

Family Dynamics

How the Law Interacts with Everyday Life



What the law doesn't say about marriage, childrearing, sex, and death often helps shape our daily lives as much as what it prescribes or proscribes, according to Law Professor Laura Rosenbury. That fact drives her to examine how the law influences seemingly private relationships and conduct in ways we don't often realize.

PROFESSOR LAURA ROSENBURY'S FAMILY LAW RESEARCH breaks new ground with its practical implications—such as her discovery that pursuant to most states' default marital property distribution rules, women generally fare better financially as divorcees than as widows. It also raises new issues with its theoretical analysis of the law's role in the most fundamental of human relationships.

"I'm very interested in the subtle ways in which law can influence everyday behavior, especially those areas thought to be outside the law, such as parent-child relationships, friendships, and even child-child relationships," says Rosenbury, who recently was awarded tenure and was named the 2006 Professor of the Year.

But that influence often comes as much from what the law doesn't say—and thus tacitly supports—as what it explicitly dictates, what she calls "the expressive power of various silences within family law." Such as its ignoring authority figures other than the state or family in childrearing, which she examined in "Between Home and School," published in the April 2007 *University of Pennsylvania Law Review* and selected for presentation at the 2006 Stanford Yale Junior Faculty Forum.

A New Theory of Childrearing

In the article she posits that while the law acknowledges parental authority and that of the school over children under its care, it ignores a fundamental reality: Much of childhood takes place in spaces between home and school—in playgrounds, childcare centers, churches, community gyms, clubs, cyberspace, and more. Yet family law remains virtually silent about “what happens or what should happen in these spaces,” Rosenbury says.

She then goes on to provide the first family-law reading of the pivotal decision *Boy Scouts of America v. Dale*, where the Scouts sought to exclude homosexual scoutmasters, and sets forth a new theory of childrearing designed to acknowledge the socializing force of people and institutions between home and school.

However, her interest in such areas where the law has been hushed up to now does not necessarily reflect a desire to extend state regulation or control there.

“I want to expand the field of legal analysis and thought,” says Rosenbury, “although I’m very conflicted about expanding state regulation. I’m more interested in small ‘l’ law—social norms and conventions—rather than big ‘L’ Law. The decision not to regulate is as important as to regulate—it shapes the field. The law’s attention does not necessarily mean increased state regulation.”

Divorce or Death?

Rosenbury’s 50-state analysis of default inheritance statutes, outlined in “Two Ways to End a Marriage: Divorce or Death,” published in the 2005 *Utah Law Review*, exposes another area where family law scholars have been largely quiet: marriages that end by death. Her study produced the perhaps counterintuitive finding that, in most states—thanks to laws embracing the partnership theory of marriage at divorce—spouses are guaranteed to receive more property via divorce than by inheritance, where other family members may profit.

“Family law scholars are ignoring the phenomenon that many women do better in a divorce settlement molded by state divorce laws, rather than inheriting as a widow pursuant to state intestacy or elective share laws,” says Rosenbury. She theorizes that the schism expresses “a continued expectation of wifely sacrifices within marriages that do not end in divorce, despite the rhetoric of spousal equality that pervades family law scholarship” and sees this expectation of sacrifice “lurking within the partnership theory itself.”

Says Rosenbury: “The partnership theory was a good interim strategy but not as useful as it once was. We now need to change it.”

Seemingly, she would also change the perception of family law among legal scholars.

“Family law has a low status in academia for its dealing with mundane realities. But I just disagree,” says Rosenbury. “This is what shapes people’s everyday lives.”

And while Rosenbury is happy to be in academia and working in the theoretical realms of family law, she came to it circuitously.

She grew up in northern Indiana without a family legal background. In fact, she was brought up in the Church of the Brethren—related to other “peace” sects such as Quakers, Mennonites, and Amish—which often eschews the courts and settles members’ disputes within the church, she says.

Emphasizing Theoretical Work

She left to study at Harvard-Radcliffe College, where, she claims, “a whole new world opened up.” After graduating she worked at the national office of Planned Parenthood, where she “saw lawyers doing the most interesting work,” and subsequently entered Harvard Law School.

But after her first year studying legal fundamentals, she was ready to quit, thinking she might have made a mistake by entering law school. She went to her mentor there, Martha Minow, with whom she studied civil procedure and, later, family law. Minow, the Jeremiah Smith, Jr. Professor of Law, encouraged her to come back for her second year, but with more emphasis on writing and theoretical work—advice that helped invigorate Rosenbury’s legal education.

After earning her JD, Rosenbury worked in the litigation department at Davis Polk & Wardwell in New York, focusing on high-profile white-collar criminal defense cases while handling family-law cases pro bono. But her billable caseload brought her to a formative realization.

“Poring over e-mails and documents in complex white-collar criminal-defense cases, I saw that life is really messy. You begin to see how complicated reality is. ‘What is willful misconduct?’” she says, is not always an easy question to answer. “That feeds into my work now in family law, where many gray areas—such as the tension between privacy and the interests of the state—exist. My practice continues to influence my work in subtle ways.”

New Work and the Future

Another Rosenbury article, “Friends with Benefits,” published in the *Michigan Law Review* in November 2007, “examines the effects of family law’s intense interest in marriage and marriage-like relationships and its complete silence about other adult intimate relationships,” says Rosenbury, “namely friendships.”

In it she discusses how family law could support more pluralistic personal relationships beyond gendered conceptions of marriage and “transform not just marriage and friendship, but also gender itself.” Her next article will examine child–child relationships, an area that the law has also largely ignored except in extreme cases such as violence or bullying.

Rosenbury, who will be working as a visiting professor at Stanford University in fall 2008 and at the University of Chicago the following spring, states that her work shows “how perceptions of the divide between public and private are not just inaccurate but illusory. Once the law’s role in the construction of everyday life choices is exposed and better understood, scholars will be able to consider various normative approaches to those constructions. I strive to be an active part of that dialogue.” ■■■