

\* *Introduction* \*

EVERYBODY, IN EVERY SOCIETY, is born into a family. Even a newborn baby, unwanted, abandoned as soon as it is born, perhaps wrapped in a filthy rag and left on a doorstep, will eventually wind up in somebody's family. A child without a family is likely to die. But there are families and there are families. They come in all shapes and sizes. There are loving families, unloving families, crazy families, saintly families, families made up of nothing but men or nothing but women, nuclear families and extended families, small families and large families. Even a person who lives alone has a family—somewhere; and can be defined as a family of one; or a fragment of a family. Human beings, like wolves or termites, are social animals, family animals. The family is the fundamental unit of society. Families are the molecules that together make up that huge compound we call a community, or a society. In this society, in this day and age, families still matter enormously—even though modern life has, in many ways, weakened the family and instead has placed enormous emphasis on the individual, the isolated, naked self. This emphasis is one of the themes of this book. This is because individualism has had such an overwhelming impact on families and family life. Nonetheless, the family remains a vital social institution. What we will try to show is how individuals and families interact, how the equations of family life shift and contort, and the role that law plays in these complex equations of family life.

Families are also *social* institutions. Family structure and family life are different from place to place, time to time, and culture to culture. In some societies, one man can have a flock of wives; in a few rare societies, a woman can have a flock of husbands. There are societies where the core of the family is a mother's brother, or a mother-in-law; where women have a lot to say or very little to say about marriage, sex, children, and family power; there are societies where blood relationship counts, no matter how far-fetched, where distant cousins have significance and assert claims on people's lives; while in other societies (like ours), even brothers and sisters often have nothing to do with each other once they leave the nest. The ways in which law and

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the legal system impact the family—regulate it, affect it, mold it, challenge it, or perhaps even ignore it—are, naturally, as variable as the forms of families themselves.

This book is about family law in the United States in the twentieth century and the first decade of the twenty-first century. Or rather, it is about law and the family. “Family law” is the name lawyers give to a particular branch of the law—mostly about marriage, divorce, child custody, family property, adoption, and some related matters. This book deals with all these subjects; but it tries to consider other parts of the law that touch on the family in an important way: inheritance, for example; or the intersection between criminal law and family affairs—domestic violence and marital rape.<sup>1</sup>

We do not, however, claim to exhaust the subject. In some ways, it would be more accurate to say that this is a book about middle-class family law. There is another, vast field, which deals with poor families. This too is not usually classified as “family law” and is not covered in the usual treatises and articles. But it is a significant factor in American law, and has a huge literature of its own. Its history, among other things, is the tortured and depressing story of the way in which the state, in exchange for welfare payments, has claimed and exercised rights to meddle with the family lives—even the sex lives—of poor mothers and other women, in ways that would be legally and socially intolerable with regard to middle-class families. We will refer to this alternate system of family law from time to time, but we do not deal with it in much detail.

We have already mentioned our most basic assumption. Family law follows family life. That is, what happens to families, in this society, determines what happens to the law of the family. Law is not autonomous; it does not evolve according to some mysterious inner program; it grows and decays and shifts and fidgets in line with what is happening in the larger society. The relationship between law and society is tight, but it is not always transparent. This is, in part, because family life, in a big, bustling, diverse society, is a tangle of complexities; its essence (if it has one) is also not always immediate and transparent. No single formula, no lapidary sentence, describes the American family, as it was in 1900, as it was in 1950, as it is in 2011. When family life is intense, multiplex, and conflicted, then family law is bound to be

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equally intense, multiplex, and conflicted. The story we want to tell is therefore quite complicated. But the main lines of development, we think, are reasonably clear.

## CENTURIES OF CHANGE

The twentieth century was a period of constant and dramatic change in society—it was a century that began with the invention of the automobile and the airplane and ended with the computer and the Internet. It began with the world divided, pretty much, among the great European empires; and it ended with a world in which tiny islands were sovereign nations, and the mighty empires had crumbled into dust. It was a century of genocide and war, a century of human rights, and a century of incredible technological development. The world, at the end, was bursting at the seams with people, as the population grew and people lived longer and longer. All of these developments made their mark on the law, and indeed in some ways all of them took place in and through law. The sheer volume of law, in all developed countries, grew even more rapidly than the sheer volume of people.

What happened to family law (in our expanded sense)? In part, the changes were continuations of trends that started in the nineteenth century; but in part they were completely new. Perhaps the single most important trend was the decline of the traditional family, the family as it was understood in the nineteenth century, the family of the Bible and conventional morality. The traditional family, in the twentieth century, came under greater and greater pressure; and, in some ways, it came apart at the seams.

“Traditional family” evokes a certain image. It is a picture of the family in a Norman Rockwell painting. Here is the cozy home; in it, a man and a woman, married and faithful to each other, sit at the head and foot of the table; he is the breadwinner, and the head of the family, ruggedly masculine, in charge, ruler of the roost, but a benign despot, firm but understanding, an object of respect and not of dread. She, on the other hand, inhabits a “separate sphere.” She is the homemaker, the soft and delicate core of the family, neat and feminine, the loyal and trustworthy wife, obedient and helpful, darning the socks and baking the bread; the primary caregiver of the children; a warm and tender

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presence, who teaches the children religion and ethical values, who instructs them to honor their father, and blankets them with the unique blessing of mother love. And the children too—the apple-cheeked boy and girl—are enveloped in sweetness and affection, as they grow up in the image of their parents. And, of course, the family is middle class and white.

This was always something of an ideal type—or perhaps always something of a myth. Most families never fit the description.<sup>2</sup> Poor and non-white families, in particular, never lived this idyllic life. Moreover, death and dissolution destroyed thousands of families in the nineteenth century. It was also a century of desertion, drunkenness, and orphanages. But the law respected and supported families that conformed to the central image, insofar as it could, and coerced or ignored the families that did not conform. Law gave the father the right to command. The wife and the children were supposed to obey. He had custody of the children, if it came to that. Divorce was appropriate only if he was a vicious brute, a philanderer, or simply abandoned the family. He controlled the family's money and its business affairs; a married woman, well into the nineteenth century, had no right to buy and sell property, could not own a farm, a house, a lot in the city; or execute a will. Her position in law was little better than that of a lunatic or a slave. Husband and wife, as Blackstone put it, were "one flesh." But it was his flesh, not hers. He was the manager and owner of the flesh.

Of course, nineteenth-century law was not static. Society was changing rapidly, and so was the law. Both formally and informally, law gradually changed to conform to what was happening to men and women and to family life. From about the middle of the nineteenth century, the states began to pass married women's property laws. These laws gave the wife the right to own property, to buy and sell, to earn money in her own name. The courts were sometimes hostile to these laws, and some courts parceled out rights to married women rather stingily, but in the end the changes took hold. The changes in the law of marital property did not result from a dramatic rights movement; it was not because men had their consciousnesses raised, but because of concrete economic and social needs and demands.

New developments in inheritance law, for the most part, improved the position of women—especially women who lived

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longer than their husbands. In the common-law system, widows chiefly had to make do with the ancient right of dower. This gave her a lifetime share in some of her husband's land, but nothing much else. New laws gave the widow a fixed portion of the whole estate, and it was hers to do with as she pleased. Again, this was only in part (if at all) an act of generosity or social equity; but it helped ensure a more orderly disposition of land, by freeing estates from the threat of possible dower, which might act (in the law's apt metaphor) as a "cloud" on the title to land.

In the early nineteenth century, divorce was rare and cumbersome. In some states, mostly in the south, only the legislature could grant a divorce. The northern states instituted a system of judicial divorce: divorce as a regular courtroom procedure. The formal rules of divorce, in many states, danced back and forth between toughness and leniency; for most states, in the end, toughness won out. Divorce was not to be encouraged. That was the posture of the law. It was the view of most ethical elites. But the reality of divorce law soon made a mockery of the toughness. In the last third of the century, all sorts of ways to get around stringent divorce laws developed. Some states turned themselves into "divorce mills," where divorce was quicker and easier to get. Above all, there was collusive divorce: divorce as a lie, as a charade.

In theory, there was no such thing as an agreement to get a divorce. Husband and wife had no right to make any such agreement—no right to decide to call it quits. Divorce was a privilege granted to an innocent spouse—a woman, say, whose husband beat her, or deserted her, or committed adultery (in New York, only adultery would do). But in practice, most divorces in the late nineteenth century were in fact products of some sort of agreement—in other words, collusive. They were (legally speaking) frauds. They depended on lies told in court. Yet the legal system accepted them. The judges saw through the charade, but played dumb.

In custody disputes, the father lost ground between 1800 and 1900. Children no longer belonged, almost automatically, to the father, which was the original rule: as head of the family, he was also the natural guardian of children in case of separation or divorce. By the end of the century, a new rule prevailed: the child's

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“best interests” were paramount. In practice, this usually meant (for young children at least) a mother’s loving care.

So, at the dawn of the twentieth century, family law had already undergone tremendous changes. What did the twentieth century bring? A great deal more. A massive evolution. Dramatic change—more dramatic, perhaps, than anything in the nineteenth century. It is not easy to sum up these changes in a few crisp sentences. Many of them, however, like much of the development in the nineteenth century, led even further away from legal arrangements that mirrored, more or less, the Norman Rockwell picture of marriage and family life, toward more fluid, more complex, legal arrangements. One major development has already been mentioned: expansion and redefinition of the legal concept of the “family.” Marriage lost its monopoly over legitimate sexual behavior. By the end of the century, there was no such thing, legally speaking, as a bastard; children born out of wedlock had more or less the same rights as children of married parents. This development was linked to another one, which would have startled the good citizens of Victorian America: cohabitation was not only legal, it was as common as dirt. Sexual freedom had gained both social and legal acceptance. Moreover, in some places, gay couples could be recognized as a kind of family.

A second development was the transfer of responsibility for family welfare, in many situations, from individuals or families, to the government: Social Security and Medicare are outstanding examples, and so are the laws concerning pensions and pension funds. The federal government also made its first forays into child welfare law in the twentieth century, with deep involvement in the law of child support, as well as issues of child abuse and neglect. Government programs have aimed at strengthening family life; but whether they did—or further weakened the family—is an interesting question. In any event, tax laws on the whole tended to favor families: homeowners, for example, got to deduct their mortgage payments from their income tax, and there was no estate tax on money left to a dead man’s wife, or a dead woman’s husband. In the twentieth century, the state took responsibility for educating children, at state expense. Children had to go to school, and parents had no right to say no. To be sure, there were disputes and arguments over home schooling, private schools, and the rights of small, discrete groups (like the Amish)

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to control how their children were brought up and taught. But these were marginal. There were such programs as Head Start for good children; and juvenile courts for delinquents. The laws with regard to children became, in many regards, denser, more complex, and in a sense tighter than before; but at the same time, restraints on the family's grown-ups became looser and looser. No-fault divorce, cohabitation rights, and protection for non-marital children are clear examples of this second trend.

This book will describe some of these dramatic changes in family law. The question is, what brought them about? There is no point looking at the law itself for answers. The key lies in larger movements of the larger society: dramatic changes in relations between men and women, the particular mass culture of the late twentieth century, and the influence of the media, among other factors. The precise way in which these factors played themselves out in connection with the law is the subject of the book. Thus, the dependent variable (to use social science jargon) is the law that affected the family. Changes in family life itself act as the independent variable—the motor cause. Many of these changes in family life are obvious. For example, changes in sexual mores led very notably to changes in legal rules, on such subjects as cohabitation, unwed parenting, use of new reproductive technology, and same-sex marriages or civil unions. There evolved more ways of constituting a family, more ways of constituting “relationships,” than had been true in the past. And family law reflected all of these things going on in society.

A few of the obvious factors that had an impact on family life in the twentieth century are worth mentioning. There were, to begin with, technological changes—methods of contraception, the pill, in vitro fertilization. These made possible a wide variety of family forms that never existed before. Other technologies had more subtle, indirect effects on family life. The automobile made families more mobile, and helped the trend to leave the crowded streets of the city. The automobile has a lot of responsibility for that great innovation, the suburb; the suburb in turn encouraged families to live in the single-family house, the house that sits by itself in a puddle of flowers and grass, fenced off from its neighbors, and relatively private. Suburbia, and the general restlessness of Americans, also helped accelerate the flight away from the so-called extended family. In many or most families,

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grandma and grandpa no longer tended to live with the kids, or even anywhere near them.

There were also demographic changes of a pretty fundamental nature. People lived longer—because of antibiotics, better nutrition and sanitation, and modern medicine in general. Longevity changed the dynamics of inheritance enormously. As John Langbein has pointed out, it is one thing to inherit money in your twenties or thirties; quite another to have to wait until your last parent dies at age ninety-five. Lifetime gifts—down payments on a house, college tuition—became critical forms of transfer of wealth within the family, more critical on the whole than the money that came from estates of the dead.<sup>3</sup> Longer life spans have also changed the dynamics of divorce. As Lawrence Stone observed, most marriages endure about as long today as they did one hundred years ago; divorce has become a “functional substitute for death.”<sup>4</sup>

Above all, there was the influence of money on families and family law. This was already a rich country, relatively speaking, in the nineteenth century. In the twentieth century, and especially in the last half of the century, it became an immensely rich country. The Great Depression was, as things turned out, an interruption in a long-term cycle of growth (at least we hope so); this book, however, was written during one of the deepest recessions (2008–2010) in memory. Still, over time, a bigger and bigger proportion of the public left the ranks of the poor and entered the house of the great middle class. Middle-class people, everywhere in the world, have fewer babies than poor people. They organize their families differently from poor people (or the very rich). They have some leisure (that is, extra time) in which to spend their money. They have separate rooms for each of the kids, and bathrooms with stall showers. Attitudes toward privacy—and toward nudity—change. These attitudes, in subtle ways, affect sexual behavior; and whatever affects sexual behavior impacts the family as well. They also accelerate the trend toward “expressive individualism”<sup>5</sup>—the radical individualism of our times—and this too has had a crucial impact on family life and family law.

All of these developments in society are linked to each other in chains of cause and effect. Technology produced wealth, wealth produced leisure, leisure encouraged consumption and



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advertising, and all these, together with demographic trends, fostered a culture of personal growth and individualism. The traditional family tottered under the weight of these powerful forces. The media played a special role, spreading the message of getting and spending and developing the self. They were a powerful outside influence on the family. Children were exposed to the big world sooner and in a more vivid, intense way than in the villages and cities of the nineteenth century. Now, in the age of television, children were a market, a target, an army of potential and actual consumers; and the conditions of social life made them draw closer to their peers than to their parents. Adolescence became a time of turbulence. At the same time, the civil rights movement—and the civil rights idea—strengthened an already strong movement of women to claim their half of earth and sky. Opportunities—jobs, professions, careers—began to open up for women. The role of women in the economy, as it grew steadily, reverberated, naturally enough, within the family. The family became (relatively) less of a unit, more of a collection of individuals, each with his or her own rights and obligations. It is no accident, then, as we shall see, that in the late twentieth century one began to hear not only about women's rights, but also about "children's rights," a concept our great-great-grandparents would have found unsettling and strange.

## BUTTING IN AND BUTTING OUT: THE LAW OF MARRIAGE

In the early part of the twentieth century, the law of marriage became in some ways more intrusive than before. The state asserted more claims to regulate marriage. That old American institution, the common-law marriage, was already in retreat at the end of the nineteenth century. A common-law marriage is a marriage without any formalities at all—no license, witnesses, judge, or minister (not to mention bridesmaids and a wedding cake). Two people simply agree to be married. Most states at one time recognized this sort of marriage, that is, they treated a common-law marriage as no different from a ceremonial one. But state after state later decided that the time had come for common-law marriage to go.

One reason for this change was a heightened concern for the country's gene pool. The early twentieth century was the heyday

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of the “science” of eugenics. Marriage was the door to sex and children (for respectable people). Controlling marriage was a way to make sure that diseased, criminal, and feeble-minded people were unable to marry and to breed. But common-law marriage was beyond state control. In this period, some states experimented with sterilization as well—an even more radical way to improve the stock. Marriage across race lines was also forbidden—between blacks and whites; and, in the West, between Asians and whites. One point was to prevent the birth of “mongrels.” There was, in fact, plenty of sex across race lines—mostly white men and black women, in the south; but the point of the laws was to keep that sex illegitimate and unrecognized. There were also “marriage mills,” as increasing mobility challenged the ability of states to enforce their own strict rules on who could marry; and a complex set of doctrines developed, on the recognition (and non-recognition) of out-of-state marriages.

In the latter part of the twentieth century, the laws of marriage reversed course dramatically. The legal controls loosened. The civil rights movement doomed the laws against miscegenation. Sterilization laws were wiped off the statute books. And marriage lost one of its most sacred aspects, the monopoly on legitimate, approved-of sex. “Cohabitation” (it used to be called “living in sin”) became so common in the late twentieth century that in some circles, and in some parts of the country, it had pretty much become normal. Millions of couples “cohabited,” living together in a kind of trial marriage. Or as a substitute for marriage—a form of family life (or sex life) in itself.

If behavior changes, can legal change be far behind? The answer is no. In the second half of the century, many states did a general housecleaning of their penal codes, and in the process got rid of fornication laws. The laws survived (on paper) only in the Bible belt; and even there they were hardly enforced. The next dramatic step began, as usual, in California, in the famous case of *Marvin v. Marvin* (1976).<sup>6</sup> The gist of this decision was that cohabiters did or could accrue rights against one another. A “contract” to live together, and share money and property, was not illegal (as it once was), just because the partners shared a bed as well as a life. The *Marvin* case caused a stir in legal circles, was widely reported in the papers, and was a topic of nervous humor on talk shows and in magazines. Its practical impact was

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probably much less than advertised; but it was striking evidence of the way in which morals and mores had changed; striking evidence, too, of the sensitivity of courts to changing styles of life. Generally speaking, the line between marital and non-marital families blurred.

The serious attack on “traditional values” toward the end of the century was nowhere more obvious than in matters of marriage and sex. This was, apparently, the weak link in “tradition.” Other “traditional values” were as strong as ever: norms against killing or stealing, for example. But what was good and right and moral and acceptable in matters of lifestyle and choice was radically redefined. The old ways still had passionate defenders, even at the end of the century, and were even claimed to be the views of a “moral majority.” But any claim of a moral majority was probably based on shaky statistics. Millions of people—perhaps most—had given up on at least some of the “traditional values.” They chose to get married or not, without endorsing the notion that marriage is the only “relationship” worth having. They chose to have children—or not—as they saw fit. Contraception and abortion came out of the closet. The Supreme Court helped, particularly with regard to abortion. At the end of the century, abortion was still wildly controversial (but common); contraception, basically, was not controversial at all. Sex outside of marriage came out of the closet, too; the Supreme Court, in *Lawrence v. Texas* (2003), extended the constitutional right of privacy to encompass whatever “intimate relations” consenting adults chose to engage in privately.<sup>7</sup>

In short, marriage was no longer a sacrament. If anything, it was a commitment. People still lusted and loved, of course, and they still wanted family life, they wanted “relationships”; but old forms of marriage had given way, first to companionate marriage, then to post-companionate marriage. Companionate marriage was marriage as a partnership, a sharing. It was a marriage between two equals. It replaced (for many couples) an older, more patriarchal form of marriage. Marriage was also no longer simple and monolithic, with its rights, roles, and obligations dictated by the state. The parties had more freedom to customize their marriages. In a companionate marriage, the fiction of marital unity—or “one flesh,” with the husband in charge—was definitely gone. Marriage was a union of two more or less equal

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people, whose roles were complex and ambiguous. Mostly, the husband still ruled, but with less than absolute power.

In the last part of the twentieth century, something different seemed to be evolving, something we might call post-companionate marriage, or—to use Andrew Cherlin’s phrase—individualized marriage.<sup>8</sup> Equality was still a goal, but marriage was also thought of as an intensely individual matter, a road to self-realization, to personal fulfillment. Companionate marriage failed when companionship failed, when partnership failed, when sharing lost its zing. Post-companionate marriage failed when it no longer contributed to personal growth and fulfillment, for either partner. At any rate, if marriage no longer satisfied the hopes and dreams of bride or groom, he or she felt a right to end it, then and there.

Of course, these changes in attitudes came on gradually. There was a “sexual revolution” and a “gender revolution” and a “gay rights revolution,” but, unlike the Russian or the French revolutions, there are no dates, no battles, no uprisings to pin these revolutions on. There were all along straws in the wind. The attack on the cause of action for breach of promise to marry was an early sign of change in attitudes. An engagement was legally a contract; backing out was therefore a breach of contract. Women brought these lawsuits—often women who had had sex with their fiancés; or even gotten pregnant and given birth. The real action, then, was for seduction, and for loss of respectable status. By 1930, this attitude was something of an anachronism; and a movement arose to repeal the “heart balm” laws. A number of states abolished breach of promise to marry and other dinosaurs—the torts of seduction, “criminal conversation,” and “alienation of affections.” Some states allowed these causes of action to limp along until the 1980s and 1990s, when they were put out of their misery, either by the legislature, or by the courts themselves. A few states still cling to them, along with the archaic notions of marriage and sex that shape them.

Perhaps the most startling development has been the movement to legalize gay marriage. In 1900, not only was this unthinkable, but in every state same-sex behavior was a crime, and quite a serious one. A growing gay rights movement and changing public sentiment led state after state, in the late twentieth

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century, to remove the onus of criminal penalties. After one false start, the Supreme Court put an end to all sodomy statutes in 2003 in *Lawrence*—a dozen or so had survived until then. And gay couples began to demand more positive rights: civil unions and gay marriage. In some cities, by ordinance, committed couples, of whatever mixture of sexes, could enjoy at least some of the financial benefits of marriage, and other benefits as well—rights to visit sick partners in the hospital, or bury dead ones, and the like, as if the survivor were a spouse. Some created statuses that mimicked marriage—civil unions and robust domestic partnerships. And in a few states, gay marriage actually became legal. But the mere thought that gay marriage might spread set off something like a moral panic, and led most states—as well as Congress—to rush to “defend” traditional marriage against this alien interloper.

## DIVORCE AND QUASI-DIVORCE

More and more, Americans in the twentieth century, who felt trapped in an unhappy marriage, wanted the right to end that marriage and start over. But divorce was controversial—and the law was a tangled and conflicted mess. There was strong opposition to easy divorce, or divorce at all, on religious grounds. Hardly anybody thought divorce was a good thing in itself. At best, it was a necessary evil. But there was, undeniably, a great demand for divorce. As we saw, in the nineteenth century, even though the formal law was on the surface unyielding, there were ways to give people their divorces. This “dual system” continued well into the twentieth century. It led to some bizarre results. Women with money and time went to Reno, Nevada, to establish residence (quickly) and get a divorce. Men in New York faked evidence of adultery (posing with a hired woman in a hotel) so that their wives could prove adultery, the only available grounds for divorce. Some people tried getting divorces in Mexico or elsewhere, with questionable legal results.

But in the twentieth century, as the rate of divorce moved steadily upward, the old order started to crumble. A few states, gingerly, allowed divorce for “incompatibility.” Other states,

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around the middle of the century, began to tolerate, in effect, no-fault divorce. Couples who were separated for a certain number of years could get a divorce, without any other “grounds.”

For most of the century, the old system stayed alive, fighting bitterly against its enemies. To be sure, nobody liked it. It gave off a rancid smell of collusion and fraud. Time and again, there were proposals for reform. Experts wanted to allow consensual divorce—usually only after attempts at conciliation, and some sort of cooling off period. But all attempts at “therapeutic” divorce, and “therapeutic” family courts, ended in failure. And the forces aligned against easy divorce managed to block or stalemated major change.

The end came suddenly and dramatically. The no-fault “revolution” (if we can call it that) completely destroyed the old fault-based system. This was, to use Herbert Jacob’s phrase, a “silent revolution.”<sup>9</sup> Politically speaking, it seemed to come out of nowhere. In fact, the old system had been for a long time in decay—it had become a house of cards, which the slightest breeze could knock over. The new system, no-fault divorce, began in California, in 1970. It spread like wildfire in the next decade or so. Eventually, all states adopted some form of no-fault divorce. No-fault was not just consensual divorce—divorce by agreement. It went far beyond this. It became divorce on demand—for either side.

No-fault solved one problem; but family lawyers did not have to close up shop and look for other business. Support payments, property disputes, custody arguments: these became, if anything, more common than ever and more complicated. Officially, men and women were equal, by constitutional fiat; and equal in marriage as well as outside of it. But gender roles persisted. This made property issues more difficult. Some couples entered into premarital and separation agreements, to give them control over the consequences of broken marriage. But most left themselves to the mercy of the law. There also remained a lively argument about whether no-fault made women better or worse off. Beyond a doubt, divorce hurts women (in general), whether or not no-fault aggravates the situation. But courts have had to balance men’s belief that ex-wives should go out and earn their own living (without alimony), against women who argued that their help in putting their men through college, or in starting a career, entitled them to a good chunk of their husbands’ money.

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Custody, too, is a burning issue. Some states experimented with “joint custody,” splitting the children in two (legally speaking), and giving each parent equal rights. (In real life, “joint custody” is apt to be an illusion.) States also fretted and legislated about the problem of the “deadbeat dad,” the man who welshed on his child support payments. In a mobile country this was, in fact, a national problem. Deadbeat dads helped give rise to a federal bureaucracy, designed to force parents—married or not—to support their children and keep them off the welfare rolls. This level of federal involvement in domestic relations was unprecedented.

No-fault had carried the day, but not everyone was happy with the results. Millions of people, after all, had never bought into the changes—never felt swept along by modern attitudes toward sex and marriage. Many were appalled that divorce had become so cheap and so easy. At the very end of the century, there was something of a movement to revive the corpse of traditional marriage. A small backlash, starting in Louisiana, aimed to discourage divorce; the state enacted a new form of marriage, “covenant marriage,” for couples who felt totally committed, and who rejected the no-fault idea. So far, however, covenant marriage has not been much of a success. But the culture war is far from over.

What happened to divorce thus ran parallel to what happened to marriage. In both cases, arrangements became much looser. It was easier to marry (or not marry); and easier to break up. A couple who cohabited did not have to “divorce” at all to break up. Packing a suitcase was enough. For a married couple, divorce was more complicated than for live-in partners; nonetheless, under no-fault, divorce was, as we saw, quite simple and cheap. The whole fabric of attachments had become unstrung, relatively speaking. But this was not a simple, linear development, as the movement for covenant marriage shows. And, of course, even at the end of the twentieth century, some couples did not believe in divorce, usually for religious reasons. Legal separations and annulments are an alternative, although, compared to the vast number of divorces, they remain fairly uncommon.

Even though fewer couples, at the end of the twentieth century, chose to get married, wedding bells nonetheless continued to ring. And ring again. Easy divorce may be a sign of the breakdown of the traditional family. But it is also a sign of the strength of marriage as an institution. Divorce paves the way to a

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second, perhaps better or more ideal marriage. As Samuel Johnson quipped, remarriage represents “the triumph of hope over experience.”<sup>10</sup> Despite massive changes, marriage still meant something: a commitment, perhaps; or a bow in the direction of old-fashioned respectability. People still wanted weddings, with presents, and a banquet, and a gown and a veil. Marriage also still carried with it numerous legal and financial advantages—tax advantages, during lifetime, and (for widows and widowers) after death. Long-time girlfriends, partners, cohabiters, enjoyed no such advantages. But even here, at the end of the twentieth century, there were some signs of change, as we have seen, in the form of domestic partner laws and civil unions, and the right of cohabitants in some cases to make financial claims against one another.

## DEATH AND TRANSFIGURATION

Families, like people, are born, grow, and die. In some societies, whole generations live together, in big houses, under a single roof—aunts, cousins, grandparents, kinfolk of all sorts. American families are, on the whole, much smaller. The typical family is the nuclear family: a mother and father, and kids. And even this sort of nuclear family made up less than half of all “families” by 2000. It is less and less common for old folks to live with grown children. It is less and less common for grown-up children to keep on living at home. Their job is to move out, leaving the old family like a queen bee to start a new hive. More and more, it is the pattern, then, for a family to shrink as the children grow up and move on, until only mother and father are left; then one of them dies, survived by a widow or widower; then comes final extinction and family death.

But by then, of course, the family has renewed itself, in the next generation (for most families). Death has legal significance, however, because at that point, finally, whatever the old folks owned and enjoyed passes on to the next generation. Here the law of wills, trusts, and inheritance comes into its own. These institutions are crucial to family life—and to society in general. Rich families stay rich because they inherit money; poor families stay relatively poor because they do not. The social structure



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renews itself each generation, as money, goods, stocks and bonds and other assets flow through the generations. These matters are not conventionally treated as part of “family law.” But they are important to millions of families. Money keeps families together, or drives them apart. Families squabble over who should inherit, and how much. Meanwhile, the old folks live longer and longer lives; and this, as has been pointed out, increases the significance of lifetime transfers and gifts.

And what of transfers the other way? For most people, inheriting from old parents is less of an issue than taking care of old parents. The emotional strain is hard to shift to the government; but the financial strain is something else. Nothing has more significantly affected families, family life, and family structure than the Social Security Act (1935) and Medicare (1965). What makes these programs so untouchable, so popular, is their impact on the middle-aged as well as on the old. Medicare and Social Security are a lifeline for seniors; but their adult children benefit almost as much. The financial burden of parent-care has been lifted from their backs.

## THE CHILDREN

Families do not need to have children, but children need to have families. In this society (as in most societies) it is parents who have the job of conceiving, bearing, feeding, clothing, raising, and teaching children; and controlling them until they become adults. In the United States, basically only parents have this job; in other societies, the extended family has a role in everything but pregnancy. One of the primary rules in this society—so basic we never think much about it—is that the state, government, collective, or whatever one calls it, leaves child-rearing essentially alone. There are no legal rules about how to raise children. The parents will decide what toys to buy, and what schools, religions, clothes, food, and standards of conduct to impose. Early in the twentieth century, this was elevated to a constitutional right. Fit parents were entitled under the Constitution to make decisions about the “care, custody, and control” of their children. In all but exceptional cases, the state could not interfere; and neither could unwanted third parties, even grandparents. But this

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simple rule is under increasing pressure, in an age of complex families, in which multiple adults have parent-like relationships with children.

Despite a general hands-off policy in the twentieth century, the federal government more and more tried to guarantee (bare) minimum standards for the care of children. It mandated basic definitions of child abuse and neglect, to be imposed on the states, and set up a national center to study and document the problem. It established a new framework for child support awards.

The state intervened where parents were unable or unwilling to take care of their children; or cases where parents abused their own flesh and blood. Failure to provide for children, or abusing children, was a crime under local laws. The state as *parens patriae*, as an institution standing *in loco parentis*, had the right, indeed, the duty, to take children out of homes where they were beaten or tortured; or in which they were starved or neglected. The problem is that this power was easily misused. Torture is torture; but neglect is not quite so obvious. State policy in this area can be controversial—as it was when the state took children away from their Sioux, Navajo, or Hopi parents, and put them in foster homes or boarding schools. It misjudged the customs and habits of immigrants; it was intolerant to parents whose main sin was poverty. On the other hand, the state was often castigated for its failure to act. Particularly later in the century, there were many scandals—horrendous cases in which children or foster children or adoptive children were beaten, abused, burned, starved, or murdered; and nobody had seen fit to intervene, or had intervened too little and too late. Social work agencies were obvious scapegoats in these scandals.

It is easy to forget that parents sometimes wanted state intervention. The juvenile court is essentially a twentieth-century institution. The first juvenile court was set up in Cook County, Illinois (Chicago) at the turn of the century. It spread from there to every other jurisdiction. The juvenile court handled problems of neglected and delinquent children. Often the parents themselves turned their children over to the state. They wanted the state to take care of “incorrigible” or “unmanageable” children. This was particularly true of immigrant parents. Juvenile justice was a replacement—wanted or unwanted—for a family that had

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somehow failed. Modern “baby Moses” laws serve a narrower, but similar function: mothers can abandon newborn babies in a safe place (rather than a dumpster) without fear of criminal consequences.

In one area, the state’s role is far from marginal: education. In the twentieth century, education for children was universal and compulsory. Child labor was generally abolished. For almost all children from the age of five or six onward, a large part of the normal day was spent in school, away from the family and under the guidance and control of civil servants. Even those children who went to private schools (mostly religious schools) followed a curriculum dictated by the state. School—along with the peer group, and with such outside influences as television—may have eroded parental authority. This was part of the larger process—one of our central themes—in which the family tended to dissolve into a collection of unique individuals, each with its own zone of power and authority.

ADOPTION, REPRODUCTIVE TECHNOLOGY,  
AND THE NEW FAMILY

The state could at times break up a biological family, and shift the children around. The law could also create an imitation biological family through adoption. An innovation of the nineteenth century, adoption is a strictly legal procedure. It brings a genetic stranger into a family, and makes that child the same as a “natural-born” child, for almost all legal purposes. In the twentieth century, control of adoption was an issue. There were state rules, but also private agencies, and a sort of black market in babies. One issue was whether children had to be placed only in families with the same racial and religious backgrounds. Another significant issue was secrecy. In the first decades of the twentieth century, states moved first to close off adoption proceedings from public scrutiny and later to insist on anonymity among the parties themselves. By the 1950s, virtually all states treated the “true” parents and the circumstances of birth as deep, dark secrets. This attitude changed dramatically toward the end of the twentieth century. Adopted children demanded the right

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to search out their “roots” and uncover their genetic history. For whatever reason, hundreds of adopted children, often to the dismay of adoptive parents, dug into old records, papers, documents, in search of mothers or fathers who might or might not want to confront their own distant past.

Illegitimacy was once a terrible stigma. (Most adopted children were, at birth, illegitimate.) But the stigma of illegitimacy, like the stigma of divorce, weakened considerably in the twentieth century. As early as 1921, an Arizona law declared that every child was “the legitimate child of its natural parents,” just as if the child had been “born in lawful wedlock.” The Supreme Court, in *Levy v. Louisiana* (1968), gave constitutional protection to illegitimate children.<sup>11</sup> Even the word “illegitimate” itself gave way to “non-marital”; and nobody spoke about “bastards” any more. If there was nothing wrong with cohabitation, it followed that there was nothing wrong with “illegitimacy.” In 1985, 22 percent of all children were born to mothers who were unmarried; in 1997, that number had increased to 32 percent; and by the end of 2008, it was an astonishing 40.6 percent.<sup>12</sup> And a large majority of black children were technically illegitimate. The increasing social acceptance of unwed motherhood caused a decline in the supply of adoptable babies; and increased the pressure for foreign adoptions, among other things.

It was no longer the case that only married people were entitled to have children. There were by the early twenty-first century forms of families that the nineteenth century could not have imagined. In the 1990s, surrogacy burst on the scene. Women were paid money to conceive and carry babies for families that could not have children. Science developed techniques of in vitro fertilization. There were egg mothers who were not womb mothers, and womb mothers who were not egg mothers—women who carried somebody else’s (genetic) child inside their belly. A child could have an egg mother, a womb mother, a sperm donor father, as well as a mother and father who intended to raise him or her. There were gay couples who adopted a child or made use of a surrogate mother; and lesbian couples who had babies through artificial insemination. There were even children whose biological parents had died before the children were even *conceived*. All of these variations on the theme of

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motherhood, fatherhood, and family life posed legal problems and called out for legal solutions—which were often ragged and inconsistent.

. . . . .

This is a book about changes in American family law; and their social backgrounds. That is a huge subject in itself. It is a huge subject in every major country. And, to be sure, each country—indeed, each city and each state—has its individual culture, and its individual story of how family law developed. But most of the large social forces that propel American family law are not unique to the United States; and consequently, the law follows a common pattern elsewhere as well. For example, the trend toward looser divorce can be found all over the Western world. It took longer in England, or Italy, than in the United States; and was very late in arriving in Chile; but as of 2011, only Malta still refused to countenance absolute divorce; and no-fault divorce had taken over in many countries. Cohabitation not only swept across the United States; it swept across Europe as well. The sexual revolution was not a one-country affair.

Yet, in some regards, the United States deviates from the patterns common to developed countries. More Americans marry—84 percent of American women marry by age forty, compared to 70 percent in Sweden, and 68 percent in France.<sup>13</sup> Americans form relationships easily, it seems; but they also break up easily. There is more marriage, more divorce, and more remarriage. American children leave home earlier than Italian children. An unmarried Spanish man or woman is likely to live at home; an adult American, man or woman, is likely to move away, whether married or not. Another structural point: family law, despite certain federal initiatives in the twentieth century, is basically the law of the states. There is, in the United States, as Mary Ann Glendon notes, no cabinet minister “charged with responsibility for family affairs,” nor an “explicit national family policy,” as there is in some other countries.<sup>14</sup>

Throughout the book, we try to relate legal to social change—to put family law into historical and social context. A man’s home is his castle, as the old phrase put it. It is no longer only a man’s; and it is no longer (if it ever was) a castle. But the home was

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always the seat of the family. Our aim is to look inside the home, inside the castle; to map a century's worth of dynamic change. In the following chapters, we will consider in more detail, first, problems involved in the making of a family—the marriage contract itself and the legal regulation of marriage. We also examine in this section the legal and social meaning of marriage, including its treatment by tax and immigration law; and also domestic violence, a potent destroyer of marriages. We look then at the margins of marriage, including the rise and fall of both common-law marriage and “heart balm” laws. A separate section will deal with modern challenges to traditional marriage and traditional notions of sex life—sexual freedom, cohabitation, and same-sex marriage. We will also consider family breakup: separation, annulment, and the relatively complex story of twentieth-century divorce. We explore the aftershocks of divorce: custody, child support, property division, and support payment issues. We will briefly deal with older members of the family—aged parents, in particular; and with the younger members, too, both natural children and adopted children. In one chapter, we will treat questions about inheritance and other issues that arise when death dissolves a family. Throughout, we will have our eye on the “new new family”: families created outside the traditional mold—through cohabitation, or with the aid of reproductive technology, or with the involvement of multiple adults. In the last chapters we look at the formation of parent-child relationships and parental rights.

In the century or so that we cover in this book, the family has changed enormously. What lies ahead is something we cannot know; but eternal constant change seems to be the fate of this most vital and intimate branch of law. Much has happened, in the course of the twentieth century. Is there a single theme, a single line of development, which ties the whole fabric together? Perhaps not. But, to repeat, it is striking how much the social concept of “the family” has moved in a single direction. The old family has been melting away; what was once a tightly knit unit is now more and more a cluster of individuals, all more or less on their own. Family members are selves who choose (or think they choose) their own path through modern life. They marry as they please and divorce as they please. They feel free to indulge their own intimate desires; and the law allows them to do this, so long

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as there is no collateral damage. Even children are treated, more and more, as miniature selves. They are no longer the slaves of their parents. Parents can choose or not choose to have children. Children, of course, cannot choose their parents; but they can choose to break all ties when they reach majority; and they are not financially responsible for their family of origin, as they would be in many cultures. Government—law—has moved in to fill some of the gaps in the social fabric, as the traditional family dissolved.

This is the main event, the great show in the center ring. It is important to recognize that the changes are relative, not absolute. Through all of this, the family remains: changed, modified, twisted in some cases beyond recognition, but still the bedrock of the social order. What we experience today was the product of a legal and social evolution; it was a long time growing; and with many detours and sideshows, and only with effort and struggle. The rest of the book fills in the details.