

Professor Joan Heifetz Hollinger

Tu-Th 9:30-11:00 a.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 reader is currently available from Copy Central, 2560 Bancroft Way. The second and third readers will be available in late-September. 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 2, in class	Approx. 20 %
Second Midterm, Tuesday, October 30, in class	30 %
Final Exam, Tuesday, December 11, 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 Our GSI, Giuliani Perrone, will schedule her own office hours.

Readings in Course Reader Volume 1

Part I. Introduction: Aug 23-28

****The readings for Part I.A on pages 6-29 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 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
- U.S. Census Snapshot Dec 2010: Same-Sex Couples and the LGBT Population
America's Children in Brief: 2012 Highlights
NCCP, *Who are America's Poor Children?* (2011)
Fragile Families Fact Sheet
- Naomi Cahn & June Carbone, *Changing Marriage Patterns Reflect Economics and Class*, huffingtonpost.com, May 20, 2011

Aug 28: pages 31-57

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

Aug 30 – Sep 4: pages 59-109

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 25th 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 6: pages 111-138

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

Sep 11-13: pages 140-179

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 during October

Part III. Marriage: Spousal Roles, Rights, Responsibilities

Sep 18: pages 181-190

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 18-20: pages 192-229

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 25-27: pages 231-269

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 2: FIRST MIDTERM EXAM IN CLASS

Starting on Thursday, October 4, we will discuss the final section of Part II. The Regulation of Marriage: ..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 4: Overview

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

Map: Overview of Relationship Recognition
Same Sex Couples in Census 2010
California Census Snapshot 2010
Illinois Census Snapshot 2010
New York Census Snapshot 2010
Overview of Recent Developments, August 2012
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)
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 9:

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

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

Oct 11:

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

Oct 16-23:

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

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 4th 757 (Cal Supreme Ct. May 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

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 Trial and Decision 2010

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]
Fox News 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

12. Perry v. Brown: U.S. Court of Appeals 9th Circuit: Three Judge Panel Affirms Judge Walker; Rules Prop 8 Unconstitutional using Romer 14th Am. Eq Pro Analysis

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

Oct 25:

13. Recent Developments

William Saletan, *Gay Bells in Bondage*, slate.com June 28, 2011
DOMA Litigation: Excerpts from Gill, Golinski, Windsor, Pedersen and Hollinger Briefs
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

Tuesday, October 30: SECOND MIDTERM IN CLASS

Nov 1-29: Assignments will be from Course Reader Vol III.

Part IV. ESTABLISHING THE PARENT-CHILD RELATIONSHIP

Nov 1:

A. Determining Parentage: Overview

Note: Establishing Paternity & Maternity
Hollinger, *Adoption: Legal & Policy Perspectives* (2009)

Nov 6-8:

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)

Nov 13:

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

Nov 15-19:

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)

Nov 27-29:

E. **Determining the “Suitability” Of Adoptive Parents: Two Examples**

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 11, FINAL EXAMINATION, 3:30-5:30 p.m.: