Insurance Law's Practical Theorist • Exploring History's Relevance to Constitutional Law • An Interdisciplinary Approach to Family Law
2 • DEAN'S MESSAGE

5 • KENNETH S. ABRAHAM:
INSURANCE LAW'S PRACTICAL THEORIST

15 • MICHAEL J. KLARMAN:
EXPLORING HISTORY'S RELEVANCE TO
CONSTITUTIONAL LAW

25 • ELIZABETH S. SCOTT:
AN INTERDISCIPLINARY APPROACH
TO FAMILY LAW

36 • FACULTY BIBLIOGRAPHIES
A Message from the Dean

With this issue, we introduce the *Virginia Journal*, a publication devoted to the scholarship of the faculty of the University of Virginia School of Law. Published annually, each issue will include both a survey of recent publications and in-depth profiles of selected faculty. The purpose of the *Virginia Journal* is not only to record the achievements of a remarkable faculty but also to inform the continuing debate over the appropriate relationship between the scholarly and professional missions of American law schools.

Over the past 25 years, academic law has evolved into a fully formed professional career, chosen by aspiring teacher-scholars early in their professional lives and pursued for a lifetime. Perhaps not surprisingly, this period also has witnessed both an explosion in the quantity and a transformation in the character of legal scholarship. Borrowing from the social sciences and the humanities, legal academics have melded the insights of other disciplines with the rigor of legal analysis. The result has been the development of a number of competing conceptual frameworks for synthesizing, analyzing, and evaluating legal rules. The commitment to think more broadly about law and legal rules has enhanced the role of American law schools as centers of learning and scholarship. At the same time, the more formal academic language borrowed from other disciplines has had the secondary effect of distancin##the scholarly commitment of American law schools from their professional mission to train and inform the practicing bar. The challenge for the next generation of legal scholarship is to integrate the new scholarly insights with the modes of analysis and discourse common to the practicing profession.

The scholarly tradition at the University of Virginia School of Law rests on a foundation that dates to the first half of this century and owes much to the standard set by three major figures in American law: Garrard Glenn, Charles O. Gregory, and Hardy Cross Dillard. All three had a passionate commitment to excellence in both teaching and scholarship. In particular, the impetus for the rich and diverse scholarly tradition that characterizes the Law School today can be traced to Dillard, who taught at the Law School from 1931 to 1968 and served as dean for the last five years of his tenure.

Dillard believed that lawyers should respond to new issues and problems with creativity and imagination. The challenge facing law schools, he argued, was providing law students the traditional tools of the profession while at the same time encouraging and nourishing legal imagination. To meet this challenge, Dillard believed the best approach to legal education was one that was broad-based and firmly grounded in the humanities and social sciences. He brought to the Law School a number of talented faculty members whose teaching and scholarship represented a variety of methodologies and points of view.

Dillard’s insight and commitment were embraced by his successor as dean (and close friend) Monrad Paulsen. During the 1970s and 1980s, Deans Emerson Spies and Richard Merrill presided over an explosion of interdisciplinary scholarship, including pioneering “law and ...” studies involving economics, social science, history, medicine, and philosophy. During this period, teacher-scholars from disciplines other than law, in addition to legal scholars with diverse interests, perspectives, and areas of expertise, joined the faculty to build the foundation for today’s interdisciplinary traditions.
Perhaps the greatest risk in embracing interdisciplinary scholarship is that the faculty may splinter into groups centered around their non-law individual disciplines. The Virginia faculty not only avoided this risk but succeeded in creating a collegial scholarly atmosphere that fosters intellectual exchange across methodologies. To encourage and nurture the development of a scholarly community, faculty members established a legal studies workshop, one of the first of its kind. Resident and visiting faculty alike participate in the workshops, presenting their papers and engaging in lively debate. Twenty years later, these faculty workshops continue to provide a valued forum for the cross-fertilization of ideas.

The three faculty members profiled in this inaugural issue of the Virginia Journal were selected by a faculty committee in part because of the diversity of their scholarly perspectives and methodologies. Kenneth S. Abraham’s expertise is in the area of insurance and tort law, and his scholarship combines legal and economic analysis to explore the complex relationships between civil liability and insurance. Michael J. Klarman is a legal historian who seeks to understand not only what the Supreme Court does and how judicial review works, but also what the Supreme Court should do with the power of judicial review. Elizabeth S. Scott’s scholarship brings the disciplines of law, psychology, sociology, and economics to bear on the study of family law. She applies research and theory from the social sciences to establish a conceptual basis for legal reform.

While exemplary, these three scholars also are emblematic of the 64 members of the faculty who teach, research, and write at the University of Virginia School of Law. Together they embody an institution that is exceptionally strong, committed to its dual mission of excellence in teaching and scholarly research, and poised to lead legal education in providing future generations of lawyers with a foundation in the law that combines the insights of theory with the hard discipline of experience, and that inspires in them the belief that being a good lawyer makes a difference, that ideas matter, and that great lawyers and great ideas about the law are mutually reinforcing.

Robert E. Scott
Dean
Lewis F. Powell, Jr. Professor of Law
Arnold H. Leon Professor of Law
Kenneth S. Abraham describes himself as a "practical theorist." "I have always thought that law teaching and legal scholarship must be theoretical or they will be nothing more than reporting and description," he says. "But my taste runs to the kind of theory that can actually help to solve real-world problems." Over a career that now spans more than two decades, Abraham has "tried to use theory—and show my students and those who read my work how to use theory—to solve actual legal problems."

Abraham began teaching Torts at Case Western Reserve in 1974. That year saw the first appellate decision in the mass-tort, products-liability litigation involving asbestos. Similar cases involving DES and the Dalkon Shield contraceptive device were brought later in the decade. Then, as now, virtually every torts casebook
excerpted Justice Roger Traynor’s 1944 opinion in *Escola v. Coca Cola Bottling Co.*, where he argued that manufacturers should be strictly liable for injuries caused by defective products. Traynor asserted that manufacturers could insure against the risk of injury more easily than could victims, an assertion that soon became the standard rationale for strict enterprise liability for defective products and for injuries arising from a variety of other activities.

During the first few years of his academic career, Abraham taught the standard insurance rationale for enterprise liability to students. Although they accepted it without objection, he began to wonder whether it was really true that enterprises could easily insure against the new liabilities courts were imposing on them. Finding little help in the literature, Abraham (then at the University of Maryland School of Law) volunteered to teach Insurance Law. His dean, who had been teaching the course himself, was only too happy to give up what he considered the driest of subjects.

Abraham did not find it so. His first article, entitled “Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured,” 67 *Virginia Law Review* 1151 (1981), explored how judicial decisions create new insurance, much in the same way that they make new law. This article attracted the attention of his future colleagues, who invited Abraham to visit Virginia and then to join the faculty as a tenured full professor, which he did in 1984.

By the time he arrived in Charlottesville, Abraham had completed a draft of the book that was to launch his national reputation. *Distributing Risk: Insurance, Legal Theory, and Public Policy* (Yale University Press, 1986), raised questions that not only had not previously been addressed in legal analysis, but in some cases had not even been recognized as questions. For the first time, Abraham systematically examined insurance law from the perspectives of rights theory, economic analysis, and the comparative competence of the various legal institutions that regulate insurance. Today, *Distributing Risk* is an obligatory citation in virtually every law review article on insurance. The book’s intellectual reach and theoretical depth have assured its continued relevance in a rapidly changing field. The chapter on the tension between efficiency and fairness in risk-classification, for example, originally had particular relevance to sex-based insurance pricing. Today, the “hot” issue is genetic discrimination in insurance, but the terms of Abraham’s analysis still inform scholarly debate.

When public controversy about an insurance “crisis” mounted in the mid-1980s—see, for example, Kenneth S. Abraham, “Making Sense of the Liability Insurance Crisis,” 48 *Ohio State Law Journal* 399 (1987)—the American Law Institute (ALI) undertook a major, long-term study of the tort liability of business enterprises. This massive project had five original reporters: three from Harvard, one from Yale, and Abraham from Virginia. Their work culminated in a two-volume study, *Enterprise Responsibility for Personal Injury* (1991), which proposed both expansions of and restrictions on tort liability. Work on this project also led to Abraham’s collaboration with fellow reporter Paul Weiler of Harvard on an ambitious proposal for major reform of liability for medical malpractice, published as “Enterprise Medical Liability and the Evolution of the American Health-Care System,” 108 *Harvard Law Review* 381 (1994), and eventually to Abraham’s election to the Council of the American Law Institute. Abraham’s participation in this body places him at the nerve center of the nation’s most productive collaboration of practitioners, judges, and academics.
As his work on the original ALI project wound down, Abraham began work on a casebook, *Insurance Law and Regulation* (Foundation Press), first published in 1990 and now in its second edition, focuses equally on commercial insurance and personal insurance. Moreover, he introduces the full texts of insurance policies into discussions on coverage issues. As a result, students are able to study entire insurance policies while reading cases that explore their meaning and application. *Insurance Law and Regulation* quickly became the leading casebook in the field and is now used in more than 50 American law schools.

At the same time, Abraham became increasingly interested in the effects of a new form of liability on liability insurance. New federal legislation, enacted in 1980, mandated the cleanup of hazardous waste sites across the nation. Under this “Superfund” legislation, companies were required to pay for the cleanup of hazardous waste produced by the company. With the cost of a typical cleanup often running into the hundreds of millions of dollars, companies began turning to their liability insurers for reimbursement.

Abraham’s first foray into this new field of environmental liability insurance law was as a consultant to policyholders suing their insurance carriers for coverage of the costs of environmental remediation. He quickly realized the need for an analytic treatment of this emerging field, and the result was *Environmental Liability Insurance Law: An Analysis of Toxic Torts and Hazardous Waste Insurance Coverage Issues* (Prentice Hall Law & Business, 1991). This work helped cement Abraham’s reputation as “Mr. Insurance.”

Abraham’s interest in environmental liability insurance also led to his involvement in one of the Law School’s first Principles and Practice course offerings. In 1995, Abraham and Robert Sayler, a partner in Covington & Burling and one of the nation’s leading insurance lawyers, joined forces to teach Complex Insurance Litigation: Principles and Practice. The course required students to apply legal theory to practical problems. Of necessity, Abraham and Sayler prepared the teaching materials for the course; these consisted mainly of sophisticated problems involving client counseling, argument of dispositive motions, use of expert witnesses, and the negotiation of complex settlements.

Abraham’s experience teaching the Principles and Practice course prompted him to introduce practical problems into his first-year Torts course. These problems are designed not only to develop lawyering skills but also to teach students to think more rigorously and analytically about tort doctrines. He recently published a book for students, *The Forms and Functions of Tort Law* (Foundation Press, 1997), which already is widely used as a supplement to traditional torts casebooks.

As he nears 25 years in law teaching, Abraham continues to explore new issues in insurance and tort law. Currently he is focusing his attention on new forms of insurance designed to cover liability arising from the use and misuse of intellectual property. He also is monitoring the spread of negligence as a liability standard from personal injury into fields such as defamation and civil rights violations. Abraham describes this development as “largely undesirable” and is working on an article (or perhaps a book) discussing his views tentatively entitled *Against Negligence*.

Whatever his specific projects, Abraham will continue to explore the complex relationships between civil liability and insurance. His work in that field has already brought him to national prominence. Building on years of intellectual investment and scholarly achievement, Kenneth Abraham will continue to set the standard for the “practical theorist” in American law.
Becoming a Generalist: Membership on the American Law Institute's Council

In the spring of 1997, Kenneth S. Abraham, University of Virginia School of Law Class of 1962 Professor of Law and Albert Clark Tate, Jr. Research Professor, was honored with an invitation to join the highly respected and accomplished practitioners, judges, and academics who make up the Council of the American Law Institute (ALI). The council is the governing body of the ALI, which was organized in 1923 after a prominent group of judges, lawyers, and teachers, including such noted judges as Learned Hand and Benjamin Cardozo, conducted a comprehensive study of American law and found that uncertainty in the law, and its increasing complexity, resulted in a general dissatisfaction with the way justice was administered. Based on the recommendations of this study group, the ALI was created to clarify and simplify the law, improve the administration of justice, and promote and conduct scholarly legal work.

In its early years, chief among the ALI's priorities was an effort to address uncertainty in the law. ALI founders, convinced that one cause of
uncertainty was a lack of agreement among members of the profession on the fundamental principles of the common law, sought to rectify this problem through the restatement of basic legal subjects. The first Restatements of the Law were developed between 1923 and 1944 and covered such subjects as agency, conflict of laws, contracts, property, torts, and trusts. Since then, other subjects have been addressed and early restatements updated. Other ALI projects include influential Model Codes, including a Model Penal Code, Model Code of Evidence, Model Code of Pre-Arraignment Procedure, and a Model Land Development Code.

A more recent ALI priority has been an effort to enhance the competence of the practicing bar through a national program of continuing legal education. Since 1947, the ALI has collaborated with the American Bar Association to provide instruction, books, periodicals, and audiovisual materials covering most areas of practice to practitioners throughout the country.

The ALI boasts a membership of 3,000 judges, lawyers, and academicians from around the U.S. and some foreign countries. They are selected based on their professional achievement and demonstrated commitment to improving the law. Council members serve nine-year terms and are elected by their peers from among the ALI membership. The 60-plus current members of the council include a former U.S. attorney general, a former deputy U.S. attorney general, six U.S. court of appeals judges, four chief justices of state supreme courts, several former members of the cabinet, the president of a major university, several past presidents of the American Bar Association, the general counsel of one of the largest automobile manufacturers in the country, and eight law school professors, including two deans.

The council is responsible for determining which projects, programs, and activities the institute will undertake. Once a particular project is identified, the council selects an expert in the field, usually an eminent legal scholar, to serve as a reporter for the project. Council members must approve all works of the institute before they can be considered by the membership at large. The final product, the result of the careful and searching review by experienced and highly competent members of the bench and bar, often carries great authority, sometimes rivaling the authority accorded judicial decisions. ALI council members are thus afforded an opportunity to influence the law in a way few can.

Abraham finds his work on the council both challenging and tremendously rewarding. As a council member, Abraham, an expert in the field of insurance law, is called upon to evaluate works from many varied fields, a task that requires intellectual agility and a willingness to educate himself on matters far removed from his field of expertise. “At our last meeting, we spent nearly a day each on drafts of the Principles of the Law of Family Dissolution, the Restatement of the Law Governing Lawyers, and a new Uniform Commercial Code article addressing sales transactions over the Internet,” he said. “For each several-day meeting, we typically have over 1,000 pages of dense material to digest and debate.”

Working closely with other members of the council on Restatements, Principles of the Law, and other works of the ALI, Abraham has had a chance to learn about less-familiar fields from some of the leading experts in the country and to become a generalist again after years of specialization. He finds this transition very satisfying. “It has been a challenge to get up to speed on this material, but it is also a terrific way to get an education in new fields,” he said. “I have been very impressed by the insights that council members have about the issues we discuss. I have learned a lot simply by listening to what these wise and seasoned lawyers have had to say.”
Awards for pain and suffering perform a number of functions. First, in the case of serious injuries, few people would think that providing compensation for out-of-pocket loss alone could ever make the plaintiff “whole.” Money paid for pain and suffering may not remove that loss, but it does acknowledge rather than ignore the plaintiff's intangible losses. Second, even if the plaintiff's pain and suffering cannot ever be fully compensated for with money, the plaintiff may be able to use an award to provide activities or enjoyments that substitute for those lost as a result of the injury in question. . . .
Regardless of whether money can compensate in any way at all for pain and suffering, there can be little question that pain and suffering [are] consequences with respect to which the law aims to achieve optimal deterrence. . . . [E]ven if there were no benefit obtained from paying pain and suffering awards to victims, it would make sense to hold injurers liable for these damages. From the standpoint of optimal deterrence it really does not matter whether the defendant pays these damages to the plaintiff, or to a charitable foundation instead, or the amount of pain and suffering damages the defendant is required to pay is put in a bucket and burned in the courtroom. What matters is that the defendant has to pay the money. The requirement of payment assures that other potential injurers are threatened with liability not only for out-of-pocket, but also for pain and suffering damages. And this threat promotes optimal deterrence by encouraging potential defendants to take into account the cost of the pain and suffering that their activities may cause in deciding what safety precautions are worth taking.

Admittedly, in certain contexts this deterrence argument is less persuasive than in others. For example, whenever potential plaintiffs are in a direct or indirect contractual relationship with potential injurers—in fields such as medical malpractice or products liability—the right to bring a tort action can be understood as insurance for which potential plaintiffs pay in advance through increased medical expenses or product costs. Strong arguments have been made and contested in the literature about whether rational purchasers of medical services and products would want to pay for insurance against pain and suffering. If they would not, some commentators argue, then pain and suffering awards should not be made at all. Other commentators have suggested that it is rational to want to purchase pain and suffering insurance. This issue remains contested. But as long as we have a general law of damages rather than damages rules apply-

Excerpted from The Forms and Functions of Tort Law (Foundation Press, 1997).
Publications of Kenneth S. Abraham

**Books**


*The Forms and Functions of Tort Law* (Foundation Press, 1997).

**Chapters in Books**


**Articles and Papers**


**BOOK REVIEWS**


Exploring History's Relevance to Constitutional Law

Though the unifying theme of Michael J. Klarman's scholarship is the relevance of history, he came to the field relatively late. After studying political theory at the University of Pennsylvania and law at Stanford, Klarman won a Marshall Scholarship to study legal history at Oxford. For his doctoral dissertation, Klarman tackled an event at the intersection of British political and legal history: the 1909 decision by the House of Lords (in its judicial capacity) restricting the ability of labor unions to contribute money to political parties. This study spawned several early articles,* but more importantly, sparked Klarman's passion for history and his dedication to archival research.

When Klarman joined the Virginia faculty in 1987, he turned his historical attentions to American constitutional law. His first pub-

lication in that field, "An Interpretive History of Modern Equal Protection," 90 Michigan Law Review 213 (1991) made productive use of Supreme Court conference notes and draft opinions to throw new light on the evolution of equal protection doctrine. As more of the justices' private papers become available for public inspection, Klarman's commitment to archival research yields increasing dividends.

Klarman's subsequent constitutional law scholarship falls into two genres: positive and normative. His positive scholarship seeks to understand what the Supreme Court does and how judicial review actually works. In "Brown, Racial Change, and the Civil Rights Movement," 80 Virginia Law Review 7 (1994), Klarman gave a detailed account of the political, social, economic, and ideological background of Brown v. Board of Education and assessed its impact on American race relations. His analysis was informative, and his conclusions surprising. The conventional view of Brown emphasizes its educational effect on whites and its motivational impact on blacks. Yet Klarman found that the principal direct consequence of Brown was to crystallize opposition to changes in the racial status quo. Brown undermined southern white liberals and propelled southern politics toward racial extremism. In a sense, politicians like Bull Connor and George Wallace were made by Brown. In the extremist political environment that Brown unwittingly helped create, civil rights demonstrations inevitably would be greeted with violent suppression. This is precisely what happened in Birmingham, in Selma, and elsewhere in the 1960s. In response, a horrified viewing public demanded national intervention. Ironically, Brown did improve race relations, not so much by inspiring southern whites to racial moderation as by provoking intransigence so extreme and disreputable as to arouse and unite the rest of the nation.

Similarly, in "Rethinking the Civil Rights and Civil Liberties Revolutions," 82 Virginia Law Review 1 (1996), Klarman challenged the historical accuracy of the Supreme Court's reputation as heroic defender of minority rights. Klarman looked at four areas of constitutional law—race, freedom of speech, establishment of religion, and criminal procedure—and concluded that the Court's decisions were broadly consistent with underlying sociopolitical trends and not strongly countermajoritarian. Even the decision striking down school prayer, Engel v. Vitale, 370 U.S. 421 (1962), Klarman argued, can best be understood in terms of the post-World War II disintegration of the nation's unofficial Protestant establishment and of the broad popular revulsion against Nazi persecution of religious minorities. In this and other areas, Klarman sought to explode the myth of the Supreme Court as "counter-majoritarian hero" and to provide, through history, a more realistic account of the constraints within which judicial review actually operates.

Klarman's most recent contribution to positive constitutional scholarship is "Race and the Court in the Progressive Era," 51 Vanderbilt Law Review 881 (1998), an article that examines the Court's Progressive-era race cases in historical context. Again, he uses history to attack and correct the misperception of the Supreme Court as counter-majoritarian defender of minority rights.

These projects will culminate in a book, provisionally entitled From Plessy to Brown and Beyond: Race, the Court, and the Constitution in the Twentieth Century, which will situate the Supreme Court's race cases in a broader sociopolitical context. As in the articles already published, Klarman's principal theme will be to describe the extralegal forces that establish the practical parameters of judicial review and that limit the Court's capacity to resist majoritarian oppression.

History also is a central theme of Klarman's normative scholarship. In these articles, Klarman attempts to specify what the Supreme Court should do with the power of judicial review. He advocates a form of process theory—the idea that judicial review is most justified when courts intervene to correct malfunctions in the political process. For example, in an early article entitled "The Puzzling Resistance to Political Process Theory," 77 Virginia Law Review 471 (1991), he argued that the Supreme Court's decision in Brown v. Board of Education could be justified by the fact that in 1954, blacks in the South were still largely excluded from political participation. The article featured a characteristically detailed historical investigation of black voting power. On the basis of that analysis, Klarman argued that, had black suffrage been protected as the Fifteenth Amendment required, the political process might have produced desegregation by the 1950s, even without judicial intervention.

A more recent article, "Majoritarian Judicial Review: The Entrenchment Problem," 85 Georgetown Law Journal 491 (1997), examines Alexander Bickel's classic statement of the countermajoritarian difficulty: the idea that judicial review conflicts with democracy because it empowers the
least accountable actors in the political system to resolve controverted questions of social policy. Klarman argues that in certain identifiable situations, judicial review may be more majoritarian than legislative decisionmaking. One such area involves issues of “legislative entrenchment,” where legislato-

tors pursue their self-interest in securing re-election rather than the broader interests of the constituencies they represent. The agency problems of representative government are most acute in electoral matters, such as term limits, malapportionment, gerrymandering, campaign finance reform, and the like. With regard to such issues, Klarman argues, judicial review plausibly might be more majoritarian than the decisions of the political branches.

In addition to exploring the virtues of process theory, Klarman has also criticized other approaches. A recent article entitled “Antifidelity,” 70 Southern California Law Review 381 (1997) suggests difficulties with the popular notion that the Constitution deserves our fidelity. The essential problem, in Klarman’s view, is that the Constitution was drafted more than 200 years ago by people facing problems radically different from those that confront America today. Many constitutional theorists address the “dead hand” problem by arguing that the constitutional concepts embraced by the founding generation should be “translated” to fit modern conditions. Klarman rejects this approach, noting that “translators” implicitly hold some aspects of the framers’

world constant and treat others as variables to be adapted to modern conditions. But which aspects are fixed and why? In the absence of any principled answer to this question, Klarman asks, why should we not treat all changed circumstances as variables to be translated, which would have the effect of converting the framers into us? Put simply, asking what the framers would have done in light of all the changes that distinguish our world from theirs is no different from asking what we should do. In Klarman’s view, the exercise of “translation” is not only indeterminate, but meaningless.

While the relevance of history to positive scholarship is obvious, establishing the connection between historical experience and normative theory requires some argument. In Klarman’s words, “it is not clear that one can extract an ‘ought’ from an ‘is.’” In response, he argues that historical understanding of the role the Supreme Court has in fact played in American society is a first step toward a sound normative conception of the role the Court should be urged to play. History also reminds us of the Court’s capacity to protect the “wrong” minority interests, such as those of the slaveholders in *Dred Scott*. Moreover, history reveals the Court’s proclivity for advancing the values of the nation’s cultural elite. For most of the nation’s history, this proclivity translated into conservative protection of property rights. For the past half-century, however, the Court’s tendency to identify with the cultural elite has led to a liberal slant. Finally, Klarman sees in history a tendency toward judicial imperialism. Apparently, courts possess the same incentives as other institutions to expand their own powers. For Mike Klarman, realistic appraisal and sensitive appreciation of the Court’s past performance are prerequisites for a sound understanding of what the Court should do now.
MICHAEK KLARMAN IS NOT ONLY A RENOWNED SCHOLAR; he is also a star in the classroom. Winner of the University of Virginia's Outstanding Teacher Award (1997) and Harrison Award (1997), and the State Council of Higher Education's Outstanding Faculty Award (1998), Klarman is recognized as a master teacher in the Law School and beyond. His regular offerings include Criminal Law, Constitutional Law, Constitutional History I: Articles of Confederation to the Civil War, and Constitutional History II: From Reconstruction to Brown.

Klarman is consistently ranked at the top of a strong teaching faculty. In the words of a former student, "Professor Klarman's classes address issues in which students are interested, and he never fails to bring the material to life. I learned about the Constitution as a battleground for conflicting notions about the role of government in people's lives and the role of the judiciary in
the structure of government. . . . Professor Klarman is a tremendous asset."

Over the course of the 11 years he has been teaching, Klarman has come to believe that the relationship between scholarship and teaching is synergistic. "Both scholarship and good teaching require substantial investments of time and energy. Those being finite resources, one would think that scholarship and teaching must be, at some level, competitive with one another," he said. "Experience has taught me otherwise. Teaching inspires scholarship by raising interesting questions, and scholarship returns the favor by supplying answers, or at least perspectives, to incorporate into one's teaching."

Three of Klarman's recent articles were conceived in the classroom. In "Rethinking the Civil Rights and Civil Liberties Revolutions," 82 Virginia Law Review 1 (1996), he presents the theme he first developed in his Constitutional History II course: the surprisingly limited capacity of the Supreme Court to protect minority rights from majoritarian oppression. Similarly, "Majoritarian Judicial Review: The Entrenchment Problem," 85 Georgetown Law Journal 491 (1997), originated in his basic Constitutional Law course. "For years I struggled to fit the Supreme Court's voting rights decisions into a course that emphasized the countermajoritarian difficulty of judicial review," Klarman explained. "Each time I taught Constitutional Law, I tried to refine and extend the argument that in some contexts, especially in voting rights, judicial review is actually likely to be more majoritarian than legislative decisionmaking."

Finally, "Race and the Court in the Progressive Era," 51 Vanderbilt Law Review 881 (1998) developed directly from his Constitutional History class notes. In preparing for the course, Klarman read extensively on the Progressive era and American race relations at the turn of the century. "Writing the article consisted mainly of revisiting and reorganizing research that I had already undertaken for class preparation," he said.

Klarman finds the contribution of teaching to scholarship to be reciprocal. "While teaching has often inspired my interest in research, the knowledge and perspectives I have gained from that research have likewise informed my teaching. For example, as a result of my work on 'Brown, Racial Change, and the Civil Rights Movement,' 80 Virginia Law Review 7 (1994), I now devote one entire Constitutional Law class to dissecting the conference discussion on Brown in an effort to recreate the justices' thoughts as they wrestled with the most important case in the Court's history. I made similar adjustments in classroom discussion to incorporate research findings after writing 'Rethinking the Civil Rights and Civil Liberties Revolutions' and other articles."

According to Klarman, one of the most important contributions teaching makes to scholarship is that it not only suggests topics for research, but also provides a testing ground for ideas. "In a recent Constitutional History class, I had the pleasure of presenting material that would ultimately become my article entitled 'Race and the Court in the Progressive Era,'" he said. "The article is destined to be a chapter in a forthcoming book on the Supreme Court and race in the twentieth century. To my delight, students in the class raised questions and objections that forced me to revise my thinking on the subject and that will be reflected in the book. In this case, classroom discussion prompted me to write an article; the article then informed my teaching; and further classroom discussion led to changes and refinements that will eventually be reflected in a book. For me, at least, scholarship and teaching have proven mutually enriching. Each is improved by my commitment to the other."
Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell

by Michael J. Klarman

IN 1995 BROWN SEEMS UNAMBIGUOUSLY RIGHT, if anything is right. For a constitutional theory to be unable to justify such a normatively compelling result seems fatal. Yet Brown in 1954 was not seen to be so obviously correct. Contemporaneous opinion polls revealed the country to be divided roughly in half on the segregation issue; archival evidence shows the justices deciding Brown to have been terribly conflicted; and the president of the United States privately deemed the decision to have been a grave mistake. For a particular constitutional theory to be unable to justify a decision that was contemporaneously so controversial seems far less devastating than its inability to accommodate a result that is universally applauded.
This perceived exigency to justify Brown is not the only consequence of approaching constitutional theory ahistorically. Just as we seem reluctant to acknowledge that Brown in its time was a genuinely controversial decision, so do we seem unwilling to accept the converse—that certain rulings that are universally condemned today were quite uncontroversial in their time, and probably were not realistically subject to contrary resolution. Much as the felt imperative to justify Brown has distorted normative constitutional theory, the perceived exigency to discredit decisions such as Plessy v. Ferguson has distorted positive constitutional theory, by inflating our evaluation of the Court’s capacity to protect minority rights from majoritarian oppression.

Scholarly treatments of Plessy v. Ferguson and Korematsu v. United States are perhaps the most notorious examples of our resistance to understanding within their historical context past decisions whose values are universally repudiated today. An historicist approach would regard such decisions as regrettable but essentially inevitable, given the background social and political context within which the Court necessarily functions. Most modern constitutional commentators, however, have portrayed these decisions as unfortunate “mistakes,” which realistically could have been averted had the justices simply displayed a little greater wisdom, fortitude, or good faith. Yet it is implausible to believe that either Plessy or Korematsu (at least at the time when the war’s result was genuinely in doubt) could have come out the other way, given the background context of the decisions and the limited countermajoritarian inclinations and capacities of the justices. No Court decision in American history has been that countermajoritarian.

Constitutional scholars have paid exceedingly little attention to the historical forces — political, social, economic, ideological, cultural — that rendered possible the twentieth century civil rights and civil liberties revolution. By essentially ignoring the forces that rendered possible the Court’s interventions, constitutional scholars and judges have ascribed undue responsibility for legal changes to the Court.

Misdescribing the Court’s past failures to protect the civil rights and civil liberties that are so valued today as avoidable “mistakes,” rather than as inevitable byproducts of very different political and social milieus, enables us to sustain the myth of the Court as “countermajoritarian hero.” The myth can survive only if obvious counterexamples are dismissed as contingent mistakes rather than understood, more realistically, as the Court’s inevitable capitulations to dominant social norms. Moreover, just as we write off the Court’s many past failures to protect civil rights and civil liberties as aberrant exceptions, so do we exaggerate the coun-
termajoritarian nature of the Court's actual interventions. The culprit, once again, is our failure to approach the subject with adequate sensitivity to historical context.

Constitutional scholars have paid exceedingly little attention to the historical forces—political, social, economic, ideological, cultural—that rendered possible the twentieth century civil rights and civil liberties revolution. By essentially ignoring the forces that rendered possible the Court's interventions, constitutional scholars and judges have ascribed undue responsibility for the legal changes to the Court. Thus, to take just one prevalent example, legal scholars have overwhelmingly portrayed Brown as the principal cause of the civil rights revolution, rather than seeing the decision itself as the product of deep social and political forces impelling the nation gradually but ineluctably toward greater racial equality—forces such as the Great Migration, the increasing urbanization of the black population, the decline of southern agriculture, the increasing potency of the northern black vote, the burgeoning black middle class, increasing black literacy rates, the egalitarian ideology of World War II, the Cold War imperative for racial change, and the growing social and economic integration of the nation. This scholarly neglect of background historical forces has produced a widespread conviction that the Court has played, and can continue to play, a more fundamental role in safeguarding civil rights and civil liberties than is plausibly the case.

Constitutional theory—both normative and positive—would thus benefit from a substantial dose of historicism. Resisting the natural tendency to think about the past ahistorically would permit an end to the demand that all constitutional theories be able to justify Brown—a decision that resisted easy justification on the basis of the traditional sources of constitutional interpretation (and that was plainly indefensible on narrow originalist terms). Further, an historicist approach to constitutional law would permit an end to the pretense that the Court realistically could have invalidated racial segregation at a time when the nation overwhelmingly sympathized with the practice, protected the free expression rights of political radicals at a time when they were widely deemed to pose a genuine threat to the nation's well-being, or mandated a strong separation of church and state at a time when the country continued to operate under an informal Protestant establishment. To approach constitutional theory ahistorically is to ensure that it be done badly; we can do better.

Publications of Michael J. Klarman

ARTICLES AND PAPERS


BOOK REVIEWS AND COMMENTS


IN ADDITION to her formal legal training, Elizabeth S. Scott is an autodidact in psychology, sociology, and economics. Her scholarship brings these disciplines to bear on the problems of family law. Specifically, she has used research and theory from the social sciences to establish a conceptual basis for legal reforms in the areas of child custody, marriage and divorce, and the legal status of adolescents.

As a Virginia law student in the 1970s, Scott became involved in an early interdisciplinary program called the Forensic Psychiatry Clinic. Run by Law School faculty member Richard Bonnie and local psychiatrist Browning Hoffman, the clinic introduced Scott to the interplay between psychiatry and criminal responsibility. After graduation, Scott returned to the Law School to work in the newly established Institute of Law, Psychiatry, and Policy, again directed by Richard Bonnie. At the institute, Scott teamed with psychologist Dick Reppucci to offer an interdisciplinary seminar combining clini-
ical evaluation with traditional instruction. The seminar applied social science research and theory to the legal regulation of child custody, abuse and neglect, and juvenile delinquency.

Scott’s scholarly agenda grew from this seminar. Believing that judges and legislators often have unwarranted confidence in the validity of their intuitions about children and families, Scott set out to show that family law could profit from interdisciplinary inquiry that tested the law’s implicit assumptions against social science theory and research.

Her first project was child custody. By the 1980s, the traditional “tender years” presumption explicitly favoring custody by mothers had fallen out of favor. The alternative “best interest of the child” standard proved hopelessly vague and gave courts virtually unbridled discretion in deciding issues of custody. To many observers, joint custody seemed the ideal solution. It promised a rule-oriented approach that would reinforce gender equality and encourage divorced fathers to remain active in child-rearing. Advocates lobbied hard for statutes that would displace the “best interest of the child” non-standard with a legal presumption in favor of joint custody. Elizabeth Scott countered this trend. In “Rethinking Joint Custody,” 45 Ohio State Law Journal 455 (1984) and 54 American Journal of Orthopsychiatry 188 (1984), which she co-authored with child psychiatrist Andre Derdeyn, Scott argued that the case for a legislative presumption of joint custody rested on incomplete and flawed psychological research. The studies showing satisfaction involved a small number of families who had freely chosen that option; joint-custody advocates failed to acknowledge the costs of coercion. Scott and Derdeyn cited research showing that exposure to continued parental conflict is the source of the most serious harm to children from divorce. A coercive presumption in favor of joint custody would often perpetuate conflict in an arrangement that, of necessity, requires sustained and detailed cooperation. In particular, a parent who was the primary caretaker during the marriage may resent sharing custody with a parent who was previously little involved in child-rearing. This argument has been confirmed by subsequent research, which tends to show that court-ordered joint custody is an unstable arrangement associated with substantial adjustment problems in children.

Scott later developed these ideas into a proposed “approximation” standard for child custody. Specifically, in “Pluralism, Parental Preference and Child Custody,” 80 California Law Review 615 (1992), she argued that courts should base custody decisions on how much each parent participated in child-rearing during the marriage, trying to “approximate” the pre-divorce roles after the marriage is dissolved. Under this approach, custody arrangements involving a primary caretaker and a busy professional might look like traditional sole custody with visitation, while joint custody would be appropriate for parents who fully shared child-rearing responsibilities during their marriage. Scott supported this view with insights from psychological research, the economic theory of bargaining, and the sociological theory of role formation. Her proposal singles out the one factor that developmental psychologists think is essential to the healthy development of the child: protection of the relational bonds between the child and the parent or parents providing care. Unlike a rule awarding custody to the primary caretaker, Scott’s proposal embraces no presumption that only one parent has performed child-rearing duties. Rather, the “approximation” standard recognizes the diversity among modern families in the allocation of parenting duties. This “pluralist” approach is particularly appropriate in an era when family and gender roles are changing and families vary enormously in their division of parenting duties. “Approximation” would allow families to function according to their own values and preferences, while subtly
encouraging both parents to invest in parenting before divorce.

Scott also relied on research suggesting that pre-divorce allocations of parental responsibility usually reflect the parents’ “true” preferences for future roles. Post-divorce arrangements based squarely on prior history are likely to prove relatively stable. Moreover, bargaining theory suggests that a rule that closely tracks the parties’ preferences will discourage strategic behavior because the parties have little to trade. Additionally, greater predictability of the outcome of adjudication than the “best interest” standard allows would promote cooperation by enhancing the incentives to settle.

Scott also has written about marriage and divorce; for example, see “Rational Decisionmaking About Marriage and Divorce,” 75 Virginia Law Review 9 (1990). In most states, no-fault divorce laws allow easy unilateral termination of the marriage by either party and embrace “clean break” policies disfavoring continuing obligations between former spouses. As rising divorce rates made the economic and psychological costs for children increasingly clear, critics began to attack no-fault divorce and, in some cases, to urge restoration of a legal regime based on fault. Scott also criticized no-fault divorce, but from a very different perspective. She argued that contemporary law provides inadequate means for couples entering marriage to make a meaningful commitment. Couples who share the goal of lasting marriage may wish to make a greater commitment to the relationship than the no-fault regime allows. Permitting them to make such a commitment, Scott argued, enhances rather than restricts their personal freedom. Drawing on behavioral economics and cognitive psychology as well as on contract theory, Scott suggested that voluntary reinforcement of the marital relationship through restrictions on divorce can serve a valuable function of precommitment. Each spouse is discouraged from pursuing transitory preferences that are inconsistent with the couple’s self-defined, long-term interest in a lasting marriage. Moreover, the contractual commitment allows each spouse to rely on the other, knowing that his or her investment in the relationship will be protected. Consequently, Scott argued, allowing couples entering marriage to volunteer for a greater legal commitment than current law allows would have a direct effect on their decision to divorce and an indirect effect on their behavior during marriage.*

The latest wave of legal reform has largely followed Scott’s suggestion. In 1997, Louisiana became the first state to enact a covenant marriage statute. Couples entering marriage can choose to marry subject to conventional no-fault divorce laws, or they can undertake a greater commitment by choosing covenant marriage. The latter arrangement is subject to more stringent divorce rules, most notably a two-year waiting period. Louisiana’s approach is now under consideration in several states. Amitai Etzioni, a sociologist and a leader of the covenant marriage movement, has described Scott as the intellectual architect of this reform.

A third focus of Scott’s scholarship is legal decision-making by adolescents. Based on a presumption that they are immature, adolescents traditionally have been lumped

has been challenged. Children’s rights advocates have argued that adolescents should have the rights and privileges of adults, a claim central to abortion rights for minors. Others argue that the law is too forgiving of adolescents and that they should instead be held responsible—as adults are—for criminal misconduct. Both claims share the assumption that adolescent decisionmaking is more like that of adults than the law traditionally has assumed. In response, Scott argued that adolescent competence in decisionmaking may, in fact, differ from that of adults, even where their cognitive capacities are similar. She based this claim on research that identified several factors that distinguish adolescent from adult development. Called “judgment factors,” they are common in adolescent behavior and include a greater tendency to take risks, a short-term outlook, and the tendency to be heavily influenced by their peers. Scott incorporated these factors, along with cognitive aspects of reasoning and understanding, into a “judgment” framework for comparing the decisionmaking of adolescents and adults. Based on this work and on other social science research, Scott and developmental psychologist Thomas Grisso argued against the trend of treating younger juvenile offenders as adults in “The Evolution of Adolescence: A Developmental Perspective on Juvenile Reform,” 88 Journal of Criminal Law and Criminology 137 (1997). In their view, the developmental evidence supports a presumption of diminished responsibility for most youthful offenders. Moreover, the evidence that most youthful crime is “adolescent limited” behavior argues for policies that preserve the future options of adolescents and against the currently popular punitive approach.

Scott’s theoretical framework for evaluating adolescent decisionmaking is currently the basis of ongoing research. Working with University of Virginia psychologists Dick Reppucci and Jennifer Woolard to refine the “judgment” model, she has begun to conduct empirical research that will compare teen criminal defendants with their adult counterparts; see Elizabeth Scott, N. D. Reppucci, and Jennifer Woolard, “Evaluating Adolescent Decisionmaking in Legal Contexts,” 19 Law and Human Behavior 221 (1995). This research seeks to determine whether judgment factors affect the abilities of adolescent defendants to assist their attorneys and to participate in their own defense. Future investigation will focus on whether these developmental factors influence choices to engage in criminal behavior, an inquiry potentially relevant to questions of criminal responsibility. Scott also has become part of the multidisciplinary MacArthur Foundation Research Program on Adolescent Development and Juvenile Justice, which is promoting an extensive research agenda based in part on work ongoing at the University of Virginia.

In addition to its intellectually interdisciplinary nature, Scott’s work often involves close and fruitful collaboration with experts from other fields. In 1996, she, psychologist Bob Emery, and sociologist Steve Nock were awarded a substantial three-year grant to establish the Center for Children, Families, and the Law at the University of Virginia to promote interdisciplinary discussion and research on family policy.

After ten years in law teaching, Elizabeth Scott is at the height of her influence. The countless hours invested in the study of psychology, sociology, and economics have paid off with fresh insights and influential proposals for the reform of family law. In the years to come, Scott will continue to play a leadership role, not only in the academic study of family law but also in the evolution of national policy regarding children and families.
CONVINCED THAT RECENT CHANGES in the American family pose new challenges for policymakers, the Law School's Elizabeth S. Scott, Robert C. Taylor Research Professor and University Professor, joined forces with Professor of Psychology Robert E. Emery and Professor of Sociology Steven L. Nock to create the University of Virginia Center for Children, Families, and the Law.

Supported by a substantial, three-year grant from a fund for academic enhancement programs created by the provost of the University of Virginia, the center brings together a group of more than 25 U.Va. scholars from a wide range of disciplines. The center's goal is to inform legal policy by achieving a more comprehensive understanding of the needs and challenges facing modern families as they experience dramatic increases in the number of out-of-wedlock births, divorces and remarriages, and significant changes in the role of women in the workplace and the home. One of the center's major strengths is its multidisciplinary approach to the study of children and families, drawing as it does on the knowledge and expertise of faculty members from the departments of psy-
One of the center’s major strengths is its multidisciplinary approach to the study of children and families, drawing as it does on the knowledge and expertise of faculty members from the departments of psychology, sociology, and economics in the College of Arts and Sciences, and the schools of law, medicine, and education.

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Faced with evidence that changes in family structure and relationships pose a variety of risks to the healthy development of children, and concerned by the failure of researchers and policymakers to respond in a cohesive and comprehensive manner, the center devotes much of its efforts to coordinating and unifying efforts to expand what is known about the American family. According to Scott and center co-founders Emery and Nock, investigators typically approach their research from a narrow disciplinary focus and often fail to consider adequately the policy implications of their findings. Center scholars advocate a different approach, which they outlined in their grant application. “A more useful framework for research and policy studies the family from multiple perspectives, focusing on the individual family member, the family as a unit, the family as part of a community, and family as part of the larger society,” they wrote.

Center scholars also advocate better communication and collaboration between researchers and policymakers. They believe that, in general, legal policy could benefit greatly if policymakers were better informed about the large body of social science research on families. An important goal of the center is to make the existing research about families available to courts, legislatures, and other agencies charged with policymaking, and to promote research that is useful to policymakers.

To promote multidisciplinary research, the center awards small seed grants, available to both faculty and graduate students to facilitate pilot research and increase external research funding. A recent fellowship, awarded to a Law School student, is funding a research project that focuses on transracial adoption. The student is studying the impact a 1996 federal law prohibiting the delay or denial of adoption on the basis of race has had on adoption placement practices.

The center also promotes an interdisciplinary approach to research and education in other ways. It sponsors an interdisciplinary colloquium series that allows University faculty to present papers in a forum open to faculty and students across departments. It brings scholars from other universities who are working on issues of importance to family policy to U.Va. for extended visits. In 1998, for example, it sponsored a semester-long visit by Jeffrey Haugaard, a psychologist from Cornell whose research focuses on adoption and foster care. The center also advises undergraduates on research and course work on family issues, and coordinates research, course work, and grant writing for graduate students.

Public service is another important function of the center. The center sponsors the University of Virginia Conference on Children, Families, and the Law, an annual conference for professionals, policymakers, and the public. The 1997 conference focused on the role of the law in shaping family relationships; participants included leading experts in sociology, public policy, economics, and law from around the country. The 1998 conference will focus on legal policy as it relates to juvenile crime, an issue that has been the subject of intense public debate and media attention in recent years. The center also serves as a resource for inquiries from the community.

The center’s founders are enthusiastic about the success it has realized in its first two years. Says Scott, “Through the center, we have been able to bring together faculty and students from across the University whose research focuses on children and families, and who may have had limited contact with each other and little awareness of each other’s work. My own work has been greatly enriched by the associations that I have developed through the center. The possibilities it offers for interdisciplinary collaboration and for enriching the educational experience of law students, as well as students in other disciplines, are very exciting.”
Pluralism, Parental Preference and Child Custody

by Elizabeth S. Scott

The current debate about custody is in large measure a conflict about the extent to which the custody decision should rest on the parents’ participation in rearing their child during marriage. During an era in which parenting roles are in flux, families vary in the allocation of child care responsibilities. In response to this pluralism, the dominant best interests standard for deciding custody presumes that past patterns of care are inadequate as a guide to future custody. In different ways, both joint custody advocates and proponents of a primary caretaker preference object to the best interests standard because it obscures the importance of past parental involvement. Only a legal preference for the primary caretaker assures that the parent who has been principally respon-
The inquiry regarding future custody arrangements should focus on the past relationship of each parent to the child and do so in a more precise and individualized way than either the best interests standard or the reform alternatives require. In most cases the law’s goal should be to approximate, to the extent possible, the predivorce role of each parent in the child’s life.

Divorce, which by any measure is a period of upheaval in a child’s life, should not be treated as an opportunity for restructuring parent-child relationships. Child development experts emphasize the harmful impact of the disruption associated with divorce, and the link between continuity of the parent-child relationship and healthy child development. Custody law can minimize disruption of the child’s habitual routines and relationships after divorce by perpetuating patterns of parental care established in the intact family. A rule that preserves the continuity of family relationships would seem to reflect the best interests of the child as accurately as this elusive concept permits.

The approximation approach . . . accommodates two strands of child development research and theory that have been drawn into the policy debate over custody and are currently treated as irreconcilable. The first strand, attachment theory, emphasizes the importance of the mother-child relationship to the child’s healthy development and has been invoked to support both the tender years presumption and the primary caretaker preference. Attachment theory would support the assertion that the gravest deficiency of the best interests standard is the risk of disrupting the relationship between the child and her primary caretaker. More recently, however, other researchers have suggested that the role of fathers in their children’s lives has been undervalued and that attachment theory exaggerates the uniqueness and exclusiveness of the primary caretaker-child bond. Some observers argue that this research supports a stronger claim for father custody or, at least, weakens the viability of a primary caretaker preference. Taken together these two psychological perspectives point to a legal response that does not choose between parents or split custody of the child but rather seeks to gauge the strength of existing bonds and to perpetuate them through the custody arrangement. Thus, for example, if both parents have been active caretakers, the
child should not have to suffer from the disruptive effects of relegating one parent’s status to that of visitor. On the other hand, if one parent’s involvement and care for the child have been dominant, that strong bond should not be disturbed.

Structuring future custody [in this way] could also mitigate the observed tension between two goals of custody law: encouraging the participation of both parents after divorce and avoiding exposure of the child to excessive interparental conflict. The joint custody debate demonstrates this tension, with advocates stressing the harm of lost parental contact while opponents emphasize the detriment to the child from exposure to interparental conflict. It is plausible to assume that basing custody on past patterns of caretaking would provide optimal parental involvement with minimal conflict. Joint physical custody, which provides the greatest opportunity for conflict, will be ordered under this approach only if it replicates the pattern of childrearing that occurred during the marriage. In such a situation, the couple’s prior experience of shared responsibility increases the likelihood of mutual commitment, competency, and respect.

Consider the following comparison between a joint custody arrangement involving parents who have fully shared parenting responsibilities during marriage and an arrangement in which a primary caretaker and an ambitious professional begin to share in the care of their children only after divorce. Common sense suggests differing prospects for success between the two arrangements. In the former case, both parents have invested heavily in their caretaking role, which can be assumed to be an important part of their lives. Each has likely adjusted to the other’s participation in the family, and both function in a social and employment context that has adapted to their choice of role division. In this situation of shared caretaking, both parents might value the caretaking relationship equally and would consider any disproportionate diminishment of this role to be a serious loss. In contrast, a mother who was the primary caretaker during the marriage is likely to prefer a larger share of custody than does her professional husband. Because most wives spend a greater proportion of their time doing domestic tasks, caring for the child plays a larger part in their lives and personal identities. The primary caretaker mother might find it difficult to adjust to a reduction in this role or to accept an expansion of the childrearing responsibilities of her former husband.

Implicit in this analysis is the conclusion that a rule that reflects parents’ preferences for custody is also in the best interests of the child. This conclusion is dissonant with much rhetoric about custody, which rarely focuses on the impact of parental satisfaction on the success of future family relations. My analysis, however, argues that the premise upon which the law operates in dealing with intact families should not be forgotten upon divorce. Parents adopt roles and functions in the family according to complex sets of values and preferences and with little legal supervision. The law can look to these family patterns as the best reflection of the parents’ true preferences and the best predictor of the future stability of custody arrangements.

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COMMENTS AND REVIEWS


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