2013

Symposium Introduction

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On April 11-12, 2013, more than twenty family law scholars joined together *In Search of Equality in Family Law*. Our symposium began with a reception and keynote address by Dean David Meyer at Michigan State University's new Broad Art Museum. The museum seemed a particularly fitting venue for our gathering: the museum is a celebration of modern architecture with lots of glass, steel, and jagged edges, and its prominent position among older, stately red brick buildings with lead glass windows caused quite a stir on the Michigan State University campus and within the community. The controversy concerning the Broad Museum seems emblematic of the tensions in current family law jurisprudence and scholarship. Family law scholarship reflects the fissures between contemporary understandings of family and older meanings based on longstanding traditions and presumptions. Trying to balance and bridge these contemporary and traditional understandings highlights some of the complexity of searching for equality in family law. Adding further complication to attaining family equality is the growing income disparity in the United States. Class and social inequality were repeatedly addressed by our symposium participants.

The past fifty years have brought extraordinary changes to family law. The Supreme Court has affirmed the fundamental right of marriage and has invalidated as unconstitutional antimiscegenation statutes[1] as well as a federal law defining marriage as the union of one man and one woman.[2] The Court has affirmed rights of procreative liberty and abortion;[3] has refuted

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* Associate Dean for Graduate and International Programs and Professor of Law. I extend deep appreciation to my friend, colleague, and symposium co-organizer, Professor Cynthia Lee Starnes; to Dean Joan Howarth for her tremendous support of Law College symposia; to the wonderful members of the *Michigan State Law Review*; and especially to the fantastic scholars who contributed to our symposium, *In Search of Equality in Family Law*.

1. Loving v. Virginia, 388 U.S. 1 (1967) (affirming that marriage is a fundamental right and holding that Virginia's antimiscegenation law violated both the Equal Protection and Due Process Clauses of the Fourteenth Amendment by restricting the freedom to marry based solely on racial classifications).

2. United States v. Windsor, 133 S. Ct. 2675 (2013) (invalidating as unconstitutional § 3 of the Defense of Marriage Act). Although the Court had not decided the case when we met, the Court had heard oral arguments the previous month and most participants anticipated this outcome.

3. Griswold v. Connecticut, 381 U.S. 479 (1965) (holding unconstitutional a statute that prevented the use of contraception); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be

reliance on gender stereotypes in alimony determinations;[4] has recognized greater rights for nonmarital children;[5] and has also recognized that the Constitution protects intimate sexual conduct between consenting partners.[6] Although the Court re-affirmed the significance of the nuclear family to family law jurisprudence,[7] it softened that view somewhat when recognizing that third parties often serve as a meaningful figure in a child's life and may have continued rights of custody or visitation.[8] Despite this enormous progress, gender, income, class, and sexual orientation inequalities still persist.

This symposium issue of the *Michigan State Law Review* includes articles written by eighteen of our esteemed participants and highlights several important themes that emerged from the symposium. First, many scholars questioned the means by which we should craft and envision equality norms to expand and protect multiple family forms as well as all family participants. Second, it was particularly striking how many scholars recognized income and class inequality as among the most intractable barriers to family equality. In their presentations and articles, our scholars highlighted both the gains made toward achieving equality as well as some of the reasons why inequalities exist and suggested various models of reform.

In his keynote address and corresponding article,[9] Dean David Meyer discussed the extraordinary role the Supreme Court has had over the past fifty years in removing barriers to equality based on race, gender, and sexual orientation. He further observed that the next fifty years will most likely be marked by incrementalism, rather than the revolution we witnessed in the past several decades. Dean Meyer noted that the jurisprudential revolution that helped diversify family life has correspondingly added greater complexity by recognizing competing interests. For instance, the Court will

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free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); Roe v. Wade, 410 U.S. 113 (1973) (holding a woman has a fundamental right to an abortion).

4. Orr v. Orr, 440 U.S. 268 (1979) (rejecting gender as a proxy for financial need and requiring a gender-neutral alimony law).

5. *E.g.*, Gomez v. Perez, 409 U.S. 535 (1973) (holding that a state must provide nonmarital children a right to parental support).

6. Lawrence v. Texas, 539 U.S. 558 (2003) (holding that liberty under the Due Process Clause encompasses private sexual conduct between persons of the same sex).

7. Michael H. v. Gerald D., 491 U.S. 110 (1989). A plurality of the Court affirmed California's marital presumption and affirmed the importance of the nuclear family to American society. *Id.* at 130-31.

8. Troxel v. Granville, 530 U.S. 57 (2000). The Court held that a statute that permitted a third party to petition for visitation at any time was unconstitutional as applied and affirmed the importance of parental autonomy; but the Court took note of the decline of the nuclear family and did not foreclose the rights of third parties to seek custodial or visitation rights under circumstances not present in this case. *Id.* at 72-74.

9. David D. Meyer, *Family Law Equality at a Crossroads*, 2013 MICH. ST. L. REV. 1231.

have fewer occasions to rely on rigid classifications such as "man v. woman" or "straight v. gay" and will instead be required to engage in a more factual, nuanced inquiry to determine which party has the "greater" right in a particular case. And, like many of our symposium participants, Dean Meyer expressed concern that increasing social and economic inequality among families is the single most significant obstacle in the pursuit of greater equality within family law.

Despite our "equality" theme, our symposium participants did not uniformly agree on one meaning of "equality" or how "equality" should be applied. For instance, while some scholars specifically refuted the "channeling function" of family law and see the traditional family paradigm as an impediment to further familial equality, other scholars opined the importance of the traditional family paradigm as value-added to society. Many symposium participants rejected the traditional nuclear, white, middle-class paradigm as the optimal family paradigm and encouraged reforms that not only recognize but also embrace more diverse and complex family forms. The paradigm's emphasis on traditional family forms with its inherent gender, racial, and class inequalities has created large legal and social schisms that stand as a barrier to equality for many Americans. Professors June Carbone and Naomi Cahn frame this issue as "the triple system of family law,"[10] arguing that there is a class-based disconnect between the law and family norms. Noting that there is often state-initiated family law for the poor and private legal ordering for the "elite," Professors Carbone and Cahn express concern for the growing "middle" who operate in the shadow of the law. Professors Carbone and Cahn argue for greater adaptation of family laws to better meet the needs of changing, diversifying family structures. In contrast, Professor Lynn Wardle argues that the exclusionary aspects of defining family in very traditional ways—i.e., using the traditional nuclear family paradigm—benefits children and that such "inequality" serves a social good.[11]

Concerns about social and class inequality permeated the symposium presentations. In her article focusing on matriarchy and class,[12] Professor Tonya Brito examines the role of the Great Recession in creating greater gender equality potential for the middle class, particularly by enabling women and men to depart from traditional gender roles such that women may be primary breadwinners and men can be primary homemakers and child caregivers. Professor Brito is quite critical, though, of the ways in

10. June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 1185.

11. Lynn D. Wardle, *Reflections on Equality in Family Law*, 2013 MICH. ST. L. REV. 1385.

12. Tonya L. Brito, *What We Talk About when We Talk About Matriarchy*, 2013 MICH. ST. L. REV. 1263

which the law does not adequately support lower-income families. In those families, poor fathers who do not pay support are punished by child-support laws, and the family is not able to embrace the flexibility and fluidity of gender role reversal. Expressing similar gender and class concerns in her essay about kinship families,[13] Professor Sacha Coupet challenges us to reconsider equality and liberty as applied to poor families of color, many of whom place greater reliance on government assistance and may experience equality and liberty differently from white, middle-class families. White, middle-class families place great value on liberty from government and state actors, but Professor Coupet observes that some poorer kinship families of color might willingly trade some liberty interests for improved access to government services and laws intended to govern traditional families. Relatedly, Professor Linda McClain focuses on access to the legal and political system and highlights how social inequality affects decision making.[14] Professor McClain explores how notions of family values and personal versus public responsibility influence political discourse and helped shape three statutes enacted during the Clinton presidency—FMLA, PRWORA, and DOMA. She further demonstrates how the "state of the family" affects the "state of the nation."

Professor Alicia Kelly also explored the theme of economic inequality and in *Sharing Inequality*[15] examines the need for economic sharing frameworks for all families, including intergenerational families. Current law takes into account some economic sharing for marital couples, but there is little legal protection for a nonmarital partner who contributed significant labor and decision making—but not money—to the family. Professor Kelly proposes a more sophisticated model of economic sharing that accounts for the multi-layered interdependency of family actors and does not merely privilege one actor's financial contributions. Professor Mark Strasser also focuses on financial inequality but examines the rights of posthumously conceived children. Professor Strasser critiques the Supreme Court's missed opportunity in *Astrue v. Capato*[16] to establish equal treatment for posthumously conceived children to receive social security benefits.[17] Professor Strasser laments the Court's failure to explore the policy of tying social security survivor benefits to the laws of intestacy and, further, the Court's larger failure of establishing greater rights to benefits for such children.

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13. Sacha M. Coupet, *What Price "Liberty?": The Search for Equality for Kinship-Caregiving Families*, 2013 MICH. ST. L. REV. 1249.

14. Linda C. McClain, *Federal Family Policy and Family Values from Clinton to Obama, 1992-2012 and Beyond*, 2013 MICH. ST. L. REV. (forthcoming).

15. Alicia B. Kelly, *Sharing Inequality*, 2013 MICH. ST. L. REV. 967.

16. 132 S. Ct. 2021 (2012).

17. Mark Strasser, Capato, *ART, and the Provision of Benefits to After-Born Children*, 2013 MICH. ST. L. REV. 1341.

While considerable attention was paid to equality rights of adults, Professors Appell and Dwyer challenge current family law jurisprudence from a different perspective—that of the child. In separate articles, they both address the need for improved systems to protect children and greater rights for children. Challenging the rhetoric of "equality" as applied to children, Professor Annette Appell hypothesizes a Children's Equal Rights Amendment, as a standard by which to measure equality of access and participation for children.[18] She argues that childhood is constructed to keep children unequal and that without a significant paradigm shift, it will be impossible to attain equality. Her paradigm shift requires that states not discriminate based on youth and re-imagines childhood such that minority is no longer synonymous with dependence and inferiority to adults. Professor Dwyer similarly posits that children are being denied equal personhood rights, largely because of the difficulty and resistance to implementation of those rights.[19] Professor Dwyer criticizes rhetoric that espouses children's equal rights yet uses children's difference—age—as a way to deny children the full panoply of rights that adults take for granted.

Additional symposium participants advocated for improved children's rights, but focused their inquiry on the child-welfare system. Professor Sarah Katz examines the right of children who have been removed from their legal parents' care to have the ability to be reunified with the legal parent under appropriate circumstances.[20] Although the Adoption and Safe Families Act has as its main goal permanency for children, which often precludes legal parents from regaining custody of their children if their child has a new legal guardian, Professor Katz suggests a more nuanced approach that emphasizes a child's right to stability rather than permanency, which would allow legal parents the right, in some cases, to regain custody of their children and serve the child's best interests. Professor Cynthia Godsoe also focuses on the child-welfare system and suggests that child-welfare agencies should incorporate multiple permanency plans for children and should not focus solely on adoption.[21] Especially for older children, Professor Godsoe advocates for the greater use of legal guardianship, which still provides children with stability and care but is often more realistic for many children. She rejects, too, the nuclear-family-based paradigm that undergirds adoption as the "best outcome" and instead advocates for the recognition of multiple family structures in child welfare.

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18. Annette R. Appell, *The Child Question*, 2013 MICH. ST. L. REV. 1137.

19. James G. Dwyer, *Equality Between Adults and Children: Its Meaning, Implications, and Opposition*, 2013 MICH. ST. L. REV. 1007.

20. Sarah Katz, *The Value of Permanency: State Implementation of Legal Guardianship Under the Adoption and Safe Families Act of 1997*, 2013 MICH. ST. L. REV. 1079.

21. Cynthia Godsoe, *Permanency Puzzle*, 2013 MICH. ST. L. REV. 1113.

Professor Raymond O'Brien was similarly critical of the child-welfare system and its harsh impact on poor children and their parents.[22] Professor O'Brien examines the inadequacy of federal legislation and funding that lead to unfavorable outcomes for poor children, such as the involuntary termination of their parents' rights and subsequent foster care drift. Noting the tilt toward greater child protection and lessening protection of parental rights, Professor O'Brien observes the particularly unfortunate outcome for many poor children and their parents—a disrupted legal relationship that could be preserved if only adequate resources and attention were paid.

Three of our presenters focused on the parent–child relationship, including how parenthood is affected by gender stereotypes and class differences. In her article concerning parentage establishment, Professor Leslie Harris illustrates the ways in which current paternity law reifies gendered and nuclear family norms at the expense of a child's best interests.[23] Focusing particularly on paternity disestablishment, Professor Harris advocates reforms that place greater emphasis on the adult parties' agreement and commitment to co-parent and less emphasis on biology alone. By focusing on parental commitment, Professor Harris is also able to advocate for greater protection of the child's best interests and a more gender-, status-, and class-neutral application of paternity laws. Focusing on fatherhood, Professor Dara Purvis uses gay, stay-at-home fathers as a lens by which to deconstruct stereotypes of masculinity and caregiving.[24] Professor Purvis explores how gay men who perform greater child caregiving can benefit all fathers, who may be seen as having a greater caregiving ability and also offer women more space to assume roles other than primary caregiver. Professor Kevin Maillard examines serial paternity and cautioned against a modern eugenics movement—"judicial sterilization" of men who father multiple children with multiple women but who are unable to pay sufficient child support.[25] While Professor Maillard recognizes the need to improve the welfare of children born to men who serially father children for whom they are unable to pay support, he disagrees with the remedy of imposing as a condition of probation (rather than requiring jail time for nonpayment of child support) a requirement that the man not father any more children, likening the condition to a form of eugenics.

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22. Raymond C. O'Brien, *Reasonable Efforts and Parent–Child Reunification*, 2013 MICH. ST. L. REV. 1029.

23. Leslie Joan Harris, *Reforming Paternity Law to Eliminate Gender, Status, and Class Inequality*, 2013 MICH. ST. L. REV. 1295.

24. Dara E. Purvis, *The Sexual Orientation of Fatherhood*, 2013 MICH. ST. L. REV. 983.

25. Kevin Noble Maillard, *Serial Paternity*, 2013 MICH. ST. L. REV. 1369.

Our symposium was nestled between oral arguments and the decisions in *United States v. Windsor*[26] and *Hollingsworth v. Perry*.[27] Two presenters focused specifically on marriage equality, although their articles do not focus on the issue of same-sex marriage per se. In her article, Professor Susan Appleton uses domicile to illustrate how differences among jurisdictions can actually promote greater social equality overall, including marriage equality for same-sex couples.[28] Defining domicile as "federalism's inequality by design in family law,"[29] Professor Appleton advocates for state-by-state variation in marriage rules, observing that such variation (rather than nationalized uniformity) will promote innovation, particularly if jurisdictions embrace methods that improve access to marriage by people of all social and economic classes. In her article addressing marriage equality,[30] Professor Barbara Stark emphasizes that it is impossible to attain marriage equality—i.e., equality within heterosexual marriages—without first attaining true gender equality. Noting the many limits within American law to achieving full gender equality due to our narrow conception of rights, Professor Stark advocates for the reliance on international human rights, specifically the incorporation of the Convention Against All Forms of Discrimination against Women, as a way to obtain gender and then marriage equality.

The articles in this symposium issue are provocative, timely, thoughtful, and all propose meaningful reforms to improve family law equality. It was a wonderful privilege to host such a fantastic group of scholars, and I am delighted that you can read these papers, too. Happy reading!

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26. 133 S. Ct. 2675 (2013).

27. 133 S. Ct. 2652 (2013).

28. Susan Frelich Appleton, *Domicile and Inequality by Design: The Case of Destination Weddings*, 2013 MICH. ST. L. REV. 1449.

29. *Id.* at 1457.

30. Barbara Stark, *Marriage Equality, Gender Equality, and the Women's Convention*, 2013 MICH. ST. L. REV. 941.