

**SYLLABUS**

How has the law constructed "family" relationships? What is the scope of state regulation of the relationships between married spouses, unmarried cohabitants, opposite sex and same sex couples? Should anyone be denied a "right" to marry? Is there a fundamental right to marry? How are marital and non-marital relationships affected by different public policies and socio-cultural values? Should married couples be allowed to divorce? How has the law responded to changes in our psychological understanding of adult-to-adult and adult-to-child relationships? What are the historical, constitutional, common law, and statutory antecedents of contemporary notions of "family privacy," "parental autonomy," "parens patriae," and a child's "best interests"? Should children have legal rights, and, if so, rights to what and against whom? How does the State determine the legal parentage of children? When should the State intervene in families to protect children against abusive or neglectful parents? Should public policy on behalf of neglected children focus on preservation of their original families or on expediting their permanent adoptive placement? These and similar questions will be explored through a variety of readings in law and the social sciences.

The recent and extraordinary changes in social and cultural understandings of sexual orientation and the efforts to achieve legal recognition and protection of LGBT individuals and their families will be discussed extensively in order to respond to some of the questions listed above.

There are THREE required Course Readers. The first Reader is currently available from Copy Central, 2560 Bancroft Way. The second Reader will be available in mid-September; the third in October. A copy of the Readers will be placed on Reserve in the UGL.

Supplementary materials will be posted on b-space or distributed in class.

Your final grade in this course will be based on the following:

First Midterm, Thursday, October 3, in class	Approx. 20 %
Second Midterm, Thursday, November 7, in class	30 %
Final Exam, Tuesday, December 17, 3:00-5:30 p.m.	30 %
Section attendance and participation	20 %

The exams will be open-book and will be highly structured essay questions based on the lectures and on the assigned readings. Although you are expected to attend ALL of the lectures and section meetings, you will not be penalized for missing a class to observe a religious holiday or because of illness or other special circumstances.

Professor Hollinger's office hours are Tuesday, 3:00-5:00 p.m. in Boalt Hall Room 465, or by appointment, 642-1419; [jhollinger@law.berkeley.edu](mailto:jhollinger@law.berkeley.edu) Our GSI, Lauren Maisel Goldsmith, will schedule her own office hours.

## Readings in Course Reader Volume 1

### Part I. Introduction: Aug 29-September 3

**\*\*The readings in Part I.A on pages 7-46 are background materials. Please skim them now and return to them for a more careful reading later in the semester. Additional data are posted in the folder, Families & Children: Demographic Data on our b-space Resources page\*\***

#### A. What is Happening to Children and Families in the United States?

Pew Research Center. *The Decline of Marriage and the Rise of New Families*, 2010

S.Roberts, *In a Generation, Minorities May Be the U.S. Majority*, NY Times, Aug. 14, 2008

Charles Blow, *Marriage and Minorities*, NYTimes op-ed, Aug 2, 2013

PEW Reports, *A Portrait of Stepfamilies*, 2011

Williams Institute, *Same-sex and Different-sex Couples in American Community Survey: 2005-2011*

U.S. Census Snapshot Dec 2010: Same-Sex Couples and the LGBT Population

PEW Reports, *Love and Marriage*, Feb 2013

Pew Reports, *Divorce and the Great Recession*, Nov 2012

Naomi Cahn & June Carbone, *Changing Marriage Patterns Reflect Economics and Class*, huffingtonpost.com, May 20, 2011

*America's Children: Key Indicators of Well-Being 2013 Highlights*

*America's Children in Brief: 2012 Highlights*

NCCP, *Basic Facts About Low-Income Children?* (2011) [updated Jan 2013]

### September 3: pages 49-76

#### B. Effects of Government Policies on "Fragile Families"

Andrew Cherlin, *Should the Government Promote Marriage?* (2003)

Jason DeParle & Sabrina Tavernise, *For Women Under 30, Most Births Occur Outside Marriage*, NY Times, Feb. 2012

Sabrina Tavernise, *Young Mothers Describe Marriage's Fading Allure*, NY Times, Feb. 2012

C. Brad Wilcox, *Single Motherhood Worse for Children* (2012)

Katie Roiphe, *In Defense of Single Motherhood*, NY Times, Aug. 2012

Policy Brief: Strengthening Fragile Families 2010

Fragile Families Research Brief #23: "His" and "Her" Marriage Expectations

## **Part II. Legal Regulation of Marriage and The Family**

### **September 5-10: pages 79-122**

#### **A. Traditional Restrictions**

Note: Who Can Marry?

California Family Code: Valid & Void Marriages

#### **B. Constitutionality of Marriage Restrictions**

*Perez v. Sharp* (Cal. Supreme Ct. 1948)

*Loving v. Virginia* (U.S. 1967)

D.Margolick, *A Mixed Marriage's 25<sup>th</sup> Anniversary of Legality*, NY Times, June 12, 1992

*Mildred Loving Dies at 68*, NY Times, May 6, 2008

Nadine Cohadas, *A Secret's Staying Power*, NY Times, Dec 27, 2003

Brent Staples, *Sen. Strom Thurmond's Deception Ravaged Two Lives*,  
NY Times Op-Ed, Dec 26, 2003

Sam Roberts, *Black Women See Fewer Black Men at the Altar*, NY Times, June 2010

Oliver Wang, *Stir It Up: Race and Newlywed Marriages*, Atlantic online, Aug 2010

R. Richard Banks, *Is Marriage for White People?* 2011

PEW Reports, *The Rise of Intermarriage*, 2011

### **September 12: pages 125-134**

*Zablocki v. Redhail* (U.S. 1978)

*Turner v. Safley* U.S. 1987)

### **September 17-19: pages 137-170**

#### **C. Incest Prohibitions**

*Singh v. Singh* (1990)

*Back v. Back* (1910)

Claude Levi-Strauss, Excerpts

Margaret Mead, Excerpts & Notes

Denise Grady, *Few Risks Seem to the Children of First Cousins*,  
NY Times, April 4, 2002, A1

Ann Patchett, *Kissing Cousins*, NY Times Mag., Apr 28, 2002, p.21

#### **D. Age Restrictions**

Note on Marital Age

*Marriage Advised in Some Youth Pregnancies*, NY Times, Sept. 1996

L.Tanenbaum, *Don't Force Pregnant Teens to Marry*, Newsday, 1996

D.Terry, *Cultural Tradition and Law Collide in Middle America*, NY Times, Dec. 2, 1996

**September 24: pages 172-212**

**E. Prohibition of Polygamy and Bigamy**

*In re Black* (Utah 1955)

W.S.Maloney, Arizona Raided Short Creek & Notes

Neil Young, *Short Creek's Long Legacy*, Slate, April 16, 2008

E. Joseph, *My Husband's Nine Wives*

S.Paynter, *Polygamy Cases Highlight Society's Confusion over Age of Consent*,  
Seattle Post-Intell, Aug 6, 2007

Kirk Johnson, *Polygamy Raid in West Texas May Pose a Risk for Authorities  
Elsewhere*, NY Times, April 12, 2008

*In re Steed* (Tx Ct App 2008)

Dahlia Lithwick, *Yearning for Evidence*, Slate, May 22, 2008

August 2009 Update on LDS Custody Cases in Texas

Warren Jeffs convicted in Texas of child sexual assault, Aug 2011

Jonathan Turley, *One Big, Happy Polygamous Family*, NY Times op-ed July 2011

*Kody Brown And Family Suing Utah Over Bigamy Law*, huffingtonpost.com July 25, 2012

**F: Should Sexual Orientation Be A Basis for Excluding People from Civil Marriage? THE  
READING MATERIALS FOR THIS PART ARE IN COURSE READER Vol II. We will  
discuss them in October**

**Part III. Marriage: Spousal Roles, Rights, Responsibilities**

**September 26: pages 215-224**

**A. The Traditional Model of Marriage**

*Graham v. Graham* (1940)

Blackstone on the status of married women at common law

**B. The Doctrine of Family Privacy**

*McGuire v. McGuire* (1953)

Excerpt from L.E.Teitelbaum, 1985 Wis L.Rev.

**October 1: pages 227-263**

**C. Family Privacy as "Cover" for Domestic Violence?**

*State v. Rhodes* (1868)

D.Davenport, *The Need for Macho Men*, Cosmopolitan, 1977

Marital Rape: *People v. Liberta* (NY 1984) & Notes on Spousal  
Rape Laws (2000)

Hoffman, *When Men Hit Women*

*Growing Movement Confronts Hidden Violence Within Immigrant  
Families*, NY Times, Oct. 2000

B.Horsburgh, *Domestic Violence in the Jewish Community* (1995)

K.E.Holmes, *Philadelphia Muslims Take Stance against Abuse*, 2005

Note on Legal Responses to Domestic Violence  
S.Lewis, *U.S. Supreme Court decides there is no constitutional right to enforcement of restraining order*, Wisc Law J., July 6, 2005  
Spousal Tort Liability: *Burns v. Burns* (Miss. 1988)  
Federal Response: Violence Against Woman Act of 1994 (VAWA)  
Note July 2005: Mobilization to convince Congress to reauthorize VAWA  
Statement of Nat'l Center for Victims of Crime to U.S. Sen. Judiciary Comm., July 2005  
Radha Iyengar, *The Protection battered Spouses Don't Need*, NY Times op-ed, Aug 6, 2007

## **Thursday, October 3: FIRST MIDTERM EXAM IN CLASS**

### **October 8: pages 267-304**

#### **D. Challenging and Defending the Traditional Model of Marriage**

Stephanie Coontz, *The Heterosexual Revolution*, NY Times, July 5, 2005  
*For Better, For Worse, Marriage Means Something Different Now*,  
Wash. Post, May 1, 2005  
Mary Lyndon Shanley, *Just Marriage: On the public importance of private unions*

*Marvin v. Marvin* (Cal. 1976)

Marvin Rejected in *Hewitt v. Hewitt* (Ill. 1979) and Notes  
Grace Ganz Blumberg, *Cohabitation without Marriage*, 28 UCLA L.Rev. 1125 (1981)  
Ira Mark Ellman, "Contract Thinking" was Marvin's Fatal Flaw, 76 Notre Dame  
L. Rev. 1365 (2001)

The Status Alternative: ALI Proposals for Domestic Partners  
A Defense of Marriage by Conservative Scholars, 2006

**Starting on Thursday, October 10, we will discuss the movement to achieve marriage equality for same sex couples. The readings will be in Vol II of the Course Reader as supplemented by cases and materials posted on the Resources page of our b-space site.**

## **Part II.F: Should Sexual Orientation Be A Basis for Excluding People from Civil Marriage?**

### **Oct 10: Overview**

#### **1. Marriage, Domestic Partnerships, and Civil Unions for Same-Sex Couples:**

Recent Developments, August 2013  
Note: Three important public policy purposes served by marriage  
Evan Wolfson, *Does Our Country Need "Gay Marriage"?* 2004  
Marriage, Registration and Dissolution by Same-Sex Couples  
In U.S. (Williams Ins. July 2008)  
Ronald Dworkin, *Three Questions for America*, NY Rev., Sept 21, 2006  
Dale Carpenter, *A Traditionalist Case for Gay Marriage*, 50 S. Tex. L. Rev.  
93 (2008)

*Love or Country?* Aug 2010  
*Gay Old Times*, New Yorker, Sept. 2, 2002  
Announcements of Gay Couples' Commitment Ceremonies & Marriages in NY Times

**October 15:**

2. **The Constitutional and Political Legacy of the 1990's:**

*Baehr v. Lewin* (Hawaii 1993) Notes  
*Bowers v. Hardwick*, 478 U.S. 186 (1986)  
*Romer v. Evans*, 517 U.S. 620 (1996)  
F.Rich, *A Gay Rights Victory Muffled*, Op-Ed NYT 1996  
U.S. Congress Enacts Defense of Marriage Act (DOMA), 1996  
Attorney General Holder Letter to Congress: DOJ will not defend DOMA

3. **Vermont Opts for Civil Unions, 2000**

*Baker v. Vermont* (Vt. 1999)  
C.Goldberg, *Gay & Lesbian Couples Head for Vermont*, NYT July 2000  
Andrew Sullivan, *Why Civil Unions Aren't Enough*, New Republic, 2000  
UPDATE: Vermont legislature votes for full marriage equality 2010

4. **Political and Religious Firestorms, 2003-07: Proposed Federal and State Constitutional Amendments to Bar Same-Sex Marriage**

*Lawrence v. Texas* (U.S. 2003) Excerpts  
Evan P. Schultz, *A More Perfect Union*, Legal Times, July 21, 2003.  
Pamela S. Karlan, *Loving Lawrence*, 102 Mich. L. Rev. 1447 (2004) [excerpts]  
*Gay Marriage is Immoral*, Vatican Says, LA Times, Aug. 1, 2003  
Emily Bazelon, *Holy Matrimony*, Slate, April 7, 2004  
Proposed Federal Constitutional Amendment Relating to Marriage  
Mark D. Agrast, *A Constitutional End-Run*, July 21, 2004  
S.Dewan, *United Church of Christ Backs Same-Sex Marriage*, NY Times,  
July 5, 2005  
*Psychiatric Board backs same-sex marriage in 14-1 vote*, Aug. 2005

**October 17:**

5. **Massachusetts Court Allows Same-Sex Couples to Marry:**

*Goodridge v. Dep't of Public Health* (Mass. 2003)  
Pam Belluck, *Hundreds of Same-Sex Couples Wed in Massachusetts*,  
New York Times, May 18, 2004  
Andrew Sullivan, *My Big Fat Straight Wedding*, Atlantic.com, Sept 2008  
Note: Mass. Repeals 1913 marriage law  
T.Kelley, *New York Gay Couples Head to Massachusetts*, NY Times,  
Aug 2, 2008

6. **New York and Washington State Courts Uphold Marriage Restrictions:**

*Hernandez v. Robles* (NY Ct Appeals, July 2006)

*Andersen et al. v. King Co.* (Wash. Sup. Ct, July 2006)  
Dan Savage, *Same-Sex Marriage Wins by Losing*, NY Times, July 30, 2006  
Dahlia Lithwick, *How to make a thorny constitutional question disappear*,  
Slate, July 26, 2006  
UPDATE: New York Legislature authorizes marriage by same sex couples: June 2011  
New York Times stories July 20-24, 2011  
Washington Legislature authorizes marriage by same-sex couples 2011-12

7. **New Jersey Punts: 2006-08**

*Lewis v. Harris* (N.J. 2006) excerpts  
Civil Unions in New Jersey: 6 month update

**October 22:**

8. **California Teeters in All Directions:**

Prop. 22 (Knight Initiative) approved by 60% of voters in 2000  
UCLA Study Shows Why Same-Sex Couples with Children in California  
Need Marriage, 2004  
California: Latino Same-Sex Couples as Parents, UCLA Study 2005

**Domestic Partnership Laws extend marriage-like rights and duties to same –sex couples:**

*San Francisco Trial Court Allows Surviving Same Sex Partner to File  
Wrongful Death Action*, 28 July 2001  
*AB25: Domestic Partners Benefits Boosted*, October 2001  
*AB 205: Domestic Partners Rights and Responsibilities Greatly  
Expanded*, Sep. 2003  
California Supreme Court Upholds Domestic Partnership Law, June 2005  
*Golf Club Case*: Cal. Supreme Court says a “Domestic Partner” is same as a  
“Spouse” under state antidiscrimination laws.

**The move toward full marriage rights since 2004:**

Dean Murphy, *San Francisco Married 4,037 Same Sex Pairs From  
46 States*, NY Times, March 18, 2004  
Patricia Leigh Brown, *For Children of Gays, Marriage Brings Joy*,  
NY Times, March 19, 2004  
Lee Romney, *State's High Court Voids S.F. Same-Sex Marriages*,  
LA Times, Aug 13, 2004

**October 24:**

9. **The Constitutional Challenge to California’s Ban: 2004-08**

Notes on Developments in California Marriage Cases 2005-08  
Family Law Professors Amicus Brief in Marriage Cases [excerpts]  
*In re Marriage Cases*, 43 Cal 4<sup>th</sup> 757 (Cal Supreme Ct. May 2008)  
William Eskridge, Jr & D.R.Spedale, *Revolution in Waiting*, Slate, June 20  
2008  
June 16, 2008: First legal marriages by same-sex couples begin in California

10. **Proposition 8 Overrides Cal Marriage Cases: 2008-2009**

Constitutional Law Professors Pam Karlan, Kathleen Sullivan and others  
Oppose Prop 8  
*Strauss v. Horton*: Cal Supreme Court upholds Prop 8 (May 2009)  
*Boies and Olson, Bush v. Gore Foes, Join to Fight Gay Marriage Ban* (2009)  
John Dean, *The Olson\Boies Challenge: A High-Risk Effort*, (2009)

**October 29:**

11. **Perry v. Schwarzenegger, Federal District Court Trial and Decision 2010 by Judge Vaughn Walker**

**Note: Judge Walker's opinion is posted on LS 155 b-space site as are reactions to the trial testimony by law students**

Excerpts from Judge Walker's opinion, Aug 4, 2010  
Summary of Judge Walker's opinion  
Ross Douthat, *The Marriage Ideal* [a Catholic perspective] & responses  
From Andrew Sullivan [gay Catholic commentator]  
Interview with Ted Olson, Aug 8, 2010  
Jon Davidson, Lambda Director, *Post-Perry What-Ifs*, Aug 2010  
Dahlia Lithwick, *What Will Anthony Kennedy Do on Gay Marriage*,  
slate.com Aug 2010

**October 31:**

12. **Perry v. Brown: U.S. Court of Appeals 9<sup>th</sup> Circuit: Three Judge Panel Affirms Judge Walker; 9<sup>th</sup> Cir. Rules that Prop 8 is Unconstitutional on basis of Romer 14<sup>th</sup> Am. Eq Pro Analysis**

*Perry v. Brown* (USCA 9<sup>th</sup> 2012) excerpts  
Prop 8 Proponents seek review by U.S. Supreme Court: Fall 2012

*Obama Says Same-Sex Marriage Should be Legal*: May 2012  
David Blankenhorn, *How My Views on Gay Marriage Changed*, NY Times, June 2012  
*First Gay Wedding on Military Base*, July 2012

13. ***Hollingsworth v. Perry* (U.S. June 2013)** U.S. Supreme Court dismisses Prop-8 Proponents appeal of Judge Walker's ruling in 5-4 opinion; majority opinion by Chief Justice Roberts find that Prop-8 Proponents lack "standing" to pursue their appeal in federal courts. Result of Supreme Court's decision is to vacate 9<sup>th</sup> Cir. Opinion and reinstate Judge Walker's ruling that Prop-8 is unconstitutional. California State officials are ordered not to enforce Prop-8 any longer... Gov and AG order County clerks to issue marriage licenses to same-sex and opposite-sex couples. Further efforts by Prop-8 Proponents to sustain Prop-8 appear to fail.



### **November 5:**

14. *Windsor v. U.S.* (U.S. June 2013) U.S. Supreme Court rules that DOMA §3 is unconstitutional and can no longer be enforced by the federal government. That provision of DOMA defined “marriage” for purposes of all federal laws as “only a legal union between one man and one woman as husband and wife.” Justice Kennedy writes [bizarre] opinion for majority; 5-4 decision with bitter dissents by Justices Scalia and Alito and calm dissent by Chief Justice Roberts. Why are the Court’s liberals silent? What are the consequences of the decision invalidating DOMA §3

15. Developments since June 2013? Stay tuned.....

### **Thursday, November 7 : SECOND MIDTERM IN CLASS**

**November 12-December 6: Reading Assignments will be from Course Reader Vol III.**

### **Part IV. ESTABLISHING THE PARENT-CHILD RELATIONSHIP**

#### **November 12-14:**

#### **A. Determining Parentage: Overview**

Note: Establishing Paternity & Maternity

Hollinger, *Adoption: Legal & Policy Perspectives* (2009)

#### **B. Parental Rights: Scope and Limits**

1. Grandparent & Third Party Visitation over Parental Objection:

*Troxel v. Granville* 530 U.S. 57 (2000)

2. Psychological and De Facto Parents:

The Case of *Phillip B.* (California 1983)

#### **November 19:**

#### **C. Who Is A Legal Mother?**

Cartoons

*In re Baby M.*, N.J. Sup. Ct. (1988)

*Johnson v. Calvert*, Cal. Sup. Ct. (1993)

*Holtzman v. Knott* (Wisc 1995) & *In re Elisa B.* (Cal 2005) excerpts

#### **November 21-26:**

#### **D. Who Is A Legal Father?**

Notes on *Stanley v. Illinois* (U.S.1972); *Quilloin v. Walcott* (U.S. 1978);

*Caban v. Mohammed* (U.S. 1978)  
*Lehr v. Robertson*, 463 U.S. 248 (1983)  
*Michael H. v. Gerald D.*, 491 U.S. 110 (1989)  
*Adoption of Kelsey S.*, 1 Cal.4th 816 (1992) [Excerpts]  
Note on “best interests” & “detriment” when an adoption fails  
[from *In re Bridget* (Cal 1996)]  
*In re Nicholas H.*, Cal. Supreme Ct. (2002)

**December 3-5:**

E. **Determining the “Suitability” Of Adoptive Parents**

1. Should race, color, or national origin be a factor in selecting adoptive parents?  
Federal Multi-Ethnic Placement Act: Overview  
*In re Vito* (Mass. 2000)
2. Should sexual orientation be a factor in selecting adoptive parents?  
Stacey & Biblarz, *How Does the Gender of Parents Matter?* (2010) Excerpts  
*CWLA Amicus Brief* by Hollinger et al. in Florida GILL case challenging state ban on adoptions by gays and lesbians

**Tuesday, December 17, FINAL EXAMINATION, 3:00-5:30 p.m.:**