure,<sup>23</sup> that family law is a matter of exclusively local jurisdiction,<sup>24</sup> that the family must remain free of commodification and economic exchange<sup>25</sup> and separate from the market,<sup>26</sup> and that human dependencies should be addressed primarily by the family rather than the state.<sup>27</sup>

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the shift in nomenclature. See WILLIAM RANDALL COMPTON, *CASES ON DOMESTIC RELATIONS* (1951); ALBERT C. JACOBS & JULIUS GOEBEL, JR., *CASES AND MATERIALS ON DOMESTIC RELATIONS* (1952); GEORGE LUTHER CLARK, *CASES ON DOMESTIC RELATIONS* (1954); ALBERT C. JACOBS & JULIUS GOEBEL, JR., *CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS* (1961); FOWLER V. HARPER & JEROME H. SKOLNICK, *PROBLEMS OF THE FAMILY* (1962); MORRIS PLOSCOWE & DORIS JONAS FREED, *FAMILY LAW: CASES AND MATERIALS* (1963); HOMER H. CLARK, JR., *CASES AND MATERIALS ON DOMESTIC RELATIONS* (1965); CALEB FOOTE, ROBERT J. LEVY & FRANK E. A. SANDER, *CASES AND MATERIALS ON FAMILY LAW* (1966).

As the Columbia chapter of this history demonstrates, pinpointing the beginning of “family law” is not unproblematic. As Müller-Freienfels, a German scholar of civil law concerned with the international unification of law, including family law, observes, “[R]ecognizing the *droit de famille* or the *Familienrecht* as a special legal branch or coherent unit with the aim of ordering the entirety of its norms in a system is a very complex matter.” Wolfram Müller-Freienfels, *The Emergence of Droit de Famille and Familienrecht in Continental Europe and the Introduction of Family Law in England*, 28 J. FAM. HIST. 31, 31 (2003). Legal thinkers did not describe family law as such until the mid-20th century when casebook authors started using the designation “family law” in casebook titles. However, legal thinkers employed the term at an earlier date, even if they did not use it as a formal classification.

22. See, e.g., MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* (1989); Susan Frelich Appleton, *How Feminism Remade American Family Law (and How It Did Not)*, in RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 426 (Cynthia Grant Bowman & Robin West eds., 2019); Katharine T. Bartlett, *Feminism and Family Law*, 33 FAM. L.Q. 475, 478–79 (1999); *Halley II*, *supra* note 21, at 217; Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1809–10 (1985).

23. See Susan Frelich Appleton, *Toward a “Culturally Cliterate” Family Law?*, 23 BERKELEY J. GENDER L. & JUST. 267, 268–69 (2008).

24. See JILL ELAINE HASDAY, *FAMILY LAW REIMAGINED* 17–66 (2014); Arianne Renan Barzilay, *Labor Regulation as Family Regulation: Decent Work and Decent Families*, 33 BERKELEY J. EMP. & LAB. L. 119, 124 (2012); Courtney G. Joslin, *The Perils of Family Law Localism*, 48 U.C. DAVIS L. REV. 623, 623 (2014).

25. See MARTHA ERTMAN, *LOVE'S PROMISES* xi–xxv (2015); RETHINKING COMMERCIALIZATION 303–47 (Martha Ertman & Joan Williams eds., 2005); Martha M. Ertman, *Commodifying Marriage: A Proposal for Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17, 19–20 (1998); Joan C. Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2249–54 (1994).

26. See *Halley I*, *supra* note 17; *Halley II*, *supra* note 21.

27. See MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 208–09, 237–39 (2004).

In a fourth transformation, still underway, children gained rights and came to be seen as autonomous individuals, separate and distinct from their parents in the legal sense of family. In this phase, the parent/child relationship became a central focus of family law;<sup>28</sup> the courts removed almost all of the disabilities of birth outside marriage,<sup>29</sup> and the field began to think in terms of the autonomy of, rather than rights to, children.<sup>30</sup> Although incomplete and contested,<sup>31</sup> this transformation in the law's conception of children and their legal status was a significant shift. More recently, with the rise of nonmarital cohabitation and reproductive technologies enabling individuals to sever reproduction from sexual relations, the field has shifted its focus even more deeply to questions concerning the definition of a legal parent and the parent/child relationship.<sup>32</sup>

What is family law's next transformation? Legal and demographic developments are disrupting the field once again. Since 2001, beginning with the Netherlands, 31 countries have legalized marriage for same-sex couples,<sup>33</sup> and

28. See JUNE CARBONE, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW* xiii–xiv, 180–94 (2000) (showing how parent-child relationships were made an important and distinct category of family law in a gradual process of legal recognition that matured during the 1980s).

29. See, e.g., *Glon v. Am. Guarantee & Liab. Ins. Co.*, 391 U.S. 73, 75–76 (1968) (invalidating, under the Equal Protection Clause, a Louisiana statute denying parents recovery for the wrongful death of children born outside marriage); *Levy v. Louisiana*, 391 U.S. 68, 70–72 (1968) (invalidating, under the Equal Protection Clause, a Louisiana statute that excluded nonmarital children from recovering for the wrongful death of their mother but allowed children born to married women to recover).

30. See Victoria Mikesell Mather, *Evolution and Revolution in Family Law*, 25 ST. MARY'S L.J. 405, 430 (1993).

31. See HASDAY, *supra* note 24, at 133–58 (contesting the story in family law that common law property norms no longer shape the law of parenthood); BARBARA BENNETT WOODHOUSE, *HIDDEN IN PLAIN SIGHT* (2008) (telling the story of children's rights in America, and asking why the United States today, alone among nations, rejects the United Nations Convention on the Rights of the Child).

32. See sources cited *supra* note 13; UNIF. PARENTAGE ACT (UNIF. LAW. COMM'N 2017).

33. In order of legalization, the countries that permit marriage without regard to the sex of the parties are: Wet van 21 december 2000, Stb. 2001, 9 (Neth.); Loi du 13 février 2003 ouvrant le mariage à des personnes de même sexe [Law Opening Marriage to Persons of the Same Sex], M.B., Feb. 28, 2003 (Belg.); Ley por la que se modifica el Código Civil en materia de derecho a contraer matrimonio (B.O.E. 2005, 157) (Spain); The Civil Marriage Act, S.C. 2005, c 33 (Can.); Civil Union Act 17 of 2006 (S. Afr.); Lov om ekteskap [The Marriage Act], Act 1991-07-04 No. 47, amended by Act 2008-27-06 No. 53 (Nor.); LAG OM UPPHÅVANDE AV LAGEN OM REGISTRERAT PARTNERSKAP (Svensk författningssamling/författningssamling [SFS] 2009:260) (Swed.); Law No. 26.618, July 22, 2010, [CXVIII] B.O. 31.949 (Arg.); Lög um breytingar á hjúskaparlögum og fleiri lögum og um brottfall laga um staðfesta samvist (ein hjúskaparlög) [Law on Amendments to the Marriage Act and the Repeal of Registered Partnerships (One Marriage Act)], Law No. 65/2010 (Ice.); Lei n. ° 9/2010 de 31 de Maio Permite o casamento civil entre pessoas do mesmo sexo [Act no. 9/2010 of May 31] (Port.); Lov nr. 532 af 12/06/2012 [Law no. 532 of 06/12/2012] (Den.); Resolução no. 175, de 14 de Maio de 2013, C.N.J., n. ° 89/2013, D.J.e., 15/05/2013, 2 (Braz.); Marriage (Same Sex Couples) Act 2013, c. 30 (Eng.); Loi 2013-404 du 17 mai 2013 ouvrant



several others are close to joining these nations<sup>34</sup> or will (at least) recognize valid marriages performed abroad.<sup>35</sup> At the same time, marriage is becoming less common, with significant portions of the populations of the United States and other

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le mariage aux couples de personnes de même sexe [Law 2013-404 of May 17, 2013 Opening Marriage to Same-Sex Couples], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 17, 2013, p. 8253 (Fr.); Marriage (Definition of Marriage) Amendment Act 2013 (N.Z.); Matrimonio Igualitario [Equal Marriage] (Law No. 19.075) (Uru.); Marriage (Same Sex Couples) Act 2013 c. 30 (Wales); Loi du 4 juillet 2014 portant de réforme du mariage [Law of July 4, 2014 on the Reform of Marriage], JOURNAL OFFICIEL DU GRAND-DUCHÉ DE LUXEMBOURG [J.O.] [OFFICIAL GAZETTE OF LUXEMBOURG], July 17, 2014, p. 1798 (Lux.); Marriage and Civil Partnership (Scotland) Act 2014, (ASP 5) (Scot.); Marriage Act 2015 (Act No. 23/2015), <http://www.irishstatutebook.ie/eli/2015/act/35/enacted/en/print.html> (Ir.); Obergefell v. Hodges, 576 U.S. 644 (2015) (U.S.); Corte Constitucional [C.C.] [Constitutional Court], abril 28, 2016, Sentencia C-214/16 (Colom.); Lov om ændring af myndighedsloven for Grønland, lov om ikrafttræden for Grønland af lov om ægteskabets retsvirkninger, retsplejelov for Grønland og kriminallov for Grønland [Act Amending the Authority Act for Greenland, Act on the Entry into Force of Greenland by the Act on the Legal Effects of Marriage, the Code of Judicial Procedure for Greenland and Criminal Law for Greenland], LOVTIDENDE A [OFFICIAL GAZETTE A], Feb. 3, 2016, no. 103 (Green.); *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) (Austl.); Lag om ändring av äktenskapslagen [Act Amending the Marriage Act] (Law No. 156/2015) (Fin.); Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts [Law Allowing the Right of Persons of the Same Sex to Marry], June 30, 2017, BGBl. I at 2787 (Ger.); Act No. XXIII of 2017 Marriage Act and Other Laws (Amendment) of 2017, THE MALTA GOVERNMENT GAZETTE 19,840, Aug. 1, 2017, Gov't Notice No. 831 (Malta); Verfassungsgerichtshof [VfGH] [Constitutional Court], Dec. 4, 2017, No. G 258-259/2017-9 (Austria); *Ecuador's Top Court Approves Same-Sex Marriage*, BBC NEWS (June 13, 2019), <https://www.bbc.com/news/world-latin-america-48620744> (Ecuador); Enforcement Act of Judicial Yuan Interpretation No. 748, May 17, 2019 (Taiwan); Costa Rica Constitutional Court, Res. No. 12782-2018, <https://nexuspj.poder-judicial.go.cr/document/sen-1-0007-875801> (ordering lawmakers to extend marriage rights to same-sex couples in Costa Rica within 18 months); Costa Rica Supreme Court, Sec. Gen., Circular No. 113-2018, Nov. 26, 2018, [https://www.imprentanacional.go.cr/publico/boletin/2018/11/bol\\_26\\_11\\_2018.pdf](https://www.imprentanacional.go.cr/publico/boletin/2018/11/bol_26_11_2018.pdf) (extending 18-month deadline to May 26, 2020) (Costa Rica); Executive Formation Etc. Act (Northern Ireland) 2019 c. 22 (N. Ir.).

34. A landmark advisory opinion by the Inter-American Court of Human Rights declaring that, *inter alia*, states must extend all existing legal mechanisms—including marriage—to same-sex couples is expected to facilitate marriage equality in several countries in the Americas. See State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights), Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24 (Nov. 24, 2017), [http://www.corteidh.or.cr/docs/opiniones/seriea\\_24\\_esp.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_24_esp.pdf).

35. In Israel, for example, same-sex marriages performed abroad in a jurisdiction where such marriages are legal can be registered with the state for some purposes. See HCJ 3045/05 Ben-Ari v. Director of Population Registry in Interior Ministry, 61(3) PD 537 (2006) (Isr.); Aeyal Gross, *Israel's Supreme Court Orders Registration of Same-Sex Marriage Conducted in Canada*, LESBIAN/GAY L. NOTES, 226 (Dec. 2006).

countries cohabiting outside of marriage.<sup>36</sup> That is, marriage is simultaneously becoming more inclusive yet less central as an organizing social institution.

The shifts in the legal definition and social significance of marriage have generated considerable debate and discussion among leading thinkers in the field. A significant contingent on the critical left (and here I mean left of “liberal”) has called for a new era of family law and policy that does not make marriage the dividing line between who is and who is not a family deserving legal recognition, status, and benefits.<sup>37</sup> According to these experts, demoting marriage to private religious or cultural practice is the preferred course. Most of the energy for this line of attack has come from the queer and critical-left flank of family law,<sup>38</sup> but not only.<sup>39</sup>

More conservative and traditional voices have responded that disestablishing marriage risks disturbing valuable ideologies and purposes served by marriage, such as faithfulness, financial interdependence, and the optimal care of children. Relying on legal analysis and social science, these experts contend that marriage constitutes a more stable relationship than unmarried cohabitation.

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36. For example, in the United States, the 2010 Census showed that less than 25% of U.S. households consisted of traditional nuclear families (married parents with children), while the number of households headed by unmarried partners had increased by 41% from 2000 to 2010. *See* DAPHNE LOFQUIST ET AL., U.S. CENSUS BUREAU, HOUSEHOLDS AND FAMILIES: 2010, at 3, 10 tbl.4 (2012). Unmarried partner households made up at least 5.2% of total households and included some 7.7 million people, 4.6 million in opposite-sex households. *Id.* at 3, 5 tbl.2.

37. *See, e.g.*, FINEMAN, *supra* note 13, at 228–30; KATHERINE FRANKE, WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY *passim* (2015); POLIKOFF, *supra* note 14, *passim*; RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 217–28 (2009) (arguing that only private institutions, not the state, should recognize something called “marriage”); Lisa Duggan, *Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families and Relationships*, 9 STUD. GENDER & SEXUALITY 161, 161–68 (2008); Alice Ristoph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1269–79 (2010).

38. *See, e.g.*, FRANKE, *supra* note 37; POLIKOFF, *supra* note 14; Drucilla Cornell, *The Public Supports of Love*, in JUST MARRIAGE 81, 82 (Mary Lyndon Shaney ed., 2004); Michael Warner, *Beyond Gay Marriage*, in LEFT LEGALISM/LEFT CRITIQUE 259, 260 (Wendy Brown & Janet Halley eds., 2002); Paula L. Ettelbrick, *Domestic Partnership, Civil Unions, or Marriage: One Size Does Not Fit All*, 64 ALB. L. REV. 905, 914 (2001); Ruthann Robson & S.E. Valentine, *Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 TEMPLE L.J. 511, 540 (1990); Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK: NAT. LESBIAN & GAY Q., Autumn 1989, at 8–12.

39. *See* FINEMAN, *supra* note 13, at 230–33 (arguing that the publicly supported form of the family should be the mother/child dyad and thus challenging the confluence of the family and sexual relationships imposed by the state’s imposition of marriage as the norm). As Fineman explains:

[I] suggest that, instead of trying to fit more and more relationships into the legal space that marriage occupies by asserting that they are entitled to the same set of privileges and protection as marriage, we abolish marriage as a legal category. In other words, I suggest that all relationships between adults be nonlegal and, therefore, nonprivileged—unsubsidized by the state.

*Id.* at 4–5.

Accordingly, they suggest that it is appropriate for the state to promote legal marriage and to elevate the rights of married couples over the rights of unmarried cohabitants.<sup>40</sup>

Some experts have adopted a middle position, laying out a pluralistic vision in which the state legitimately promotes and privileges marriage, while also proliferating alternative statuses that would support committed, long-term relationships.<sup>41</sup> In this vein, many of these experts have developed proposals intended to benefit children that would encourage committed, long-term, stable parental partnerships irrespective of the sexual or legal relationship of a child's parents.<sup>42</sup> Such experts have sought to reorient family law away from questions about marriage and toward the well-being of children.

What are we to make of these debates and developments? Are we witnessing family law's fifth transformation? That is, is the field of family law on a path toward more enduring, pluralistic possibilities and fundamental restructuring? Or rather, are we, in Kuhnian terms,<sup>43</sup> experiencing a moment of temporary revolutionary upheaval that will end with a return to "normalcy" in which marriage

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40. See, e.g., Lynn D. Wardle, *Relationships Between Family and Government*, 31 CAL. W. INT'L L.J. 1, 19–21 (2000) (arguing that the state should foster marriage above all other relationships among adults); Robin Fretwell Wilson, *Evaluating Marriage: Does Marriage Matter to the Nurturing of Children?*, 42 SAN DIEGO L. REV. 847, 876–79 (2005) (arguing that marriage matters to how children thrive and to the extent to which their parents are willing to invest in them and cautiously concluding that the state should encourage marriage); Ryan T. Anderson, *The Social Costs of Abandoning the Meaning of Marriage*, HERITAGE FOUND.: ISSUE BRIEF, no. 4038, Sept. 2013, [https://thf\\_media.s3.amazonaws.com/2013/pdf/ib4038.pdf](https://thf_media.s3.amazonaws.com/2013/pdf/ib4038.pdf) (arguing that marriage encourages men and women to commit permanently and exclusively to each other and take responsibility for their children and opposing no-fault divorce, marriage equality, and other progressive marriage reforms). Not all scholars who oppose the disestablishment of marriage assert that marriage should be unchanging. See, e.g., STEPHEN MACEDO, JUST MARRIED 10–11, 79–118 (2015) (arguing that marriage occupies a special place in our society due to its symbolic dimension as a distinctive form of commitment as well as its benefits and obligations and that this is precisely why it should be extended to previously excluded groups such as gay and lesbian people).

41. See, e.g., Maxine Eichner, *Marriage and the Elephant: The Liberal Democratic State's Regulation of Intimate Relationships Between Adults*, 30 HARV. J.L. & GENDER 25, 62–63 (2007); Shahar Lifshitz, *The Pluralistic Vision of Marriage*, in MARRIAGE AT THE CROSSROADS 260, 260–64 (Marsha Garrison & Elizabeth S. Scott eds., 2012).

42. See, e.g., CLARE HUNTINGTON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS 113–22, 145–64 (2014); WEINER, *supra* note 13, at 131–82; Ayelet Blecher-Prigat, *Conceiving Parents*, 41 HARV. J. GENDER & L. 119, 135–46 (2018); Lifshitz, *supra* note 41, at 268–74.

43. A mature science, according to the philosopher of science Thomas Kuhn, experiences alternating phases of normal science and revolutions. In the normal science phase, the key theories, instruments, values, and metaphysical assumptions that comprise the disciplinary matrix are kept fixed, permitting the cumulative generation of solutions to specific problems and puzzles, whereas, in a scientific revolution, the disciplinary matrix undergoes revision to permit the solution of the more serious puzzles that disturbed the preceding period of normal science. See generally THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962).

reasserts itself as the “measure of all things”?<sup>44</sup> Depending on which developments in the field one examines, it seems that either interpretation could be accurate.

On the one hand, the idea of marriage—however updated, reformed, and transformed—as the preferred institution for containing intimate and dependent relationships has shown impressive powers of resilience in the United States. One need only look at how the legalization of same-sex marriage has further entrenched marriage as a cultural ideal or how states and municipalities that adopted civil unions and domestic partnerships in the lead-up to marriage equality sunsetted these laws or converted these statuses to marriages.<sup>45</sup> Furthermore, for evidence of the resilience of marriage (even traditional, patriarchal, heteronormative marriage), just consider the proliferation of religious exemptions from American marriage laws now that marriage equality for same-sex couples has been won. These include solemnization exemptions, religious-organization exemptions, commercial exemptions, Religious Freedom Restoration Act (“RFRA”) exemptions,<sup>46</sup> ministerial exemptions, and tax exemptions.<sup>47</sup> In these observations, I am assisted by other family law historiographers and scholars who remind us to be skeptical of the teleological view of family law’s history. Family law has never unfolded in a

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44. See Katherine M. Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685, 2686 (2008).

45. See D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 175 (2016); *Civil Unions and Domestic Partnership Statutes*, NAT’L CONF. OF ST. LEGISLATURES (July 25, 2019), <https://www.ncsl.org/research/human-services/civil-unions-and-domestic-partnership-statutes.aspx> (listing five states—Connecticut, Delaware, New Hampshire, Rhode Island, and Vermont—that have converted all civil unions into marriages after the legalization of same-sex marriage).

46. RFRA allows a person to seek an exemption from federal laws that impose a substantial burden on religious exercise but authorizes courts to reject such claims if enforcing the law is “the least restrictive means of furthering [a] compelling governmental interest.” 42 U.S.C. § 2000bb-1(a)–(b) (2018). Almost half the states have enacted laws that mirror the federal RFRA and apply to state law. *State Religious Freedom Restoration Acts*, NAT’L CONF. OF ST. LEGISLATURES (May 4, 2017), <https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>.

47. See Leslie Griffin, *Marriage Rights and Religious Exemptions in the United States*, OXFORD HANDBOOKS ONLINE (May 2017), <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935352.001.0001/oxfordhb-9780199935352-e-19>; see also *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1732 (2018) (holding that a state civil rights commission did not employ religious neutrality when it decided that a bakery violated the state’s antidiscrimination law by refusing the business of a gay couple and ordered the bakery to make a wedding cake for the couple); *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 926–27 (Ariz. 2019) (holding that a city human relations ordinance precluding discrimination on basis of sexual orientation violated wedding invitation designers’ right to free speech and free exercise). See generally Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839 (2014); Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169 (2012); Douglas NeJaime & Reva Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015).

straight line from the patriarchal, heteronormative family to an egalitarian, rights-based familial order.<sup>48</sup>

On the other hand, as a result of marriage equality (both its achievement and critical responses), one can detect an emergent, more profound commitment to pluralism in family law, especially with regard to same-sex parenting and modes of alternative parenting outside the marital family. For example, a majority of the Supreme Court implicitly recognized the validity of nonbiological, functional parenthood when it reasoned that nonrecognition of same-sex marriage “harm[s] and humiliate[s] the children of same-sex couples,”<sup>49</sup> and when, by an even greater majority, the Court subsequently concluded that a state may not deny married same-sex couples recognition on their children’s birth certificates that the state grants to married different-sex couples.<sup>50</sup> In light of these marriage equality decisions, states have addressed the potential constitutional infirmity of their parentage laws by applying the presumption of parenthood equally to different- and same-sex married couples.<sup>51</sup> Along the same lines, at least partly due to new understandings of family emanating from the marriage equality movement, states are increasingly recognizing and extending parental rights to people who function as parents to children with whom they are not biologically connected.<sup>52</sup> Additionally, more states than ever now

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48. See, e.g., *Halley I*, *supra* note 17; *Halley II*, *supra* note 21 (demonstrating the resilience of the market/family distinction despite sustained and organized intellectual attacks of this ideology by both legal realists and feminists); Martha Minow, ‘*Forming Underneath Everything that Grows*’: *Toward a History of Family Law*, 1985 WIS. L. REV. 819, 819 (challenging the dominant account that family law has “evolve[ed] in a steady line of progress from the ‘traditional’ patriarchal family to an egalitarian family whose members individually enjoy rights protected by the state”); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives’ Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2131–32 (1994) (recounting how the courts in the 19th century coopted statutes giving wives a right to own their labor by cautiously interpreting and applying them so the statutes did not fundamentally alter the marriage relation).

49. See *Obergefell v. Hodges*, 576 U.S. 644, 646 (2015).

50. See *Pavan v. Smith*, 137 S. Ct. 2075, 2078–79 (2017).

51. See, e.g., *Henderson v. Box*, 947 F.3d 482, 487 (7th Cir. 2020) (“[A]fter *Obergefell* and *Pavan*, a state cannot presume that a husband is the father of a child born in wedlock, while denying an equivalent presumption to parents in same-sex marriages.”); *McLaughlin v. Jones*, 401 P.3d 492, 498 (Ariz. 2017) (“The marital paternity presumption is a benefit of marriage, and following *Pavan* and *Obergefell*, the state cannot deny same-sex spouses the same benefits afforded opposite-sex spouses.”); *Roe v. Patton*, No. 2:15-CV-00253-DB, 2015 WL 4476734, at \*3 (D. Utah. July 22, 2015) (concluding that the plaintiffs were “highly likely to succeed in their claim” that extending the “benefits of the assisted reproduction statutes to male spouses in opposite-sex couples but not for female spouses in same-sex couples” was unconstitutional).

52. Several states recognize such parents under a variety of equitable doctrines—sometimes called “*de facto*” parentage, “*in loco parentis*,” or the “psychological parent” doctrine. See, e.g., *Bethany v. Jones*, 378 S.W.3d 731, 738 (Ark. 2011) (*in loco parentis*); *Mullins v. Picklesimer*, 317 S.W.3d 569, 576–77 (Ky. 2010) (“acting as a parent”); *Boseman v. Jarrell*, 704 S.E.2d 494, 504–05 (N.C. 2010) (intent and functional parenthood); *McAllister v. McAllister*, 779 N.W.2d 652, 662 (N.D. 2010) (psychological parent); *Marquez v. Caudill*, 656 S.E.2d 737, 744 (S.C. 2008) (psychological parent); *In re Parentage of L.B.*, 122 P.3d

recognize greater than two adults as legal parents of a child under certain circumstances.<sup>53</sup> These developments, one may argue, are a result of increased awareness of the legal needs and configurations of lesbian and gay families. Finally, although at its very early stages, one may now see a reform movement gaining steam to address the “negative consequences for sex and sexuality on marriage’s outside”<sup>54</sup> that have become ever more apparent with the legalization of marriage for same-sex couples. For example, the Uniform Law Commission<sup>55</sup> is drafting a model act that would ensure that unmarried cohabitants have the same ability to contract and, upon termination of their relationship, obtain economic remedies, as persons who are not in an intimate relationship.<sup>56</sup>

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161, 177 (Wash. 2005) (de facto parent); *In re Clifford K.*, 619 S.E.2d 138, 157 (W. Va. 2005) (psychological parent); *V.C. v. M.J.B.*, 748 A.2d 539, 549–50 (N.J. 2000) (psychological parent). Other states now extend rights to functional parents by statute. *See, e.g.*, DEL. CODE ANN., tit. 13, § 8-201(c) (West 2020); ME. STAT. tit. 19-a, § 1891 (2016); MINN. STAT. §§ 257C.01–08 (West 2020); TEX. FAM. CODE ANN. § 102.003(9) (West 2019); VT. STAT. ANN. tit. 15C, § 501(a)(1)(G) (West 2020). Some states also recognize functional parents through case law interpreting statutes. *See, e.g.*, *Elisa B. v. Superior Ct. of El Dorado Cnty.*, 117 P.3d 660, 667, 670 (Cal. 2005); *In re S.N.V.*, 284 P.3d 147, 149 (Colo. App. 2011); *Frazier v. Goudschaal*, 295 P.3d 542, 552–53 (Kan. 2013); *Partanen v. Gallagher*, 59 N.E.3d 1133, 1139 (Mass. 2016); *In re Guardianship of Madelyn B.*, 98 A.3d 494, 501 (N.H. 2014); *Chatterjee v. King*, 280 P.3d 283, 293 (N.M. 2012). For a discussion of the functional turn in family law and the law’s evolving understandings of parenthood, see Doug NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 319–43 (2020).

53. A handful of jurisdictions expressly permit a court to find that a child has more than two legal parents by statute. *See* CAL. FAM. CODE § 7612(c) (West 2020); D.C. CODE § 16-831.01(1)(A)(iii) (West 2020); ME. STAT. tit. 19-a, § 1853(2) (West 2019); VT. STAT. ANN. tit. 15c, § 206(b) (West 2019); WASH. REV. CODE § 26.26A.460(3) (West 2019). In addition, courts in several other states have reached that conclusion as a matter of common law. *See, e.g.*, *In re Interest of P.S.*, 505 S.W.3d 106, 109, 111 (Tex. Ct. App. 2016) (three-way custody and visitation arrangement); *A.B. v. T.V.*, No. 1408 WDA 2014, 2015 WL 7571451, at \*7 (Pa. Super. Ct. Feb. 12, 2015) (holding that trial court erred in finding “that granting *in loco parentis* standing” to former stepmother “would interfere with Child’s developing relationship with Mother and . . . having ‘two mothers’ would be confusing to Child”); *McAllister*, 779 N.W.2d at 661 (three-way visitation arrangement); *Jacob v. Shultz-Jacob*, 923 A.2d 473, 482 (Pa. Super. Ct. 2007) (finding that parental rights or obligations could extend to the biological mother, nonbiological mother, and sperm donor); *Warren v. Richard*, 296 So.2d 813, 815 (La. 1974). *See generally* Laura T. Kessler, *Community Parenting*, 24 WASH. J.L. & POL’Y 47 (2007) [hereinafter Kessler, *Community Parenting*].

54. *See* FRANKE, *supra* note 37, at 207.

55. The Uniform Law Commission, established in 1892, drafts model legislation for states to bring clarity and stability to critical areas of state statutory law. *See About Us*, UNIF. L. COMM’N, <https://www.uniformlaws.org/aboutulc/overview> (last visited Sept. 10, 2020).

56. *See* Draft Economic Rights of Unmarried Cohabitants Act, Uniform Law Commission (Sept. 12, 2020), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=0f2bb781-89cd-67b2-3771-4b06c15042b0&forceDialog=0>. Specifically, the Act would provide for recognition of express and implied-in-fact agreements regarding unmarried cohabitants’ economic interests and rights arising within the context of their relationship, as well as equitable claims and remedies (with some limitations) upon dissolution of their cohabitation. *Id.* §§ 6, 7, 11–12.

### *B. Aims and Significance of this Study*

This study offers an empirical intervention to assess the field's history and trajectory. It consists of a content analysis of family law casebooks published between 1960 and 2019. The study has both descriptive and normative purposes.

The first purpose is to describe the academic field of family law, as legal thinkers and teachers inside law schools have conceptualized it, from the mid-20th century to the present. Such a project may prove useful to family law educators, as it would assist them in determining if the teaching materials typically used in family law courses adequately reflect the range of issues and problems that family lawyers encounter in contemporary family law practice.

This study is also undertaken in recognition of the fact that the history of family law is still being written. Therefore, the study's second purpose is to examine whether marriage remains the dominant disciplinary concern of family law and, if so, to steer the field in more expansive directions. Ultimately, the hope is that this study will inspire family law educators to self-consciously consider the ideology of the family that we perpetuate through legal education and to undertake an ideological reorganization of the field of family law so that it considers a greater range of intimate relationships and legal realms.

As Susan Appleton, Adrienne Davis, Martha Fineman, Janet Halley, Jill Hasday, Melissa Murray, Laura Rosenbury, Zvi Triger, and many other legal scholars have observed, family law is notable not just for what it includes, but also for what it excludes. For example, although many social and legal domains have significant social and distributive effects on families, family law does not address (or only tangentially addresses) sexual pleasure,<sup>57</sup> friendship,<sup>58</sup> multiple parenthood,<sup>59</sup> disability,<sup>60</sup> polygamy and polyamory,<sup>61</sup> stepfamilies,<sup>62</sup> sibling

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57. See Appleton, *supra* note 23, at 268–69 (noting family law's silence on sexual pleasure, particularly women's); cf. Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 204–08 (2001) (noting the lack of attention in legal feminism to the connections between the regulation of families and the regulation of sexuality).

58. See Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189 *passim* (2007) (discussing the lack of recognition of friendship as a relationship of legal significance in family law).

59. See, e.g., Kessler, *Community Parenting*, *supra* note 53, at 49 (noting that the "more-than-two" parent family is widely viewed as undesirable).

60. See HASDAY, *supra* note 24, at 865–66 (noting that family law hardly considers disability, such as laws that prohibit or restrict marriage based on disability).

61. See, e.g., Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 1959 (2010) (noting that family law is ill equipped to deal with the complexities of polygamy); Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 281 (2004) (noting that mainstream culture accepts the restriction of two-person marriage without question); Kessler, *supra* note 18 (presenting rewritten Supreme Court decision that reimagines polygamy as a constitutionally protected practice).

62. See, e.g., Margaret M. Mahoney, *Stepparents as Third Parties in Relation to Their Stepchildren*, 40 FAM. L.Q. 81, 82 (2006) ("In spite of the long history of stepfamily

relationships,<sup>63</sup> domestic workers,<sup>64</sup> and a range of other relationships and intimate practices. Nor does family law, as conceptualized within legal practice and law school curricula, include the many areas of law that have significant distributive impacts on family members,<sup>65</sup> such as tax, health insurance, real estate, education, bankruptcy, business associations, social security and government benefits, and inheritance law. These legal fields impact families, sometimes even fundamentally structuring a family's economic circumstances, yet they are typically addressed by lawyers outside the family law bar and in other curricular territories.

The narrow boundaries of family law have ideological effects, constructing the ways academics, students, judges, and policymakers think about the family and the questions they ask (and do not ask).<sup>66</sup> As the widely hailed *Carnegie Report* on the best practices for legal education instructs, law schools provide rapid socialization into the standards of legal thinking.<sup>67</sup> Similarly, in Duncan Kennedy's words, "Because students believe what they are told, explicitly and implicitly, about the world they are entering, they behave in ways that fulfill the prophecies the system makes about them and about that world."<sup>68</sup> It is thus natural to begin the project of working out critical approaches to family law from inside law schools,

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issues in the legal arena, and the increased demand for regulation in recent decades, little progress has been made in establishing a clear or consistent legal definition of the stepparent status."); *id.* at 107 ("The recognition of third-party claims by residential stepparents in this manner has caused a limited shift in the established boundaries of family in the law.").

63. See, e.g., NAOMI CAHN, *THE NEW KINSHIP: CONSTRUCTING DONOR-CONCEIVED FAMILIES* 61–88 (2013) (discussing donor-conceived siblings); Ruth Zafran, *Reconceiving Legal Siblinghood*, 71 *HASTINGS L.J.* 749, 751 (2020) (noting that family law is "ill-equipped" to deal with questions raised by siblinghood, especially siblings conceived through gamete donation). For earlier contributions to this topic, see Ellen Marrus, "Where Have You Been Fran?" *The Right of Siblings to Seek Court Access to Override Parental Denial of Visitation*, 66 *TENN. L. REV.* 977 (1999) and William Wesley Patton & Sara Latz, *Severing Hansel from Gretel: An Analysis of Siblings' Association Rights*, 48 *U. MIAMI L. REV.* 745 (1994).

64. See Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 *VA. L. REV.* 385, 388 (2008) (arguing for broader legal recognition of caregiving networks and nonparental caregivers); Zvi Triger, *Introducing the Political Family: A New Road Map for Critical Family Law*, 13 *THEORETICAL INQUIRIES L.* 361, 379–80 (2012) (highlighting how legal authorities have defined paid caregivers outside of the field of family law and raising the question of whether noncitizen migrant nannies should be afforded some legal status in the family).

65. See *Halley I*, *supra* note 17, at 5–6; *Halley II*, *supra* note 21 at 192 (urging a "reconnect[ion] [of] domestic relations/family law not only with the market but with the vast array of regulatory orders, inside and outside the state, that condition its lifeways").

66. See HASDAY, *supra* note 24, at 3–5.

67. See WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 47–86, 185–86 (2007) [hereinafter *THE CARNEGIE REPORT*].

68. See Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System*, 32 *J. LEGAL EDUC.* 591, 591 (1982). For discussions of how disciplines reproduce ideologies, both generally and in educational institutions, see MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977), KEITH M. MACDONALD, *THE SOCIOLOGY OF THE PROFESSIONS* (1999), and LOUIS ALTHUSSER, *Ideology and Ideological State Apparatuses*, in *LENIN AND PHILOSOPHY AND OTHER ESSAYS* 121–76 (Ben Brewster trans., 1971).



where future lawyers (of all specialties) and legal decisionmakers, who exercise considerable power in society over family law and families, are first exposed to the field. Further, as members of professional schools, law school faculties are deeply immersed in the development of the law, not only through their research,<sup>69</sup> but also more directly through participation in impact litigation and law reform commissions and other expert bodies. As such, studying the academic discipline of family law, as it is conceptualized and taught within legal education, can tell us quite a bit about “the ways of thinking about family that are widely shared . . . by legal authorities.”<sup>70</sup> In sum, the academic discipline of family law is an important artifact that both reflects and produces the ideology of the family, however complex and indirect its relationship to the “law of family law” developed by courts, legislatures, and government agencies.<sup>71</sup> For these reasons, academic family law is worthy of study by those interested in the role of the family and family law in ordering social relations.

This study is also of personal significance, as it provides an opportunity for me to test my earlier hypotheses about the future direction of the field of family law. In 2008, I published a book chapter titled *New Frontiers in Family Law*<sup>72</sup> when the marriage equality movement was gaining significant momentum in the United States.<sup>73</sup> I argued that a broader range of family relationships and sexual practices was displacing marriage as the central subject of scholarly inquiry on the family,

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69. There is a large body of legal scholarship on the relevance of legal scholarship to the practice and development of law. *See, e.g.*, Neil H. Buchanan, *Legal Scholarship Makes the World a Better Place* (Nov. 7, 2014) (unpublished manuscript), <https://ssrn.com/abstract=2975813>; Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 2191 *passim* (1992); Deborah J. Merritt & Melanie Putnam, *Judges and Scholars: Do Courts and Scholarly Journals Cite the Same Law Review Articles?*, 71 CHICAGO-KENT L. REV. 871 *passim* (1996); Lee Petherbridge & David L. Schwartz, *An Empirical Assessment of the Supreme Court's Use of Legal Scholarship*, 106 NW. U. L. REV. 995, 1016–27 (2012); Diane P. Wood, *Legal Scholarship for Judges*, 124 YALE L.J. 2592 *passim* (2015).

70. *See* Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 825 (2004).

71. Given the porosity of the boundaries between legal education and the legal profession, I hesitate to call law outside law schools “law in the real world.”

72. Kessler, *New Frontiers*, *supra* note 14.

73. Although the gay liberation movement began in the 1960s in the United States, the civil rights movement for legal recognition of same-sex marriage did not gain real traction until 1993, when a decision of the Hawaii Supreme Court in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), seemed to imply that same-sex marriage might be legally required. The *Baehr* decision was the “first olive out of the jar,” so to speak. However, the real game-changer occurred in 2003, when the Supreme Judicial Court of Massachusetts ruled in *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003), that the ban on same-sex marriage violated the state constitution. By 2011, when *New Frontiers in Family Law* was published, the movement had gained significant steam, as had the anti-same-sex-marriage movement. For example, in November 2008, California passed a referendum called “Proposition 8,” which nullified a California Supreme Court decision striking down California’s same-sex marriage ban, but only after 14,000 same-sex couples had been married there. *See* MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* (2013).

and I identified four intellectual shifts in the field's scholarly agenda resulting from the waning interest in marriage.<sup>74</sup> Specifically, based on my review of family law scholarship published in the first decade of the 21st century, I found pervasive evidence of new mindsets among family law scholars. Family law researchers, I argued, were more attentive to the state's role in supporting families,<sup>75</sup> concerned with a greater variety of intimate configurations,<sup>76</sup> and interested in developing family law so that it better supports sexual and other freedoms.<sup>77</sup> They were also pushing their research into fields of law that historically were not considered family law, such as constitutional, tax, immigration, criminal, and employment law.<sup>78</sup>

I characterized this transformation as a “new frontier” in family law scholarship and mapped out four potential paths for family law's future. Potential Path 1: With continued diffusion and expansion and the end of its *raison d'existence* (marriage) as a social ideal and institution of legal significance, family law may move toward obsolescence and eventually disappear as a coherent field of knowledge.<sup>79</sup> Potential Path 2: As family law adds new statuses, recognizes a greater range of intimate relationships, and enters new legal domains, a much broader field may emerge, “the Law of Intimacy.”<sup>80</sup> Potential Path 3: Nonmarital relationships—and the problems of gender, sexuality, race, and economic inequality and the family—will be banished to the wilderness of specialized “law and” classes and seminars, such as Feminist Legal Theory, Critical Race Theory, Poverty Law, and Gender, Sexuality, and the Law, due to resistance from within the discipline by academics who remain committed to marriage. In this last scenario, family law's traditional focus on middle-class families and on marriage would be preserved.<sup>81</sup> Potential Path 4: All three of the posited routes would occur to some degree. Thus: (a) Some family law topics will break off and migrate to other fields of law—for example, the topic of marriage equality for same-sex couples, I hypothesized in 2008, could eventually be claimed by Constitutional Law or Sexuality, Gender, and the Law; (b) Other parts of family law, I surmised, might become obsolete—for example, there will come a point when fault-based divorce grounds are relegated to the dust bins of family law casebooks (the endnotes), like the “heart-balm” claims of yesteryear; and (c) What remains will then become a slightly expanded field concerned with a fuller range of legal relationships, perhaps Super Modern Family Law, but still primarily focused on marriage.<sup>82</sup> This empirical study provides an opportunity to test some of these earlier predictions about the field's possible direction through the examination of a rich data set of 86 American family law casebooks published from 1960 to 2019.

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74. See Kessler, *New Frontiers*, *supra* note 14, at 226–27, 230–35.

75. *Id.* at 230.

76. *Id.* at 233.

77. *Id.* at 231.

78. *Id.* at 234.

79. *Id.* at 237–39.

80. *Id.* at 239–40.

81. *Id.* at 240–41.

82. *Id.* at 241.

## I. METHODOLOGY

Over the last 60 years, scores of family law casebooks have been published and widely used in legal education at hundreds of law schools. This study describes and tracks their topical coverage over time through a content analysis. Content analysis is a research method that has come into wide use in many disciplines in recent years; it is a flexible method for analyzing text data.<sup>83</sup> Quantitative approaches to content analysis, employed in this study, count the frequency of a set of codes to get a sense of what is in the data.<sup>84</sup> Quantitative content analysis typically employs a deductive approach, with the codes predetermined and drawn from outside the existing data, typically from existing theory or prior research.<sup>85</sup> A quantitative approach to content analysis is most suitable when prior research exists about a phenomenon that is incomplete or would benefit from further description.<sup>86</sup> Qualitative content analysis, in contrast, employs an inductive approach.<sup>87</sup> Researchers develop the codes from the text itself, then use the codes to develop new insights into the data. Qualitative content analysis is most suitable when theory generation is the goal of the research.<sup>88</sup> When the sample is representative, and the categories are sufficiently defined so that all coders will reach the same conclusions, content analysis is both reliable and valid.<sup>89</sup> I selected a quantitative approach for this study, because one of my goals is to test my earlier theories about the extent of coverage of specific topics in the field of family law (particularly the core areas of marriage, divorce, child custody, and child support).<sup>90</sup>

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83. Stephen Cavanagh, *Content Analysis: Concepts, Methods and Applications*, 4 NURSE RESEARCHER 5, 5 (1997). Content analysis is one of numerous research methods used to analyze text data; other methods include ethnography, grounded theory, phenomenology, and historical research. See Hsiu-Fang Hsieh & Sarah E. Shannon, *Three Approaches to Qualitative Content Analysis*, 15 QUALITATIVE HEALTH RES. 1277, 1278 (2005).

84. See David L. Morgan, *Qualitative Content Analysis: A Guide to Paths Not Taken*, 3 QUALITATIVE HEALTH RES. 112, 115 (1993).

85. See BRUCE L. BERG, QUALITATIVE RESEARCH METHODS FOR THE SOCIAL SCIENCES 233–52 (3d ed. 1998).

86. See Hsieh & Shannon, *supra* note 83, at 1281.

87. See BERG, *supra* note 85.

88. See Hsieh & Shannon, *supra* note 83, at 1279–80.

89. See OLE R. HOLSTI, CONTENT ANALYSIS FOR THE SOCIAL SCIENCES AND HUMANITIES 127–42 (1969); Marijke Breuning, *Content Analysis*, in 21ST CENTURY POLITICAL SCIENCE: A REFERENCE HANDBOOK 490, 494–95 (John T. Ishiyama & Marijke Breuning eds., 2011).

90. To increase reliability consistent with best practices, the categories used in this study were pretested in a series of trials and repeatedly redefined before they were finalized to ensure that the coding system was clear and unambiguous. See Cavanaugh, *supra* note 83, at 10–11. This “repeated movement of the researcher between the data and content analysis” study also generated new categories. *Id.* at 11. As such, the study incorporates an inductive, qualitative element as well. “Inductive and deductive approaches are not mutually exclusive, and it is often useful to apply both,” as researchers can strengthen a quantitative content analyses with the addition of an initial qualitative analysis. See Nancy L. Kondracki et al., *Content Analysis: Review of Methods and Their Applications in Nutrition Education*, 34 J. NUTRITION EDUC. & BEHAV. 224, 225 (2002).

It is important to note at the outset the strengths and limitations of a content analysis. Content analysis provides a technical advantage when a large volume of material exceeds an investigator's ability to qualitatively analyze data.<sup>91</sup> This method presents a particular advantage in this study, which evaluates 96,762 pages of casebook text. Content analysis is also useful when it is not practical to interview or survey subjects, as here, when many professors who authored or used the casebooks in this study are retired or deceased. Although not a perfect reflection of classroom activities, casebooks provide a rough record of the content of family law instruction.<sup>92</sup> Finally, the frequency of a set of assertions or codes can, inferentially, provide a window into their importance. A content analysis thus fits well with this study's aim to assess the direction of the academic field of family law in the past half-century and, in particular, the centrality of marriage as the field's organizing framework and purpose. What can a content analysis not do? It cannot determine the truth of an assertion. It cannot, without additional qualitative analysis, explain the social meaning or context of the categories analyzed. For example, 1960s casebooks often examined divorce, "homosexuality," and nonmarital cohabitation in a negative light.<sup>93</sup> In other words, a content analysis cannot tell us what the casebook authors in this study think so much as what they think about. This study is intended to supplement the existing abundant and exemplary qualitative scholarship examining family law's canonical texts.<sup>94</sup>

The 86 casebooks chosen for this study were identified through WorldCat, a global catalog of library collections.<sup>95</sup> Using the advanced search option in WorldCat, books were selected by searching for the subject "domestic relations United States cases" that were published between 1960 and 2019.<sup>96</sup> Next, the results were refined by selecting only law casebooks intended for use in legal education, excluding e-books and microfiche, single state and region-specific books, teachers'

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91. See HOLSTI, *supra* note 89, at 17.

92. *Id.* at 16.

93. See, e.g., CALEB FOOTE ET AL., CASES AND MATERIALS ON FAMILY LAW 3 (1966) (discussing the "problem of illegitimacy"); ALBERT C. JACOBS & JULIUS GOEBEL, JR., DOMESTIC RELATIONS: CASES AND MATERIALS 268 (1961) (addressing annulment and divorce under the heading "family disorganization"); MORRIS PLOSCOWE & DORIS JONAS FREED, FAMILY LAW: CASES AND MATERIALS 153-54 (1963) (addressing homosexuality only in a section on sodomy as cruelty, adultery, or criminal activity); *id.* at 629 (addressing the lawyer's role in limiting divorce by facilitating marital reconciliation).

94. See generally HASDAY, *supra* note 24; GLENDON, *supra* note 22; Halley I, *supra* note 17; Halley II, *supra* note 21; Kessler, *New Frontiers*, *supra* note 14. For an example of vein of inquiry outside the United States, see Ayelet Blecher-Prigat & Ruth Zafran, *Evaluating 40 (and More) Years of Family Studies*, 40 TEL AVIV L. REV. 547 (2017) (in Hebrew).

95. WorldCat is a union catalog that itemizes the collections of 72,000 libraries in 170 countries and territories that participate in the Online Computer Library Center ("OCLC") global cooperative. It is operated by OCLC Online Computer Library Center, Inc. The subscribing member libraries collectively maintain WorldCat's database, the world's largest bibliographic database. See *What is WorldCat?*, WORLD CAT, <https://www.worldcat.org/whatis/default.jsp> (last visited Aug. 1, 2020).

96. Although most American casebooks discarded the designation "domestic relations" by the 1980s, WorldCat continues to classify family law books using this designation. See Appendix, *infra*.

manuals, casebook supplements, law school study aids, treatises, and continuing legal education practice books. Additionally, several books that address fields of which family law is only a small subfield, such as casebooks on poverty law and sex equality, were eliminated due to the potentially skewing nature these books would have on this study's results.<sup>97</sup> Of the remaining books, a search was conducted for editions of each casebook that may not have been captured by the initial selection method. These later editions were added to the data. The overall purpose of this selection method was to identify and include casebooks published between 1960 and 2019 developed as teaching materials for the basic introductory course in family law. Given the selection method and the relatively small number of family law casebooks published since 1960 (less than 100), this study quite literally occupies the field.<sup>98</sup> The selected books were grouped according to the decade in which they were published. Specifically, the books were broken down into six decades: 1960–1969, 1970–1979, 1980–1989, 1990–1999, 2000–2009, and 2010–2019.

The casebooks were then coded by subject by counting the pages dedicated to each designated subject, excluding blank pages and each book's preface, introduction, table of contents, table of cases, and index. The coding categories consisted of four "core" family law topics: (1) marriage;<sup>99</sup> (2) divorce;<sup>100</sup> (3) child custody;<sup>101</sup> and (4) child support;<sup>102</sup> and twelve "noncore" family law topics: (1) adoption;<sup>103</sup> (2) alternative dispute resolution;<sup>104</sup> (3) assisted reproduction;<sup>105</sup> (4) cohabitation;<sup>106</sup> (5) family violence;<sup>107</sup> (6) foster care/child welfare;<sup>108</sup> (7) juvenile

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97. Specifically, because the content of such topically-focused casebooks lie mostly outside of family law, and this study measures topical content as a percentage of the books' overall content, their inclusion could result in an inaccurate underrepresentation of the family law topics covered in these books. More generally, these books were eliminated because they are not intended for family law instruction.

98. An Appendix is included at the end of this Article with all of the casebooks included in the study.

99. Premarital agreements, procedural and substantive requirements for entering marriage (including annulment if not met), and the legal and economic consequences of an existing marriage.

100. Fault grounds for divorce, no-fault divorce, and economic consequences of divorce, including spousal support, property division, separation agreements.

101. Issues of child custody, including jurisdiction, modification, enforcement, and visitation, irrespective of parents' marital status.

102. Issues relating to child support, including jurisdiction, modification, and enforcement, irrespective of parents' marital status.

103. All issues relating to adoption.

104. Family mediation.

105. In vitro fertilization, surrogacy agreements, and legal issues related to other reproductive technologies, including parentage.

106. Common law marriage, cohabitation, contract rights, and third-party rights vis-à-vis unmarried partners.

107. Violence between spouses/domestic partners and family torts.

108. Child abuse, child neglect, infanticide, foster care issues, and children in the child welfare system.

justice;<sup>109</sup> (8) lawyers' role in family law disputes;<sup>110</sup> (9) LGBT issues;<sup>111</sup> (10) parent/child/state;<sup>112</sup> (11) race and family law;<sup>113</sup> and (12) reproductive rights.<sup>114</sup> This coding scheme by no means represents all of the potential categories covered in basic family law casebooks or courses or the only way to slice up the discipline. However, these categories provide a reasonable representation of the categories that casebook authors consider important, and they mirror the way casebooks commonly group family law topics.

## II. FINDINGS

### A. *Core vs. Noncore Family Law*

Table 1 below presents the percentage of casebook pages covering core and noncore family law topics from the 1960s through the 2010s. The percentage of casebook pages dedicated to core family law declined by approximately 16 percentage points since the 1960s, with a corresponding increase in casebook pages dedicated to noncore family law issues. Whereas core family law (marriage, divorce, child support, and child custody) constituted almost 75% of casebook pages in the 1960s, by the 2010s these topics constituted just under 60% of casebook pages. Of note, since the 1980s, the percentage of casebook pages dedicated to core family law has remained relatively stable in the range of 55% to 60%. A graph depicting the trend in casebook content dedicated to core family law in the six decades from the 1960s to the 2010s is represented in Figure 1.

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109. Children in the criminal justice system.

110. Professional responsibility issues, including those relating to dual representation and billing.

111. Same-sex cohabitation and marriage; cases involving custody disputes, adoption, and foster care by gay parents.

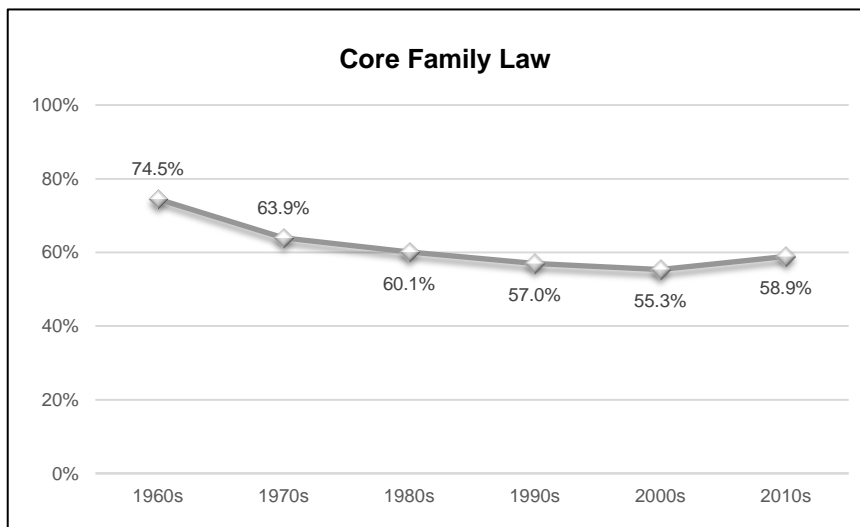
112. The constitutional dimensions of the parent/child relationship; parentage, including nonmarital fathers' rights; children's constitutional rights

113. Interracial marriage, interracial adoption, race and custody, and racial bias in child welfare hearings.

114. Abortion and contraception. Importantly, the 12 noncore family law topics were counted in multiple noncore categories where appropriate—for example, interracial adoption would be included in both the “adoption” and “race and family law” categories. However, there was no overlap in the coding of the four core family law topics. For example, a legal decision involving both child custody and child support would be placed in one or the other category, depending on where in the casebook the author placed the case and an assessment of the bulk of the substantive content of the decision. The purpose of this approach was to ensure an accurate measure of core family law topics (defined as marriage, divorce, child custody, and child support) as a proportion of casebook coverage, compared with noncore topics (everything else).

**Table 1. Percentage of casebook pages covering core and noncore family law topics, by decade, 1960s to 2010s**

Year	Core Family Law	Non-Core Family Law
1960s	74.5%	25.5%
1970s	63.9%	36.1%
1980s	60.1%	39.9%
1990s	57.0%	43.0%
2000s	55.3%	44.7%
2010s	58.9%	41.1%



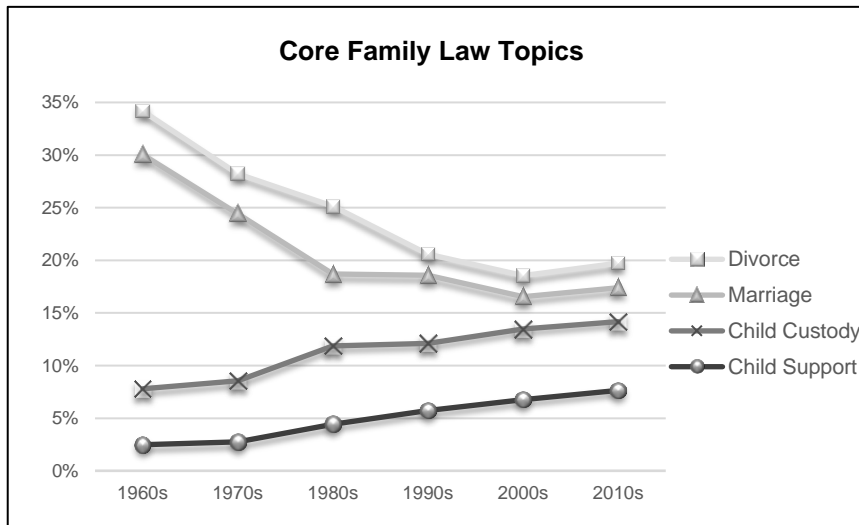
**Figure 1. Percentage of casebook pages covering core family law topics (marriage, divorce, child custody, and child support), by decade, 1960s to 2010s**

### ***B. Changes in the Coverage of Core Family Law Topics***

As illustrated in Table 2, below, in looking at each of the specific topics that make up the core of family law (marriage, divorce, child custody, child support) over the six decades from the 1960s to the 2010s, the percentage of casebook pages dedicated to marriage and divorce decreased, while pages dedicated to child custody and child support increased. The percentage of casebook pages dedicated to marriage and divorce almost halved. Child custody's share of pages nearly doubled, and child support's share of pages more than tripled. Despite the decrease over time, divorce consistently represents the greatest proportion of pages in the family law casebooks sampled. Figure 2, below, shows the overall trends in coverage of core family law topics from the 1960s to the 2010s.

**Table 2. Casebook coverage of core family law topics, by decade, 1960s to 2010s**

Year	Marriage	Divorce	Child Custody	Child Support
1960s	30.0%	34.2%	7.8%	2.5%
1970s	24.4%	28.2%	8.6%	2.7%
1980s	18.7%	25.1%	11.9%	4.4%
1990s	18.6%	20.6%	12.1%	5.7%
2000s	16.6%	18.5%	13.5%	6.8%
2010s	17.4%	19.7%	14.2%	7.6%



**Figure 2. Casebook coverage of core family law topics, by decade, 1960s to 2010s**



Table 3 shows the percentage change in each core family law topic from the decade preceding it. For example, the percentage of pages dedicated to marriage and divorce decreased by 42.0% and 42.3%, respectively, from the 1960s to the 2010s. During that same period, the percentage of pages dedicated to child custody and child support increased by 81.9% and 208.8%, respectively.

**Table 3. Percentage change in casebook coverage of core family law topics, by decade, 1960s to 2010s**

Change from prior decade	Marriage	Divorce	Child Custody	Child Support
1960s – 1970s	- 18.7%	- 17.5%	9.9%	10.8%
1970s – 1980s	- 23.5%	- 10.9%	38.7%	62.0%
1980s – 1990s	- 0.6%	- 18.1%	2.0%	29.4%
1990s – 2000s	- 10.8%	- 10.0%	11.2%	18.0%
2000s – 2010s	5.2%	6.4%	5.2%	12.6%
Total % change 1960s – 2010s	- 42.0%	- 42.3%	81.9%	208.8%

It is also useful to look at each core topic individually.

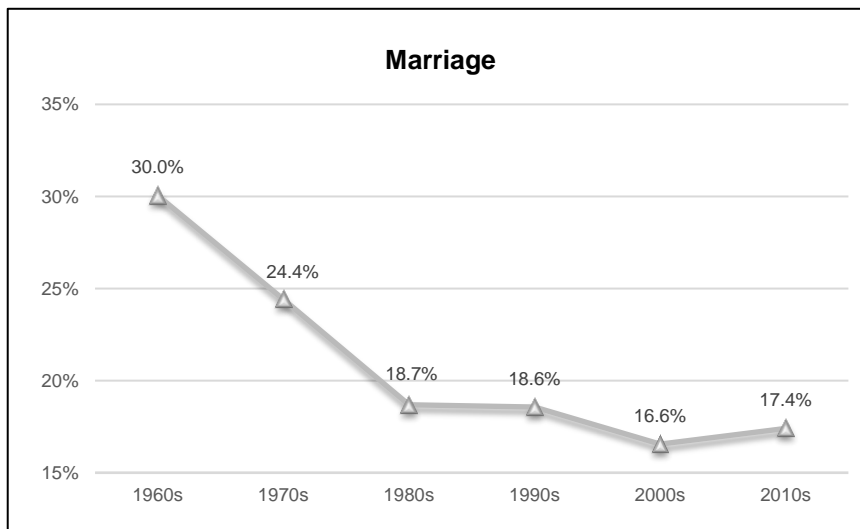
### 1. Marriage

As Table 4 below illustrates, after the 1960s, the percentage of the casebook pages dedicated to marriage decreased each decade until the 2010s, when it increased slightly. This uptick could be due to the acceleration of court decisions addressing marriage equality for same-sex couples from 2000 to 2019.<sup>115</sup> Overall, the percentage of pages in the casebooks covering marriage decreased by almost half from the 1960s to the 2010s. A graph depicting these trends is represented in Figure 3, below.

115. In chronological order, some of these decisions are: *Lawrence v. Texas*, 539 U.S. 558 (2003); *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941 (Mass. 2003); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Hollingsworth v. Perry*, 570 U.S. 693 (2013); *United States v. Windsor*, 570 U.S. 744, 772 (2013); *Obergefell v. Hodges*, 576 U.S. 644 (2015). The exceptions are two important same-sex marriage cases decided in the 1990s. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Baker v. State*, 744 A.2d 864 (Vt. 1999). Because authors and publishers typically release updated editions of casebooks every three to five years, one would expect a delay before these cases made their way into family law casebooks.

**Table 4. Percentage of casebook pages covering marriage, by decade, 1960s to 2010s**

Year	Marriage
1960s	30.0%
1970s	24.4%
1980s	18.7%
1990s	18.6%
2000s	16.6%
2010s	17.4%



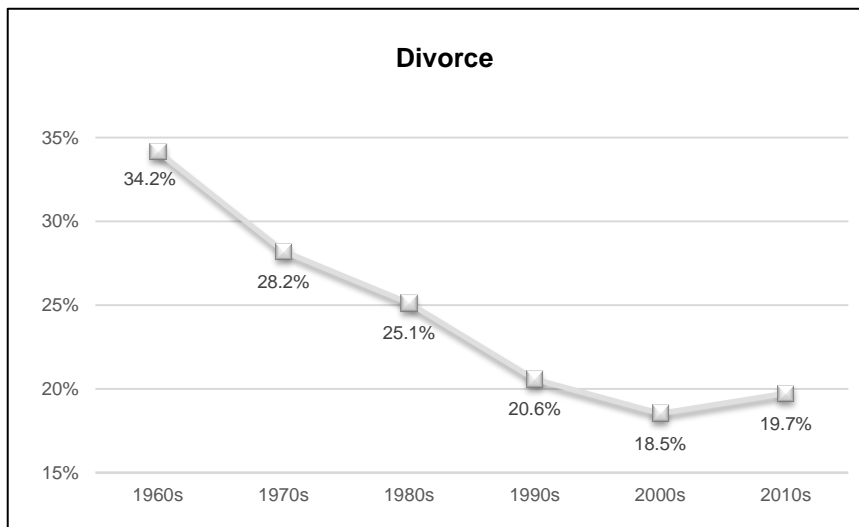
**Figure 3. Percentage of casebook pages covering marriage, by decade, 1960s to 2010s**

## 2. Divorce

Table 5 shows that since the 1960s, the percentage of casebook pages dedicated to divorce decreased each decade until the 2010s, when there was a slight uptick. Overall, the percentage of pages dedicated to divorce decreased by almost half from the 1960s to the 2010s. A graph depicting this decreasing trend in divorce coverage in family law casebooks is represented in Figure 4.

**Table 5. Percentage of casebook pages covering divorce, by decade, 1960s to 2010s**

Year	Divorce
1960s	34.2%
1970s	28.2%
1980s	25.1%
1990s	20.6%
2000s	18.5%
2010s	19.7%



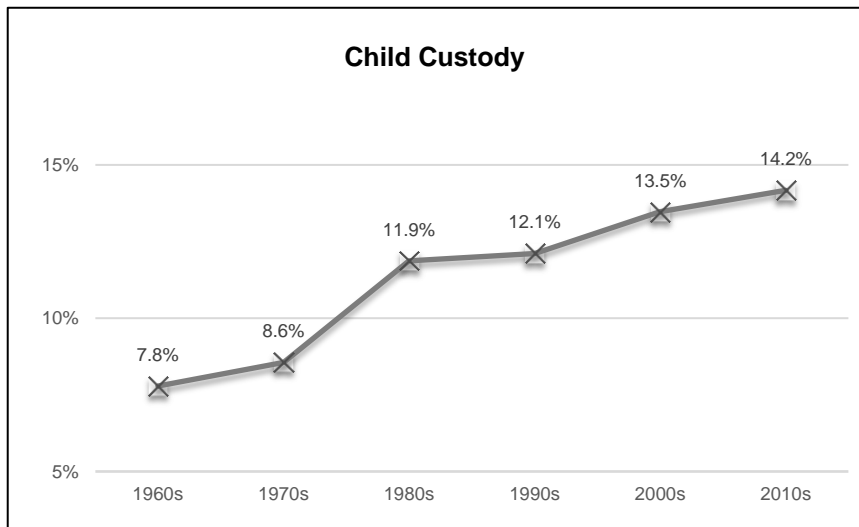
**Figure 4. Percentage of casebook pages covering divorce, by decade, 1960s to 2010s**

### 3. Child Custody

Table 6 below shows that the percentage of casebook pages dedicated to child custody has generally increased since the 1960s. Although child custody represents a small portion of the casebook pages in this study (ranging from 8% to 14%), the coverage nearly doubled from the 1960s to the 2010s. The upward trend in casebook coverage of child custody is represented graphically in Figure 5.

**Table 6. Percentage of casebook pages covering child custody, by decade, 1960s to 2010s**

Year	Child Custody
1960s	7.8%
1970s	8.6%
1980s	11.9%
1990s	12.1%
2000s	13.5%
2010s	14.2%



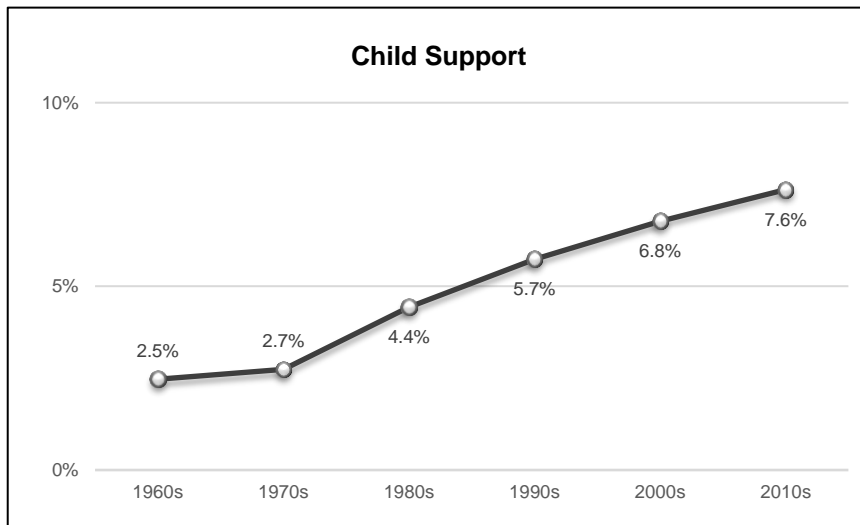
**Figure 5. Percentage of casebook pages covering child custody, by decade, 1960s to 2010s**

#### 4. Child Support

The percentage of casebook pages dedicated to child support also increased since the 1960s, indeed dramatically, more than tripling from the 1960s to the 2010s, as set forth in Table 7 below. Like child custody, child support represents a very small share of the analyzed casebooks, constituting just 2%–8% over the past 60 years. The clear upward trend in casebook pages dedicated to child support is illustrated graphically in Figure 6.

**Table 7. Percentage of casebook pages covering child support, by decade, 1960s to 2010s**

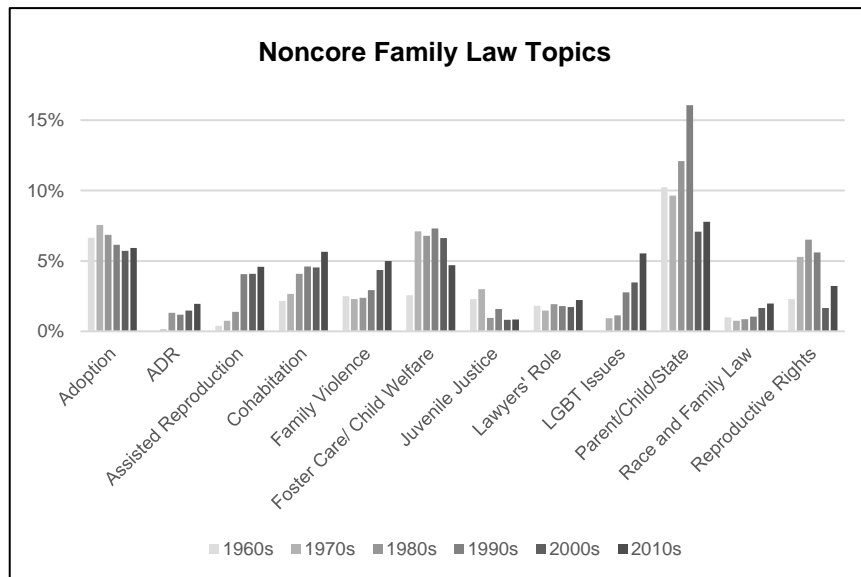
Year	Child Support
1960s	2.5%
1970s	2.7%
1980s	4.4%
1990s	5.7%
2000s	6.8%
2010s	7.6%



**Figure 6. Percentage of casebook pages covering child support, by decade, 1960s to 2010s**

### C. Changes in the Coverage of Noncore Family Law Topics

With regard to noncore topics, there are some clear trends. A substantial increase in coverage can be found in alternative dispute resolution, assisted reproduction, cohabitation, family violence, LGBT issues, and race and family law. In contrast, coverage of child welfare, juvenile justice, “parent, child, and the state,” and reproductive rights have trended downwards, at least since the 1980s or 1990s. Evidence suggests that these decreases may have occurred because these topics now receive enough attention to merit their own casebooks and courses.<sup>116</sup>



**Figure 7. Percentage of casebook pages covering noncore family law topics, by decade, 1960s to 2010s**

### III. DISCUSSION

The findings described above do not reveal why casebook authors decided to include certain topics or exclude others, or why they dedicated more content to some topics than others. Nor do the findings directly measure how lawyers or judges understand the field and define family law. However, the findings do reveal the topics that family law casebooks have addressed over the past 60 years and shifts in topical coverage during this period.<sup>117</sup> The findings also shed some light on the

116. See, e.g., BARRY C. FELD & PERRY L. MORIEARTY, CASES AND MATERIALS ON JUVENILE JUSTICE ADMINISTRATION (5th ed. 2018); LESLIE J. HARRIS & LEE E. TEITELBAUM, CHILDREN, PARENTS, AND THE LAW: PUBLIC AND PRIVATE AUTHORITY IN THE HOME, SCHOOLS, AND JUVENILE COURTS (4th ed. 2020); ROBERT H. MNOOKIN & D. KELLY WEISBERG, CHILD, FAMILY, AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW (7th ed. 2014); MELISSA MURRAY & KRISTIN LUKER, CASES ON REPRODUCTIVE RIGHTS AND JUSTICE (2015).

117. See *supra* Part II.

bigger questions animating this study: how has the discipline of family law evolved (or not evolved) over the past half-century, where might it be headed, and what is the continued significance of marriage in the field?

The results demonstrate that, first, the core of the academic field of family law has remained relatively stable in the past 60 years. Marriage, divorce, child custody, and child support continue to dominate the topics presented in family law casebooks, with these topics constituting approximately 55% to 75% of their content.<sup>118</sup> At the same time, there has been a discernible shift in priorities within family law's core. Topical coverage of marriage and divorce in family law casebooks has decreased since the 1960s, each by about 40%.<sup>119</sup> In contrast, pages dedicated to child custody and child support have increased, together more than doubling their share.<sup>120</sup> That is, although marriage and divorce, as a whole, still receive the majority of attention as a percentage of casebook coverage, legal questions concerning children have partially replaced marriage and divorce.<sup>121</sup>

The findings of this study are also notable for what is “not” family law. My earlier research hypothesizing that noncore topics and nonmarital relationships may eventually overtake the field, resulting in an expansion of the discipline into a more capacious field conceptualized as “the Law of Intimacy,” is unconfirmed by this study.<sup>122</sup> Together, family law concerns such as cohabitation, assisted reproduction, race and the family, and reproductive rights remain the minority of family law casebook coverage, hovering around 40% since the 1980s, and there does not appear to be any disruption in the balance between core family law (marriage, divorce, child custody, and child support) and noncore family law topics (everything else) in the past 40 years. In sum, while this study finds a substantial increase in relative coverage of the parent/child relationship and a corresponding decrease in the relative coverage of marriage and divorce in family law casebooks published from 1960 to 2019, the outer boundaries of the discipline of family law appear to be quite

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118. See *supra* Table 1 and Figure 1.

119. See *supra* Table 2, Table 3, and Figure 2.

120. See *supra* Table 2, Table 3, and Figure 2.

121. In these trends, one can see the influence and prescience of experts, such as Martha Fineman. Twenty-five years ago, in her pathbreaking book, *The Neutered Mother*, Fineman called on policymakers and academic experts to examine what adjustments are necessary to help new forms of family, many of which are raising children, meet their responsibilities. See FINEMAN, *supra* note 13, at 7–8. She argued that it was time for policymakers to refocus their attention and energy on the caretaker-dependent relationship. *Id.* at 9. As she explained, the gender revolution in marriage had been actualized or at least reached its limits, and therefore, marriage no longer justified the intense attention given by policymakers and legal thinkers. *Id.* at 7. Moreover, the view of marriage as the cure for all social ills, she argued, hides the ugly reality of marriage's inherently exclusionary nature, as well as the larger social and economic forces that are destructive to families and children within families. See *id.* at 5. In light of this analysis, she argued that the state must also bear some responsibility for the well-being of children and stop blaming nonnuclear families for economic forces beyond their control and the insufficient scope of government safeguards from poverty. See *id.* at 106–42, 213–17.

122. See Kessler, *New Frontiers*, *supra* note 14, at 239–40.

stubborn. In this Part, I discuss the implications of these findings for legal education, law school curricula, and the ideology of the family.

**A. Implications for Legal Education and Law School Curricula**

Family law experts note that the last two decades have seen substantial changes in the practice of family law, yet “law school curricula and teaching have remained relatively static.”<sup>123</sup> Accordingly, family law education reformers have called on law schools to update their curricula to ensure lawyers are prepared to address the many issues and contexts encountered by today’s family lawyers. Among other recommendations, it is urged that family law curricula must (1) include more interdisciplinary instruction on topics such as family systems theory, child psychology, and family violence;<sup>124</sup> (2) emphasize a broad range of skills, including listening, counseling, communicating, and managing;<sup>125</sup> (3) provide instruction on the role and methodologies of alternative dispute resolution, which has widely displaced traditional litigation in family courts;<sup>126</sup> and (4) address professional ethics, including lawyers’ conduct as it relates to clients<sup>127</sup> and nonlawyer professionals.<sup>128</sup> Finally, educational reformers argue that (5) the family law curriculum would better prepare lawyers for the realities of contemporary practice if family law courses exposed law students to a broader range of topics, especially those influencing the economics of the family, such as tax, contracts, retirement benefits, real estate, and health insurance continuation (COBRA).<sup>129</sup>

The findings of this study suggest that family law casebooks may constitute a barrier to this larger reform agenda. Family law casebooks continue to focus on marriage, divorce, child custody, and child support to the exclusion of the multitude of other fields of law that impact family relationships and the economics of the family. For example, this study finds that professional ethics and alternative dispute resolution are only a marginal aspect casebook content, with professional ethics

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123. Mary E. O’Connell & J. Herbie DiFonzo, *The Family Law Education Reform Project Final Report*, 44 FAM. CT. REV. 524, 524–25 (2006).

124. *Id.* at 525.

125. *Id.* at 547.

126. *Id.*

127. *Id.* Some of the ethical questions unique to family law practice, for example, are: How should lawyers meet their ethical obligations to their clients in the nonadversary context in which family law conflicts are often resolved? How can lawyers vigorously advocate for clients without increasing conflict between the parties? *Id.* at 540. The call for increased training and focus on professional ethics in family law education is consistent with broader legal education reform initiatives. See AM. BAR ASS’N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 4–5, 138–40 (1992) (identifying “recognizing and resolving ethical dilemmas” as one of the ten essential lawyering skills on which law schools must focus).

128. See O’Connell & DiFonzo, *supra* note 123, at 540, 566 n.122.

129. *Id.* at 122. “COBRA” is the Consolidated Omnibus Budget Reconciliation Act. This law is the vehicle for the continuation of health insurance when an insured person’s link to a providing employer is severed, including by divorce. See 29 U.S.C. §§ 1161–1169 (2018).



(“lawyers role”) making up just 2.2% of the content of casebooks published in the last decade and alternative dispute resolution 1.9% in the same period.<sup>130</sup>

Although this study did not analyze casebooks for topics related to skills or skills content, a qualitative examination of the content of the 86 casebooks studied reveals that most of the pages are devoted to case material or statutes, with the vast bulk of those pages consisting of case law. It is widely acknowledged that the case method,<sup>131</sup> cherished by generations of law professors and ingrained in our teaching texts, provides a distorted understanding of the nature of the practice of law.<sup>132</sup> While there is no doubt that discerning, synthesizing, and applying legal rules are essential skills to the competent practice of law, they represent only a small fraction of those that lawyers need, especially family lawyers who spend only a small part of their time in litigation.<sup>133</sup>

To be sure, anecdotal evidence suggests that most family law professors supplement their casebook reading assignments with outside materials, such as problems, social science studies, news articles, law review articles, and statutes.<sup>134</sup> Certainly, today, there exists a breadth of materials that teachers can draw on so that their courses incorporate alternative topics and competencies. For example, many casebooks now include companion websites or teachers’ manuals with simulation problems that family law professors can incorporate into the basic family law course.<sup>135</sup> Moreover, the Family Law Education Reform Project, a joint project of the Association of Family and Conciliation Courts, Hofstra Law School, and the William Mitchell College of Law, has developed simulation exercises for family law teachers that assist educators in ensuring that their courses prepare students for the modern practice of family law.<sup>136</sup> Scholarly communities of professors who teach

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130. See *supra* Figure 7.

131. The case method is a pedagogical method for teaching law. It was invented by Christopher Columbus Langdell, who served as the Dean of Harvard Law School from 1870 to 1895. See *The Case Study Teaching Method*, HARV. L. SCH., <https://casestudies.law.harvard.edu/the-case-study-teaching-method/#:~:text=The%20case%20method%20in%20legal,that%20furthered%20principles%20or%20doctrines> (last visited Aug. 25, 2020). Langdell’s case method systematized and simplified legal education by focusing on case law that furthered principles or doctrines. *Id.* Langdell wrote the first casebook, entitled *A Selection of Cases on the Law of Contracts*, a collection of settled cases that, in his view, illuminated the then-current state of contract law. *Id.* Students were required to read the cases and come to class prepared to analyze them in a Socratic question-and-answer session in class. *Id.*

132. See THE CARNEGIE REPORT, *supra* note 67, at 60, 186–88; Todd Rakoff & Martha Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597, 600–02 (2007).

133. See O’Connell & DiFonzo, *supra* note 123, at 528, 559 n.19.

134. This Author, for example, incorporates extensive supplemental materials on domestic violence, alternative dispute resolution, working with custody experts, and professional ethics.

135. See, e.g., *Casebook Companion: Abrams, Cahn, Ross, and McClain’s Contemporary Family Law, 5th Edition*, WEST ACAD. PUBL’G, <http://www.abrams-familylaw.com/> (last visited Oct. 30, 2020).

136. See *Welcome to the Family Law Education Reform (FLER) Project Website*, FAM. L. EDUC. REFORM PROJECT, <https://www.flerproject.org/> (last visited Sept. 5, 2020).

and write in family law also serve as a resource for sharing problems, pedagogical innovations, and materials.<sup>137</sup>

Nevertheless, casebooks create a strong pull for law teachers, who have many demands, not the least of which is research, which receives priority in most institutions. It is understandable, then, that casebooks serve as the bread and butter of teaching materials in the core law school curriculum, given the natural efficiencies casebooks afford, the absence of institutional incentives to undertake the work of continually supplementing casebooks, and the time-intensive nature of skills training. Moreover, even if a professor supplements the casebook, which is quite common, casebooks send a strong implicit message about what is important, since they represent the “official” version of the field. As compared to a published book, a professor’s supplemental materials or exercises may be perceived by students as less authoritative or important. As such, family law casebooks are highly influential in socializing lawyers into the field of family law.

The content analysis undertaken in this study suggests that family law casebooks, by focusing primarily on core family law topics, present an incomplete picture of the many domains of law that regulate families, such as business, employment, tax, health, immigration, and government benefits law. They also paint an incomplete and distorted picture of the nature of the practice of family law by focusing primarily on the adversarial dispute process of litigation rather than counseling, problem solving, and alternative dispute resolution.

It is worth pausing to consider what has caused this state of affairs. One obvious contributing factor, perhaps the tail wagging the dog, is the bar exam. The majority of jurisdictions in the United States, including 36 states, the District of Columbia, and the Virgin Islands, have adopted the Uniform Bar Exam (“UBE”).<sup>138</sup> The UBE offers law students licensing flexibility in an increasingly transnational legal market by providing a standardized, portable bar test score.<sup>139</sup> The National Conference of Bar Examiners (“NCBE”),<sup>140</sup> developed the UBE with the goal that

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137. For example, the annual Family Law Scholars and Teachers Conference traditionally includes a plenary panel on family law pedagogy. The session provides family law teachers the opportunity to share instructional strategies that they have used in their classrooms and share simulation exercises, group-based work, visuals, or any other strategies that they use to help their students learn. *See, e.g.*, Announcement, Thirteenth Annual Family Law Scholars and Teachers (FLST) Conference, Brooklyn Law School, June 16, 2020 (on file with author).

138. *See Jurisdictions that Have Adopted the UBE*, NCBE, <http://www.ncbex.org/exams/ube/> (last visited Feb. 24, 2020). Additionally, although not UBE states for reciprocity purposes, three states—Hawaii, Mississippi, and South Dakota—administer all four parts of the UBE. *See Preparing for the Bar Exam: HI*, REGENT U. L. LIBR. (July 30, 2020), <https://libguides.regent.edu/barexam/HI>; *Preparing for the Bar Exam: MS*, REGENT U. L. LIBR. (July 30, 2020), <https://libguides.regent.edu/barexam/MS>; *Preparing for the Bar Exam: SD*, REGENT U. L. LIBR. (July 30, 2020), <https://libguides.regent.edu/barexam/SD>.

139. *See* Jonathan Lippman, *Embracing the Uniform Bar Exam in New York: Toward A More Rational Bar Admissions Process Promoting Essential Lawyer Mobility*, 23 PROF. LAW. 8, 9 (2016).

140. The NCBE is a nonprofit, initially founded in 1931, to improve legal testing across the country. *Id.*

all jurisdictions will implement the test, resulting in one nationwide, portable bar exam.<sup>141</sup>

The UBE consists of three parts: the Multistate Bar Examination (“MBE”),<sup>142</sup> Multistate Essay Exam (“MEE”),<sup>143</sup> and Multistate Performance Test (“MPT”).<sup>144</sup> The MEE is the portion of the UBE that covers family law,<sup>145</sup> with family law representing one of 12 possible subject areas tested by essay.<sup>146</sup> The NCBE provides an outline of family law topics that states may test on the MEE, including “getting married,” “being married,” “separation,” “divorce,” “dissolution and annulment,” “child custody,” the “rights of unmarried cohabitants,” “adoption and alternatives to adoption,” and “parent, child, and state.”<sup>147</sup> Surveying past exams and materials from commercial bar review companies reveals the MEE most commonly tests core family law topics as defined in this study, i.e., marriage, divorce, child custody, and child support.<sup>148</sup>

Indeed, an analysis of MEE exams administered from February 2008 to February 2000 reveals that almost all of the family law questions fall within the

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141. *Id.* The UBE was first implemented in February 2011, when North Dakota and Missouri became the first two states to administer the test. *See* James Podgers, *One for All the Uniform Bar Exam Is Picking Up Steam*, 96 A.B.A. J. 56, 56–57 (2010). The National Conference of Bar Examiners (NCBE) created the UBE as an extension of its work on the MBE, MEE, and MPT, the three sections of the UBE that many states already used. Dennis R. Honabach, *To UBE or Not to UBE: Reconsidering the Uniform Bar Exam*, 22 PROF. LAW. 43, 47 (2014).

142. The MBE is a 200-question, multiple-choice exam that covers seven key areas of law: civil procedure, constitutional law, contracts, criminal law and procedure, evidence, real property, and torts. *Preparing for the MBE*, NCBE, <https://www.ncbex.org/exams/mbe/preparing/> (last visited Oct. 9, 2020).

143. The MEE includes six essay questions and rotates subject areas. *Preparing for the MEE*, NCBE, <https://www.ncbex.org/exams/mee/preparing/> (last visited Oct. 9, 2020).

144. The MPT is an exam simulating the application of law, where students are given a case file and must perform practical research and writing assignments. *Preparing for the MPT*, NCBE, <https://www.ncbex.org/exams/mpt/preparing/> (last visited Oct. 9, 2020).

145. *See* NCBE, 2020 MEE SUBJECT MATTER OUTLINE 7–8 (2019), <https://www.ncbex.org/pdfviewer/?file=%2Fdocsdocument%2F227> [hereinafter NCBE, 2020 MEE SUBJECT MATTER OUTLINE].

146. *Id.* Specifically, in addition to the topics examined in the MBE, the MEE also covers business law, commercial law, conflicts of law, estates and probate law, and family law. *Id.* Because the MEE rotates subject areas, some years, family law is not included on the UBE at all. *Id.* For example, neither the February nor the July 2015 MEE exams included family law questions. *See February 2015 MEE Sample Questions*, NCBE, <https://www.ble.mn.gov/wp-content/uploads/2016/02/Representative-Good-Answers-Feb-2015.pdf>; *July 2015 MEE Sample Questions*, NCBE, <https://www.ble.mn.gov/wp-content/uploads/2016/02/Representative-Good-Answers-July-2015.pdf>.

147. NCBE, 2020 MEE SUBJECT MATTER OUTLINE, *supra* note 145, at 7–8.

148. *See Family Law on the Multistate Essay Exam: Highly Tested Topics and Tips*, J.D. ADVISING, <https://www.jdadvising.com/family-law-on-the-multistate-essay-exam-highly-tested-topics-and-tips/> (last visited Sept. 26, 2019) (identifying child custody and support, property division, and spousal support as the most frequently tested subjects); Dawne Ducarpe, *Bar Review: Family Law*, MAGOOSH, (July 12, 2017), <https://magoosh.com/bar-exam/bar-review-family-law/> (identifying economic issues, marital termination, and matters relating to children as the most frequently tested subjects).

general subject areas of marriage, divorce, child custody, and child support. Specifically, 15 of the 25 MEE exams administered in this period tested family law.<sup>149</sup> The most commonly tested topics were child custody (tested 9 times),<sup>150</sup> marital property (tested 8 times),<sup>151</sup> child support (tested 5 times),<sup>152</sup> spousal support (tested 4 times),<sup>153</sup> child custody jurisdiction (tested 4 times),<sup>154</sup> premarital agreements (tested 4 times),<sup>155</sup> and family privacy (tested 3 times).<sup>156</sup> Occasionally, common law marriage,<sup>157</sup> modification of settlement agreements,<sup>158</sup> adoption,<sup>159</sup>

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149. The NCBE posts five years of previously administered MEE questions on its website, adding new questions and deleting older questions on a rolling basis. *See Preparing for the MEE*, *supra* note 143 (posting questions from July 2015 to February 2015). This analysis is based on the MEE exams presently posted, *see id.*, as well as earlier MEE exams previously posted by the NCBE and subsequent MEE exams posted on various state bar websites. All exams discussed in this analysis are on file with the author.

150. *July 2008 MEE Questions and Analyses*, NCBE (on file with author) [hereinafter July 2008 MEE]; *February 2009 MEE Questions and Analyses*, NCBE (on file with author) [hereinafter Feb. 2009 MEE]; *July 2009 MEE Questions and Analyses*, NCBE (on file with author) [hereinafter July 2009 MEE]; *July 2011 MEE Questions and Analyses*, NCBE (on file with author) [hereinafter July 2011 MEE]; *July 2012 MEE Questions and Analyses*, NCBE (on file with author) [hereinafter July 2012 MEE]; *July 2013 MEE Questions and Analyses*, NCBE (on file with author) [hereinafter July 2013 MEE]; *February 2017 MEE & MPT Questions*, N.Y. ST. BAR EXAM (containing NCBE February 2017 MEE Questions) (on file with author) [hereinafter Feb. 2017 MEE]; *February 2018 MEE & MPT Questions*, N.Y. ST. BAR EXAM (containing NCBE February 2018 MEE Questions) (on file with author) [hereinafter Feb. 2018 MEE]; *July 2019 MEE & MPT Questions*, N.Y. ST. BAR EXAM (containing NCBE July 2019 MEE Questions) (on file with author) [hereinafter July 2019 MEE].

151. *July 2008 MEE*, *supra* note 150; *February 2010 MEE Questions and Analyses*, NCBE (on file with author) [hereinafter Feb. 2010 MEE]; *July 2010 MEE Questions and Analyses*, NCBE (on file with author) [hereinafter July 2010 MEE]; *February 2011 MEE Questions and Analyses*, NCBE (on file with author) [hereinafter Feb. 2011 MEE]; *July 2014 MEE Questions and Analyses*, NCBE (on file with author) [hereinafter July 2014 MEE]; *February 2016 MEE Questions & Best Answers*, AR. BAR EXAM (containing NCBE February 2016 MEE Questions) (on file with author) [hereinafter Feb. 2016 MEE]; Feb. 2017 MEE, *supra* note 150; Feb. 2018 MEE, *supra* note 150.

152. *February 2008 MEE Questions and Analyses*, NCBE (on file with author) [hereinafter Feb. 2008 MEE]; Feb. 2009 MEE, *supra* note 150; July 2009 MEE, *supra* note 150; Feb. 2011 MEE, *supra* note 151; July 2013 MEE, *supra* note 150; July 2014 MEE, *supra* note 151.

153. *See* Feb. 2010 MEE, *supra* note 151; July 2010 MEE, *supra* note 151; Feb. 2011 MEE, *supra* note 151; July 2019 MEE, *supra* note 150.

154. July 2009 MEE, *supra* note 150; July 2011 MEE, *supra* note 150; July 2012 MEE, *supra* note 150; July 2019 MEE, *supra* note 150.

155. July 2008 MEE, *supra* note 150; July 2010 MEE, *supra* note 151; Feb. 2016 MEE, *supra* note 151; Feb. 2018 MEE, *supra* note 150.

156. July 2012 MEE, *supra* note 150; July 2013 MEE, *supra* note 150; July 2019 MEE, *supra* note 150.

157. July 2011 MEE, *supra* note 150; Feb. 2017 MEE, *supra* note 150.

158. Feb. 2010 MEE, *supra* note 151; Feb. 2011 MEE, *supra* note 151.

159. Feb. 2008 MEE, *supra* note 152; July 2011 MEE, *supra* note 150.

divorce jurisdiction,<sup>160</sup> child welfare,<sup>161</sup> and paternity<sup>162</sup> have also been tested, but (except for common law marriage) not recently. Additionally, 12 states and the Virgin Islands add a local component to the UBE, typically in the form of a short, low-stakes, online course<sup>163</sup> or an open-book exam.<sup>164</sup> These courses and open-book exams include some local elements of family law.<sup>165</sup> Like the MEE, they generally focus on marriage, divorce, and child custody.

Sixteen states and Puerto Rico substitute or supplement the MEE with a state-created essay question. Of these jurisdictions, most (11) test family law,<sup>166</sup> a

160. July 2014 MEE, *supra* note 151.

161. July 2013 MEE, *supra* note 150.

162. Feb. 2011 MEE, *supra* note 151.

163. Maryland, Massachusetts, Missouri, New York, Washington, and the Virgin Islands require bar applicants to review outlines on local laws and pass an open-book exam online. *Maryland Law Component*, STATE BD. L. EXAM'RS, <https://www.courts.state.md.us/ble/mdlawcomponent> (last visited Feb. 27, 2020); *The Massachusetts Law Component (MLC)*, BD. BAR EXAM'RS, <https://www.mass.gov/how-to/the-massachusetts-law-component-mlc> (last visited Feb. 27, 2020); *Missouri Educational Component*, MO. BD. L. EXAM'RS, <https://www.courts.mo.gov/page.jsp?id=325> (last visited Feb. 27, 2020); *NYLC & NYLE Course Materials & Sample Questions*, N.Y. STATE BD. L. EXAM'RS, <https://www.nybarexam.org/Content/CourseMaterials.htm> (last visited Feb. 27, 2020); *Washington Law Component Test*, WASH. STATE BAR ASS'N, <http://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/washington-law-component> (last visited Feb. 27, 2020); *Virgin Islands Law Component (VILC)*, JUD. BRANCH U.S. V.I., [https://www.vicourts.org/professional\\_regulation/bar\\_admission/virgin\\_islands\\_law\\_component](https://www.vicourts.org/professional_regulation/bar_admission/virgin_islands_law_component) (last visited Feb. 27, 2020).

164. Specifically, Alabama, Arizona, Montana, New Mexico, North Carolina, South Carolina, and Tennessee all require bar applicants to complete a short course on state laws, including state-specific family law. *See Frequently Asked Questions*, ALA. ST. BAR ADMISSIONS OFF., <https://admissions.alabar.org/faq> (last visited Feb. 27, 2020); *Arizona Law Course Online Registration*, ARIZ. JUD. BRANCH, <https://www.azcourts.gov/educationservices/Committees/JCA/Online-Registration> (last visited Feb. 27, 2020); *Admissions Information*, ST. BAR MONT., <https://www.montanabar.org/page/AdmissionInfo> (last visited Feb. 27, 2020); *Application by Bar Exam*, N.M. BD. BAR EXAM'RS, <http://www.nmexam.org/bar-exam/take-the-bar-exam/process-forms-deadlines/> (last visited Feb. 27, 2020); *Course Instructions*, BD. L. EXAM'RS ST. N.C., <https://www.ncble.org/nc-state-specific-component-course-instructions> (last visited Sept. 19, 2019); S.C. CT. R. 402(c)(8), <https://www.sccourts.org/courtReg/displayRule.cfm?ruleID=402.0&subRuleID=&ruleType=APP> (requiring successful completion of a course on South Carolina law); TENN. BD. L. EXAM'RS, [https://www.tnble.org/?page\\_id=57](https://www.tnble.org/?page_id=57) (last visited Feb. 27, 2020).

165. *See, e.g., Maryland Law Component Subject Matter Outlines*, MD. L. COMPONENT SUB-COMMITTEE, <https://www.mdcourts.gov/sites/default/files/import/ble/pdfs/mlcoutlineube.pdf> (last visited Feb. 28, 2020) (including topics of marriage, divorce, annulments, custody, child support, use and possession, division of property, alimony, and adoption); *The Massachusetts Law Component (MLC)*, *supra* note 164 (including domestic relations as topic on test); *Arizona Law Course Online Registration*, *supra* note 164 (online course includes module on family law).

166. Specifically, California, Florida, Georgia, Indiana, Louisiana, Michigan, Nevada, Oklahoma, Pennsylvania, and Virginia give an independent, state-created essay

few extensively.<sup>167</sup> These non-UBE states test primarily on the same topics as the UBE. For example, recent state-created essay exams have most commonly tested

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exam that includes family law; Wisconsin uses a combination of locally drafted and MEE essay questions. *See Scope of the California Bar Exam*, ST. BAR CAL., <http://www.calbar.ca.gov/Admissions/Examinations/California-Bar-Examination/California-Bar-Examination-Scope> (last visited Oct. 15, 2020) (indicating that community property, i.e., the economic aspects of the marital relationship, is tested on the bar); *Exam Information, Test Specifications, Study Guide, and Virtual Tour*, FL. BD. BAR EXAM'RS (Aug. 28, 2020), <https://www.floridabarexam.org/web/website.nsf/52286AE9AD5D845185257C07005C3FE1/125BA5AFD5EB7D2385257C0B0067E748>; SUP. CT. OF GA., RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW 10 (2018), <https://www.gabaradmissions.org/rules-governing-admission>; *Overview of the Indiana Bar Exam*, IND. JUD. BRANCH, <https://www.in.gov/judiciary/ace/2529.htm> (last visited Sept. 28, 2019); *The Bar Exam*, LA. SUP. CT. COMM. ON BAR ADMISSIONS, <https://www.lascba.org/BarExam/Default.aspx?tab=subjects> (last visited Sept. 28, 2019); MICH. BD. L. EXAM'RS, FULL LIST OF FREQUENTLY ASKED QUESTIONS 6 (Feb. 5, 2020), <https://courts.michigan.gov/Courts/MichiganSupremeCourt/BLE/Documents/BLE-FAQs.pdf>; *Bar Exam Subjects and Test Format*, ST. BAR NEV., <https://www.nvbar.org/for-lawyers/admissions/bar-exam/exam-subjects-and-test-format/> (last visited Sept. 28, 2019); *Frequently Asked Questions*, OKLA. BD. BAR EXAM'RS, <http://www.okbbe.com/FAQ/default.aspx> (last visited Feb. 27, 2020); *Bar Exam Tests and Topics Tested*, PA. BD. L. EXAM'RS, [http://www.pabarexam.org/bar\\_exam\\_information/testsubjects.htm](http://www.pabarexam.org/bar_exam_information/testsubjects.htm) (Oct. 9, 2020); VA. BD. BAR EXAM'RS, RULES 1, <https://barexam.virginia.gov/pdf/VBBERules.pdf> (last visited Oct. 15, 2020); WIS. BD. BAR EXAM'RS, S. CT. WISC., INFORMATION AND FILING INSTRUCTIONS—ELECTRONIC APPLICATION 4 (2020). Two of the 11 jurisdictions, Delaware and Puerto Rico, do not include family law on their state-created essay exams and, as a result, currently do not test on family law at all. DEL. BD. OF EXAM'RS, RULES OF THE BOARD OF BAR EXAMINERS OF THE STATE OF DELAWARE 6, <https://courts.delaware.gov/forms/download.aspx?id=28408> (last visited Feb. 27, 2020); *Requirements for Bar Admission*, U.S. DIST. CT. FOR DIST. OF P.R., <https://www.prd.uscourts.gov/requirements-bar-admission> (last visited Oct. 15, 2020).

167. For example, Indiana and Michigan include family law on every bar exam. *See Indiana Essay Exam Feb. 2019*, IND. BD. L. EXAM'RS, <https://myble.courts.in.gov/feb2019> (last visited Sept. 28, 2019) (testing on child custody, adoption, and termination of parental rights); *Indiana Essay Exam July 2019*, IND. BD. L. EXAM'RS, <https://myble.courts.in.gov/july2019> (last visited Sept. 28, 2019) (testing on child support, divorce grounds, and premarital agreements); *Indiana Essay Exam July 2018*, IND. BD. L. EXAM'RS, <https://myble.courts.in.gov/july-2018> (last visited Sept. 28, 2019) (testing on child support and division of property); *Indiana Essay Exam Feb. 2018*, IND. BD. L. EXAM'RS, <https://myble.courts.in.gov/feb2018> (last visited Sept. 28, 2019) (testing on marriage of minors, child custody, and establishment of paternity); *February 2019 Michigan Bar Examination Bar Examiners' Analyses*, MICH. BD. L. EXAM'RS, [https://courts.michigan.gov/Courts/MichiganSupremeCourt/BLE/Documents/February\\_2019\\_Examiners\\_Analyses.pdf](https://courts.michigan.gov/Courts/MichiganSupremeCourt/BLE/Documents/February_2019_Examiners_Analyses.pdf) (last visited Sept. 29, 2019) (testing on modification of spousal support agreements); *July 2018 Michigan Bar Examination Bar Examiners' Analyses*, MICH. BD. L. EXAM'RS, [https://courts.michigan.gov/Courts/MichiganSupremeCourt/BLE/Documents/past-exams/July2018\\_ExaminersAnalyses.pdf](https://courts.michigan.gov/Courts/MichiganSupremeCourt/BLE/Documents/past-exams/July2018_ExaminersAnalyses.pdf) (last visited Sept. 29, 2019) (testing on child support); *February 2018 Michigan Bar Examination Bar Examiners' Analyses*, MICH. BD. L. EXAM'RS, [https://courts.michigan.gov/Courts/MichiganSupremeCourt/BLE/Documents/past-exams/feb\\_2018\\_Examiners\\_Analyses.pdf](https://courts.michigan.gov/Courts/MichiganSupremeCourt/BLE/Documents/past-exams/feb_2018_Examiners_Analyses.pdf) (last visited Sept. 29, 2019) (testing division of marital property).

divorce, including division of marital property<sup>168</sup> and spousal support;<sup>169</sup> the enforceability of divorce settlement agreements;<sup>170</sup> and child custody<sup>171</sup> and child support.<sup>172</sup> Some states also occasionally include questions on premarital agreements,<sup>173</sup> parental rights,<sup>174</sup> and adoption.<sup>175</sup>

In sum, family law is tested on the bar across the United States. Yet for most bar applicants, knowledge of just a few frequently tested topics will be necessary. This state of affairs significantly influences law school curricula. Because the bar exam tests state-based family law doctrine, not tax, benefits programs, alternative dispute resolution, immigration, ERISA,<sup>176</sup> COBRA, and other areas that family lawyers often must address in the context of even the most basic divorce, this likely reinforces law professors' tendency to stay away from these crucial materials, "despite [their] enormous impact on client well-being."<sup>177</sup> The bar also likely influences the topics covered in family law casebooks. These findings suggest that those concerned with the mismatch between the basic family law course in law

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168. See, e.g., *July 2016 Kentucky Essay Questions*, KY. OFF. BAR ADMISSIONS, <https://kyoba.org/files/files/S16%20Questions%20Website%20Ready.pdf> (last visited Oct. 16, 2020); *February 2018 Michigan Bar Examination Bar Examiners' Analyses*, MICH. BD. L. EXAM'RS, [https://courts.michigan.gov/Courts/MichiganSupremeCourt/BLE/Documents/past-exams/feb\\_2018\\_Examiners\\_Analyses.pdf](https://courts.michigan.gov/Courts/MichiganSupremeCourt/BLE/Documents/past-exams/feb_2018_Examiners_Analyses.pdf) (last visited Sept. 25, 2020).

169. See, e.g., *February 2015 Bar Examination Sample Answers*, GA. OFF. BAR ADMISSIONS, <https://www.gabaradmissions.org/feb15a> (last visited Sept. 28, 2019); *February 2019 Michigan Bar Examination Bar Examiners' Analyses*, MICH. BD. L. EXAM'RS, [https://courts.michigan.gov/Courts/MichiganSupremeCourt/BLE/Documents/February\\_2019\\_Examiners\\_Analyses.pdf](https://courts.michigan.gov/Courts/MichiganSupremeCourt/BLE/Documents/February_2019_Examiners_Analyses.pdf) (last visited Sept. 29, 2019).

170. *July 2016 Kentucky Essay Questions*, *supra* note 168.

171. See, e.g., *February 2018 Bar Examination Sample Answers*, GA. OFF. BAR ADMISSIONS, <https://www.gabaradmissions.org/feb18a> (last visited Sept. 28, 2019); *Indiana Essay Exam Feb. 2018*, IND. BD. L. EXAM'RS, <https://myble.courts.in.gov/feb2018> (last visited Sept. 28, 2019); *Indiana Essay Exam Feb. 2019*, IND. BD. L. EXAM'RS, <https://myble.courts.in.gov/feb2019> (last visited Sept. 28, 2019); *February 2015 Bar Examination Sample Answers*, GA. OFF. BAR ADMISSIONS, <https://www.gabaradmissions.org/feb15a> (last visited Sept. 28, 2019).

172. FLA. BD. BAR EXAM'RS, FLORIDA BAR EXAMINATION STUDY GUIDE AND SELECTED ANSWERS 11–12 (Aug. 2019); *Indiana Essay Exam July 2018*, IND. BD. L. EXAM'RS, <https://myble.courts.in.gov/july-2018> (last visited Sept. 28, 2019); *Indiana Essay Exam July 2019*, IND. BD. L. EXAM'RS, <https://myble.courts.in.gov/july2019> (last visited Sept. 28, 2019); *July 2018 Michigan Bar Examination Bar Examiners' Analyses*, MICH. BD. L. EXAM'RS, [https://courts.michigan.gov/Courts/MichiganSupremeCourt/BLE/Documents/past-exams/July2018\\_ExaminersAnalyses.pdf](https://courts.michigan.gov/Courts/MichiganSupremeCourt/BLE/Documents/past-exams/July2018_ExaminersAnalyses.pdf) (last visited Sept. 29, 2019).

173. *Indiana Essay Exam July 2019*, IND. BD. L. EXAM'RS, <https://myble.courts.in.gov/july2019> (last visited Sept. 28, 2019).

174. FLA. BD. BAR EXAM'RS, FLORIDA BAR EXAMINATION STUDY GUIDE AND SELECTED ANSWERS 5–6 (Aug. 2018), [https://www.floridabarexam.org/\\_85257bfe0055eb2c.nsf/52286ae9ad5d845185257c07005c3fe1/466efda0a98891ad852582dc006bd64f](https://www.floridabarexam.org/_85257bfe0055eb2c.nsf/52286ae9ad5d845185257c07005c3fe1/466efda0a98891ad852582dc006bd64f).

175. *Id.*

176. The Employee Retirement Income Security Act, 29 U.S.C. §§ 1001–1461 (2018) (serving as the primary source of U.S. pension law).

177. See O'Connell & DiFonzo, *supra* note 123, at 538 (discussing negative consequences of the bar exam on law school family law courses and curricula).

school and the practice of family law may need to look beyond law schools—and especially to the bar exam—in their efforts to design a family law curriculum for the 21st century.<sup>178</sup>

### ***B. Implications for the Ideology of the Family***

A surprisingly large number of law students enter law schools with the idea that being a lawyer means something more than just having a career.<sup>179</sup> There is the idea of “doing justice,” for example, by representing disadvantaged people or helping to change the law for the better; helping their own families and communities; or working on the hardest and most important problems in our society. And although most students who take family law do not enroll in the course because they want to practice family law, they understand that many areas of legal practice will require them to have some knowledge of the field. There are also motives for taking family law unrelated to career. Studying the law of love, sex, and money is for many students more interesting than the relationships and institutions considered in other courses. That is, the human side of family law is a respite from the dry nature of the content in many courses. Law students are also motivated by the desire to help their own families and communities. By learning a little family law, they think, perhaps

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178. Toward that end, the NCBE appointed a Testing Task Force in 2018 that is undertaking a three-year review by consultants to ensure the UBE is effectively ensuring competence of new lawyers. NCBE, YEAR IN REVIEW 5 (2018), <http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F231>. Last year, the Testing Task Force conducted listening sessions with stakeholders and found the major concerns to be that the current UBE goes more in depth than necessary in some subject areas and that the exam insufficiently tests skills. NCBE, YOUR VOICE: STAKEHOLDER THOUGHTS ABOUT THE BAR EXAM 3 (2019), <https://www.testingtaskforce.org/wp-content/uploads/2019/08/FINAL-Listening-Session-Executive-Summary-with-Appendices-1.pdf>. The Testing Task Force is currently administering a nationwide practice analysis to assess how currently tested subjects and skills align with practice. *Id.* Curricular reformers and casebook authors might consider becoming involved in this review process and soliciting the endorsement of bar examiners in their efforts. *Id.* at 5.

179. Numerous studies have found that a significant population of law students are attracted to law by a desire to help others, improve society, and redress injustice; additionally, these studies explore the aspects of legal education and socialization into the legal profession that dampen these aspirations. *See* ROBERT GRANFIELD, MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND 52 (1992) (study of legal education examining how training to “think like a lawyer” pulls law students away from altruistic, public-interest goals by shifting their thinking from a “justice-oriented consciousness” to a “game-oriented consciousness”); LANI GUINIER ET AL., BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE 27–28, 49–71 (1997) (indicting traditional law school teaching for creating a chilly climate that is differentially discouraging to women); ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK LIKE A LAWYER” 11, 226 n.16 (2007) (suggesting that law students’ drift away from public-interest ambitions may partially result from legal training and epistemology); John Bliss, *From Idealists to Hired Guns? An Empirical Analysis of “Public Interest Drift” in Law School*, 51 U.C. DAVIS L. REV. 1973, 1976–77 (2018) (study finding that some students have a strong inclination toward public-interest jobs upon entering law schools and that the experience of the 2L hiring process is an important shaper of public-interest “drift”); Kennedy, *supra* note 68, at 591 (describing law school as “ideological training for willing service in the hierarchies of the corporate welfare state”).



they will be able to help their friends, families, and communities when they are called upon to provide informal legal advice, even if they do not intend to practice family law when they graduate. And so family law is a place in the law school curriculum where students can feel less alienated and more empowered to do good, especially as they begin in their second year of law school to face the ideological compromises and realities of professional life as a lawyer. Finally, for many students, taking family law is part of a personal journey. While only some law students have been involved in litigation, business partnerships, or the criminal justice system, everyone has a family.

And, indeed, law students arrive in their family law classes with a surprising variety of relevant experiences. Most obviously, given the prevalence of divorce,<sup>180</sup> a significant portion of law students come from families where their parents were divorced, or they themselves have been divorced. These students may have been raised in a single-parent household or with a stepparent present, or they are themselves (or have been) single parents or stepparents. There are students raised by never-married parents and students who spent parts of their childhoods in the care of grandparents. There are adopted students and students who have given up a child for adoption. In my many years of teaching family law, I have also had as students a polygamous wife, a student raised on a commune, and students who practice polyamory. Law students come to family law with negative experiences of sex and family, including incest, rape, abuse, neglect, and time spent in foster care. Law students have been victims of domestic violence or perpetrators of domestic violence or were raised by parents who were victims or perpetrators. Many gay law students were bullied as children, forced into conversion therapy, or rejected by their families. Transgender or transitioning law students have had to renegotiate their intimate and family relationships and also may have been rejected by family and friends. Many women law students have had abortions, a topic that is relevant in many family law cases, even if the cases do not directly address abortion. In other words, students who take family law typically come to the subject with a wide variety of motivations and experiences of family, sex, sexuality, and intimacy.

The content of a typical basic introductory family law class, to the extent that casebooks are an indication of what a typical course covers, erases many of these family forms and experiences. The casebooks are overwhelmingly focused on marriage and divorce and, hence, on the legal problems of middle-class, heterosexual, white families.<sup>181</sup> In an effort to present a seemingly more liberal stance on the field, casebooks sometimes begin with a chapter on “family privacy,”

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180. In 2018, of every 1,000 married persons, 7.7 divorced. *See U.S. Marriage and Divorce Rates by State*, U.S. CENSUS BUREAU (Jan. 15, 2020), <https://www.census.gov/library/visualizations/interactive/marriage-divorce-rates-by-state.html>.

181. In the United States, there are distinctive socioeconomic and racial patterns around marriage; marriage rates are substantially higher among college-educated white people and lower among Americans with a high-school diploma or less, African Americans, and other people of color. *See PEW RES. CTR., THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES 2* (2010), <https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2010/11/pew-social-trends-2010-families.pdf>.

which examines the limits of state interference in the family.<sup>182</sup> Of course, students learn from these materials the small measure of constitutional protection afforded families and their members. But soon even the patina of this revelation wears off, as students learn the limits of this privacy principle<sup>183</sup> and absorb a conservative ideological lesson of family law about the unresponsive state. Through the privacy materials, students learn the state has limited responsibility for providing for the welfare of its members<sup>184</sup> or protecting family members from violence and abuse.<sup>185</sup> Alternatively, in an effort to present a more expansive understanding of the definition of family, some casebooks begin with a chapter exploring the legal status of roommates,<sup>186</sup> extended families,<sup>187</sup> and other intimate and family associations in an effort to answer the question: “What is a family?” Including these materials usually backfires, however, as students know these cases are the exception meant to prove the rule (i.e., lip service paid to nonmarital families) given that more than half of their casebooks are dedicated to the law of marriage and divorce. What really matters, they quickly learn, is the “real” family law, i.e., the family law that they need to know for the bar, which is primarily the law of marriage, divorce, child custody, and support.

Before arriving at the topic of divorce and its consequences (the main act), most casebooks (and thus classes) address the substantive requirements of entering

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182. In chronological order, cases covered in this unit may include *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (establishing the fundamental right to make child-rearing decisions free from unwarranted governmental intrusion); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (striking down a state statute requiring all children to attend public school and expanding due process clause protections of parents’ civil liberties); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (establishing a right to use contraception because there is a right “to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child”); and *Roe v. Wade*, 410 U.S. 113 (1973) (establishing a constitutional right to have an abortion without excessive government intrusion).

183. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874, 900–01 (1992) (establishing the “undue burden” test, which permits more restrictions on abortion, including waiting periods and “informed consent” laws that require health care providers to inform women of the risks of abortion, the gestational age of the fetus, and abortion alternatives such as adoption); *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (upholding the Partial-Birth Abortion Act of 2003, which banned intact dilation and extraction, a medically necessary form of late-term abortion).

184. See, e.g., *Harris v. McRae*, 448 U.S. 297, 326–27 (1980) (holding that states participating in Medicaid are not required to fund medically necessary abortions for which federal funding is unavailable under the federal Hyde Amendment of 1976, which restricted the use of federal funds for abortion).

185. *United States v. Morrison*, 529 U.S. 598, 627 (2000) (holding that parts of the Violence Against Women Act of 1994 were unconstitutional, because they exceeded the powers granted to Congress under the Commerce Clause and the Section 5 of the Fourteenth Amendment); *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005) (holding that a town and its police department could not be sued for their failure to enforce a domestic violence restraining order and consequent murder of a woman’s three children by her estranged husband, because, *inter alia*, a restraining order does constitute a property interest for the purposes of the Due Process Clause of the Fourteenth Amendment).

186. See, e.g., *Village of Belle Terre v. Boraas*, 416 U.S. 1, 2 (1974).

187. See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494, 496 (1977).

marriage, including marriage restrictions declared unconstitutional by the Supreme Court.<sup>188</sup> And many white students are often surprised and interested to learn that slaves could not marry and that slave children were routinely separated from parents and sold in slavery or that there was a time in the United States when interracial marriages were banned.<sup>189</sup> They appreciate this bit of legal history, because it explains the significance of canonical Supreme Court decisions, and they know, at some level, the best lawyers are not merely technocrats who manipulate rules. But then anxiety arises in many students as they ask: why are we learning all this history? Is it going to be on the bar?<sup>190</sup> And then students move from a mixture of curiosity and bar anxiety to discomfort as the casebook and course progress to the topic of same-sex marriage, for if a student is gay, they may not want to be out in class (or, understandably, to speak for all gay people). Conversely, if a student is homophobic, they may not want to reveal their views and possibly embarrass themselves or offend a classmate. And the same-sex marriage cases, ironically, sustain rather than reduce cynicism about family law and its possibilities for supporting diverse, intimate forms, because students learn from the marriage equality cases that marriage is *sacred*, a religion unto itself, a spiritual experience, indeed fundamental to all of society, including ordering social relations, distributing benefits, raising healthy children, and conferring dignity.<sup>191</sup> This intellectual experience leads to a gradual revelation that family law is more in the business of sustaining traditional family forms than supporting new ones.

Somewhere in the course, perhaps either before marriage and divorce or as an interlude, there will be a concise unit on nonmarital families, maybe one or two classes addressing the enforceability of economic agreements between nonmarital intimate partners.<sup>192</sup> Or perhaps the professor will opt for more extensive study of nonmarital families and also include the topic of nonmarital families and third

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188. See, e.g., *Turner v. Safley*, 482 U.S. 78, 95 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

189. See *Loving*, 388 U.S. at 2.

190. The answer: probably not, at least on the family law portion of the bar exam. No UBE family law question has tested constitutional limits on marriage in the past decade. See *supra* notes 138–75 and accompanying text (discussing UBE coverage).

191. See *Obergefell v. Hodges*, 576 U.S. 644, 666 (2015) (“The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality.”); *United States v. Windsor*, 570 U.S. 744, 772 (2013) (“[Marriage allows] children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 955 (Mass. 2003) (“Because it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life’s momentous acts of self-definition.”); see also *Halley II*, *supra* note 21, at 287.

192. Casebooks typically address this topic via *Marvin v. Marvin*, 557 P.2d 106, 122–23 (Cal. 1976) (en banc) (holding that nonmarital partners may assert contractual and equitable claims against each other and thereby have legal means to enforce their economic agreements at the end of their relationship).

parties.<sup>193</sup> This will have complex effects; some students will react with appreciation and others will wonder why the professor is spending time on ancillary topics not generally tested on the bar. Ultimately ambivalence sets in even among the more left leaning students. And what lessons do family law casebooks teach students about nonmarriage? First, that nonmarital families do not exist, because casebooks give very little attention to the particular legal problems of unmarried persons, typically only one chapter, if at all.<sup>194</sup> Second, students learn that, to the extent such families exist, the law is inconsistent in its recognition and protection of nonmarital partners. Specifically, as the leading cases on this topic instruct, although many states recognize agreements concerning nonmarried partners' economic interests and possibly also equitable claims and remedies upon dissolution of their relationships, the availability of these claims is often an empty promise. In fact, the contract rights of nonmarried intimate partners are inferior to those of everyday people who are not in a sexual relationship. Third, students learn they will unlikely ever live in a state recognizing common law marriage, as only eight states recognize this doctrine.<sup>195</sup> Never mind that 59% of adults in the United States have lived with an unmarried partner.<sup>196</sup> Fourth, students learn that the best bet for the Michelle Marvins of the world,<sup>197</sup> if they want to ensure that their economic interests are protected, is *to get*

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193. See, e.g., *Graves v. Estabrook*, 818 A.2d 1255, 1261–62 (N.H. 2003) (addressing the availability of tort damages for unmarried cohabitants who witness the negligent injury of their partner); *N.D. Fair Hous. Council v. Peterson*, 625 N.W.2d 551, 553 (N.D. 2001) (addressing protection from housing discrimination on the basis of marital status); *Shahar v. Bowers*, 114 F.3d 1097, 1099 (11th Cir. 1997) (addressing constitutionally based employment discrimination protections for LGBT employees on the basis of their intimate relationships with partners of the same-sex); *In re Guardianship of Kowalski*, 478 N.W.2d 790, 792 (Minn. Ct. App. 1991) (addressing the ability of a lesbian partner to petition for guardianship of her brain-injured intimate partner).

194. In the last decade (from 2010 to 2019), 5.7% of the content of the casebooks in this study addressed the legal rights and obligations of nonmarital families, defined as common law marriage, cohabitation, contract rights, and rights *vis a vis* third parties. See *supra* Figure 7.

195. *Common Law Marriage by State*, NAT'L CONF. OF ST. LEGISLATURES (Mar. 11, 2020), <https://www.ncsl.org/research/human-services/common-law-marriage.aspx> (listing Colorado, Iowa, Kansas, Montana, New Hampshire, South Carolina, Texas, and Utah as states recognizing common law marriage).

196. Juliana Menasce Horowitz et al., *Marriage and Cohabitation in the U.S.*, PEW RES. CTR. (Nov. 6, 2019), <https://www.pewsocialtrends.org/2019/11/06/marriage-and-cohabitation-in-the-u-s/>.

197. Michelle Marvin was the plaintiff in *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976), who lived with actor Lee Marvin for approximately six years. *Id.* at 110. After their breakup, she sued him, claiming he promised to support her for the rest of her life, as she had given up her own successful career as an entertainer and singer to support his career as an actor. *Id.* at 110–11. The California Supreme Court ruled that she could bring both an express and implied contract claim to assert the alleged economic agreement. *Id.* at 122. Moreover, it reasoned in dicta that she could assert equitable claims such as quantum meruit for the reasonable value of household services or seek equitable remedies such as constructive or resulting trust. *Id.* at 122–23. On remand, the trial court found neither an express nor an implied contract based on the parties' conduct. See *Marvin v. Marvin*, 176 Cal. Rptr. 555, 558 (Cal. Ct. App. 1981). Nonetheless, the trial judge awarded Michelle Marvin \$104,000 in

*married*. Of course, these do not have to be the lessons of the typical unit on nonmarital partners in family law. A critical stance on the law of nonmarital cohabitation has become the subject of an expanding body of legal scholarship.<sup>198</sup> Yet one would not know of this critical energy after picking up a typical family law casebook. These textbooks contain a dearth of nonmarriage cases,<sup>199</sup> as well as a general lack of critical content on the law of nonmarriage. This sends the message to students that there is no purchase for unconventional thinking about the family in the typical family law course.

And then, after four to five weeks, students finally get to the topic they thought they enrolled in family law to learn—divorce. They know this is the main family law topic (other than child custody) tested on the bar, so they really start to perk up. But they soon learn that the main problem presented in their casebooks is the economic dislocation of the 1970s' and 1980s' middle-class housewife and that

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“rehabilitative alimony” based on the California Supreme Court’s contemplation of broad equitable remedies, the plaintiff’s resort to unemployment benefits for support, and Lee Marvin’s net worth at separation exceeding \$1 million. *Id.* at 559. The trial judge arrived at the amount by calculating plaintiff’s highest salary as a singer for two years prior to the couple’s cohabitation. *Id.* at 557. The appellate court reversed, reasoning that the trial court had merely established plaintiff’s need and defendant’s ability to pay. *Id.* at 559. The court elaborated:

A court of equity admittedly has broad powers, but it may not create totally new substantive rights under the guise of doing equity. . . . [I]n view of the already-mentioned findings of no damage (but benefit instead), no unjust enrichment and no wrongful act on the part of defendant with respect to either the relationship or its termination, it is clear that no basis whatsoever, either in equity or in law, exists for the challenged rehabilitative award.

*Id.*

198. See, e.g., Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276 *passim* (2014) (revealing how state recognition of nonmarital cohabiting relationships confers all of the burdens but none of the benefits); Albertina Antognini, *Against Nonmarital Exceptionalism*, 51 U.C. DAVIS L. REV. 1891 *passim* (2018) (demonstrating how courts impose gendered marital norms on unmarried partners); Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167 *passim* (2015) (identifying the disjuncture between family life in nonmarital families and family law and offering ways that family law can change to facilitate effective co-parenting in nonmarital families). For earlier considerations, see CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 173–220 (2010) (explaining how the United States is out of step with other developed nations with respect to protections for cohabitants); FINEMAN, *supra* note 13, at 145–76 (discussing the law’s undue attention to the adult sexual relationship at the expense of legal recognition and support of the parent/child relationship); POLIKOFF, *supra* note 14, at 126–31 (arguing that marriage should not bestow special legal privileges upon couples, because people live in a variety of household configurations, including nonmarried cohabitation, single-parent households, extended (biological) family units, and myriad others); Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1166 (1981) (recommending, for purposes of support and property division, treating nonmarried cohabitants similarly to married persons if they have remained together for two years or if a child is born to the parties).

199. See *supra* Figure 7 (showing that that 5.7% of the family law casebook content in the past decade addresses cohabitation).

the primary purpose of family law is to protect vulnerable women and children from the harms of marriage and marital dissolution,<sup>200</sup> no matter that marriage is on the decline,<sup>201</sup> that black families are less likely than white families to participate in marriage,<sup>202</sup> that today most women engage in paid employment,<sup>203</sup> and that same-sex marriage and men's increased caregiving all complicate the casebooks' implicit lessons on the harms of the law's nonrecognition of sex-roles in marriage.

The lack of attention in family law casebooks to the differential economic positions between black and white women (and wealthy and low-income women) vis-à-vis their intimate partners is particularly glaring. Contrary to the theme of wives' special vulnerability in divorce that is heavily present in most family law casebooks, demographic data show that almost 70% of women in the bottom quintile of earners have the same or higher income than their spouses.<sup>204</sup> Furthermore, the wage gap between African-American women and African-American men is less than the gap between white women and white men.<sup>205</sup> African-American men experience significantly higher rates of unemployment than African-American women, and the unemployment gap between African-American women and

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200. See *Halley II*, *supra* note 21, at 290 (“Feminist identity politics is obsessed with the homemaker wife’s distributional fate at the time of divorce, despite the fact that women with no role in the paid workforce are a steeply declining demographic.”).

201. See PEW RES. CTR., *supra* note 181, at i (“[A]bout half (52%) of all adults in this country were married in 2008; back in 1960, seven-in-ten (72%) were.”).

202. *Id.* at 9 (“In 1960, 61% of black adults were married. By 2008, that share had dropped to 32%.”).

203. U.S. BUREAU OF LAB. STAT., DEP’T OF LAB., BLS REP. NO. 1077, WOMEN IN THE LABOR FORCE: A DATABOOK 1, 3 (2018), <https://www.bls.gov/opub/reports/womens-databook/2018/pdf/home.pdf> (reporting that in 2017, 57% of all women participated in the labor force, and of these women, 62% worked full-time and year round); A.W. Geiger & Kim Parker, *For Women’s History Month, A Look at Gender Gains—and Gaps—in the U.S.*, PEW RES. CTR. (Mar. 15, 2018), <http://pewrsr.ch/2HDZtxX> (reporting that in 2018, 31% of women who are married to or cohabiting with a male partner contribute at least half of the couple’s total earnings, up from just 13% in 1980). Of course, despite these gains, women still remain less attached to the labor force than men. See generally Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women’s Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371 (2001). However, the fact that women are less attached to the labor force than men does not alter the fact that family law casebooks underrecognize women’s economic autonomy, and most all but ignore the differential attachment to work of black and white women. See U.S. BUREAU OF LAB. STAT., DEP’T OF LAB., BLS REP. NO. 1076, LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2017, at 3 (2018), <https://www.bls.gov/opub/reports/race-and-ethnicity/2017/pdf/home.pdf> (reporting that, among adult women age 20 and older, black women (62.5%) were more likely to participate in the labor force than Hispanic women (58.9%), Asian women (58.3%), and white women (57.6%)).

204. June Carbone & Naomi Cahn, *Whither/Wither Alimony?*, 93 TEX. L. REV. 925, 949–50 (2015) (reviewing CYNTHIA LEE STARNES, *THE MARRIAGE BUYOUT: THE TROUBLED TRAJECTORY OF U.S. ALIMONY LAW* (2014)).

205. INST. FOR WOMEN’S POL’Y RES., *THE GENDER WAGE GAP: 2018 EARNING DIFFERENCES BY RACE AND ETHNICITY* tbl.1 (2019), [https://iwpr.org/wp-content/uploads/2020/08/C478\\_Gender-Wage-Gap-in-2018.pdf](https://iwpr.org/wp-content/uploads/2020/08/C478_Gender-Wage-Gap-in-2018.pdf) (reporting that in 2017 and 2018, African-American women averaged 89% of what African-American men made, compared to white women who averaged 81.5% of what white men made).

African-American men is significantly greater than the unemployment gap between white women and white men.<sup>206</sup> Thus, there is less reason (than for white different-sex couples) to assume economic disparity disadvantaging African-American women in African-American couples. The economic vulnerabilities that many family law casebooks are seeking to solve in the chapters on divorce are a white, middle-class woman's problem. The experiences of poor women and women of color are simply left out (not to mention same-sex married partners). Worse, the implicit suggestion that economic remedies such as spousal support, child support, and protection of economic settlements from discharge in bankruptcy need to be shored up may be downright harmful to low-income women and women of color, who often earn comparably more than their partners and still do most of the unpaid family labor.

What do law students learn from the glaring absence of low-income women and men and families of color in their family law casebooks? For students with these backgrounds and identities, the implicit message is that their experiences are not relevant. They come to expect that lawyers live in a world in which people like them are not represented or are misrepresented. In anthropological terms, this difficulty is the problem of "cultural invisibility and dominance," that is, some viewpoints become invisible while others dominate, all the while, this process is usually hidden beneath the apparent neutrality of classroom content.<sup>207</sup> More broadly, the approach (or nonapproach) to race, economic inequality, and the family genders and races the marital space. Furthermore, the disproportionate focus on marriage, particularly women's supposedly unequal position in different-sex marriage, ratifies the idea that legal realms most relevant to low-income families and families of color, such as government benefits law, criminal law, and immigration law, are not family law.

### CONCLUSION

The focus on marriage and divorce in family law casebooks has decreased since the 1960s, especially marriage. Child custody and child support have partially replaced these topics. Thus, we see a reordering of priorities in casebooks among family law's traditionally core topics, with a shift toward topics concerning the parent/child relationship. Yet it cannot be said that the Law of Intimacy has arrived. Noncore family law topics (such as cohabitation, assisted reproduction, race and family law, and reproductive rights) constitute the minority of family law casebook coverage (about 40%), and there does not appear to be any disruption in the balance between core family law (marriage, divorce, child custody, and child support) and noncore family law topics (everything else) in the past 40 years. The outside boundaries of the discipline of family law appear to be quite stubborn.

These findings confirm that family law casebooks "vastly lag behind social developments."<sup>208</sup> Family law casebooks emphasize marriage and divorce and the problems of middle-class, white families. They perpetuate the historical template separating family law from bodies of law that regulate families such as criminal law,

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206. See *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU LAB. STAT. (Jan. 22, 2020), <https://www.bls.gov/cps/cpsaat05.htm>.

207. See MERTZ, *supra* note 179, at 5.

208. See *Halley II*, *supra* note 21, at 292.

immigration law, tax law, and poverty law. This mismatch perpetuates a set of problematic exclusions and ideologies of the family. If we are to adequately prepare our students for the practice of family law and accurately present social conditions in the classroom, then legal thinkers and family law teachers must reform the materials we use to teach family law. The time is ripe to remake the academic field of family law—to write a new story.



## APPENDIX

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