

Professor Joan Heifetz Hollinger  
Tu-Th 12:30-2:00 p.m.

### 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 required readings are:

Course Reader. Three Readers: The first two readers are currently available from Copy Central, 2560 Bancroft Way. The third reader will be available in late-October. A copy of the Readers has been 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, Tuesday, October 4 in class	Approx. 20 %
Second Midterm, Tuesday, November 15, in class	30 %
Final Exam, Friday, December 16, 8:30-11:00 a.m.	35 %
Section attendance and participation	15 %

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 GSIS, Hannah Alsgaard and Lauren

Maisel will schedule their own office hours.

## Readings in Course Reader Volume 1

### Part I. Introduction: Aug 25-30

**\*\*The readings for Part I.A on pages 7-47 of Vol 1 are background materials. Please skim them now and return to them for a more careful reading later in the semester. Additional data on families and children are posted in a folder 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

U.S. Census Snapshot Dec 2007: Same-Sex Couples and the LGBT Population  
ChildStats. 2011 Highlights

America's Children: Key Indicators 2009

NCCP, Who are America's Poor Children? (2007)

Child Trends, *The Strengths of Poor Families* (2009)

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

#### Aug 30: pages 51-68

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

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

Child Trends, *Births Outside of Marriage: The Rise of Cohabitation* (2007)

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

#### Sep 1-8: pages 71-120

#### 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  
*Zablocki v. Redhail* (U.S. 1978)  
*Turner v. Safley* U.S. 1987)

### **Sep 13: pages 123-150**

#### **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  
L. Wardle, Rethinking Marital Age Restrictions  
*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

### **Sep 15-20: pages 151-188**

#### **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

**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 during October**

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

**Sep 22: pages 190-199**

**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.

**Sep 22-27: pages 201-239**

**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*, Chicago Tribune, Aug. 10, 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

**Sep 27-29: pages 240-278**

**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

## **Tuesday, October 4: FIRST MIDTERM EXAM IN CLASS**

**Starting on Thursday, October 6, we will discuss the final section of Part II. The Regulation of Marriage.....The readings are 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 6: Overview pages 7-64**

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

Map: Overview of Relationship Recognition, 2010

Same Sex Couples in Census 2010

California Census Snapshot 2010

Illinois Census Snapshot 2010

New York Census Snapshot 2010

Overview of Recent Developments, August 2011

Note: Three important public policy purposes served by marriage

Evan Wolfson, *Does Our Country Need "Gay Marriage"?* 2004

M.V.Lee Badgett, *Will Providing Marriage Rights to Same-Sex Couples  
Undermine Heterosexual Marriage?* (2004)

Marriage, Registration and Dissolution by Same-Sex Couples

In U.S. (Williams Ins. July 2008)

T. Parker-Pope, *Gay Unions Shed Light on Gender in Marriage*, NY Times,  
June 10, 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

**Oct 11: pages 67-106**

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

*Baehr v. Lewin* (Hawaii 1993) Note on  
*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  
Several Federal Court Cases Challenging DOMA 2010  
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

**Oct 13-18: pages 109-168**

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

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

**Oct 18: pages 169-214**

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  
New York Legislature authorizes marriage by same sex couples: June 2011  
New York Times stories July 20-24, 2011

7. New Jersey Punts: 2006-08

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

**Oct 20: pages 216-254**

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

**Oct 25-27: pages 257-310**

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)  
Richard Just, *Justice Delivered: Why California Got it Right*, New Republic,  
June 11, 2008  
Jeffrey Rosen, *Justice Delayed: The Case against the Marriage Decision*,  
New Republic, June 11, 2008  
Dahlia Lithwick, *Who You Calling Activist?* Slate, May 15, 2008  
Doug Kmiec, *California Marriage Cases*—[criticizes Court's decision],  
Volokh Conspiracy Blog, May 15, 2008  
Doug Kmiec, *Why California Constitution Should be Amended* [Prop 8]  
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

**Nov 1-3: pages 312-353 and excerpts from opinions by Judge Walker and Ninth Circuit on b-space**

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)

11. Perry v. Schwarzenegger, federal district court & beyond, 2009-2010

**Note: Judge Walker's opinion is posted on LS 155 b-space site**  
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]  
Fox News interview with Ted Olson, Aug 8, 2010  
Jon Davidson, Lambda Legal Director, *Post-Perry What-Ifs*, Aug 2010  
*Prop 8 Hangs by a Legal Thread*, LA Times, Aug 13, 2010  
SCOTUS.blog: *Standing Issue May be Decisive*, Aug 12, 2010  
Emily Bazelon, *The Best Way for Proposition 8 to Lose*, slate.com Aug 2010  
Dahlia Lithwick, *What Will Anthony Kennedy Do on Gay Marriage*,  
slate.com Aug 2010

12. What next? [**General Class Discussion on Nov 3**]

William Saletan, *Gay Bells in Bondage*, slate.com June 28, 2011

**Nov 8-10: readings from Course Reader Vol III.**

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

- A. Who is a Father?**
- B. Who is a Mother?**

**Tuesday, November 15: SECOND MIDTERM EXAM IN CLASS**

**Nov 17-Dec 1: readings from Course Reader Vol III**

- C. Case Studies on parents versus “legal strangers” and children’s “best interests”**

**Friday December 16, 8:30-11:00 a.m.: FINAL EXAMINATION**