House Rules

Contents

Introduction

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This book addresses a fundamental question in family law: how to overcome the gap between rapidly changing social norms, both statistical and ideological, and legal policies and practices that so often fail to deliver just outcomes. Even in jurisdictions where legislative and judicial reforms have been instituted to address some of the many problems facing contemporary families, fair and adequate legal solutions remain elusive. Responsive reforms tend to be too limited and often come too late, while more proactive innovations, intended as much to shape as to reflect transformations in family life, often underestimate conventional norms' resistance to change. Either way, the attempt falls short of its object, in many instances entrenching or exacerbating inequality.

Why should a book on family law focus so decidedly on *norms*? To explain, we must first define and clarify the term. Among the meanings supplied by the *Merriam-Webster Dictionary,* the ones that come closest to our usage here define a norm as "an authoritative standard," "a principle of right action binding upon the members of a group and serving to guide, control, or regulate proper and acceptable behavior."[1] Social norms, then, are informal yet authoritative and widespread standards that guide the conduct of members of a specific community. Although they may be expressed in law, social norms "retain a distinctive profile" by representing patterns of behaviour "as peculiarly desirable or obligatory."[2]

Our focus on norms stems from the special status that norms have in family lives and their particular influence on family laws.[3] Social norms relate to almost every aspect of relationships and household management: from

decisions about reproduction to parenting, surname to wedding, money management to estate planning. At the same time, norms play a significant role in the institutional design of public policies. Indeed, laws and norms are situated in a complex, intertwined relationship. Because norms have widespread areas of overlap with laws, we adopt an expansive definition of laws and regulations. Laws and regulations are here used interchangeably to mean any legal directives or policies promulgated by state actors.[4] Likewise, institutions and non-state organizations also create, disseminate, and enforce centralized norms in ways that guide patterns of behaviours and therefore are an integral part of inquiry within this book.[5]

Representing four countries (Canada, the United Kingdom, the United States, and Taiwan), the contributors to this book undertake three crucial projects at the juncture of social norms and family law. Some of our authors focus primarily on discovery and description: uncovering and elaborating the norms that actually prevail in the families and households of particular contemporary societies. Others are interested mainly in evaluation and improvement – in critiquing, revising, and offering new tools to critique and transform some of the well-intentioned law reform efforts that have tried to keep up with changing social norms. And still other authors are chiefly concerned with documenting and analyzing some of the effects that resilient norms and inadequate reforms have wrought on diverse types of families and relationships. All three projects are in some sense unsettling, either by questioning and destabilizing norms that lie beneath, adjacent to, or well outside of family law, or by exposing how certain norms are themselves disturbing or are being disturbed.

The name of this collection, *House Rules*, means to capture how diverse norms operate among various communities and households and play a vital role in organizing everyday lives. House rules can be the idiosyncratic norms that govern each and every household, as well as the rules pertaining to economic management of the household, division of chores, and guidelines reflecting what parents expect from their children. At the same time, house rules can solidify norms. *Merriam-Webster* defines a house rule as "a rule (as in a game) that applies only among a certain group or in a certain place."[6] It follows that norms that guide behaviours can also appear formalized and centralized, like those of card games in a casino or the norms of a member of a legislative branch.[7] Understanding the dominant house

rules and their relation to regulations is one main topic we address in this book.

Norms, Laws, Scholarship: Playing Catch-Up

How have legal systems and scholarship responded to changes in familial social norms? There is no question that modifications in social norms have posed daunting challenges to regulators. Over the past few decades, lawmakers have struggled to adjust normative content in the face of dramatic shifts in norms, practices, and structures that govern households and relationships.[8] Consider that, in many households, both partners have now joined the paid labour force, prompting adjustment of laws – custody rules, for example – designed under the assumption that households are composed of a breadwinner and a homemaker.[9] At the same time, the norm of marriage as a lifelong commitment has declined, and an expectation of easily available divorce has grown. When laws failed to keep pace with these new norms, some people manufactured "fault" as a way to get a divorce; whereas others suffered a great deal until legislatures implemented no-fault divorce. Then, after no-fault divorce became widespread and dissolution of marriage more common and readily available, the nuclear family lost some of its dominance. The norm of getting married at all has lost its prominence; lawmakers still struggle with formulating a policy that will effectively address the skyrocketing numbers of unmarried cohabitants. More recently, laws have had to engage with changing norms with respect to same-sex relationships and sole parenting. Finally, in a new set of challenges, laws need to respond to the increased trendiness of polyamory and other family arrangements that involve more than two adults, whether as parents or partners. As laws and policy have striven to keep up with these evolutions, new norms have continued to arise and disrupt legal systems' ability to effectively address the realities of families' lives.

Simultaneously, lawmakers have occasionally struggled with norms that have not altered fast enough and with the adverse outcomes that these now-outdated or undesirable norms have produced for families. Consider, as an example, the allocation of unpaid care work within the household. On average, across the Global North, women remain responsible for a larger share of domestic work and care, an imbalance that contributes to gender-based differences in career progress and to gaps in income and

wealth holding.[10] These discrepancies can create major economic effects during and after the end of relationships. Laws in many common law jurisdictions, and various other jurisdictions, were amended to help correct the unequal consequences that divorce had on primary caregivers, by compensating them for economic losses that resulted from their domestic responsibilities and interdependency. Yet, as some chapters in this book show, despite reforms, legal systems have failed to produce just results.[11] The norm of care work being performed unequally has been particularly sticky. Indeed, sometimes, as some of our contributors demonstrate, family laws are at least partly responsible for this reinforcement.

Along with changing norms and some attempts at reforming laws, family law scholarship has metamorphosed.[12] This transformation is expressed by the topics that scholars explore, the methods they use, and by their interdisciplinary, comparative, and intersectional approaches. In terms of topics, from a field focused primarily on spouses/state relationships and the financial consequences of divorce, scholarship is now reaching into, and advancing in, new spheres. Unashamedly, family law scholarship probes a wide variety of issues related to the internal and external operations and functions of households, ranging from wealth inequality to urban design, from privatization to dispute resolution and to what constitutes a family in the first place. Laura Kessler calls this expanded version of family law "the law of intimate relations." She envisions that this version "will not be centered on marriage; it will erase the market/family and public/private distinctions; and it will include a multitude of human connections involving sex, reproduction, and care."[13] In correlation with the evolution of scholarship, the breadth of the fields from which scholars draw their analytical tools is larger than ever.

Complementing this shift in scholarship is a renewed interest in comparative family law and in exploring globalization's effects on families and their regulations.[14] Ideas flow easily and quickly across jurisdictions, inspiring and influencing reforms – and sometimes backlash – elsewhere.[15] One particular theoretical framework that has had global influence in family law scholarship is intersectionality.[16] A pivotal exploration by four scholars – including Kimberlé Crenshaw, who first introduced the theory – mapped intersectionality as an interdisciplinary analytical tool and as a social movement, one that "moves across national boundaries."[17] Growing

literature begins with the view that intersectional harms characterize inequalities in family law.

Reflecting those changes in scholarship, particularly vis-à-vis the exploration of social norms, this book grows out of our belief that comparative perspectives are fruitful in inspiring scholarship, policymaking, and discourse, especially in the area of family studies.[18] Likewise, two chapters emphasize intersectionality as a fundamental paradigm in regulating family life, and many chapters incorporate feminist, queer, and critical perspectives. In adopting this wide-ranging approach, we recognize that contemporary family law must be data-driven, conceptual, and culturally sensitive. Embracing an integrative approach – in terms of methods and scope of interventions – helps underscore this point.

The Book's Central Themes

Five central themes emerge from and structure the arrangement of the chapters. Each part of the book introduces the two chapters most representative of the theme, but nothing prevents other chapters from engaging with other themes. Part 1, "Locating Norms," explores unconventional areas of law in which novel family law scholarship looks for social norms, and it gives reasons for an expanded vision about what constitute meaningful norms for family law. Part 2, "Law's Norms," uncovers certain important social norms that family law upholds and promulgates, particularly the traditional division of house and care work. Part 3, "Norms' Stickiness," addresses how different manifestations of the private/public divide are particularly resistant to change. Part 4, "Measuring Norms," considers how empirical methods can uncover norms, and how such methods can and should be used to inform policy. Part 5, "Reforming Norms," contemplates how to reform the reform process itself, both concretely in legislative attempts, and in more theoretical and conceptual levels.

Locating Norms

Traditionally, family law scholarship confined itself to areas governing entrance into and exit from marriage – including rules concerning financial obligations following the breakdown of marriage – as well as some parent/child/state relationships. Janet Halley and Kerry Rittich call these areas

"Family Law 1," or, for short, "FL1."[19] They claim that, typically, to identify which topics constitute core areas in the FL1 field, one should look to contemporary family law textbooks, treatises, and law codes. Following their advice, Laura Kessler recently studied eighty-six family law casebooks published in the United States from 1960 to 2019. She found that "the core of the academic field of family law has remained relatively stable in the past 60 years."[20] By ascertaining what FL1 focuses on, we learn implicitly what topics it excludes and we can begin to inquire into the consequences of those exclusions.

According to Halley and Rittich, "Family Law 2" (FL2) refers to the laws that govern the family but are not part of distinct family law statutes. This category includes definitions of "family" and references to family members in legal rules concerning, for example, immigration, taxation, and welfare assistance. Put differently, FL2 regulations are those that quite clearly define and shape the family even as they lie outside of FL1's core.

"Family Law 3" (FL3) ventures into even more remote territory, encompassing various legal directives – from ordinances to definitions of family in human resources regulations – that affect the household's governance and composition more generally.[21] Consider, as examples, zoning laws that restrict the types of families that can live in an area, and condominium bylaws that disallow children.[22] Finally, "Family Law 4" (FL4) consists of myriad social and familial norms that shape FL1, FL2, and FL3. Although FL4 norms have no legal status, their content strongly influences the other three types of family law.

Probing family laws and family lives in the context of diverse legal regimes – a shift from a predominant focus on FL1 to a combination of all four areas – is part of an analytical move that contests the "exceptionalism" of family law: a tendency among scholars, judges, policymakers, and even laypeople to treat family law as distinct from other legal fields and as isolated from influences and values that guide other areas of law. Exceptionalism thus refers to doctrinal and normative characterizations of the family as a special object of moral or cultural concern and a special repository of values. The exceptionalism is achieved by a set of dichotomies where family is an entity positioned in opposition to the market, as a site of altruism instead of individualism, and as the site of status as opposed to contract.[23]

Doctrinally, according to conventional exceptionalist perspective, the foundational doctrines and theories of private laws should not constitute part of the corpus of family law (in the singular, as this is a unique type of law; we sometimes use "family laws" in the plural to reflect a set of regulations that reach far beyond the laws that constitute FL1).[24] This doctrinal isolation is supposed to reflect a view that families – and the laws that apply to them – represent the local, private, vulnerable, and altruistic.[25] Family law is understood as safeguarding the family from the influences of the market, including the perils of individualism and globalization.

Casting aside these foundational oppositions unveils a nuanced and complex body of family laws. Several contributors to this book turned their focus to how FL4 (social norms) interacts with the other types of legal directives that affect family life, be they within FL1, FL2, or, mainly, FL3. Escaping the traditional silos of family law brings new insights to light, in which regulations of family have a distributional impact on the market and society at large.

In Chapter 1, for example, Allison Tait explores the long-lived norm of financial privacy among elite families, showing how this norm has persisted, albeit in newer forms. The chapter unsettles deep-rooted norms of financial privacy among the ultra-rich. To locate the norm in its current manifestations, Tait draws on a wide variety of unconventional sources, far from FL1: from financial regulations that privilege the "family office" to the advertisements used by trust companies and wealth managers. Tait shows how various laws, related mainly to tax, trust, and estate planning, create a special regime that provides a distinctive and exclusive kind of financial privacy to wealthy families. Although these uber-rich families seek to shield their "private" information, she contends that they are *not* outside the market, rather, connected to the market and manipulate the market to their needs. And the outcomes are far from private: market behaviour creates negative externalities for most other families. Indeed, the privacy norm that elites are free from government scrutiny stands in contradiction to the norms governing everyone else's lives, especially people with low incomes. For the latter, privacy from government intrusion cannot be purchased. The result of norms that allow ultra-rich families to escape the scrutiny of the law is the increase in wealth inequality.

In Chapter 2, Chao-ju Chen tackles the legal challenges experienced by Taiwanese Indigenous women who transmit their Indigenous status to their children. Patronymic naming has been a particularly ingrained norm in that country; 98 percent of all newborns are given their father's name, and over 80 percent of non-marital children are given their father's surname after paternal acknowledgment. Indigenous mothers who intermarry with non-Indigenous partners must choose between giving Indigenous status to their child or having the child receive their spouse's name, a choice that reflects norms associated with both gender and racial hierarchies. Chen's research leaves FL1 altogether and moves freely between FL2 (administrative laws that govern name change) and FL3 (rules regarding the transfer of Indigenous status) to expose the work that FL4 does in shaping the law – namely, preserving patrilineal normativity.

Chen's chapter deals with denying Indigenous mothers the ability to pass on Indigenous status to their children, which is a form of discrimination at the intersection of patriarchy and colonialism. The rules enabling this denial often involve discrimination based on various combinations of gender, marital status, age, and race. Informed by scholarship on multiculturalism and feminism, her chapter contends that "the intersection of private and public laws produces a unique situation where gender-neutral law perpetrates gender inequality through *private choice*." Chen contends that paternal bloodlines were privileged in order to sustain racial hierarchy – a goal that has survived several legal reforms through the imposition of the gendered and racialized duty of naming. She theorizes that group self-determination does not facilitate the dual goals of gender and Indigenous justice if Indigenous sovereignty is established as a private sphere that tolerates internal domination. Her work marks an assessment of a failed reform – a theme we discuss later in detail – and uses intersectionality as a major analytical lens to illuminate the roles that gender and Indigeneity play in creating the problem and the role they must play in solving the inequality.

Several other chapters seek the norms that influence family lives outside standard family law codes. In our view, what is most important is the conclusion: family laws cannot be found only in the core statutes and legal directives where the word "family" appears. Family law is, and ought to include, the vast array of legal mechanisms that affect family lives and contribute to the structuring of households and personal relationships.

Law's Norms

Laws and social norms have complex relations. Sometimes, laws incorporate and express existing norms. At other times, laws are responsible for the creation and/or the maintenance of norms. Often, norms are attendant to specific *roles*. Classic examples include doctor, friend, teacher, and student. Each role entails a web of social norms that almost everyone understands and internalizes. Laws and norms that constitute a role are interconnected in many ways. As Cass Sunstein puts it, "prevailing roles and norms can be fortified by legal requirements; they may even owe their existence to law. Law is frequently an effort to prescribe roles … In fact, many roles are so deeply internalized that they seem 'natural,' even though they owe their origin to social and even legal conventions."[26]

In our book, the role of *spouse* has loomed large as a central element at the intersection of law and familial norms. Historically, gendered spousal roles were upheld by laws, for example, by the doctrine of coverture, or by duties of obedience and protection. Although rules that directly prescribe gendered roles are no longer in effect – and indeed same-sex marriage is now legal in all jurisdictions discussed in this book – traditional spousal norms of unequal allocation of care remain ingrained. What is the function of laws in sustaining the gendered dimensions of spousal roles? Does law have a role in dismantling them?

Uncovering the norms that laws promote is an arduous task. Gender-neutral language in legal directives and court opinions often eclipses the gendered effects of legal rules. To ascertain the responsibility of legal rules to the maintenance of traditional spousal roles, scholars need to dig deep and examine distributional consequences of various laws from diverse fields, as well as how they affect norms. Further, the fact that diversity of spousal relationships exists – with different or similar patterns of division of labour, with same-sex marriage, and with different class and racial dimensions – makes it harder to elucidate the norms without falling into an essentialist perspective as if most women are housemakers and most men are breadwinners.

Notwithstanding the difficulties, contributors in this book derive norms that show prominence in different legal systems, and expose the mechanisms used to promote them. The authors of Chapters 3 and 4 conduct their work in FL1 – rules pertaining to divorce, parenting, and property – but

from their analysis, they learn what norms and roles the systems advance. The rhetoric that courts adopt purports to hide the stubbornness of traditional gendered norms, making their entrenchment more difficult to identify. The authors find that laws sometimes establish or support norms that help shape and structure households; at other times, a change in laws does no more than camouflage the continuation of previous outcomes.

In Chapter 3, Alison Diduck takes up the connection between familial norms and the functions of relevant laws by analyzing "[l]egal statements – judicial and legislative statements of the law" – in England and Wales. Her case study of rules pertaining to property division finds that older doctrines were designed under the norm of a breadwinner/homemaker household. Scholars and judges have characterized recent changes in rules governing division of assets as reflecting a shift from protecting societal institutions like marriage to creating policies that aim to protect the individual. That is, nowadays cases purport to reflect the new social norms that dominate relationships: those of independence, autonomy, and personal responsibility. Diduck doubts whether norms of individualism – such as clean break in divorce, in which each spouse is assumed or encouraged to reach self-sufficiency right after divorce – have taken prominence and replaced older norms. She points out that the substantive rules about division of property always have "said as much about the way society and the state organize and value economic, reproductive, and caring responsibilities as about the way family members do." Upon scrutiny, she contends, new doctrines still contain much of the previous laws' underpinnings. The expressive role of English law that praises independence is not in line with gendered norms and structures (like employment) that guide individuals in the role they adopt in their marriages. Both the old and new doctrines, despite the different norms they purport to promote, deliver the same outcome: they maintain a social order structured around traditional spousal roles of effectively a temporary breadwinner and a primary care provider.

In Chapter 4, Rachel Treloar shows how spousal roles transcend dimensions of relationships, before and after divorce. Her chapter uncovers the entrenchment of gendered norms related to parenting, based on a qualitative study conducted with twenty-five parents in British Columbia who at one time experienced a high-conflict separation or divorce. The chapter

illustrates how a gendered division of labour is dynamic, generational, and related to class. Even those women who worked full time outside home during the marriage took a larger share of the care work than their former partners. Treloar finds that "most participants described men's work as prioritized within their marriage, whereas women's work inside the family was often invisible outside of it." The dynamics in division of labour, however, shifted after the divorce, where some of the ex-husbands asked to take a larger role in the care of the children. Some of these changes were conceptualized as part of a litigation strategy; at other times, when men took more responsibility for care, it opened their eyes to the complexity of the caregiving role, reminding us that gender-based norms harm all those who do not conform to the traditional construction of gender.

Treloar illuminates the massive part that gender roles and gendered expectations play during marriage and after divorce. Interviewees show that inequalities in division of labour persisted after divorce, in various manifestations. Their divorce proceedings heavily influenced the gender dynamics after the relationships, and most mothers felt disappointed by the legal system. Many believed that their ex-husbands were able to abuse the system by demanding to pay less child support while asking for more decision-making responsibilities and control over the children. Many mothers expressed the view that relevant laws diminished their roles as caregivers during the marriage, while forcing them afterwards to start being financially self-sufficient. Each parent deals with these inequities differently – some accept them, some fight them – but what is clear is how salient gender norms are in the lives of people who have gone through high-conflict divorce. The interplay of gender and roles, then, is multifaceted, with personal and legal aspects.

Norms' Stickiness

Beyond the chapters showing how the inegalitarian allocation of domestic labour persists and is sometimes advanced by legal systems, some contributors also contextualize conventional norms as part of the private/public divide. The function of family laws as vehicles to privatize care work – essentially, to roll the responsibility of caregiving onto families rather than the state – has long stood at the centre of family law scholarship. In her canonical 2002 work on privatization and family law, Brenda Cossman

argues that, in the era of neoliberalism, privatization has acquired "a newfound importance."[27] American scholars have also analyzed how privatization gradually becomes the gold standard for family law.[28] Accordingly, one of the primary functions of family law is to free the state from the burden of supporting dependent members of society. The state "recognizes and bestows benefits on families so that they will serve a private welfare function, minimizing reliance on state and federal coffers."[29] The state shifts responsibilities for care onto families, forgoing its obligation to remedy structural causes of dependency. Often, this is done by increased enforcement of private support obligations, such as between unmarried partners. Simultaneously, as they have classically been construed, various laws often continue to shield the "private" domain from state scrutiny, a situation that maintains inequality, most often harming the primary caregiver (still commonly a woman) in the household.

Several chapters contribute to our understanding of how privatization works and how embedded it is within family law systems in different countries. In Chapter 5, Wanda Wiegers tracks the prevalence of gendered-care norms across a few fields of family laws: from regulation governing child support and custody to laws concerning child protection. In these contexts, the stereotypical norms of care do not merely survive legal reforms but, upon scrutiny, are promoted by various state policies. Across these different legal regimes, the cost of care is, yet again, trundled from the state onto families. In the area of child protection, for example, foster parents in British Columbia must meet stringent requirements of care for their foster children, including residential space, educational support, and health care. In the area of custody, the obligation of non-parents to pay child support is limited and rarely arises, thus concentrating the responsibility for care and support on parents and their post-divorce conjugal partners, and rarely on non-parents such as extended family. In any event, in all these arenas, women disproportionately bear the costs of privatizing care. Furthermore, foster care and kinship care, both of which have been undercompensated in the past, have increasingly recruited Indigenous and racialized women as care providers. The outcome is that the costs of privatization of care are not distributed evenly but are disproportionally borne by working-class, impoverished, and Indigenous women. One particularly sticky manifestation of the public/private divide is expressed by the

"unremunerated nature of labour performed (usually by women) in the home, in contrast to the remunerated labour performed (traditionally more by men than women) in the market."[30] Wiegers's chapter rectifies how regulations replicate long-standing assumptions that care work in a family setting is or will be in some measure provided altruistically – further confirming care work as a domain that belongs to the privacy of the household, distinct from the market, and one that does not warrant adequate compensation.

Another aspect of the private/public divide relates to the distinction between state regulation and the market. One manifestation of this distinction, as underscored by Susan B. Boyd, has been the difficulty "to introduce regulatory measures that promote women's equality into non-government workplaces."[31] In Chapter 6, Nicola Barker complicates this idea by offering a fresh analysis of the private/public divide in the context of human rights legislation in the United Kingdom. She critiques the application of the *Human Rights Act of 1998* (*HRA*)[32] and its failure to improve women's lives, especially for those who work in what has traditionally been considered "private domains." Accordingly, despite the *HRA*'s potential to advance equality, courts have rendered it ineffective through their narrow interpretation. As but one example, courts have refused to recognize private contractors who perform services that traditionally were considered public (for example, providing health care services) as liable for human rights violations under the *HRA*. This narrow interpretation, Barker argues, has a particular impact on women, not only as service users but also as service workers. She concludes that the *HRA* has not sufficiently advanced access to justice for women in family matters and that it "largely falls short … in its utter failure to move beyond, or even shift the borders of, the public/private divide." Further, Barker's contribution demonstrates how the *HRA* has had limited impact in reducing the effects of reforms that greatly curtail access to justice for family law litigants. The reforms, she suggests, privatized family law conflicts by encouraging alternative dispute resolutions and private settlements and by virtually eliminating legal aid in "private" family law matters. The reforms' outcome is further privatization, and the *HRA*'s power to prevent this process has been inadequate.

Finally, in what we deem a new articulation of the private/public divide, one that is possible only when scholarship explores areas outside FL1,

Chapter 1 by Allison Tait offers several examples of the methods by which some financial activities continue to enjoy exemption from regulatory insight primarily because they are deemed private, notwithstanding their impact on the economy and society at large. For instance, by using sophisticated trusts, high-wealth families shield their money from creditors, tax authorities, and even from ex-spouses. By doing so, rich families "not only reshape household economies, but they also, once again, potentially recalibrate the relationship between public and private markets."

Measuring Norms

In a 2018 essay, Clare Huntington documented the "empirical turn in family law"[33] – that is, the increased reliance on empirical data in family law advocacy and policy design. While she celebrates this growing use of empirics, she also warns that outcomes and data are not everything: there are various "competing, and often contested, values also at play in family law," and these values should be taken into consideration.[34] We contend that it is imperative to take an empirical approach to uncover prevalent norms as a means to understanding better how they affect the content of FL1, FL2, and FL3.

To clarify, when we discuss empirical research, we mean both qualitative and quantitative approaches. As defined by John Baldwin and Gwynn Davis, a qualitative approach "involves an attempted in-depth exploration of legal processes, typically focusing on a modest number of interactions but viewing these from a variety of perspectives and perhaps over time. The strength of this approach lies in its capacity to reflect the complexity of legal processes, and the complexity of the relationship between process and outcome."[35]

Chapter 7 is particularly significant in creating and using empirical data in the search for norms – and their impact on schema of legal policies. In it, Hélène Belleau contributes to our knowledge of cohabitants' lives in Canada and shows how data should guide policymaking. Belleau is primarily concerned with whether unmarried cohabitants know about the laws governing their mutual obligations (which, in most jurisdictions, do not automatically create financial obligations among the partners) when they make decisions about their family form (married or unmarried). For example, she reports on a study she conducted in 2015 that surveyed 3,250

Quebec residents who live as unmarried cohabitants.[36] Forty-five percent of respondents believed they had the same legal protections as married people regarding mutual financial obligations – a crucial mistake. Belleau's chapter is replete with key findings, from the reasons that unmarried partners chose not to get married to the over-optimism exhibited by most cohabitants when evaluating their chances of not breaking up. Belleau calls on legislatures, when crafting regulations in this area, to abandon the myth that unmarried couples make an informed choice not to marry, and to design a policy that is in line with reality. She concludes that "the gap between social norms and values, on the one hand, and those enacted by the law, on the other, risks compromising the effectiveness of laws." Belleau's chapter, then, is an example of using empirical data to uncover the norms that underlie a decision to live as de facto spouses, with the goal of using these data to reform laws fairly and effectively. It also challenges the norms the state uses to guide regulation of families.

In Chapter 8, Erez Aloni and Adam Vanzella-Yang seek norms that motivate couples to share residency. In interviewing couples who cohabit informally, they find that norms around love and commitment are secondary to norms and economics of the housing rental market in terms of catalyzing couples to move in together. The authors argue that understanding the norms that trigger cohabitation is essential to improving the design of policies in a wide range of areas, from housing to governmental benefits. If inaccurate perceptions of which norms animate decisions to live together are used to shape laws about financial obligations among unmarried couples, they are likely to create injustice. Moving between FL1 (rules about when cohabitation begins for purposes of division of property), FL4 (norms of commitment and love), and FL2 (rules concerning the definition of "spouse" for the purpose of qualification and disqualification of public assistance), this chapter provides an example of family studies that moves between the layers of family laws and norms to expose the complex ways in which norms – including a wrong perception of norms – inform laws.

Aloni and Vanzella-Yang's chapter advocates collecting further data on the lives of unmarried cohabitants in general and on the process of relationship development specifically and engaging further with the data in policymaking. They argue that norms related to people's reasons for not getting married, and policies designed to address their lives, must rely on

data and not hunches. For instance, they note that the decision to move in together – a decision that has legal meaning both for recognition of a relationship as spouse-like and for commencing the time during which gains in property are dividable – often stems not so much from a relationship's progression as from housing market and other socio-economic considerations.

Reforming Norms

How can we reduce the weight of some norms in creating inequality and promoting privatization? And what can be done about regulations that cultivate unequal norms? Our contributors make it clear that effectively reforming family laws to reflect changes to or entrenchment of norms is a daunting task. One challenging aspect in the field of family law is that, in some jurisdictions and some areas, laws have constantly been reformed and transformed. The consequences, as some chapters show, are unsettling laws that deliver unstable and unpredictable outcomes. Contributors examine reform processes from top to bottom. They analyze different reform strategies, the reasons for reforms, and the effects of reforms.

In Chapter 3, discussed above, Alison Diduck offers a cautionary tale of reform failure in the United Kingdom. She presents a genealogy of a botched attempt to reform laws that govern property disputes among divorcing couples. Her chapter explores how contemporary doctrines that control division of assets upon divorce have contended with historical "chaos" in family law doctrine and values. Located within the narrative of progress, family law is seen as having worked out its conflicting philosophies and discarded its debris from earlier centuries. Yet, the narratives of progress and chaos are not always straightforward and can have significant material and symbolic implications for intimate partners. Diduck teaches that, when examining the success of reform, looking at the rhetoric is insufficient: investigating the outcomes is equally important. Her caselaw analysis focuses on FL1, but the analysis is aimed primarily at FL4, for Diduck cares mainly about the laws' expressive function – the norms upheld and delivered by the set of rules. Her point is that evaluating what norms play key role in adjudication can only be measured by results, not by rhetoric.

Two chapters systematically illuminate the particular challenges of confronting organizational norms in the context of courts and of legislative

reforms. In Chapter 9, Julianna Ivanyi and Régine Tremblay examine how to reform law reforms. They analyze not simply one reform but, more generally, the process of reforming. Their point of departure is the interplay between changing norms and changing legal contexts: changes in norms influence reform; hence, to evaluate the success of reform, we must examine how the norms are implemented and reflected within the new regulations. Because family laws have been, as the authors put it, "subject to the winds of change," they contend that it is imperative to learn how to assess the outcomes of law reforms systematically and to determine what makes a reform successful. Their all-inclusive exploration begins with defining "reform" – a task more complicated than it sounds – and ends with creating a framework to evaluate reforms. They argue that law reform assessment includes treatment of "process," "content," and "effects." Careful to avoid the trap of family law exceptionalism, they state, "[p]arsing family law out as exceptional ignores the reality that family law does not exist in a vacuum – instead, it touches and interweaves with many different areas of the law." With that in mind, they propose that, in the family law context, policy-makers and other stakeholders might pay particular attention to two areas: public consultation and education/resource allocation. Ultimately, they advise that law reform is only one tool to effect change for families, and that it may or may not lead to progressive change. Either way, more thinking is required to make better family law reform. Ivanyi and Tremblay's chapter also contributes to the argument about the importance of empirical work to reforms. One of their arguments is that "reform must ... be empirically based." At the same time, they warn that "empirical data on specific aspects of a law reform can provide for good assessments of success, but we have to be careful with these numbers."

Closing the book, in Chapter 10, Brenda Cossman suggests that contemporary family law in Ontario does not work for many. The problem is access to justice: the changes in norms and law – for example, ease of getting divorced – have overwhelmed the courts. As a result, the system is unequipped to meet the needs of many, thus preventing individuals from relying on what is otherwise an exemplary law (in terms of its substantive content). According to Cossman, the substantive rules governing obligations upon dissolution of relationships are judicious; however, enforcing the rules is difficult, especially with an increasing number of unrepresented

litigants and in the absence of a well-functioning court system. The problems within this system, she maintains, are deeply entrenched and difficult to repair. Cossman is pessimistic about the opportunity for effective reform, arguing that "path dependency" – how future reform has been dependent on how we have gotten certain outcomes to date – will make serviceable reform nearly impossible. She thus questions the premise that an incremental fixing of particular shortcomings will change the structures that prevent family laws from functioning adequately.

The chapter contests family law exceptionalism directly. Cossman suggests that we should restructure the family law system so that it is "disarticulated from its private, civil law moorings." To overcome the structural barriers, Cossman proposes that we change the framework altogether, not merely tweak the rules. A possible new system might increase reliance on novel digital technologies to facilitate disputes resolutions. But it must go further: for technology to work, she maintains, we have to consider reducing court discretion, because it undercuts consistency and predictability. Innovatively, she imagines marriage insurance as a method of allocating the risk of dependency among many individuals, as insurance typically operates. The idea is to try to envision an apparatus removed from the private and exceptional elements of traditional family laws as a means of overcoming the endless process of small and unsuccessful reforms. Abolishing family law is a thought experiment only, but it allows us to imagine what family laws that are detached from the influence of core areas could look like.

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Multiple stakeholders have expressed the view that there is a shortage of sustained family law scholarship at a time when such research is essential.[37] Responding to this challenge, and particularly to the need to keep thinking about the disconnect between social norms and family laws, this book assesses norms that are situated at the centre of family law matters, and methods of affecting substantive reforms. Together, the chapters provide an insight about the breadth of norms that are at play in the intersection of family laws and social norms: moving in together, living in marriage or informally, dividing house and care work, understanding societal meaning of marriage, purchasing financial privacy, privatizing care, naming

offspring, parenting post-divorce, to name just a few. Contesting exceptionalism to different extents, the chapters find the operation of norms in conventional and unconventional domains: courts, housing market, administrative law, trusts, reform process, as well as in the unwritten norms of care among divorced and between unmarried couples. The results of unequal norms and inadequate laws, the chapters discover, are cultural, gender, racial, and economic inequalities. The chapters ask that we think harder and more creatively about the challenges posed by the changing norms and by attempts to transform or adjust those norms. The interdisciplinary and contextual approach taken in this book, we hope, will provide tools to analyze and help resolve some of the difficulties in designing apt laws that respond both to ongoing, sometimes radical, shifts in norms and, other times, to the entrenchment of norms of inequality.

Notes

1 "Norm," online: *Merriam-Webster.com Dictionary* <www.merriam-webster.com/dictionary/norm> [perma.cc/FQ8C-W8QC].

The second of these formulations recalls Philip Pettit's observation that almost all scholarly uses of "norm" carry two necessary meanings. First, a norm is a regularity to which people in a given society conform; and second, members of the society generally approve of the regularity and abhor deviance from it. Philip Pettit, "Virtus Normativa: Rational Choice Perspectives." (1990) 100:4 Ethics 725, <http://www.jstor.org/stable/2381776>.

2 Pettit, *supra* note 1 at 725.

3 Although social norms have immense influence on different fields of laws and diverse areas of life, "norms particularly shape the relationships and intimate decisions that fall within the ambit of family law." Clare Huntington, "Familial Norms and Normality" (2009–10) 59 Emory LJ 1103 at 1105.

4 See Colin Scott, "Analysing Regulatory Space: Fragmented Resources and Institutional Design" (2001) Public L 283 at 283 (defining "regulation" as "any process or set of processes by which norms are established, the behavior of those subject to the norms monitored or fed back into the regime, and for which there are mechanisms for holding the behavior of regulated actors within acceptable limits of the regime").

5 Richard H McAdams & Eric B Rasmusen, "Norms and the Law" in A Mitchell Polinsky & Steven M Shavell, eds, *The Handbook of Law and Economics* (Amsterdam: Elsevier, 2007) 1573.

6 "House rule," online: *Merriam-Webster Dictionary* <https://www.merriam-webster.com/dictionary/house%20rule>.

7 "House rule," online: *Dictionary.com* <https://www.dictionary.com/browse/house-rule>.

8 Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil and Family Justice: A Roadmap for Change* (October 2013), online (PDF): <www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf> [perma.cc/2B9U-JB8B] [Action Committee]; Elizabeth S Scott, "Social Norms and the Legal Regulation of Marriage" (2000) 86:8 Va L Rev 1901; Fiona Kelly, "Multiple-Parent Families under British Columbia's New *Family Law Act:* A Challenge to the Supremacy of the Nuclear Family or a Method by which to Preserve Biological Ties and Opposite-Sex Parenting" (2014) 47:2 UBC L Rev 565; Li-Ju Lee, "Law and Social Norms in a Changing Society: A Case Study of Taiwanese Family Law" (1998) 8 S Cal Rev L & Women's Stud 413; Nancy E Dowd, "Law, Culture, and Family: The Transformative Power of Culture and the Limits of Law" (2003) 78:2 Chicago-Kent L Rev 785.

9 Susan B Boyd, ed, *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997) at 5–6.

10 Sophie Ponthieux & Dominique Meurs, "Gender Inequality" in Anthony B Atkinson & François Bourguignon, eds, *The Handbook of Law and Economics* (Amsterdam: Elsevier, 2015) vol 2A 981.

11 See Chapter 3 by Alison Diduck and Chapter 4 by Rachel Treloar in this book.

12 The change occurred in many places; however, we restrict our claim to the four jurisdictions that contributors represent in this book.

13 Laura T Kessler, "Family Law by the Numbers: The Story That Casebooks Tell" (2020) 62 Ariz L Rev 903 at 907.

14 See, generally, Daphna Hacker, *Legalized Families in the Era of Bordered Globalization* (Cambridge: Cambridge University Press, 2017).

15 See e.g. Kelly Kollman, "Same-Sex Unions: The Globalization of an Idea" (2007) 51:2 Intl Studies Q 329.

16 See generally Ange-Marie Hancock, *Intersectionality: An Intellectual History* (Oxford: Oxford University Press, 2016) at 26 (discussing "the global reach of intersectionality").

17 Devon W Carbado et al, "Intersectionality: Mapping the Movements of a Theory" (2013) 10:2 Du Bois Rev Social Science Research on Race 303 at 307.

18 This book is cross-disciplinary, composed of chapters written by legal scholars and sociologists. It is more accurate, then, to characterize it as part of "family studies," a term we use to delineate the broad scope of issues and methodologies reflected here. Two chapters in particular – Chapter 7 by Hélène Belleau and Chapter 8 by Erez Aloni and Adam Vanzella-Yang – fall more into the sociology of the family than into legal analysis per se; but the other authors in the book have also adopted a broad and interdisciplinary perspective. We use "family

studies" as an umbrella term that encompasses family law scholarship and scholarship concerning the household generally.

19 Janet Halley & Kerry Rittich, "Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism" (2010) 58:4 Am J Comp L 753 at 761–62.

20 Kessler, *supra* note 13 at 933.

21 See Halley & Rittich, *supra* note 19 at 762–64.

22 See e.g. Kate Redburn, "Zoned Out: How Zoning Law Undermines Family Law's Functional Turn" (2019) 128:8 Yale LJ 2412, discussing the discrepancy between functional family law and definitions of "family" in zoning laws.

23 Halley & Rittich, *supra* note 19 at 755, 758.

24 See e.g. Frances E Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96:7 Harv L Rev 1497.

25 As Halley and Rittich note, colonial order has often imported the colonizer's rules about contracts from the mother's country, whereas personal laws (rules applicable to family matters like marriage and divorce) were left to be governed by the local orders. Halley & Rittich, *supra* note 19 at 771–772.

26 Cass R Sunstein, *Free Markets and Social Justice* (New York: Oxford University Press, 1997) at 43.

27 Brenda Cossman, "Family Feuds: Neo-Liberal and Neo-Conservative Visions of the Reprivatization Project" in Brenda Cossman & Judy Fudge, eds, *Privatization, Law, and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002) 169 at 169.

28 See e.g. Laura A Rosenbury, "Federal Visions of Private Family Support" (2014) 67 Vand L Rev 1835.

29 *Ibid* at 1866–67.

30 Boyd, *supra* note 9 at 9.

31 Boyd, *ibid* at 8.

32 *Human Rights Act 1998* (UK), 1998, Sched 1.

33 Clare Huntington, "The Empirical Turn in Family Law" (2018) 118:1 Colum L Rev 227.

34 *Ibid* at 232.

35 John Baldwin & Gwynn Davis, "Empirical Research in Law" in Mark Tushnet & Peter Cane, eds, *The Oxford Handbook of Legal Studies* (Oxford: Oxford University Press, 2005) 880 at 891.

36 See also Hélène Belleau, Carmen Lavallée & Annabelle Seery, *Unions et désunions conjugales au Québec: rapport de recherche. Première partie: le couple, l'argent et le droit* (June 2017), INRS Centre – Urbanisation Culture Société, online (PDF): <espace.inrs.ca/5763/1/belleau-2017-unionsA.pdf> [perma.cc/38K4-A9T6].

37 Alice Woolley, "Law Schools' Dirty Little Secret" (26 April 2018), online: *Slaw* <www.slaw.ca/2018/04/26/law-schools-dirty-little-secret/> [perma.cc/976S-D2L9]; Action Committee, *supra* note 8. See also Laura Robertson & Karen Broadhurst, "Introducing Social Science Evidence in Family Court Decision-Making and Adjudication: Evidence from England and Wales" (2019) 33:2 Intl JL Pol'y & Fam 181 at 182–84.

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