

**Boston College Law School**  
**Digital Commons @ Boston College Law School**

---

Boston College Law School Faculty Papers

---

January 2007

# Homer H. Clarke, Jr., As Scholar

Sanford N. Katz

*Boston College Law School, katzs@bc.edu*

Follow this and additional works at: <https://lawdigitalcommons.bc.edu/lspf>



Part of the [Contracts Commons](#), [Family Law Commons](#), and the [Juvenile Law Commons](#)

---

## Recommended Citation

Sanford N. Katz. "Homer H. Clarke, Jr., As Scholar." *University of Colorado Law Review* 78, (2007): 16-19.

This Article is brought to you for free and open access by Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law School Faculty Papers by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact [nick.szydowski@bc.edu](mailto:nick.szydowski@bc.edu).

downplay his own importance. The problems he drafted and the readings he assigned were essential to the success of his classes. More than that, it was Homer's attitude toward learning—his seriousness, his meticulous preparation—that formed the fabric of these classes. He communicated, without seeming to, how learning could take place. At bottom, though, it was up to the students themselves. The message in all of his teaching was that he could not do it for us. We had to do it ourselves. We had to make the material our own. We had to master it and to decide what we thought about it, what kind of world we wanted to live in. It was Homer's great strength as a teacher that he would never let us forget that teaching is about learning, and the opportunity and burden of learning are ours and no one else's.

\* \* \*

## HOMER H. CLARK, JR., AS SCHOLAR

SANFORD N. KATZ\*

Each area of the law has its greats who have written not only the major treatise in his field but has also had an enormous impact on shaping the law. Few think of torts without reference to Prosser, to evidence without Wigmore, or to contracts without Corbin or Williston. In family law, our great scholar is Homer H. Clark, Jr., and his masterwork, *The Law of Domestic Relations in the United States*<sup>14</sup> must be the most cited family law text in appellate cases and scholarly books and articles in the United States. For almost half of a century, Professor Clark has dominated family law in America.

When West published the first edition of Clark's treatise in 1968, it was replacing Joseph Warren Madden's *Handbook of the Law of Persons and Domestic Relations*,<sup>15</sup> which had been the leading national text on domestic relations for the previous thirty-seven years. In the preface to the 1931 book, Professor Madden, later Judge Madden,<sup>16</sup> wrote that since the previous publication of a book on domestic relations,<sup>17</sup> "there

---

\* Darald and Juliet Libby Professor of Law, Boston College.

14. CLARK, TREATISE, *supra* note 4.

15. JOSEPH WARREN MADDEN, HANDBOOK OF THE LAW OF PERSONS AND DOMESTIC RELATIONS (1931).

16. When he wrote the domestic relations treatise, Professor J. Warren Madden (1890–1971) was on the faculty of the University of Pittsburgh Law School. Later he was appointed to the United States Court of Claims where he served from 1941–1961.

17. He was referring to WALTER C. TIFFANY, HANDBOOK OF THE LAW OF PERSONS AND DOMESTIC RELATIONS (3d ed. 1921).

have been far-reaching developments centering around family life.”<sup>18</sup> He cited these developments as “trends toward greater liberality in the law of annulment of marriage for fraud, and of divorce for mental cruelty, the effect on infant’s contracts of this age of motor vehicles and installment buying, [and] the new problems of tort liability of parents and children and husbands and wives . . . .”<sup>19</sup>

Judge Madden’s handbook moves beyond those issues, which were thought to be important at the time, and reads very much like a restatement of the law of persons and domestic relations with each section beginning with a doctrinal statement in bold print, followed by a full discussion extensively footnoted with references to state cases and statutes. Madden’s handbook may be studied today not only as an illustration of a particular style of writing a treatise prevalent at the time, but also for learning what the law was in a given area of family law in many states seventy-five years ago. Throughout his book, Judge Madden, a highly regarded scholar, stayed close to a holding of a case or to the wording of a state statute so that he could extract a rule of law. It is difficult to determine precisely what Madden’s position was on a given issue, except where he wrote that a particular judge’s statement of the law was accurate.

I have described Madden’s book so that I can contrast it with Professor Clark’s monumental work, which is encyclopedic in both depth and scope and is also illustrative of the enlightened family law scholarship of the second half of the twentieth century. One aspect of that scholarship, which Professor Clark carries out so successfully, is the viewing of family law as neither isolated from other legal areas nor limited by state boundaries. Professor Clark believed that “the provincial nature of domestic relations so commonly assumed . . . is both an illusion and a mistake.”<sup>20</sup> Another aspect of modern scholarship is the introduction of the active voice. Professor Clark states in his preface to the first edition that he expresses his own criticisms of legal principles and suggests the direction that the law ought to take.

Throughout his book there are many examples of Professor Clark’s expression of his own views. One illustration is in his discussion of *Perez v. Lippold*,<sup>21</sup> the 1948 California miscegenation case. Professor Clark praises Justice Traynor’s “great opinion,” which established the unconstitutionality of the California miscegenation statute. He then analyzes the case brilliantly. The reader knows where Professor Clark’s

---

18. MADDEN, *supra* note 15, at vii.

19. *Id.*

20. CLARK, TREATISE, *supra* note 4, at vii.

21. 198 P.2d. 17 (1948).

preferences lie when he writes that the dissenting opinion in *Perez* “relied upon precedent and upon outdated and unscientific studies of interracial marriage to find the statute constitutional. The judicial precedents are interesting only as extreme expressions of racial prejudice.”<sup>22</sup> Later, in the same section of the book he discusses *Loving v. Commonwealth of Virginia*,<sup>23</sup> the United States Supreme Court case, decided almost twenty years after *Perez*, which struck down Virginia’s miscegenation statute as a violation of both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and concludes with the statement, “By this decision a pernicious set of statutes has been erased from American law.”<sup>24</sup>

In 1988, West published Professor Clark’s second and sadly the final edition of *The Law of Domestic Relations in the United States*.<sup>25</sup> In that edition, Professor Clark recognizes the major changes that had taken place in two decades, especially those relating to the status of women and illegitimate children,<sup>26</sup> the growing legislative acceptance of no-fault divorce, and the attempts at redefining marriage. His discussion of same-sex marriage, footnoted with state appellate cases and an extensive social science bibliography, all absent from the first edition, is excellent in terms of laying out all the legal, historical, religious, and cultural arguments that were and are used almost twenty years later in the same-sex marriage cases of our time.<sup>27</sup> However, what Professor Clark did not anticipate was the extent to which advocates for legitimatizing same-sex marriage would sue in a state court and invoke that state’s constitutional law to argue the illegality of the provision of the state’s marriage law that limited marriage to one man and one woman.

Professor Clark noted that in the twenty years since the publication of his first edition, he had seen the tension between the power of individual autonomy and legislative regulation. The former was and is particularly evident in prenuptial agreements, and the latter more pronounced in divorce where legislation governs the assignment of property, and the

---

22. CLARK, TREATISE, *supra* note 4, at 93.

23. 388 U.S. 1 (1967).

24. CLARK, TREATISE, *supra* note 4, at 94.

25. CLARK, STUDENT EDITION, *supra* note 12.

26. Professor Clark’s fifty-four page discussion of the rights of illegitimate children in a variety of contexts and his discussion of termination of parental rights and adoption of children in eighty-eight pages are the most comprehensive treatment of the subjects I have read. *See id.* at 149–203, 850–938. West published a two-volume edition for practitioners in 1987. *See* CLARK, PRACTITIONER’S EDITION, *supra* note 12. The Student Edition is an abridged version of the longer work. The Student Edition was then reprinted in 1998.

27. *E.g.*, *Goodridge v. Dep’t of Health*, 798 N.E.2d 941 (Mass. 2003); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006).

custody and support of children. Interestingly enough, those two areas of family law are now the subject of uniform acts and provisions in the American Law Institute's *Principles of the Law of Family Dissolution*.<sup>28</sup>

The brilliance of both the first and second editions of *The Law of Domestic Relations in the United States* lies in the fact that they are more than two works on family law. Both editions can be studied as a two century history of family law in the United States, from the eighteenth century English origins to the twentieth century. They can be read as an analysis of and commentary on family law in the United States during the same period, and they can be read as a leading scholar's view of the family law of the future. Using any standard, the contribution of Professor Homer H. Clark, Jr., to family law is immeasurable. His is the scholarship on which all of us working in the family law vineyard have relied.<sup>29</sup>

\* \* \*

## FIFTY YEARS LATER: HOMER CLARK AND THE LAW OF DOMESTIC RELATIONS

ANN LAQUER ESTIN\*

When Homer Clark began teaching domestic relations law in 1953, the world was a very different place. Divorces were difficult to obtain and the law on the books in most states required proof of serious marital fault. Married women had gained the right to contract and own property, but in most states a husband could not be prosecuted for forcibly raping his wife. The Supreme Court had recently weighed in on the problems of full faith and credit and migratory divorce, but it had not yet addressed

---

28. E.g., UNIF. PREMARITAL AGREEMENT ACT (1983); UNIF. MARRIAGE AND DIVORCE ACT (1973); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (2002). Professor Clark discusses surrogacy contracts as a possible area for regulation. In 1988, there were no statutes regulating surrogacy contracts. See CLARK, STUDENT EDITION, *supra* note 12, at 921-25. Since 1988, assisted reproductive technology has become a major issue especially with regard to the rights and legal status of the parties involved. See KINDREGAN & MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY (2006) (discussing the latest cases and statutes on the issue and including a reference to Professor Clark's work).

29. I do not believe that the footnotes in any other text on family law in America have a more complete list of cases, statutes, and social science research in a given area. What is extremely helpful to one doing research in the field is Professor Clark's comments on the references, often stating that a particular law review article is the best on the subject. As a source for family law research the 1988 edition (either the Student Edition or the Practitioner's Edition) of *The Law of Domestic Relations in the United States* is indispensable.

\* Professor of Law, University of Iowa.