

AN INVITATION TO FAMILY LAW

PRINCIPLES, PROCESS AND
PERSPECTIVES

Carl E. Schneider
Margaret F. Brinig

American Casebook Series®



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By

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Psalm 127: 3-5

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Preface

A preface to a casebook may once have been unnecessary, since casebooks were relatively similar. This is no longer true, and it is particularly untrue of this casebook. We have therefore tried to explain briefly some of what we hope to accomplish in our *Invitation to Family Law*.

We have two primary purposes. The first is to help you learn family law. Of course, part of what that means is introducing you to the legal doctrines that make up that subject. Fortunately, those doctrines are not impossibly technical or complex, and they are thus relatively easily learned. We have tried to make learning them as comfortable as possible by describing them straightforwardly, sometimes through cases, but sometimes through text.

However, another part of learning family law is as hard as learning the doctrine is easy—considering, as Oliver Wendell Holmes put it, “the ends which the several rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the price.” As Holmes suggests, those questions are worth asking about any field. But family law is law stretched to—perhaps beyond—its limits. Family law tries to regulate people in their least regulable behavior, in their most tumultuous settings, in their most private lives. Family law, then, deals with questions that have baffled human beings throughout history. This casebook tries to equip you to look analytically, critically, and probingly at the heart of family law: the rules and assumptions the field employs in answering those questions.

Some of what you will read in our casebook will ask you to think about what family law ought to be. Thus we will regularly and extensively try to criticize family law and to explore ways to improve it. But we will also strive to understand family law as it is. We do this not because family law is right as it is, but because one function of any casebook is to help you understand the law.

Our second primary purpose is to help you learn law. That is, we try to use family law to help you think about some issues that are basic to the way the law generally relates to society. Thus the casebook concentrates on a number of “themes.” One problem with the way law is conventionally taught is that students rarely have a chance to see the forest of law instead of the trees of each subject area. Some problems with writing and applying law recur from area to area, but professors seldom pause to deal with them as special problems which people have specially thought about. These recurring problems are our “themes.” Most chapters specifically address a theme as well as a subject-matter area. Thus chapters consider subjects like the usefulness of contract as an organizing principle of law and life, the social and legal idea of privacy, the na-

ture and desirability of rights thinking, the proper extent of judicial discretion, and so on.

We treat one particular kind of recurrent legal problem in a special way. We have tried to identify five functions that law in general serves and to explore those functions more directly and expressly than casebooks and courses usually do.

These themes and functions all raise standard questions every lawyer should have thought about. They are in fact questions that most law students have dealt with. The problem is that law students are generally asked to deal with them indirectly. In other words, these questions form the implicit basis for much discussion of specific problems in the substantive area being taught, but students are often not told explicitly what the jurisprudential problem is and are generally not exposed to literature that expressly confronts it. Our goal is to bring these problems more directly to your attention, to provide some thoughtful discussion of them, but to anchor these efforts in specific family-law issues.

Our casebook is different from most others in yet another way. The themes and functions we have just described together form an analytic framework that can be deployed to understand the whole range of family law problems. Our goal, then, is to provide you with a set of ideas that will serve you over the years as you confront the many novel issues in family law that you will encounter in the half-century during which you are likely to practice.

We have written the kind of casebook we have been describing partly because we believe family law offers a rewarding way of integrating much of the learning students are expected to accomplish in law school. In addition, however, we are responding to the fact that family law has undergone extraordinarily rapid change over the last two decades. The field thus is in particular need of reflection and evaluation after the burst of reform and revision.

Of course, to some extent, *all casebooks are* intended to help you learn how to think about legal problems and to think about the substantive area with which the book deals. One way in which they might accomplish these two purposes would be to analyze every legal problem which the book covers as extensively as possible, so that you could learn how to think about legal problems by studying the examples such discussions would constitute, and so that you could learn about the substantive area by studying what a knowledgeable person had to say about it. But you will have noticed that casebook authors do not follow this course.

There are reasons for this. First, casebook publishers do not allow casebook authors the space such a tactic would require, nor are students anxious to concede professors the time such a method would demand. Second, casebook authors feel that such a tactic would make it too easy for the student to read the material without engaging it. Casebook authors are overridingly eager to encourage students to reflect for themselves

about what they are reading, to practice thinking like a keen and critical lawyer about legal issues, and to develop their own ideas about the material.

Many casebook authors try to solve these problems by asking lots of questions. Their questions are designed to provoke the reader into thinking carefully and freshly about the problems the book considers, and by doing so, to learn how to “think like a lawyer.” This approach is surely legitimate, but it places onerous burdens on the student. Our experience—as onetime law students and now as professors—is that students often feel that they do not have time to engage each question fully, that there are a daunting number of questions, and that the questions are too obscure to comprehend satisfactorily. Furthermore, students sometimes fear that the casebook author’s learning is deliberately being concealed by the often delphic questions.

We have adopted what we take to be a middle course. Like many of our fellows, we have tried not to do your thinking for you. Following the conventional practice, we have used questions to stimulate you to do your own thinking. However, we have also tried not to leave you baffled by wave after wave of questions whose purpose is irritatingly obscure and whose intent seems malevolent. Instead, we have often tried to organize questions so that they unfold a series (though, given the complexity of life and the brevity of this book, not necessarily a complete series) of alternative ways of thinking about a problem. That is, we will frequently begin with a general question, and follow it with a set of subsidiary questions which intimate several (often conflicting) possible answers to the general question. We hope that this way of asking questions will exemplify for you the way that a lawyer should begin analyzing a problem by asking a series of questions about it, will give you some guidance in thinking about the substantive issues family law raises, but will encourage you to engage deeply with those issues.

In any event, *we urge you to take the questions seriously. They are at the heart of the book.* Taking the questions seriously does not mean finding the right answer to them. We believe that few of these questions have a right answer. This is not a casebook that sets you problems with verifiably correct results. Rather, the questions raise issues that people have been grappling with since societies first came to be organized. If Plato and Aristotle, if Mill and Marx could not find irrefutable answers to them, there is no reason you and we should expect to. But for the same reasons these questions cannot be indubitably answered, they are worth considering. In short, in posing questions, we are not trying to hide the ball; we are attempting to find it ourselves.

Our belief that family law is more often characterized by conceptual than doctrinal difficulty has shaped several other features of this book. It has, for instance, led us to prefer to organize discussion around a single leading case or problem. That case or problem is usually supplemented by various kinds of materials of traditional and non-traditional, legal

and non-legal sorts. This arrangement is intended to make it easier to go to underlying issues in class discussion, since the class need not be distracted by the admirable but frequently rehearsed exercise of assimilating the various fact situations and opinions of several cases. This arrangement also makes it possible to delve much deeper into opinions than the usual allotment of fifteen or twenty minutes per case allows.

This organization is possible partly because it is not a primary purpose of this casebook to train you to synthesize doctrine out of a line of cases. Important though that skill is, it is taught (and commonly taught well) throughout the first year of law school and in a great deal of the second and third years. Concentrating on a single leading case also makes it a little easier to present unedited documents. This is important because, since legal writing is often not well taught and sometimes not taught at all in law schools, students should try to learn about constructing legal documents and legal arguments by seeing it done, and you do not really see it done unless you see the whole document.

Our concern for getting to the bottom of family law's perplexities has also meant that we have not been ashamed to use a number of standard cases. Thus, like thousands of other family-law students, you will read *Reynolds v United States*, *McGuire v McGuire*, *Marvin v Marvin*, *Griswold v Connecticut*, *Roe v Wade*, *Painter v Bannister*, and *Wisconsin v Yoder*. These are, after all, standard partly because they are both important cases and good pedagogical instruments. They are, many of them, also cases that people have been thinking about for years, so that richer and wiser ideas have gathered around them than around most cases. For these reasons, they are as well, to some degree, cases that are part of a common vocabulary.

We have tried to keep in mind that casebooks are for teaching students about the law. Thus this book is not an encyclopedia for family lawyers nor a research guide for legal scholars. Rather than surveying every nook and cranny of the field, we have tried to select those issues and ideas that seem most significant and to concentrate on them. We have also not provided a complete bibliography of all that has been written on each of the areas we will be considering. Rather, we have suggested for further reading only pieces we have not already mentioned in the text that we think particularly merit attention either because of their quality or because they are the only pieces about an interesting problem.

Further, because these are teaching and not research materials, and because we have found most students are disheartened rather than inspired by masses of citations, we have eliminated (without any specific indication) many of the less consequential citations in the pieces that we have reprinted and have tried to limit the number of citations in the parts that we have written ourselves. We have also eliminated (again without any specific indication) most of the less momentous footnotes in the material we have used. In addition, once we have cited a source we

are quoting, we do not provide specific page numbers when we shortly thereafter quote the source again.

Like any casebook, this one asks you to think intently about a series of intricate, baffling, and sometimes rather abstract problems. But working on problems like those can be wearing and wearisome. Furthermore, family law involves particularly human kinds of problems. It regulates, and incorporates the stories of, real people. We have therefore tried as assiduously as we could to inject the relief of human interest into these materials. Some of the cases we think you will find deeply interesting at the most basic levels. But we have also tried to infiltrate into the materials stories about what actually happened in the cases you will read, poems, and even witticism, all designed to enliven your studies and remind you of their human element even while deepening your understanding of family law.

We have also sought to make this book more interesting by providing a wide variety of kinds of approaches and materials. As we have already said, throughout the book we try to combine doctrinal and thematic readings. Further, our techniques will vary from place to place. The chapter on divorce, among other things, raises some of the ethical questions that arise in the course of practicing family law. The chapter on spouse abuse asks you to put yourself in the position of several different kinds of legal actors, law-makers as well as law-enforcers. The chapter on marital property rests primarily on a few leading cases and principles; our chapter on child custody presents a symphony of concrete cases. The chapter on the contractualization of family law relies crucially on a contrast between contracts in business life and contracts in family life. The chapter on abortion uses excerpts from an *amicus* brief and other narratives of women in some way involved with this particular issue. The chapter on child abuse uses legal cases to survey the whole range of a social problem. The chapter on child support asks you to grapple with some very practical problems in the enforcement of law. The final chapter asks you to pull together all that you have learned in the course.

This leads us to a last word about family law. It deals with one of the happiest parts of human existence—the rewards of life among the people who love us most, and whom we love most. Yet law, much more than economics, the dismal science, deals with people in some of the most degraded parts of human existence—the failures, disappointments, and corruptions of family life. Family law cases present people so cudgeled by misfortune, so savaged by their own cruelty, so much wanderers in the wilderness of the world, that we too readily lose touch with what marriage and parenthood mean to most people most of the time. We urge you to step back regularly from these materials to try to place them in the larger context of life as you have observed it.

This leaves us to make only one further comment about this volume. We have tried to strike a blow for freedom from the inanities of the *Bluebook*. Thus, for the reasons given in Richard A. Posner, *Goodbye to the*

Bluebook, 53 U Chicago L.Rev. 1343 (1986), we follow the *University of Chicago Manual of Legal Citation* (Lawyers Co-operative, 1989) in all the materials we have prepared. Of course, citations left in cases follow their original format.

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