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CHOOSING A TEXT FOR THE FAMILY LAW CURRICULUM OF THE TWENTY-FIRST CENTURY

Catherine J. Ross

The Family Law Education Reform (FLER) Project Report is a welcome response to the sea-change that has occurred over the last 25 years in the substance and practice of family law. Family law today, in the words of the FLER Report, is a “vibrant and exciting field,” which has changed perhaps more than any other area of law.¹ In the last 40 years we have, for example, moved from restrictive fault regimes for divorce in every state to the dominance of no-fault, from a theory of property ownership in most jurisdictions that advantaged the wage-earner to a goal of equity in all states, and from a definition of the legal family so narrow that it permitted discrimination against children born outside of marriage to a recognition that the law must be responsive to a wide variety of family forms. As the FLER Report notes, law school teaching has not responded adequately to the rapidity of change in the field, and part of the problem lies in the available commercial texts on which virtually every law professor relies.

Law is not unique in facing the problem posed by outdated classics. For more than 40 years Janson’s *History of Art* defined what was what and who was who in art. The book played a central role in defining culture for generations of college students so that one could identify the works which had a plate in Janson by the hordes of young people gathered around the original in any European museum, murmuring “that’s in Janson.” When the first edition appeared in 1962 it did not feature a single woman artist, nor did it include photography or any of the decorative arts. The most recent edition, published this year and edited by a team of art historians, adds many women and, in keeping with modern scholarly trends, uses art “as a way to discuss race, class and gender.”² Gone are a number of icons—including the portrait of Whistler’s Mother. If Janson’s canon was ready for updating, so too is the canon of venerable family law texts.

WHAT ARE WE TEACHING FROM NOW?

The FLER reporters, Professors Mary E. O’Connell and J. Herbie DiFonzo, surveyed eight unidentified illustrative family law textbooks currently in use. After combing the content of the eight books, they found that almost 80% of the material in family law texts consists of standard legal materials—cases and statutes. Of course, as the FLER Report notes, these “legal building blocks form an architecture within which the practice of family law occurs,” and cases and statutes will continue to play a central role in family law courses. The aggregated content of existing books shows that the (nonexistent) mean family law text contains roughly 18 pages (or 1.5% of the text materials) drawn from the social sciences and that only 2.45% of the text deals with practical lawyering.³ These proportions do not reflect the relative importance of context and new modes of practice to the curriculum of the twenty-first century.

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The gap between the books and the new curriculum is understandable, even predictable. Many of the venerable volumes are in their third, fourth, or even fifth editions and the authors originally conceptualized the chapters and themes in the 1970s, as the initial wave of family law legal reform was in its infancy. At that point, the fault divorce system was in the process of being replaced, common law states were just beginning to grapple with the definitions of separate and marital property, and the profession commonly disparaged the divorce lawyer.

It is a rare, possibly heroic, possibly mythic, author who can revisit his or her own textbook and strip it back to bare bones. Instead, quite reasonably, newer cases and themes supplement the old. Even books conceptualized in the early 1990s precede a number of major developments including the ALI Principles, the dispersion of a variety of family forms across geographic and class lines, and fundamental shifts in the form and structure of family courts and the ways in which family disputes are resolved.

The FLER curriculum identifies what the drafters call the unofficial family law canon: the themes virtually every family law course covers. These range from historical background to the legal obligations and benefits of marriage and alternative family arrangements, to divorce, support, division of property, and child custody, and jurisdiction. Even within the core canon, it may be that the presentation of some topics should be rethought. For example, why do many textbooks treat division of marital property and maintenance in the same chapter? I suspect this is due to the financial package that courts conventionally crafted in title theory states. But today, even though courts doubtless look at both pieces in assessing whether an order is equitable, it is critical for students to understand the very different rationales that apply to property division and alimony. In the same vein, family law texts have traditionally treated all of the substantive issues related to child custody and visitation in one compact chapter. This approach belittles the prevalence and ferocity of postdissolution disputes about children and child rearing. A separate chapter devoted to disputes that arise over visitation, relocation, and major child-rearing decisions after the initial allocation of custody will better prepare students for one of the most difficult areas of family law practice. Even more important, by helping students to anticipate issues that commonly derail custody agreements, a text that pays special attention to such ongoing disputes may help a new generation of family lawyers craft more resilient agreements for their clients.

THE ELEMENTS OF A FLER-FRIENDLY TEXT

The Report's curriculum proposal identifies the heart of reform in what it terms the four C's: Content, Context, Conduct, and Competence. How should a family law professor go about choosing a book that will cover all five C's—that is, the conventional Canon and the new four?

As the FLER Report emphasizes, the next generation of family lawyers will need to be prepared to practice in an interdisciplinary setting. The textbook that will prepare them should include significant interdisciplinary materials (measured not only by the pages of excerpts from the social sciences but also by the way that material is integrated into the course through notes following cases and so forth). It should introduce students to nonlegal issues, including the emotions that surround family dissolution, in order to expose students to general concepts that will enable them to collaborate productively with other professionals and to respond more sensitively to their clients' needs.

Similarly, the reality that the vast majority of family breakups are resolved through some form of settlement, and that increasing numbers of couples are engaging in private-ordering prior to marriage, should receive more than passing mention. Because family law is a law school course, most books will probably continue to rely heavily on cases—and there is good reason to do so because court decisions, statutes, and regulations are the lawyer's basic tools and form the backdrop for every negotiated settlement. But a textbook that supports the new curriculum should also include separate chapters or sections that provide a detailed discussion of various forms of alternative dispute resolution and of the different means of private ordering that occur before, during, and after marriage, as well as those that can be used to structure nonmarital relationships.

Indeed, the textbook should also take seriously the notion that families in the United States today take a variety of forms, including marital and nonmarital heterosexual and same-sex relationships. The variety of family forms should be reflected in the materials selected for virtually every chapter, not cabined in introductory materials or chapters on how families are formed. In virtually every area, the book that serves the FLER agenda should include materials that deal with modern society's full range of family forms, including single-parent families, blended families, and gay partners and parents. For example, unmarried parents frequently turn to courts to resolve issues of child support, custody, and visitation, but are often missing from chapters on custody and visitation. And contemporary understanding of parentage itself must account for court decisions and law reform proposals that now extend parental status beyond the traditional boundaries of biology, marriage, and adoption.

The Report correctly emphasizes that students must be exposed to the ways in which gender, race, class, and culture affect the development and application of family law. Culture should include the unique issues that may confront recent immigrants. These themes should run through the structure of a casebook and not be thrown in as an afterthought. Even though reported cases may continue to dominate textbooks, family law teachers should look for casebooks that make clear families and their disputes come in a wide range of income and asset levels. Look for a book that includes nonwealthy families in lead cases and that includes notes or other materials placing the wealthy in statistical perspective. For example, it is one thing to tell students, quite accurately, that a family's primary residence and retirement accounts are normally the two most valuable assets it owns, but students should also understand that only half of all Americans have any retirement accounts and that the average balance is very low. Even when a family owns a residence, the residence may be a trailer. A thoughtful text should also alert students that bankruptcies are far more common than family trusts and that debts frequently outweigh assets. All of this has a bearing on the nature of private practice and the growth of pro se divorces.

Lest some readers wonder whether this emphasis on themes like gender and class is too ivory-tower or too politically correct, a note I recently received from a former student shows how important understanding such issues can be in modern practice.⁴ My student had recently been interviewed for a job at a small firm which devotes about half of its practice to family law. Part of his interview was to prepare and deliver a closing argument in a dissolution case. He spoke about "the way that a spouse who stays home contributes to the income of the spouse who works outside the home." He got the position, drawing on a number of skills that FLER emphasizes—understanding gender, policy, and theory and how to apply them to a particular set of facts, as well as practical skills such as oral presentation, as discussed more fully below.

THE THREE P'S

The Report advocates for a number of changes that I refer to as the three P's: the teaching of Policy, use of Problems, and emphasis on People skills. The FLER-friendly text will enhance each of these approaches.

POLICY

Students who will remain in command of their fields over the next half century will need to grapple with emerging policy issues and continuing doctrinal evolution. It is important for the text to help students understand the historical evolution of families and family law and the interaction between changes in family structure and the law. A modern text should include recent history—the changes of the recent decades—as well as history reaching back to colonial America, Reformation Europe, and classical civilization. These materials provide essential background for the policy discussions that will lie at the heart of the new curriculum and will provide the context for students to participate in ongoing policy discussions, such as those concerning the “new property,” the rebirth of fault divorces through covenant marriage, or the changing legal responsibilities in cohabiting relationships.

PROBLEMS

The FLER Report's emphasis on conduct and competence also suggests that professors should choose a book that includes a variety of challenging problems. These exercises enable students to test their understanding of the material by applying the principles and techniques they are learning to concrete situations. Problems should challenge students to use a range of skills, including: the ability to argue positions based on a set of facts or to analyze the facts and determine the outcome of a dispute; the ability to develop an informed social policy position or craft proposals for legislative reform; and the ability to advise clients about issues that go beyond legal doctrine, such as the advantages of settlement. Some problems may be discussed in class, while others may provide opportunities for collaboration by smaller groups of students. The text itself or the teachers' manual would ideally offer some suggestions for more intensive exercises that would promote such skills as negotiation or interviewing clients.

PEOPLE SKILLS

The Report argues that sensitive listening skills are the single most important attribute of a good family lawyer. In the right hands, many of the features of a modern text will promote the development of the people skills that the Report emphasizes. Sensitivity to the emotional content of family law issues; awareness of cultural, gender, and class differences; and collaboration with other professionals should all lead to better listening and client counseling. Discussion of family lawyering as a professional niche, and of the range of issues that arise in practice, should open avenues for consideration of the intricacies of working with clients. Some of the problems presented in the text should focus on the importance of both listening and communicating. These problems will promote discussion about how lawyers can explain law and process to family law clients as well as how lawyers can encourage clients to make choices that will promote healing for them and for their

children. The same student who wrote me about his job interview also shared his experience at his first client meeting with me: “My client told me that she wanted to give up all of her rights to support in exchange for her ex-husband giving up all of his parental rights. I explained to her why that might not be a good idea. When I relayed the story to the partner, she told me that what I said was exactly what a judge would have said [and that] she was impressed with my knowledge of family law.” This student had mastered not only the black letter of family law, but also the critical skills of listening, placing in context, and counseling.

ISSUES REQUIRING SPECIAL ATTENTION

Three other areas highlighted by the FLER Report deserve special consideration when comparing books for the purposes of course adoption: domestic violence, ethics, and comparative law.

DOMESTIC VIOLENCE

Most books devote only a few pages to domestic violence, but it deserves a full chapter so that all of our students will recognize it in their clients even if they do not specialize in family law. As with issues of class and race, domestic violence materials should also be integrated into other sections of the book, including chapters on grounds for divorce, alternative dispute resolution, intrafamilial torts, child custody, and visitation.

PROFESSIONAL ETHICS

Similarly, family law presents limitless opportunities to discuss professional ethics, ranging from abuses of litigation and discovery to opposing a pro se litigant. These themes can be developed from almost any textbook, but the book that will best complement the FLER curriculum will develop the issues by offering a chapter on the special problems that arise in family law practice and by integrating these issues throughout other material.

COMPARATIVE LAW

Finally, international comparative perspectives are increasingly important in the modern world, characterized by high mobility and a global economy. Some aspects of international law—such as the provisions and application of the Hague Convention—are not optional in the modern world and should be included in a basic family law text. It may be impossible to do justice to comparative family law in the typical three-credit survey course, and several excellent texts devoted to international and comparative family law are now available for advanced courses. Nonetheless, a FLER-compatible text will at least introduce students to comparative regimes, and the teachers’ manual should provide additional comparative materials to orient those of us who were trained during a more insular age.

CONCLUSION

The FLER Report envisions a world in which we family law professors are training students who will become family law practitioners. Undoubtedly, the proportion of students

who become family lawyers varies from campus to campus and from year to year. I believe, however, that the FLER curriculum has a great deal to offer to all of our students, regardless of the area of specialization they ultimately choose. The curriculum emphasizes theory and doctrine in the context of practice, which provides a useful model for any other law school course, and a critical learning opportunity for every student. Moreover, in my own experience, clients, family, and friends all rely on the lawyers of their acquaintance for advice about family law issues. Family law professors should strive to prepare all of our students to answer basic questions about core issues, even as we lay a solid foundation for students who eventually devote all or some of their practice to family law. For this reason, the family law text you choose should also be clear enough and comprehensive enough that your students will want to keep it handy in their offices after they graduate.

NOTES

1. Mary E. O'Connell & J. Herbie DiFonzo, *The Family Law Education Reform Project Report—Draft for Comment*, at iv, available at http://www.hofstra.edu/pdf/law_FLER_report_101405.pdf.

2. Randy Kennedy, *Revising Art History's Big Book: Who's In and Who Comes Out?*, N.Y. TIMES, March 7, 2006, A1.

3. O'Connell & DiFonzo, *supra* note 1, at Appendix A. Although the authors do not define "practical lawyering," the phrase appears to cover all of the knowledge and skills required in the practice of family law.

4. Although the Report makes its official appearance in this volume, a number of us have been trying to use the FLER approach for years—indeed, the Report captures what many in the field are already doing.

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