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Courtney Megan Cahill
Florida State University College of Law

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REGULATING AT THE MARGINS: NON-TRADITIONAL KINSHIP AND THE LEGAL REGULATION OF INTIMATE AND FAMILY LIFE

Courtney Megan Cahill*

This Article offers a new theory of how the law attempts to control intimate and family life and uses that theory to argue why certain laws might be unconstitutional. Specifically, it contends that by regulating non-traditional relationships and practices that receive little or no constitutional protection—same-sex relationships, domestic partnerships, de facto parenthood, and non-sexual procreation—the law is able to express its normative ideals about all marriage, parenthood, and procreation. By regulating non-traditional kinship, then, the law can be aspirational in a way that the Constitution would ordinarily prohibit and can attempt to channel all of us in ways that satisfy its normative ideals. This Article refers to this form of channeling or control as “back door” regulation, and maintains that by regulating at the margins, the law attempts to regulate everyone. In addition to offering a new theory of the family and its legal regulation, this Article uses that theory to enrich constitutional challenges to laws, like exclusionary marriage regimes, that selectively burden non-traditional intimacy and practices. Most broadly, it invites readers to consider how far the law reaches when it regulates as well as just how interconnected to one another the law’s regulation (and discrimination) makes us.

* Professor of Law, Roger Williams University School of Law. Ph.D., Princeton University; J.D., Yale Law School; B.A., Columbia University.

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INTRODUCTION

Consider two scenarios. In the first scenario, scenario “A,” a white man uses an online dating service to meet a woman whom he would like to marry someday. Because the man is interested in eventually having white children with his wife, he checks “Caucasian” in the list of criteria provided by the service. Despite his desire to marry one white woman, the man routinely has unprotected sex with many women.

The state in which the man lives passes two laws related to his activities. The first law provides that online dating services shall be subject to a sin-or-sumptuary tax when they organize patrons on the basis of racial and ethnic background. The second law provides that a man commits a misdemeanor when he engages in unprotected sex with a woman other than his wife. In support of each law, the state cites antidiscrimination and health concerns, respectively. As to the health issue, the state is particularly concerned about the possibility that men will father many children who will not know each other, thus raising the specter of incest. The man challenges both laws in federal court, arguing that they violate his associational and privacy rights under the Federal Constitution, and likely wins.¹

1. The law that taxes online dating services that organize patrons on the basis of racial and ethnic background likely violates patrons’ right to associational freedom under the First Amendment and the so-called freedom of intimate association under the First and Fourteenth Amendments. For a description of the latter right, see Kenneth L. Karst, *The*

In the second scenario, scenario “B,” a white woman wants to have a child with her Hispanic female partner. They retain the services of the California Cryobank, the largest sperm bank in the world and located in California, and choose donor # 02493, a Hispanic male who has already successfully donated to four families. The woman and her partner select a Hispanic male because they are interested in having a child that shares their ethnic heritage. For this and other reasons, donor # 02493 is the perfect donor for them.

Before the woman purchases # 02493, however, California passes two laws that relate to her activities. The first law places a large sin-or-sumptuary tax on sperm banks, like the California Cryobank, that organize donors on the basis of racial and ethnic background. The second law provides that it is a misdemeanor for sperm banks to sell donor sperm to more than three families or individuals who successfully bear children with that donor. The state cites antidiscrimination and health concerns in support of the laws. As to the health issue, California, like the state in A, is particularly concerned about the possibility of accidental incest between the biologically related siblings of popular sperm bank donors—siblings who likely will not know each other. It is worth noting that B is not just a hypothetical case, as commentators have started to argue that sperm banks should be regulated for just the reasons discussed here: to prevent incest and to promote race neutrality.²

As a result of the sin tax, the Cryobank starts to charge its customers considerably higher rates for donor sperm. The high cost of Cryobank sperm, as well as the fact that # 02493 is now off limits because he has already helped create children in four families, force the woman to seek the services of a sperm bank in another state (even though # 02493 was the perfect match). The woman challenges California’s laws on federal constitutional grounds, arguing that they violate her right to procreate, and likely loses.³

Freedom of Intimate Association, 89 YALE L.J. 624 (1980). Similarly, the law that makes it a misdemeanor for a man to have sexual relations with a woman who is not his wife is a criminal fornication law—a law that punishes extramarital sexual activity. While the Supreme Court has never directly considered the constitutionality of criminal fornication laws, it indirectly ruled on their constitutionality in *Lawrence v. Texas*, 539 U.S. 558 (2003). If, after *Lawrence*, it is constitutional to deny same-sex couples the ability to marry (as *Lawrence* itself suggests, *see id.* at 585) but unconstitutional to impose criminal penalties on them for engaging in consensual sex (as *Lawrence* explicitly holds, *see id.*), then it would seem that fornication laws must be unconstitutional because they criminalize the only kind of sexual activity (extramarital) that same-sex couples in most states can engage in. In *Martin v. Zihlerl*, 607 S.E.2d 367, 371 (Va. 2005), the Virginia Supreme Court agreed when it struck down that state’s criminal fornication statute in light of *Lawrence*.

2. *See infra* Part II.C.

3. In this case, no sexual autonomy rights are at issue because the woman is reproducing in a non-sexual way. She might argue that her associational rights are being violated here—specifically, her right to associate with the reproductive material of her choice. It is unlikely, however, that a court would look favorably on that claim given its somewhat attenuated relationship to associational autonomy. Thus, the woman in B is left with her right to procreate, which, according to *Skinner v. Oklahoma*, 316 U.S. 535 (1942) and its progeny, receives constitutional protection under the Fourteenth Amendment. Although the Court decided *Skinner* on equality grounds, it has suggested in subsequent

What is going on here? Most obviously, perhaps, the man in A likely wins because he is engaging in constitutionally protected activity (sex) and in something (online dating) that not only involves associational autonomy but also might lead to constitutionally protected activity (sex and marriage). By contrast, the woman in B likely loses because she is engaging in neither of those things. Instead, hers is a non-sexual, and non-traditional, form of procreation that arguably neither constitutes a fundamental right⁴ nor involves the same sort of activity that we typically associate with the constitutionally protected activities of sexual reproduction and romantic affiliation. As one commentator recently put it, “Autonomy interests are implicated differently in assisted reproduction . . . than they are in sexual reproduction or romantic dating.”⁵ It therefore follows that the activity at issue in B can likely be subject to regulations that would surely be unconstitutional when applied to the activity at issue in A.

But something else is going on here—something more than a simple case of government subjecting B to regulation in a way that would violate the Constitution if applied to A because B is non-traditional and therefore “not the stuff of which fundamental rights qualifying as liberty interests are made.”⁶ That is, if we simply read these scenarios as exemplifying a case where non-traditional activity (B) can be burdened in a way that traditional activity (A) cannot be, then we miss something important: the extent to which the law might be using B to

cases that *Skinner* protects a fundamental right to procreate. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). However, while *Skinner* established a right to procreate, what that procreative right actually encompasses remains highly contested. See, e.g., Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135 (2008) (arguing for a “bundle of rights” theory of procreation). The right does not necessarily include the right to procreate via third-party assistance. See Radhika Rao, *Constitutional Misconceptions*, 93 MICH. L. REV. 1473, 1483–89 (1995). For the argument that the right to procreate includes the right to noncoital procreation, see John A. Robertson, *Assisted Reproductive Technology and the Family*, 47 HASTINGS L.J. 911, 914 (1996) [hereinafter Robertson, *Assisted Reproductive Technology*] (“Since an infertile couple or individual has the same interest in bearing and rearing offspring as a fertile couple does, their right to use noncoital techniques to treat infertility should have equivalent respect.”); John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 328 (2005) (“If coital reproduction is protected, then we might reasonably expect the courts to protect the right of infertile persons to use noncoital means of reproduction to combine their gametes, such as artificial insemination.”). Still, even if the woman in B has a right to noncoital procreation, it is unclear whether that right includes the right to a sperm donor of her choice. For an argument that it does, see John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 956 n.53 (1986) [hereinafter Robertson, *Embryos*] (“The recipient of [sperm] donation . . . may have the full procreative interest, even if the donor does not. Thus, persons desiring to reproduce may have a right to receive gametes and gestation from others, even if the others have no independent right to provide those services.”).

4. See *supra* note 3.

5. Dov Fox, Note, *Racial Classification and Assisted Reproduction*, 118 YALE L.J. 1844, 1882 (2009). Fox’s argument is set forth in greater detail below. See *infra* notes 95–96 and accompanying text.

6. *Michael H. v. Gerald D.*, 491 U.S. 110, 127 (1989).

articulate normative ideals about what all intimate and family life ought to look like.

In more concrete terms, constitutional guarantees prohibit the law from directly forcing the man in A to procreate in race-neutral ways and from directly setting limits on the number of times that he “donates” sperm to women. Those guarantees do not, however, prohibit the law from regulating the similar non-traditional activity at issue in B because B, unlike A, is not constitutionally protected. Nor, importantly, do those guarantees prohibit the law from using the legal regulation of B as an opportunity to express its strong normative commitments regarding all procreation—including the traditional procreative activity in A that is constitutionally protected. When viewed in this light, B presents an occasion for the law to articulate normative ideals for everyone. It is in this scenario that the law’s thick normative commitments regarding all procreation—in this case, the law’s belief that procreation should be race neutral and incest preventative—find expression.

This Article provides a new theory of the family that has both descriptive and practical importance. Its general goal is to offer a novel way to think about how the law attempts to control intimate and familial life and to establish an ideal conception of it. Its narrow objective is to use that theory as a basis for arguing why certain regulations, like those imposed on same-sex partners or on alternative procreation, might be unconstitutional.

More specifically, this Article argues that non-traditional kinship presents an occasion for the law to articulate its normative vision of all intimate and family life, including reproduction, romantic affiliation, and family formation. Notably, family law has overlooked this phenomenon because of the conventional way in which it conceptualizes the connection between traditional and non-traditional relationships and practices. For instance, family law approaches the traditional nuclear family and the non-traditional marginal family as if they occupy distinct and separate domains.⁷ Moreover, it assumes that the marginal family is dominated by and subsidiary to its central counterpart—or, to use a metaphor often invoked by family law commentators, it assumes that non-traditional kinship sits in the “shadow” of traditional kinship.⁸ Finally, it assumes that the marginal family is highly regulated by the state, whereas the central family, protected as it is by constitutional privacy guarantees, is rarely subject to regulation.⁹

Thinking about the family and its legal regulation in this way is problematic for two reasons. First, family law’s conventional understanding of the relationship between traditional and non-traditional kinship is descriptively inaccurate. It approaches those kinship forms as separate and distinct, when, in fact, they are dynamically interrelated. Moreover, it assumes that marginal kinship is dominated by traditional models, when, in fact, marginal kinship helps to define those models. And it presupposes that traditional kinship is never regulated, when, in fact, the law regulates it all the time—albeit indirectly at the margins. This

7. See *infra* notes 13–15 and accompanying text.

8. See *infra* notes 16–19 and accompanying text.

9. See *infra* notes 20–25 and accompanying text.

Article contends that when the law uses marginality to articulate a normative vision of intimate and family life, it is regulating through the “back door” that which the Constitution prohibits it from regulating directly—namely, traditional kinship. Viewed in this light, the law’s regulation of marginal kinship constitutes an underhanded way to gain access to traditional forms of intimate and family life that the Constitution staunchly protects—the very definition of a “back door.”¹⁰

Second, family law’s conventional narrative has certain practical costs, particularly for those interested in challenging the constitutionality of laws that burden non-traditional intimacy and family life, such as exclusionary marriage laws. That narrative overlooks the extent to which the law uses non-traditional kinship as a vehicle through which to express a normative vision of kinship for everyone. As a result, advocates have missed the opportunity to make a novel constitutional argument: that the law imposes expressive or normative burdens on non-traditional kinship and that those expressive or normative burdens sometimes (although not always) amount to a constitutional equality violation.

Part I sets forth family law’s conventional view of the relationship between traditional and non-traditional kinship. Part II challenges that view by focusing on a number of instances from the family law context where the law uses marginality to express strong normative commitments about intimate and family life generally. Part III builds on these illustrations to demonstrate that the law uses marginality to try to regulate everyone; as such, it would not be improper to think about the legal regulation of non-traditional kinship as an attempt to regulate even traditional kinship, albeit through the back door. Finally, Part IV contemplates some of the practical uses to which this Article’s descriptive theory of the family and its legal regulation may be put, including the ways in which it might be used to enrich constitutional challenges to regulations that burden marginal kinship, including, but not limited to, exclusionary marriage regimes.

Commentators have long theorized the relationship between traditional and non-traditional models in American family law. Some commentators argue that traditional models, like marriage, are constraining; under this view, those models overshadow non-traditional kinship to such a degree that the latter is never truly free to express itself in new and exciting ways.¹¹ Others argue that traditional

10. While technically the entrance at the rear of a building or a house, “back door” is also a term that refers to a secret means of gaining access to something highly protected. Beyond its colloquial usage, “back door” is a term that computer programmers use to refer to hidden software tools that can be used to bypass a computer system’s security policies in order to gain access to it. See *Glossary*, IMVAJRA, <http://www.imvajra.com/glossary1.html> (last visited Dec. 26, 2011). This latter usage is a nice metaphor for the kind of back door regulation that this Article has in mind when it describes the ways in which the law tries to gain access to the traditional family—something highly protected by the Constitution—by regulating the non-traditional family.

11. See, e.g., Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 1020 (2000) (“[C]ontemporary performance-based approaches to nonmarital cohabitation posit marriage as the reigning normative model against which nonsolemnized unions are compared and against which their legal merits are evaluated.”); Katherine M. Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685, 2689 (2008) (“The normative centrality and, indeed, priority of the institution of marriage

legal relationships, like marriage, are liberating; under this view, traditional relationships offer considerable freedom vis-à-vis their non-traditional counterparts because the state so heavily regulates the latter but not the former.¹²

This Article enhances and challenges both of those accounts. It argues that traditional kinship not only sits in the shadow of its non-traditional counterpart but also is less free, and more regulated, than we might think. Its novel descriptive theory invites commentators and advocates to think more seriously about the distinctly expressive burdens that non-traditional intimate and family life bear in our legal order and about how those burdens are unconstitutional. Moreover, and equally important, its theory asks readers to consider just how far the law reaches when it regulates as well as just how interconnected the law's regulation (and discrimination) makes us.

I. LAW, INTIMATE LIFE, AND FAMILY: THE CONVENTIONAL NARRATIVE

A. *The Conventional Family Law Narrative*

Family law projects a certain narrative about the relationship between traditional and non-traditional kinship. First, and most broadly, family law assumes that central and marginal kinship structures are largely separate and disconnected. Central kinship, as its name suggests, is the traditional “nuclear” family—that is, the married heterosexual couple with biologically related children who are the product of sexual reproduction. Marginal kinship, by contrast, is the non-traditional family that fails to conform to the nuclear ideal for any number of reasons.

Family law often organizes intimate and family life in a way suggesting that traditional and non-traditional kinship structures inhabit non-overlapping domains. For instance, my students' casebook reserves an entirely separate section for what it terms “non-traditional families,” which, according to the book's editors, include individuals engaged in same-sex relationships and non-marital

establishes the standard by which all other forms of kinship, family, friendship, temporary alliance, and love are both rendered legible and assigned value. In this, and in most societies, marriage is the measure of all things.”); Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1256 (2010) (“[S]eeming departures from the marital family ideal may be less radical than they first appear. Just as unmarried fathers were recognized as fathers when they acted like husbands, unmarried couples have sometimes enjoyed legal protection because they acted as though they were married.”).

12. See, e.g., Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1665 (1993) [hereinafter Case, *Couples and Coupling*] (discussing the freedom that marriage provides vis-à-vis non-traditional alternatives like domestic partnerships, which require individuals to satisfy a laundry list of criteria that married couples do not have to satisfy); Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1774 (2005) (same); Mary Anne Case, *What Feminists Have to Lose in Same-Sex Marriage Litigation*, 57 UCLA L. REV. 1199, 1203–05 (2010) [hereinafter Case, *What Feminists Have to Lose*] (same).

cohabitation.¹³ By contrast, the casebook considers the traditional family—the heterosexual married couple with biological children—under the section entitled “Marriage and Divorce.”¹⁴ This way of thinking about the family is also present in family law scholarship and case law, each of which tends to conceptualize intimate and familial life as falling into either a central or a marginal type and to approach those types in a static and non-dynamic way.¹⁵

13. IRA MARK ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* 839–943 (5th ed. 2010).

14. *Id.* at 73–202; see also D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW* (4th ed. 2009) (treating traditional and non-traditional families separately).

15. For scholarship that divides intimate and family life along traditional and non-traditional lines, see, e.g., Kathryn Abrams, *Law in the Cultivation of Hope*, 95 CALIF. L. REV. 319, 380 (2006) (referring to same-sex relationships as “non-traditional”); Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 41 (2008) (placing same-sex relationships under the larger category of “nontraditional relationships”); Carlos A. Ball, *Communitarianism and Gay Rights*, 85 CORNELL L. REV. 443, 515 (2000) (drawing a distinction between “married couples” and “nontraditional couples”); Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 882–83 (1984) (drawing a distinction between the traditional nuclear family and “parenting relationships” that arise “outside the nuclear family”); Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1147–55 (2003) (referring to gay families as “alternatives” and making the traditional/non-traditional family distinction but also criticizing that distinction); Judith F. Daar, *Assessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 77–78 (2008) (characterizing children raised by a single parent or by same-sex parents as examples of “nontraditional parenthood”); Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1642–57 (1998) (examining and critiquing the differential legal treatment of traditional and non-traditional families); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 472–73 (1990) (referring to lesbian-headed families as non-traditional but also noting the shortcomings of that categorization because lesbian-headed households are by no means new). For examples of an alternative perspective, one that critiques the traditional/non-traditional or core–marginal distinction, see KATH WESTON, *FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP* 7 (1997) (“[N]uclear families do not constitute the timeless core of what it means to have kin in this society, relative to which all other forms of family must appear as derivative variations or marginal alternatives.”); Marsha Garrison, *The Technological Family: What’s New and What’s Not*, 33 FAM. L.Q. 691, 691 (1999) (arguing that what might look non-traditional is actually quite ordinary); Barbara Bennett Woodhouse, *“It All Depends on What You Mean by Home”: Toward a Communitarian Theory of the “Nontraditional” Family*, 1996 UTAH L. REV. 569, 570 (critiquing use of term “nontraditional” to describe so-called non-traditional families because “the term ‘nontraditional’ is a misnomer. Households that depart from the nuclear model have existed for all of human history.”). Cases have also employed the traditional/non-traditional distinction. See, e.g., *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998) (referring to same-sex marriage as a non-traditional relationship that is deserving of constitutional protection), *superseded by constitutional amendment*, ALASKA CONST. art. I, § 25 (amended 1999); *In re Interest of Z.J.H.*, 471 N.W.2d 202, 203–04, 210 n.14 (Wis. 1991) (referring to a lesbian parent as

Second, family law assumes that traditional forms of intimate and familial life dominate their non-traditional counterparts. For instance, some family law commentators have conceptualized traditional kinship—specifically, heterosexual marriage—as the “center” that casts its “shadow” over non-traditional alternatives, including non-marriage (singledom) and domestic partnerships.¹⁶ Katherine Franke, for example, has understood the relationship between formal marriage and domestic partnerships in center–margin terms, contending that marriage so often casts its “shadow” over those who are peripheral to it.¹⁷ Franke notes that marriage casts its shadow widely, constituting the legal relationship against which all other relationships, including domestic partnerships, are defined and determined.¹⁸ She says that “those who fall within marriage’s shadow find themselves locked into a social field in which the attachments we take up have meaning already determined by the state.”¹⁹ Under this view, a non-traditional structure (domestic partnerships) is forever sitting in the “shadow” of, and is thus in some sense determined and dominated by, a traditional structure (marriage).

Third and last, family law assumes that traditional intimate and family life is rarely regulated whereas its marginal counterpart is always regulated. “While family law has expanded to embrace non-traditional relationships and family structures,” one commentator observes, “the courts’ close scrutiny of these relationships and structures demonstrates their continued preference for the traditional family unit.”²⁰ Indeed, “the premise of the nuclear family underlies the legal norm of parental autonomy,”²¹ and “the traditional respect for privacy afforded to the family as a unit evaporates when the traditional family form disappears.”²² As Professor Rao argues, “The very concept of family privacy—the constitutional doctrine protecting a ‘private realm of family life which the state may not enter’—presupposes a ‘natural family’ that exists apart from and prior to

being in a non-traditional relationship), *overruled by In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995). Although this Article refers to kinship in traditional/non-traditional terms, it also understands the interrelationship that exists between them.

16. See, e.g., Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. REV. 1555, 1557 (2004) (invoking the shadow metaphor); Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1656–59, 1709–14 (2003) (same); Franke, *supra* note 11, at 2693–99 (same).

17. Franke, *supra* note 11, at 2693–99.

18. *Id.* at 2697–99.

19. *Id.* at 2697.

20. Aubry Holland, Comment, *The Modern Family Unit: Toward a More Inclusive Vision of the Family in Immigration Law*, 96 CALIF. L. REV. 1049, 1051 (2008).

21. Bartlett, *supra* note 15, at 880.

22. Katharine K. Baker, *Taking Care of Our Daughters*, 18 CARDOZO L. REV. 1495, 1503–04 (1997) (book review); see also David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 581 (2000) (“Never-married or divorced parents are subjected to state investigation and direction on a scale that would be considered unthinkable in the context of married parents in an intact family. . . . It bears remembering that the first cases recognizing what later came to be known as the constitutional right of family privacy involved state intrusions upon intact and unified families.”).

the state.”²³ “Implicit in this image,” she continues, “but seldom articulated, is the fundamental assumption that the natural family consists of two heterosexual parents and their biological children.”²⁴ According to this view, the law has adopted a “hands-on” approach to the marginal family that it would never think of applying to the traditional family, that “freestanding thing, or phenomenon, or group [that] is distinct from . . . the state.”²⁵

B. Challenging the Conventional Family Law Narrative

Family law’s conventional view of the relationship between traditional and non-traditional kinship is descriptively imprecise and warrants critique. For instance, the notion that traditional and non-traditional kinship inhabit separate, distinct, and largely non-overlapping spheres (think here of the casebook organization mentioned above) fails to capture the dynamic interrelationship that exists between them. Similarly, the notion that marginal kinship is forever dominated by central kinship (think here of the “shadow” metaphor) fails to account for the extent to which central forms of intimacy and family so often take shape in the shadow of their marginal counterparts. And finally, the notion that “the traditional respect for privacy afforded to the family as a unit evaporates when the traditional family form disappears”²⁶ fails to account for the extent to which the central family *is* regulated, albeit indirectly at the margins. Reconceptualizing the role that marginality plays in the law’s construction of intimate and family life, as described in the next Parts, offers a more accurate way to think about the family and its legal regulation, as well as a new way to think about why directly regulating certain forms of non-traditional kinship might be unconstitutional.

II. RECONCEIVING MARGINALITY

Scholars have long recognized the powerful role that marginal people and relationships can play in defining a normative vision of social life for everyone. Those who “have moved outside the margins of a group,” one sociologist writes, help to give society “its distinctive shape, its unique identity.”²⁷ The “latest

23. Radhika Rao, *Assisted Reproductive Technology and the Threat to the Traditional Family*, 47 HASTINGS L.J. 951, 960 (1996) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

24. *Id.* One time that the Supreme Court did articulate as much was in *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977) (upholding state removal procedures of foster children from their foster homes against a federal due process challenge). There, the Court observed that “the usual understanding of ‘family’ implies biological relationships, and most decisions treating the relation between parent and child have stressed this element.” *Id.* at 843. For a more recent expression of this idea, see *Long v. Holtry*, 673 F. Supp. 2d 341, 350 (M.D. Pa. 2009) (noting that foster family formations exist “in contrast to traditional family relationships whose origins are entirely apart from the power of the State, but are intrinsic to notions of freedom and liberty that are inherent in the very foundation of our country”).

25. Lee E. Teitelbaum, *The Family as a System: A Preliminary Sketch*, 1996 UTAH L. REV. 537, 542.

26. Baker, *supra* note 22, at 1503–04.

27. KAI T. ERIKSON, *WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE* 11 (1966).

marginal group,” one historian explains, serves the vital function of defining the center “by demonstrating what [the center] must never become.”²⁸ In fact, marginalized people and behavior are “a natural and even beneficial part of social life” because they “mark the outer limits of group experience and provide a point of contrast which gives the norm some scope and dimension.”²⁹ Under this view, we use whatever or whomever lies outside of us in order to define ourselves.³⁰

This Article takes this central insight and alters it slightly. Unlike many scholarly accounts of marginality, it does not argue that marginal forms of intimate and family life provide “a point of contrast which gives the norm some scope and dimension.”³¹ Rather, it contends that non-traditional relationships and reproductive practices constitute a vehicle through which the law attempts to articulate the “norm” for everyone. In this sense, this Article follows in the footsteps of those family law commentators who have argued that core legal concepts, like marriage and the family, often come into focus when the law regulates persons who exist at the periphery of those institutions. As Ariela Dubler has maintained, the normative meaning of marriage has so frequently taken shape “in the terrain beyond marriage’s formal borders.”³²

This Part’s objective is to offer examples of situations where marginality helps to bring family law’s central normative structures—ideal marriage, ideal parenthood, and ideal procreation—into focus. These examples are meant to be illustrative, not exhaustive. Each demonstrates the subtle interplay between central and marginal kinship, the expressive burdens that the law so often places on marginal kinship, and the indirect way in which the law attempts to regulate even those aspects of intimate and family life that receive robust constitutional

28. JAMES A. MORONE, *HELLFIRE NATION: THE POLITICS OF SIN IN AMERICAN HISTORY* 9, 46 (2003).

29. ERIKSON, *supra* note 27, at 27.

30. See Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 *UCLA L. REV.* 263, 287 (1995) (“At least since the time of G.H. Mead we have understood that even the interior self is hard to imagine in the absence of ‘others’ out there. In the prevailing individualized, Western, Freud-schooled, ‘masculinist’ world view, those others are the ones from whom the individual self is to be distinguished.”).

31. ERIKSON, *supra* note 27, at 27.

32. Dubler, *supra* note 16, at 1649; see also HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 1 (2000) (observing that it is “through close examination of struggles at the margins of marital life and marital identities . . . that we come to a historical understanding of core legal concepts: of wife, of husband, of unity”). This Article recognizes that core legal concepts like marriage and the family are also brought into focus and given substance when the law acts in other ways not considered here. My focus here is on the law’s regulation of marginal kinship in the family law context. But the law also tries to define core legal concepts through the criminal law, which projects an ideal vision of the family (as nonviolent, mutually supportive, etc.), and through immigration law, which projects an ideal vision of marriage (as an institution based on love, financial interdependence, etc.). See *infra* notes 62, 69, 147–49 and accompanying text. I focus here instead on the under-theorized expressive dimension of the law’s direct regulation of marginal relationships and reproductive practices through mechanisms like exclusionary marriage regimes and domestic partnership laws.

protection. In each, regulating at the margins affords the law an opportunity to express its normative ideals about a variety of institutions that we do not always think about in statist terms.

A. Same-Sex Marriage and Domestic Partnerships: Creating the Ideal Marriage

1. Same-Sex Marriage

The movement for marriage equality in the United States has given the law an occasion to articulate familial norms and what Professor Mary Anne Case has called a “thick” vision of marriage for everyone,³³ even—or perhaps especially—heterosexuals. Interestingly, that movement has produced an image of marriage as procreative—an oddity, to say the least, in twenty-first-century America, where most people are thought to marry for love and companionship rather than for reproduction.³⁴ Dismissed by many as nonsensical,³⁵ the image of procreative marriage that has emerged from marriage-equality jurisprudence is best understood when viewed through a normative lens: an attempt to articulate what marriage should ideally be rather than a description of what it actually is.

In those jurisdictions that have upheld exclusionary marriage laws against a constitutional challenge, courts have relied heavily on the procreation rationale. According to that argument, persons of the same sex can be denied the legal ability to marry each other because they cannot sexually procreate with each other.³⁶

33. See Case, *What Feminists Have to Lose*, *supra* note 12, at 1204 (arguing that a thick view of marriage has emerged from same-sex marriage advocacy).

34. See, e.g., HARTOG, *supra* note 32, at 312 (describing the twentieth-century marriage as one in which spouses can “express creatively our individuality, our shared identity, and our changing commitments, our love”); Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 *YALE J.L. & HUMAN.* 1, 10 (2009) (describing “the rise of companionate marriage, in which spouses are expected to satisfy each other’s emotional needs”).

35. See, e.g., Abrams & Brooks, *supra* note 34, at 4 (“[N]ever before have courts so truncated the possible purposes of marriage to assign it one goal: here, the policing of accidental procreation.”); Kenji Yoshino, *Too Good for Marriage*, *N.Y. TIMES*, July 14, 2006, at A19 (describing one court’s early invocation of one version of the procreation rationale as a “cockeyed aberration” that has gained acceptance by later courts).

36. The role of procreation in marriage-equality jurisprudence has changed over the past 40 years. During the first wave of marriage litigation in the 1970s and 1980s, courts justified exclusionary marriage laws on the basis of propagation of the species. Under this view, same-sex couples could be denied the right to marry the person of their choice because a same-sex marriage could not contribute to “the propagation of the human race.” *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974); see also *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980) (upholding California’s marriage exclusion on the basis of procreation as propagation of the species); *Baker v. Nelson*, 191 N.W.2d 185, 186–87 (Minn. 1971) (same with respect to Minnesota’s marriage law). Increasingly, however, courts have turned to a kinder, gentler variation of the procreation justification, one that ironically casts same-sex couples as superior to their cross-sex counterparts. Under this modified version, marriage is about encouraging responsible procreation between those who accidentally procreate and about providing a stable context in which such responsible procreation can occur. Because same-sex couples always reproduce responsibly—that is, they ostensibly never have children by accident—it follows that they do not need marriage.

While years ago “[t]he argument from procreation . . . no longer seem[ed] to be either advanced seriously by states or taken seriously by courts,”³⁷ many courts today have embraced it.³⁸ In fact, according to some commentators, procreation is “probably the most common argument against gay marriage” in certain circles.³⁹

The procreation rationale has been the object of intense criticism, with some commentators—and, recently, courts—bemoaning its flagrant under-inclusiveness, and with others arguing that it bears no relationship whatsoever to exclusionary marriage legislation because the contemporary civil institution of marriage has nothing to do with procreation, if it ever did at all.⁴⁰ Even Justice Scalia noted in his *Lawrence v. Texas* dissent that the procreation rationale for marriage prohibitions is wildly suspect because “the sterile and the elderly” may marry, though their chance for conception is about zero.⁴¹

The conventional explanation for procreation’s success in the same-sex marriage context runs something like this: True, the law, through the procreation rationale, burdens same-sex couples in a way that it does not similarly burden opposite-sex couples. But that is because it can. The Supreme Court has cast the right to marry, or at least the right to enter into a traditional marriage, as one of fundamental importance.⁴² Moreover, it has made more than clear that a right of “marital privacy” protects couples, once married, from excessive governmental interference.⁴³ Were the law to require married opposite-sex couples to procreate

See, e.g., Standhardt v. Superior Court *ex rel.* Cnty. of Maricopa, 77 P.3d 451, 463 (Ariz. Ct. App. 2003) (invoking responsible procreation); Morrison v. Sadler, 821 N.E.2d 15, 25–26 (Ind. Ct. App. 2005) (same).

37. Peter Cicchino, *Reason and the Rule of Law: Should Bare Assertions of “Public Morality” Qualify as Legitimate Governmental Interests for the Purposes of Equal Protection Review?*, 87 GEO. L.J. 139, 151 (1998).

38. *See, e.g.,* Conaway v. Deane, 932 A.2d 571, 619 (Md. 2007) (upholding the state’s same-sex marriage prohibition partly on the basis of procreation); Hernandez v. Robles, 855 N.E.2d 1, 7 (N.Y. 2006) (same); Andersen v. King Cnty., 138 P.3d 963, 978 (Wash. 2006) (same).

39. Dale Carpenter, *Bad Arguments Against Gay Marriage*, 7 FLA. COASTAL L. REV. 181, 193 (2005); *see also* William C. Duncan, *The State Interests in Marriage*, 2 AVE MARIA L. REV. 153, 154 (2004) (“The most common state interest discussed in same-sex marriage case law relates to procreation . . .”).

40. *See, e.g.,* Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 389 (D. Mass. 2010) (ruling that section 3 of the Defense of Marriage Act (“DOMA”), which defines marriage for federal purposes as a legally recognized union between one man and one woman, fails to satisfy rational basis review under the Federal Constitution and observing that the procreation rationale in support of that legislation “plainly cannot provide a rational basis upon which to exclude same-sex marriages from federal recognition because . . . the ability to procreate is not now, nor has it ever been, a precondition to marriage in any state in the country”); Courtney Megan Cahill, *The Genuine Article: A Subversive Economic Perspective on the Law’s Procreationist Vision of Marriage*, 64 WASH. & LEE L. REV. 393, 400–15 (2007); Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1397–98 (2010).

41. 539 U.S. 558, 605 (2003) (Scalia, J., dissenting).

42. *See* Turner v. Safley, 482 U.S. 78 (1987); Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967).

43. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

to either get or stay married, it would surely be violating those rights. As one state court, responding to the claim that the procreation rationale is irrational because opposite-sex married couples do not need to procreate, put it: “[I]f the State excluded opposite-sex couples from marriage based on their intention or ability to procreate, the State would have to inquire about that subject before issuing a license, thereby implicating constitutionally rooted privacy concerns.”⁴⁴

In most states, and under the Federal Constitution, same-sex couples do not enjoy these constitutionally protected rights. Indeed, non-traditional kinship structures in general do not receive the constitutional protections that traditional kinship structures receive.⁴⁵ It therefore follows that the law may impose an image of procreative marriage on same-sex couples without “implicating constitutionally rooted privacy concerns.”⁴⁶

But there is another way to think about the role that procreation is playing in the marriage-equality context, one that focuses less on why that rationale either does or does not make sense on a descriptive level and more on its normative dimension. Specifically, the legal regulation surrounding marginal kinship—here, the entire movement for marriage equality—allows the law to articulate what marriage should ideally be for everyone (namely, procreative), even, or rather especially, for those whom the law cannot directly regulate without running afoul of constitutionally guaranteed rights. As *New York Times* columnist Ross Douthat recently observed, the image of procreative marriage that has emerged from marriage-equality jurisprudence only makes sense when viewed normatively. In his words: “So what are gay marriage’s opponents really defending, if not some universal, biologically inevitable institution? It’s a particular vision of marriage, rooted in a particular tradition, that establishes a particular sexual ideal.”⁴⁷ Similarly, Professor David Cruz has argued that courts’ invocation of procreation in the marriage-equality context is an instance of “heterosexual reproductive imperatives” at work in the law—that is, an opportunity for the law to articulate

44. *Standhardt v. Superior Court ex rel. Cnty. of Maricopa*, 77 P.3d 451, 462 (Ariz. Ct. App. 2003).

45. *See, e.g., Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 7–8 (1974) (finding that the non-traditional family does not receive the same kind of constitutional protection that the traditional family receives); *John C. v. Martha A.*, 592 N.Y.S.2d 229, 232 (N.Y. Civ. Ct. 1992) (stating that while “[a]n individual’s right to privacy in an intimate relationship is fundamental to human freedom and personal integrity [and] is now firmly rooted in our law,” those privacy norms are less robust in the context of a “nontraditional familial relationship”). *But see Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998) (“Just as the ‘decision to marry and raise a child in a traditional family setting’ is constitutionally protected as a fundamental right, so too should the decision to choose one’s life partner and have a recognized nontraditional family be constitutionally protected. . . . The same constitution protects both [kinds of families].”), *superseded by constitutional amendment*, ALASKA CONST. art. I, § 25 (amended 1999).

46. *Standhardt*, 77 P.3d at 462.

47. Ross Douthat, *The Marriage Ideal*, N.Y. TIMES, Aug. 9, 2010, at A19.

“ideals that are normative and thus nonfalsifiable.”⁴⁸ The procreation rationale, in short, represents law’s “repronormativity” writ large.⁴⁹

The procreation rationale thus has a normative aspect that conventional explanations, criticisms, and discussions of it likely miss. Through it, the law is able to express its deepest normative commitments about all forms of marriage—opposite-sex and same-sex alike—and to have a conversation about that institution that the Constitution would ordinarily prohibit. It turns out, then, that the procreation rationale is not only about burdening same-sex couples with a requirement that they could not possibly satisfy. It is also about affording the state an occasion to shape the social understanding of marriage for everyone. When viewed in this light, the marriage-equality movement and the role that procreation has played in it typify law regulating at the margins—that is, law using the marginal (same-sex relationships) to help create the ideal center (marriage for all).

In this sense, the procreation rationale plays a role similar to that performed by another rationale often invoked in support of exclusionary marriage laws: the “children are best served when raised in a household with two biological, opposite-sex parents” rationale.⁵⁰ To be sure, myriad households exist in which children are raised either by one parent (biological or not) or by two non-biological parents (as in the case of adoptive households). Moreover, the state would surely violate the Constitution were it to require that parent–child relationships be united by biological ties.⁵¹ For these reasons, the two-biological-parent rationale is best—and perhaps only—understood when viewed normatively: the law’s attempt to defend a particular familial ideal and to regulate indirectly that which it cannot regulate directly.

2. Domestic Partnerships

Unmarried domestic partnerships provide another opportunity for the law to create the ideal marriage. Take, for instance, local and state domestic partner statutes, which extend a range of protections to those who statutorily qualify as

48. David B. Cruz, *Heterosexual Reproductive Imperatives*, 56 EMORY L.J. 1157, 1166 (2007).

49. For a critique of the “repronormative forces” at play in law and feminism, see Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 184 (2001). See also DAN MARKEL ET AL., PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES 125 (2009) (discussing the “repronormativity” that surrounds biological justifications for criminal and civil incest laws, which rest on the assumption that couples likely to engage in incest are both opposite-sex and procreative).

50. See, e.g., *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1308 (M.D. Fla. 2005) (citing the United States’ argument in support of the Defense of Marriage Act—that DOMA “encourage[s] the creation of stable relationships that facilitate the rearing of children by both of their biological parents”); *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) (“The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father.”).

51. It is worth noting, however, that the state would not violate the Constitution were it to prohibit households composed of unrelated individuals. See *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (upholding a local zoning ordinance based on familial status).

domestic partners. The city of Tucson, Arizona, for instance, gives certain rights to domestic partners, defined as two people who “currently share a primary residence, are in a relationship of mutual support, and declare that they intend to remain in such for the indefinite future.”⁵² Cook County, Illinois, recognizes same-sex couples as domestic partners if, among other things, they “share a common household” and are “in a close and committed relationship of mutual financial and emotional support.”⁵³ In Lawrence, Kansas, domestic partners are persons who “share a common permanent residence,” “have agreed to be in a relationship of mutual interdependence,” and “both contribute to the maintenance and support of the household.”⁵⁴ And in Rhode Island, domestic partners are entitled to funeral rights with respect to their deceased partner as long as they qualify as domestic partners under the relevant statute, which requires unmarried persons to show, among other things, that they “resided together and had resided together for at least one year at the time of death” and “were financially interdependent.”⁵⁵

Similarly, in 2000, the American Law Institute (“ALI”) set forth a detailed definition of domestic partner when it recommended that jurisdictions adopt domestic partnership legislation to protect parties to a relationship from the strategic behavior of those who will “avoid marriage in order to avoid responsibilities to a partner.”⁵⁶ The ALI defines domestic partners as persons “who for a significant period of time share a primary residence and a life together as a couple.”⁵⁷ It further maintains that “[w]hether persons share a life together as a couple is determined by reference to all the circumstances,”⁵⁸ including, for example:

- (b) the extent to which the parties intermingled their finances;
- (c) the extent to which their relationship fostered the parties’ economic interdependence, or the economic dependence of one party upon the other;
- (d) the extent to which the parties engaged in conduct and assumed specialized or collaborative roles in furtherance of their life together;
- (e) the extent to which the relationship wrought change in the life of either or both parties;

52. *City of Tucson Domestic Partner Registration Instructions*, TUCSONAZ.GOV (Dec. 1, 2003), <http://cms3.tucsonaz.gov/dprreg>.

53. *Domestic Partnership Affidavit*, COOK COUNTY CLERK’S OFF., <http://www.cookctyclerk.com/vitalrecords/DocumentLibrary/Domestic%20Partnership%20Affidavit.pdf> (last visited Dec. 28, 2011).

54. *Domestic Partnership Registry*, CITY OF LAWRENCE, KAN., http://www.lawrenceks.org/city_clerk/domestic_partnership_registry (last visited Dec. 28, 2011).

55. R.I. GEN. LAWS § 5-33.2-24 (2011).

56. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.02 cmt. b (2002) [hereinafter ALI PRINCIPLES].

57. *Id.* § 6.03(1).

58. *Id.* § 6.03(7).

(f) the extent to which the parties acknowledged responsibilities to each other . . . ;

(g) the extent to which the parties' relationship was treated by the parties as qualitatively distinct from the relationship either party had with any other person; [and]

(h) the emotional or physical intimacy of the parties' relationship⁵⁹

Some commentators argue that domestic partnership statutes such as the ALI's force non-traditional relationships *to conform to* a marital model.⁶⁰ But that argument is not quite right because it assumes that a marital model exists for the law to impose on non-traditional relationships in the first place. A better, or at least an additional, way to read these statutes is this: Domestic partnership statutes constitute a way for the law *to create* a marital model.

More specifically, domestic partnership statutes operate as a vehicle through which the law expresses its most aspirational commitments about all relationships, particularly those that it cannot reach directly.⁶¹ Unlike domestic partners, married persons do not need to effect change in each other's lives. They do not need to have a unique relationship. And they do not need to be physically intimate in order to receive the same protections that domestic partners might be eligible to receive. To be sure, married persons do not even need to be in love.⁶²

59. *Id.*

60. *See, e.g.,* Franke, *supra* note 11, at 2697 ("The intended effect of the ALI Principles is to enlarge marriage's shadow.")

61. In this sense, domestic partnership statutes play a role similar to that played by functional definitions of intimate relationships and family generally. The New York Court of Appeals' decision in *Braschi v. Stahl Associates Co.*, 543 N.E.2d 49 (N.Y. 1989), has been called the "high water mark" with respect to this functionalist approach. Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 22, 23 (1991). There, the court considered whether two men in an intimate relationship qualified as a "family" for the purpose of a city's rent control statute. *Braschi*, 543 N.E.2d at 54–55. The court concluded that because the men had sufficiently acted like a family, they qualified as one under the law. *Id.* The court in particular noted that the men were financially interdependent, had a long and exclusive relationship, were emotionally committed to each other, and relied on each other for "daily family services." *Id.* at 55. Together these actions amounted to a spouse-like relationship. *Id.* While in one sense *Braschi* is a radical opinion—the first to recognize the legal status of same-sex partners as quasi-spouses—it is also extremely conservative because it projects onto unmarried persons a normative image of marriage. *See, e.g.,* Ristroph & Murray, *supra* note 11, at 1256 n.89 (arguing that the *Braschi* court "used the normative concept of marriage to inform its understanding of family"). Most significant for this Article's purposes, *Braschi*'s functionalist approach is not only an opportunity for the law to *impose* a normative image of marriage onto unmarried persons, but also an occasion to *create* that normative image in the first instance. Without a case like *Braschi*, the law would have less of an opportunity to reflect on what marriage is or should be.

62. Unless, of course, those married persons are a citizen and a noncitizen. *See, e.g.,* Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1672 (2007) (noting that federal immigration law makes inquiries into whether a couple "married for love or in a 'sham, phony, empty ceremony' intended only to facilitate

After the couple enters into marriage, and unless and until it divorces, the state plays a minimal role in directly regulating it.⁶³ As Professor Case has argued, “‘Married couples in this society are not required to do the rather conservative things’ courts and regulators typically require of unmarried couples, whether of the same or of opposite sexes, as a condition for relationship recognition.”⁶⁴ Were the law to require married persons to be financially interdependent or even to love each other, it would certainly be violating a relationship that the Supreme Court has made clear receives vigorous constitutional protection under the mantle of marital privacy.⁶⁵

Marital privacy, however, does not apply to marginal relationships like domestic partnerships. Nor, importantly, does it prohibit the law from using marginality as a space in which to reflect on what marriage should ideally be—a space in which to define marriage, as Professor Case might put it, in “thick” terms.⁶⁶ As Sanford Katz has remarked, “In a certain sense the domestic partnership laws define what some may say is the ideal marriage.”⁶⁷ Ideally, married persons would be emotionally and physically intimate. Ideally, married persons would be economically interdependent. Ideally, married persons would assume “specialized or collaborative roles in furtherance of their life together.”⁶⁸ And ideally, married persons would be in love.⁶⁹ What the law cannot do directly (impose these ideals on married persons) it therefore does indirectly (by imposing them on domestic partners).

immigration status for one of the spouses”). In this sense, immigration law is another instance of the law regulating at the margins—projecting its normative commitments (that all marriages be for love) onto those who can be regulated (noncitizens).

63. The state, of course, regulates marriage directly at the outset by setting forth the substantive requirements (gender, age, number) that parties must satisfy in order to enter into one. It also regulates marriage on the back end if and when the married couple divorces. In fact, divorce constitutes another instance of the law regulating the substance of marriage at the margins—in that case, at the margins of the marital relationship itself. *See, e.g.*, Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 76 (2004) (observing that divorce law offers another opportunity for the state “to help shape the social understanding of marriage, and thus the actions of those who partake in it”); *see also* Katharine K. Baker, *Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection*, 59 OHIO ST. L.J. 1533, 1545–46 (1998); Carolyn J. Frantz, *Should the Rules of Marital Property Be Normative?*, 2004 U. CHI. LEGAL F. 265; Meyer, *supra* note 22, at 580–81; Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 27 (1990).

64. Case, *What Feminists Have to Lose*, *supra* note 12, at 1203 (quoting Case, *Couples and Coupling*, *supra* note 12, at 1665).

65. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965).

66. *See supra* note 33 and accompanying text.

67. Sanford N. Katz, *Marriage as Partnership*, 73 NOTRE DAME L. REV. 1251, 1269 (1998).

68. ALI PRINCIPLES, *supra* note 56, § 6.03(7)(d).

69. *See Abrams*, *supra* note 62, at 1672 (noting that federal immigration law requires marriages between citizens and noncitizens to be based on love).

B. De Facto Parenthood: Creating the Ideal Parent

If the marriage-equality movement and domestic partnership legislation typify law creating the ideal marriage, then the de facto parent doctrine typifies law creating the ideal parent. Under that doctrine, non-legal parents who act enough like a parent can obtain parental rights, including custody and visitation.⁷⁰ Courts invoking the doctrine have relied on a variety of factors to determine whether a non-parent figure qualifies as a de facto parent, including whether the non-parent “assumed the obligations of parenthood by taking significant responsibility for the child’s care, education and development” and whether the non-parent “has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.”⁷¹

Similarly, the ALI has recommended that the definition of “parent” be expanded to include a de facto parent, who, in its view, is someone who has “regularly performed a share of caretaking functions at least as great as that of the person with whom the child primarily lived.”⁷² The ALI defines “caretaking functions” to include the following:

(a) satisfying the nutritional needs of the child, managing the child’s bedtime and wake-up routines, caring for the child when sick or injured, being attentive to the child’s personal hygiene needs including washing, grooming, and dressing, playing with the child and arranging for recreation, protecting the child’s physical safety, and providing transportation;

(b) directing the child’s various developmental needs, including the acquisition of motor and language skills, toilet training, self-confidence, and maturation;

(c) providing discipline, giving instruction in manners, assigning and supervising chores, and performing other tasks that attend to the child’s needs for behavioral control and self-restraint;

(d) arranging for the child’s education, including remedial or special services appropriate to the child’s needs and interests, communicating with teachers and counselors, and supervising homework;

(e) helping the child to develop and maintain appropriate interpersonal relationships with peers, siblings, and other family members;

(f) arranging for health-care providers, medical follow-up, and home health care;

70. Lindsay J. Rohlf, Note, *The Psychological-Parent and De Facto-Parent Doctrines: How Should the Uniform Parentage Act Define “Parent”?*, 94 IOWA L. REV. 691 (2009).

71. *V.C. v. M.J.B.*, 748 A.2d 539, 551 (N.J. 2000) (quoting *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 421 (Wis. 1995)) (finding that the same-sex partner of a biological mother qualified as a parent entitled to custody and/or visitation rights under the de facto parent doctrine).

72. ALI PRINCIPLES, *supra* note 56, § 2.03(1)(c)(ii)(B).

(g) providing moral and ethical guidance;

(h) arranging alternative care by a family member, babysitter, or other child-care provider or facility, including investigation of alternatives, communication with providers, and supervision of care.⁷³

De facto parenthood and the doctrine that established it provide the law with an opportunity to create the ideal parent.⁷⁴ Supreme Court landmarks like *Meyer v. Nebraska*,⁷⁵ *Pierce v. Society of Sisters*,⁷⁶ and *Wisconsin v. Yoder*⁷⁷ protect parental autonomy in the domain of child rearing. As such, they effectively prohibit the state from requiring that all parents “manag[e] the child’s bedtime and wake-up routines,” “giv[e] instruction in manners,” and “provid[e] moral and ethical guidance.”⁷⁸ (Imagine what would happen if a state were to legally require parents to instill “manners” in their children.) Those cases, we might say, define parenthood in thin terms.

Those cases do not, however, extend constitutional protection to marginal or non-traditional parent–child relationships like de facto parenthood. Nor do they prohibit the law from using de facto parenthood as a frame in which to construct and communicate a “thick” vision of parent–child relations for everyone. Ideally, all parents would help their children “to develop and maintain appropriate interpersonal relationships.”⁷⁹ Ideally, all parents would be attentive to their children’s “hygiene.”⁸⁰ And ideally, all parents would provide “moral and ethical

73. *Id.* § 2.03(5).

74. In addition, de facto parent definitions like the ALI’s provide the law with an opportunity to articulate the ideal distribution of labor between parents (assuming that there are two parents to distribute labor between). For instance, the ALI suggests that a non-parent, in order to be considered a de facto parent, must have either “regularly performed a majority of the caretaking functions for the child” or “regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived.” *Id.* § 2.03(1)(c)(ii)(A)–(B). On this view, the parent who performs less than 50% of his or her share of caretaking functions is, in the eyes of the law, somehow less of a parent than the parent who does at least 50%. If this is the case, then recent empirical research indicating that most two-parent households do not split child-care labor in a proportion even remotely approximating 50–50 is, to say the least, revealing. For an article summarizing these studies, see Lisa Belkin, *When Mom and Dad Share It All*, N.Y. TIMES, June 15, 2008, § MM (Magazine), at 44.

75. 262 U.S. 390 (1923) (holding that a state law that prohibited foreign language education violated the Due Process Clause of the Fourteenth Amendment because it unduly interfered with parental autonomy).

76. 268 U.S. 510 (1925) (holding that a state law that required public school attendance violated the Due Process Clause of the Fourteenth Amendment because it unduly interfered with parental autonomy).

77. 406 U.S. 205 (1972) (finding that a state compulsory school law that required students to attend school past the eighth grade violated, in part, the Due Process Clause of the Fourteenth Amendment because it unduly interfered with Amish parents’ parental autonomy).

78. ALI PRINCIPLES, *supra* note 56, § 2.03(5)(a), (c), (g).

79. *Id.* § 2.03(5)(e).

80. *Id.* § 2.03(5)(a).

guidance” for their children.⁸¹ Prohibited by the Constitution from imposing those ideals on all parents directly, the law indirectly nudges parents toward satisfying them by regulating parenthood at the margins.

C. Alternative Reproduction: Perfecting Procreation

Commentators have already observed the extent to which alternative procreation⁸² reproduces the traditional family through the private preferences of those who have availed themselves of it. Professor Dorothy Roberts, for instance, argues that alternative reproduction, while a cutting edge technology that in one sense challenges the traditional family model,⁸³ more often than not profoundly reinforces it. She points to the fact that couples using sperm banks to procreate regularly choose donors on the basis of race in an effort to reproduce the racial make-up of their own family—which is usually white, given that these technologies “are used almost exclusively by affluent white people.”⁸⁴

Less critically appraised, however, is the extent to which the law, rather than private actors, has used alternative procreation as an occasion to establish the ideal family as well as the conditions under which procreation should ideally occur. Take, for instance, a 2007 bill that Donald Carcieri, then Governor of Rhode Island, vetoed. The bill required that fertility-related insurance coverage be extended to unmarried persons, who are currently excluded from such coverage because they do not satisfy the condition of marriage.⁸⁵ In his veto message, Carcieri commented that he vetoed the bill because “[a]s a matter of public policy, the state should be encouraging the birth of children to two-parent families, not the reverse.”⁸⁶ Similarly, lawmakers in some states have sponsored legislation that would categorically prohibit fertility providers from “offering and performing any medical procedure on an unmarried woman for the purpose of conception or

81. *Id.* § 2.03(5)(g).

82. Alternative procreation is defined here as the panoply of ways that persons conceive and bear children through assisted means, including artificial insemination, sperm donation, and in vitro fertilization. See Robertson, *Assisted Reproductive Technology*, *supra* note 3, at 911 (listing the various assisted reproductive technologies (“ARTs”)).

83. Dorothy E. Roberts, *Race and the New Reproduction*, 47 HASTINGS L.J. 935, 935 (1996); see also Rao, *supra* note 23, at 952 (referring to the potential for ARTs “to undermine the traditional [familial] paradigm”); *id.* at 958–59 (“At the most obvious level, assisted reproductive technologies enable the formation of families by gay men, lesbians, single people, and post-menopausal women, *visibly assaulting the traditional image* of the two-parent, heterosexual, biologically-connected family.” (emphasis added)).

84. Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 244 (1995); see also Roberts, *supra* note 83, at 936 (stating that ARTs “rarely serve to subvert conventional family norms” and that “[m]ost often they complete a traditional nuclear family by providing a married couple with a child”).

85. See *R.I. Governor Blocks Infertility Bill*, USA TODAY, July 19, 2007, http://www.usatoday.com/news/health/2007-07-19-fertility-treatment_N htm.

86. *Id.*; see also Lisa Vernon-Sparks, *Expanded Infertility Coverage Vetoed*, PROVIDENCE J., Jul. 20, 2007, at B1 (recounting the remarks of a spokesperson for the Governor that “[t]he Governor believes that the two-parent family provides a more stable environment”).

procreation.”⁸⁷ While such bills were ultimately dropped, their “mere introduction caused alarm among those who favor equal access to [assisted reproductive technology] regardless of marital status.”⁸⁸

In addition, as mentioned in this Article’s Introduction, alternative procreation has provided the law with an opportunity to articulate a vision of procreation as race neutral and incest preventative. For example, some commentators have argued that the law should limit the number of children born from any one individual’s donated sperm in order to prevent “accidental incest.”⁸⁹ “In an age of easy travel, donor secrecy, and limited understanding of genetics,” they contend, “reducing the number of children that can be born from each donor reduces the possibility of inadvertent consanguinity.”⁹⁰ Other commentators have urged the law to take more seriously sperm banks’ practice of organizing donors according to their racial background. While recognizing that sperm banks and the commercial transactions that they facilitate are private and therefore not reachable under Section 1 of the Fourteenth Amendment, these commentators argue that “racially salient forms of donor disclosure are pernicious social practices, which, while operating beyond the reach of the law, ought to be condemned as bad policy.”⁹¹

Imagine the fate of the law that placed these demands—or ideals—on sexual procreation and on the sexual relationships that might lead to it. For instance, the constitutional right to procreate arguably prohibits the law from requiring that persons be married in order to have children.⁹² Similarly, the procreative right, along with the right to sexual autonomy recognized in *Lawrence v. Texas*,⁹³ arguably prohibits the law from punishing men who have sex and

87. Daar, *supra* note 15, at 20.

88. *Id.*

89. Naomi Cahn, *Accidental Incest: Drawing the Line—Or the Curtain?—For Reproductive Technology*, 32 HARV. J.L. & GENDER 59 (2009); *see also* Jacqueline Mroz, *From One Sperm Donor, 150 Children*, N.Y. TIMES, Sept. 6, 2011, at D1 (discussing the accidental incest fear in the context of the unregulated sperm donation industry).

90. Cahn, *supra* note 89, at 102.

91. Fox, *supra* note 5, at 1844, 1846–47; *see also* Dov Fox, *Choosing Your Child’s Race*, 22 HASTINGS WOMEN’S L.J. 3 (2011) [hereinafter Fox, *Choosing Your Child’s Race*].

92. *See, e.g.*, Robertson, *Embryos*, *supra* note 3, at 962–63 (“Given the personal significance of reproduction, it would seem to deserve protection for unmarried as well as married persons. . . . [B]anning coital or noncoital conception by single persons seems absurd when unmarried sexual relations are common and when single women cannot be forced to use contraception or to abort after pregnancy has occurred.”). It likely does not, however, prohibit states like Rhode Island from requiring that individuals be married in order to be insured for reproductive assistance. A state insurance law that requires persons to be married in order to receive insurance benefits for third-party reproductive assistance (as in Rhode Island) does not run afoul of constitutional privacy guarantees any more than does a federal law that bans the use of Medicaid funds for most abortions. *See* Maher v. Roe, 432 U.S. 464 (1977). As in the abortion context, so too in the third-party reproductive assistance context would the Court—were it to hear a constitutional challenge to a law like Rhode Island’s—almost certainly draw a distinction between negative and positive rights and find that *Skinner* only protects the former, not the latter.

93. 539 U.S. 558 (2003).

procreate with several women—even if that procreation might lead to accidental incest because of the possibility of multiple siblings who do not know each other.⁹⁴ Finally, the rights to sexual and procreative autonomy arguably prohibit the law from requiring that individuals sexually reproduce in race-neutral ways. In sum, it would be fair to say that the constitutional rights to sexual and procreative autonomy collectively advance a rather thin normative vision of procreation, one that does not burden those who procreate in traditional (i.e., sexual) ways with the reproductive preferences that saturate most discussions about alternative procreation.

The same constitutional rights that protect traditional sexual procreation, however, do not necessarily apply to non-sexual procreation. As one commentator argues, “Autonomy interests are implicated differently in assisted reproduction than they are in sexual reproduction or romantic dating.”⁹⁵ “What is present in the romantic matching context that is missing in the reproductive matching context,” he contends, “is meaningful interface between the parties on either side of the exchange.”⁹⁶ Nor, importantly, do those constitutional rights prohibit commentators and policymakers from using legal issues surrounding non-sexual procreation as an occasion to signal what they would like all procreation to look like—marital, controlled, race blind, or all of those things. As with marriage and parenthood, procreation emerges from the legal regulation of its non-traditional form as something that is considerably thicker than the Constitution would normally permit.

III. REGULATING AT THE MARGINS

Part II’s survey of family law matters involving the regulation of marginal kinship complicates family law’s conventional logic. First, given the extent to which the law uses non-traditional kinship as an occasion to bring a normative vision of traditional kinship into focus, we can hardly say that traditional and non-traditional kinship structures are separate and distinct. To treat them as though they were, as some family law commentators do,⁹⁷ is to obscure the dynamic relationship that actually exists between them.

94. In the context of sexual sperm donation, the situation in which accidental incest would most likely occur would be if a man were having sex with many women, which would inevitably involve extramarital sexual relations given that polygamy/polyamory is illegal in every state. See MARKEL ET AL., *supra* note 49, at 71. If the man were married, then those extramarital sexual relations would constitute adultery, which continues to be criminal in some states even after *Lawrence*. See *id.* Even if the man is not married, his extramarital sexual activity might constitute criminal fornication in those states that continue to criminalize extramarital sex. However, criminal fornication statutes, as the Virginia Supreme Court recently recognized in *Martin v. Zihlerl*, 607 S.E.2d 367, 371 (Va. 2005), are unconstitutional after *Lawrence* because they criminalize the only kind of sex—that of the extramarital variety—in which gays and lesbians from those states that do not recognize same-sex marriage can legally engage.

95. Fox, *supra* note 5, at 1882.

96. Fox, *Choosing Your Child’s Race*, *supra* note 91, at 11.

97. See *supra* Part I.A.

Second, the shadow metaphor that commentators have invoked to describe the relationship between traditional and non-traditional kinship⁹⁸ could easily work the other way. To be sure, it is certainly true that “[h]istorically, marriage has functioned as a gnomon, the central pillar of a sundial, casting shadows outward” and determining the relationships of even unmarried persons.⁹⁹ And it is certainly true that the legitimacy of non-traditional relationships is often measured by the extent to which they approximate the nuclear marital model.¹⁰⁰ In this sense, non-traditional intimacy is indeed determined and overshadowed by traditional types.

It is also true, however, that family law’s central institutions, including marriage, are brought into focus most clearly when the law regulates the marginal space outside of them. Without the non-traditional couple, the law would never have the opportunity to reflect on what marriage is (or should be) in the first place, protected as that institution is by the robust privacy norms that prohibit the state from talking about it in a very substantive way. When viewed in this light, the margins define and determine the center no less than the center defines and determines them.

Finally, it is simply not true, as the conventional family law narrative insists, that the law has “little to say” about what traditional kinship ought to look like,¹⁰¹ or that “[t]he living standards of a family are a matter of concern to the household, and not for the courts to determine.”¹⁰² The law, as the above examples show, has quite a lot to say about what traditional kinship ought to look like on a substantive level—about what traditional marriage, parenthood, and procreation should ideally be. It simply expresses those normative commitments indirectly rather than directly by regulating non-traditional intimate and family life. Put differently, the constitutional guarantees that prohibit the law from directly regulating “[t]he living standards of a family”¹⁰³ do nothing to constrain it from

98. See *supra* notes 16–19 and accompanying text.

99. Dubler, *supra* note 16, at 1645.

100. See, e.g., Ristoph & Murray, *supra* note 11, at 1256 (“[S]eeming departures from the marital family ideal may be less radical than they first appear.”).

101. Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 1993 (2010); see also Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 104 (2001) (“One of the reasons that business relationships and intimate relationships are described as private is the purported lack of state intervention in those relationships. . . . During the course of the relationship, the state generally allows the parties to regulate their own affairs.”); Tebbe & Widiss, *supra* note 40, at 1402 (“[T]here is no direct state action involved in how one raises one’s children, engages in sexual intimacy, uses contraceptives, terminates a pregnancy, or chooses with whom to live.”).

102. *McGuire v. McGuire*, 59 N.W.2d 336, 342 (Neb. 1953) (rejecting a wife’s suit for maintenance, notwithstanding the husband’s common-law duty of support, on the ground that “to maintain [such an action], the parties must be separated or living apart from each other,” because otherwise the court would be unduly interfering with the marital relationship). *McGuire* is the common-law duty-of-support case that is used in “most family law casebooks . . . to introduce the concept of marital privacy” and one that maintains a “paradigmatic stature in American family law.” HARTOG, *supra* note 32, at 9.

103. *McGuire*, 59 N.W.2d at 342.

trying to regulate that same family through the back door. The legal regulation of non-traditional kinship represents just such an instance of back door regulation.

On this last point, how can we properly say that the law is trying to “regulate” even those forms of intimate and family life that it cannot directly reach when it regulates those who exist at the margins? Surely a married heterosexual couple does not feel forced to procreate within marriage simply because a court upholds the constitutionality of an exclusionary marriage law on the basis of procreation. Surely a legal parent does not feel forced to instill a sense of ethics in her daughter—or even love her daughter—simply because the law is more likely to reward parental rights to those individuals who do those things under the *de facto* parent doctrine. And surely the white man from the hypothetical that opened this Article does not feel forced to procreate in race-neutral ways just because the law, given its strong commitment to race neutrality, strongly discourages sperm banks’ practice of organizing donors on the basis of race. If the regulation of non-traditional kinship does not directly impose a set of normative commitments on those in traditional relationships, then how is it that traditional kinship is being “regulated” when the law regulates marginality? Couldn’t it simply be that when the law regulates marginality, that is all that it is doing—regulating marginality, rather than trying to regulate all of us?

The “regulation” that this Article contemplates is of an indirect, rather than a direct, sort. It is the kind of regulation that commentators envision when they talk about the law’s expressive and channeling functions, discussed below.

A. Marginality and Law’s Expressive Function

Cass Sunstein defines the law’s expressive function as “the function of law in ‘making statements’ as opposed to controlling behavior directly.”¹⁰⁴ Much of the time, he writes, the law attempts to alter social norms “unaccompanied by much in the way of enforcement activity.”¹⁰⁵ For instance, laws that require individuals to curb their dogs “are rarely enforced through the criminal law.”¹⁰⁶ Nevertheless, such laws “have an important effect in signalling appropriate behavior and in inculcating the expectation of social opprobrium and, hence, shame in those who deviate from the announced norm.”¹⁰⁷ Regardless of whether curbing laws are enforced, they “can help reconstruct norms and the social meaning of action.”¹⁰⁸

Curbing ordinances represent just one example among many of laws that incentivize behavioral shifts in oblique rather than direct ways. Whereas sometimes “[n]orm entrepreneurs in the private sector” can help to shape social

104. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024 (1996). For law’s expressive function, see also Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000) and Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1 (2000).

105. Sunstein, *supra* note 104, at 2032 (emphasis omitted).

106. *Id.*

107. *Id.*

108. *Id.*

meaning and change collective behavior, often it is the law itself that performs the function of “express[ing] a judgment about [an] underlying activity in such a way as to alter social norms.”¹⁰⁹ “Without understanding the expressive function of law,” Sunstein insists, “we will have a hard time getting an adequate handle on public views on such issues as civil rights, prostitution, the environment, endangered species, capital punishment, and abortion.”¹¹⁰

Law is expressive when it uses marginality to make normative statements and “judgments” about what all forms of intimacy and family life ought to look like. While domestic partner legislation and the de facto parent doctrine surely do not control married couples and traditional parents directly, they both allow the law to express and to signal appropriate behavior in ways that might over time alter spousal and parental norms. In this sense, marginality (and its legal regulation) exemplifies law’s expressive function, giving it the opportunity to construct meaning and to shape human behavior obliquely rather than relying on enforcement activity to achieve that same goal directly.¹¹¹

B. Marginality and Law’s Channeling Function

Carl Schneider writes that “in the channelling function the law creates or (more often) supports social institutions which are thought to serve desirable ends.”¹¹² An underappreciated function of family law, the channeling function in the domain of intimate and family life seeks not only to steer individuals into what the law regards to be socially desirable institutions—the most notable among them being marriage and parenthood—but also to encourage individuals to act in normatively desirable ways once they are in those institutions. To be sure, as with law’s expressive function, family law’s channeling function “does not primarily use direct legal coercion.”¹¹³ As much as the law would like to encourage individuals to marry, have children, and love their children, “[p]eople are not forced to marry. One can contract out (formally or informally) of many of the rules underlying marriage. One need not have children, and one is not forced to treat them lovingly.”¹¹⁴

That said, family law is still able to perform a channeling function indirectly; in fact, it is primarily through indirect regulation, Schneider argues, that

109. *Id.* at 2034.

110. *Id.* at 2028–29.

111. Criminal laws (unlike Sunstein’s curbing ordinances) that are enforced, of course, regulate both directly and obliquely. For instance, in their thoughtful and comprehensive examination of the criminal justice system’s family related benefits and burdens, Dan Markel and his co-authors observe that many family-ties burdens “promote a certain vision of family life within society” in addition to punishing behavior after it occurs. MARKEL ET AL., *supra* note 49, at 78. “[F]rom the ex ante position,” they argue, “criminalizing failures to rescue [or] failures to supervise, . . . and banning incest, adultery, or bigamy are all aimed at keeping certain kinds of families together to perform the work associated with a certain kind of idealized family life.” *Id.*

112. Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 498 (1992).

113. *Id.* at 504.

114. *Id.*

the law's channeling function works.¹¹⁵ For instance, while family law cannot directly force parents to be emotionally invested in their children, it can encourage emotional investments indirectly through the law of custody, which rewards such investments by looking favorably on them in the best-interest-of-the-child calculus.¹¹⁶ In this way, then, "[c]ustody law obliquely sets standards for parental behavior and emphasizes the centrality of children's interests."¹¹⁷ Family law's channeling function, in other words, indirectly sets standards for ideal parental behavior through the law of custody, just as it "indirectly sets some standards for marital behavior through the law of divorce."¹¹⁸

The legal regulation of marginality serves a channeling function analogous to the one that Schneider describes. As shown in Part II, the regulation of marginal kinship gives the law an occasion to do what the Constitution would ordinarily prohibit it from doing—namely, articulate normative marriage, parenthood, and procreation. One need only think here of the profoundly normative spouse that emerges from the ALI's definition of domestic partner, or of the profoundly normative parent that emerges from the Institute's definition of de facto parent.¹¹⁹ As such, the legal regulation of marginality performs the channeling function of supporting, if only indirectly, "social institutions which are thought to serve desirable ends."¹²⁰

Moreover, the legal regulation of marginality represents just the kind of "indirect" regulation, or indirect incentivizing, of which Schneider speaks when he states that "the channelling function does not primarily use direct legal coercion" in its attempt "to create—or, more often, to recruit—social institutions and to mold and sustain them."¹²¹ For example, Part II suggested that the law has used the legal quest for marriage equality by same-sex couples as an opportunity to put forth a normative view of marriage as procreative. While the law of course cannot force married persons to procreate in order to stay married, it can try to incentivize them to do just that by projecting a vision of marriage that is inherently procreative—and by consistently endorsing that vision in a public way.

115. See *id.* at 513 ("Channelling primarily works . . . obliquely and interstitially. That is, it does not set all the terms of behavior within an institution, but rather creates a system of incentives and disincentives that touch participants only in places, not globally. . . . In short, because channelling often uses only indirect and moderate force, . . . its power and utility are limited.").

116. See *id.* at 503.

117. *Id.*

118. *Id.* at 502; see also Baker, *supra* note 63, at 1548–49 ("As it has emerged to date, the law affords negative parental rights to married parents because the primary parent–child relationship is so important to both parent and child, but the law ignores the importance of that primary relationship once parents are divorced or if they were never married.").

119. See *supra* notes 56–59, 72–73, 78–81 and accompanying text.

120. Schneider, *supra* note 112, at 498.

121. *Id.* at 503–04.

C. Marginality and Back Door Regulation

When the law regulates non-traditional kinship, it expresses norms for all of us and attempts to channel us into satisfying them. As such, it would be fair to say that the legal regulation of marginality serves both an expressive and a channeling function. Together, those functions invite us to consider the law's regulation of non-traditional kinship as a form of indirect—or back door—regulation of everyone, even those whose intimate and familial decisions are accorded significant constitutional protection. To be sure, privacy guarantees might prohibit the law from imposing a normative conception of the family from above. Those guarantees do not, however, prohibit the law from expressing its normative commitments about intimate and domestic life, from “establishing” ideal models of intimate and family life,¹²² and, quite possibly, from channeling individuals into relationships that approximate those models.

Admittedly, one might argue that when the law's normative vision of the institutions here discussed—marriage, parenthood, and procreation—does not coincide with the descriptive reality of how most people in those institutions behave, then the law fails miserably at indirect or back door regulation. Take, for instance, the procreation rationale for exclusionary marriage laws. This Article has taken the position that the procreation rationale represents a way for the law to shape the meaning of marriage (as procreative) for all of us and to thereby channel us into marital relationships that conform to that meaning. However, the procreation rationale could arguably have the opposite effect. Indeed, the image of procreative marriage that has emerged from marriage-equality jurisprudence could have the effect of undermining our respect for the law itself. The more that the law insists on a normative definition of marriage that is so at odds with the descriptive reality of those in that institution, the less influential the law might in fact be in regulating married persons.¹²³

At the same time, though, and as commentators have recognized, courts might actually have considerable “power over the public's perception of marriage.”¹²⁴

No trained lawyer would think that just because some courts say that particular states *might* have created marriage law in order to encourage otherwise irresponsible heterosexuals to procreate responsibly that this was really what these states believed. But does the public know this? And even if lawyers and judges “know” what rational basis review is, don't they also learn what abstract and evanescent concepts like “marriage” mean through the reification that occurs when courts make attempts to textually define the undefinable?¹²⁵

122. For the argument that familial liberty requires familial disestablishment no less than free religious exercise requires religious disestablishment under the First Amendment, see Ristroph & Murray, *supra* note 11, at 1240.

123. See, e.g., Abrams & Brooks, *supra* note 34, at 33–35.

124. *Id.* at 33.

125. *Id.* at 33–34.

To be sure, corporations and the media know quite well that the communication or signaling of certain ideals—however ridiculous they might seem at first glance—can, over time, change the way that we think about something. For instance, a McDonald's near where I live in Rhode Island recently replaced its traditional golden arches for green arches. The company's move is both a descriptive and an aspirational one—a “sign” that it is going green in terms of company practices¹²⁶ as well as an invitation to the public to think about McDonald's in green terms. However absurd that might be—for some the notion of a green McDonald's is oxymoronic at best and downright fraudulent at worst—seeing the green arches every day on my way to work might, over time, change the way that I think about the “king” of fast food. The green arches might even encourage me to eat there.

So too with procreation and the other normative commitments that are expressed when the law regulates marginality. However absurd the law's procreative ideals might be for many opposite-sex couples, the frequent communication of those ideals might eventually change the way that we think about what marriage is or should be. Significantly, advocates bringing constitutional claims on behalf of same-sex couples have, over time, conformed to the law's procreative image of marriage. Rather than simply challenge the claim that marriage is inherently procreative, litigants now increasingly argue that same-sex couples *are* procreative (albeit in a different way), and that they, no less than opposite-sex couples, can satisfy a procreative definition of marriage.¹²⁷ It is no coincidence that many of the named plaintiffs in marriage-equality litigation have children themselves, and that children have played an increasingly salient role in that litigation.¹²⁸ If the procreation rationale has changed the way that marriage-equality advocacy envisions marriage, then who is to say that it could not change the way that we all think about that institution?

IV. CONSTITUTIONAL IMPLICATIONS

Having thus far been primarily descriptive in scope, this Article now turns to more practical considerations. It uses the theory described above—that the law

126. See *McDonald's Going Green*, CNBC.COM (Sept. 15, 2009, 8:40 AM), <http://video.cnbc.com/gallery/?video=1254427329>.

127. See, e.g., Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment at 53, *Kerrigan v. State*, 909 A.2d 89 (Conn. Super. Ct. 2006) (No. CV-04-4001813) (arguing that the procreation rationale for marriage prohibitions is over-inclusive because some same-sex couples are procreative).

128. See, e.g., *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 761 n.23 (Cal. Ct. App. 2006) (Kline, J., concurring and dissenting) (summarizing the testimony of a plaintiff's daughter in marriage-equality litigation), *rev'd*, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5, *amendment ruled unconstitutional by Perry v. Brown*, Nos. 10-16696, 11-16577, 2012 WL 372713 (9th Cir. Feb. 7, 2012); Respondents' Opening Brief on the Merits at 15, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999) (providing a marriage-equality plaintiff's testimony regarding the harm that her son suffered as a consequence of a state law prohibiting her from marrying); see also Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 239 (2006) (discussing “the deployment of children” in marriage-equality litigation).

expresses its normative ideals for everyone by regulating those who exist at the margins of intimate and familial life—to advance a new constitutional argument: The law burdens non-traditional kinship on an expressive level by using it as a vehicle to regulate all of us, and those expressive burdens sometimes violate the Constitution’s guarantee of equality. To be clear, other commentators have elucidated the deeply expressive dimensions of intimate relationships and have identified the constitutional infirmities of regulating non-traditional intimacy in a way that impermissibly burdens expressive interests. Most notable in this regard is Professor Kenneth Karst, who famously argued that legal regimes that burden non-traditional intimacy violate a “freedom of intimate association” that the Constitution staunchly protects.¹²⁹ Drawing from, but expanding on, Professor Karst’s insights, this Article contends that the law’s regulation of marginal kinship raises serious constitutional concerns not just because that regulation burdens marginal actors’ right to express themselves through their relationships, as Professor Karst has so eloquently argued and so cogently demonstrated. In addition, the law’s regulation of marginal kinship raises serious constitutional concerns because sometimes it represents the law using marginal kinship, and only marginal kinship, in a purely expressive way to communicate the law’s normative ideals—ideals that traditional kinship never has to satisfy and that non-traditional kinship often cannot satisfy. Under this view, the Constitution is violated when the law effectively uses marginal kinship *for no other reason* than to be expressive—that is, for no other reason than to express or communicate the law’s deep normative commitments.

Take, for instance, exclusionary marriage laws, which advocates and commentators have alternatively argued violate constitutional guarantees of due process, equal protection (as a form of sex and sexual orientation discrimination), and free expression.¹³⁰ Only two courts have found that marriage restrictions violate the fundamental right to marry under a state constitution (California) and under the Federal Constitution.¹³¹ With some notable exceptions, most courts have dismissed both the sex and the sexual orientation discrimination arguments, either finding that marriage laws do not discriminate on the basis of sex¹³² or that they

129. See Karst, *supra* note 1, at 626–30 (defining the emergence of a “freedom of intimate association” in constitutional jurisprudence).

130. See generally Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Clifford J. Rosky, *Perry v. Schwarzenegger and the Future of Same-Sex Marriage Law*, 53 ARIZ. L. REV. 913 (2011); Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471 (2001).

131. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1004 (N.D. Cal. 2010) (finding that California’s constitutional marriage prohibition violates the due process and equality guarantees of the Federal Constitution), *aff’d sub nom.* *Perry v. Brown*, Nos. 10-16696, 11-16577, 2012 WL 372713 (9th Cir. Feb. 7, 2012); *In re Marriage Cases*, 183 P.3d at 452 (holding the prohibition unconstitutional under the California Constitution).

132. See, e.g., *Hernandez v. Robles*, 855 N.E.2d 1, 10 (N.Y. 2006) (rejecting the sex discrimination argument); *Baker v. State*, 744 A.2d 864, 880 & n.13 (Vt. 1999) (same). Other courts that have struck down exclusionary marriage laws on state constitutional grounds have declined to consider the sex discrimination claim. See, e.g., *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009). To date, only one court has held that marriage laws constitute

permissibly discriminate on the basis of sexual orientation,¹³³ a non-suspect classification entitled to minimal judicial scrutiny.¹³⁴ And no high court in any state has seriously considered the First Amendment claim—that is, the argument that marriage restrictions violate the constitutional right to free expression.¹³⁵ Moreover, commentators have variously objected to some of these arguments on normative grounds. Most recently, Professor Case has criticized the marriage-equality movement for abandoning the sex discrimination argument in favor of the sexual orientation discrimination claim and the thick understanding of sexual orientation identity on which that claim rests.¹³⁶

Advocates and commentators have overlooked an additional argument for why exclusionary marriage laws are unconstitutional, one that might be more palatable to those who object on normative grounds to some of the standard constitutional arguments against those laws. According to this argument, exclusionary marriage laws violate constitutional guarantees of equal protection because they burden same-sex couples, but not opposite-sex married persons, on an expressive level by subjecting same-sex couples, and only same-sex couples, to the law's procreative ideal. For instance, as discussed in Parts II and III, the procreation rationale and the two-biological-parents rationale are best, and perhaps only, understood in normative terms: expressive projections of what the law would like for all married persons to be doing (procreating and raising biological children), even if many of those couples are not. In Parts II and III, I suggested that those expressive projections are an instance of back door regulation: What the Constitution prohibits the law from doing directly (imposing procreative demands on heterosexual married persons), the law attempts to achieve indirectly (by effectively imposing those same impossible demands on unmarried same-sex couples).

When the law uses non-traditional kinship (here, same-sex relationships) as a vehicle through which to express and establish ideal projections or models of

a presumptively unconstitutional form of sex discrimination. *See* *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (plurality opinion), *superseded by constitutional amendment*, HAW. CONST. art. I, § 23 (amended 1998). In *Perry*, a federal district court held that a state marriage prohibition was an impermissible form of sexual orientation discrimination under the Federal Constitution, although it recognized the deep interconnectedness between sex and sexual orientation discrimination. *See Perry*, 704 F. Supp. 2d at 996 (“[S]ex and sexual orientation are necessarily interrelated, as an individual’s choice of romantic or intimate partner based on sex is a large part of what defines an individual’s sexual orientation.”). A divided Ninth Circuit Court of Appeals affirmed. *Perry v. Brown*, Nos. 10-16696, 11-16577, 2012 WL 372713, at *26–29 (9th Cir. Feb. 7, 2012).

133. *See, e.g., Hernandez*, 855 N.E.2d at 10–12. *But see Perry*, 2012 WL 372713, at *28 (finding that Proposition 8 violates the Federal Constitution’s Equal Protection Clause because it impermissibly discriminates on the basis of sexual orientation); *Varnum*, 763 N.W.2d at 862 (finding that Iowa’s marriage exclusion constituted an impermissible form of sexual orientation discrimination under the Iowa Constitution).

134. *See Hernandez*, 855 N.E.2d at 10–12.

135. For the First Amendment argument, see David B. Cruz, “*Just Don’t Call It Marriage*”: *The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925 (2001).

136. *See Case, What Feminists Have to Lose*, *supra* note 12, at 1204–05.

intimate and family life for everyone, it directly subjects non-traditional kinship, but not traditional kinship, to distinctly expressive burdens.¹³⁷ Viewed in this light, exclusionary marriage laws violate equal protection because they withhold the tangible and intangible benefits of marriage from same-sex couples—benefits that opposite-sex couples are eligible to enjoy. In addition, exclusionary marriage laws violate equal protection because they use non-traditional—but not traditional—kinship in a purely expressive or normative way. As such, they treat non-traditional relationships differently, and ultimately less favorably, than traditional relationships.

Other commentators have argued that sometimes “the constitutional wrong inheres in what the law expresses.”¹³⁸ “[I]t is the expressive character of state action,” they maintain, “that determines whether a law or policy violates Equal Protection.”¹³⁹ For instance, in *Brown v. Board of Education*, the Supreme Court found that racial segregation was unconstitutional not necessarily because it caused concrete harm—to be sure, the *Brown* Court itself declared that “[s]eparate educational facilities are *inherently* unequal,”¹⁴⁰ rather, the Court found that racial segregation was unconstitutional because of what that segregation expressed—namely, “a message of unequal worth.”¹⁴¹

This Article similarly argues that an equality violation might sometimes inhere in the expressive dimension of legal regulation. Admittedly, unlike the message expressed by segregation, the message expressed by the legal regulation of any form of non-traditional kinship considered above is not itself morally objectionable. Procreation (in the marriage-equality context) and incest prevention (in the alternative procreation context) are not inherently bad—in fact, many would say quite the opposite. Nevertheless, those in non-traditional intimate and family structures are treated with unequal “concern” by the law when it imposes expressive burdens on them and on them alone.¹⁴² In this sense, we might say that the constitutional wrong inheres not in *what* the law expresses but rather in *how* the law expresses—namely, in an uneven way.

Importantly, this Article does not posit that the law always violates equality guarantees when it treats traditional and non-traditional kinship differently on an expressive level. Consider, for instance, the de facto parent doctrine. Earlier, this Article suggested that the doctrine presents the law with an opportunity to craft a normative parental model—one that the law could not impose on most

137. Importantly, this Article recognizes that traditional kinship *is* being regulated on an expressive level when the law regulates non-traditional kinship; indeed, that is one of its main descriptive points. The salient difference, however, between those forms of regulation is this: Whereas non-traditional kinship bears expressive burdens directly, traditional kinship bears them only indirectly.

138. Hellman, *supra* note 104, at 2.

139. *Id.* at 5–6.

140. 347 U.S. 483, 495 (1954) (emphasis added). On this point, Hellman observes that “[t]he opinion’s authors probably used the term ‘inherently’ both for emphasis and to forestall any attempts to show that particular children in particular schools were not affected by the stigma.” Hellman, *supra* note 104, at 9.

141. Hellman, *supra* note 104, at 10.

142. *Id.*

parents directly without running afoul of the Constitution.¹⁴³ On one view, de facto parent statutes or doctrines are unfair because they burden non-traditional parenthood with expressive projections that traditional (legal) parenthood would never have to satisfy.

On another view, however, those statutes or doctrines are entirely sound because the law burdens de facto parents with good reason. Stringent de facto parenthood definitions protect the fundamental rights of legal parents to raise their children in a way that they see fit. Absent a thick definition of what (or who) a de facto parent is, any person could conceivably step in and intrude on a preexisting parent-child relationship, one whose constitutional dimensions the Supreme Court reaffirmed in *Troxel v. Granville*.¹⁴⁴

Similarly, on one view, the law would burden non-traditional procreation on an expressive level were it to prohibit, say, sperm banks from organizing donors on the basis of race because it is normatively desirable to do so. Whereas the law could never tell traditional procreators to procreate in race-neutral ways, it might use the legal regulation of alternative procreation as an occasion to express that normative ideal. While perhaps unfair—why should non-traditional procreators have to sacrifice choice on the altar of race neutrality?—one might argue that our societal commitments to colorblindness are so strong that they trump our societal commitment to procreative freedom (assuming that we even have such a commitment for those who procreate in non-traditional ways).

This is not to say, then, that equal protection is violated every time that the law imposes a thick vision of intimate and family life onto non-traditional kinship. Rather, it is simply to say that we need to be more attentive to the myriad ways in which the legal regulation of marginal kinship presents an occasion for the law to be expressive in a way that the Constitution would normally prohibit. Sometimes, as in the case of de facto parenthood, the thick understanding of intimate and family life that flows from the legal regulation of marginal kinship will be justified. Other times, as in the case of exclusionary marriage laws, it will not be. At the very least, the law must offer some justification—other than that it can—for directly burdening non-traditional kinship, but not traditional kinship, with normative projections.

CONCLUSION

This Article has argued that family law has overlooked a critical way in which the law attempts to control intimate and family life and to establish an ideal conception of it. By regulating at the margins, the law gives the state an

143. See *supra* Part II.B.

144. 530 U.S. 57 (2000) (plurality opinion) (striking down the State of Washington's version of a non-parent visitation statute because its expansiveness intruded on the fundamental right of the legal parent to make custodial and visitation decisions with respect to her children). The *Troxel* Court reaffirmed the fundamental right that exists between child and (legal) parent, observing that "there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children," including the sorts of custodial and visitation decisions at issue in that case. *Id.* at 68–69.

opportunity to regulate all of us. In addition, this Article has contended that marginal regulation sometimes raises serious constitutional concerns.

This Article recognizes that the law regulates indirectly that which it cannot regulate directly all of the time. For instance, while the law cannot tell legal parents how to act,¹⁴⁵ it can regulate the parent–child relationship through the law of custody, which privileges one kind of parent–child relationship over another,¹⁴⁶ and through the criminal law, which imposes criminal liability on those parents who act unreasonably in certain instances.¹⁴⁷ Moreover, the criminal law indirectly communicates normative kinship preferences by extending privileges to certain kinds of families but not to others.¹⁴⁸ Finally, the criminal law advocates a certain vision of the family by choosing which family-related activities to criminalize in the first place.¹⁴⁹

The objective of this Article, then, has not been to suggest that the legal regulation of marginality is the only way that the law regulates intimate and family life through the back door. Rather, its aim has been to uncover a neglected and underappreciated form of back door regulation, one that could play an important role in shoring up constitutional arguments regarding laws, like exclusionary marriage regimes, that selectively and expressively burden non-traditional relationships and practices.

In concluding, this Article invites readers to consider the wide-ranging influence that the law has over everyone, and not just over those whom it directly regulates. Opponents of same-sex marriage know this well, as their opposition to same-sex marriage derives from a belief that marriage equality would directly affect them even though they lack a particularized interest in that relationship

145. Absent, of course, telling them not to inflict violence on their children in a way that would amount to criminal abuse. Even here, however, every state extends to legal parents the privilege of invoking the “parental discipline defense” in abuse prosecutions. This defense “exempts parents from prosecutions for assault if the corporal punishment was used to ‘benefit’ the child and if the nature of the punishment was objectively reasonable.” MARKEL ET AL., *supra* note 49, at 9.

146. See, e.g., Schneider, *supra* note 112, at 503 (“Custody law obliquely sets standards for parental behavior and emphasizes the centrality of children’s interests.”).

147. See MARKEL ET AL., *supra* note 49, at 66–69 (discussing parental responsibility laws).

148. See *id.* at 60 (“When the state makes choices regarding families and uses the criminal justice system to send normative signals about those choices, it risks marginalizing persons who consider themselves family members but are not recognized as such by the state or other institutions.”).

149. See *id.* at 77–78 (discussing the way in which family law burdens in the criminal justice system operate to promote the law’s normative vision of the family from an ex ante perspective); Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1279 (2009) (discussing the ways in which criminal and family law alike have “construct[ed] a normative ideal of intimate life and provid[ed] the substantive content for this vision”).

(other than that same-sex marriage offends them on any number of moral grounds).¹⁵⁰

Proponents of marriage equality have been less successful in driving this point home. Rather than argue that discriminatory marriage regimes—predicated as they so often are on an image of the nuclear family as procreative and biological—affect everyone, they have focused instead on the harm that same-sex couples experience individually. But as this Article has demonstrated, laws that purport to target one class (e.g., same-sex couples) also indirectly target—and may even influence—another class (e.g., opposite-sex couples). To overlook this phenomenon is to miss just how expansive the law is when it regulates, as well as just how interconnected to each other the law’s regulation—and, as the Supreme Court acknowledged in *Loving v. Virginia*, its discrimination—makes us.¹⁵¹

150. The “harm” that the general public would suffer by same-sex marriage was the source of a recent cartoon in *The New Yorker*. In it, the cartoonist, Robert Mankoff, depicts a wife in her mid-50s walking out the door of her house with two suitcases in hand. Presumably in response to her husband’s question why she is leaving him, she answers: “There’s nothing wrong with our marriage, but the spectre of gay marriage has hopelessly eroded the institution.” Robert Mankoff, Cartoon, *THE NEW YORKER*, July 26, 2004, at 30.

151. In *Loving*, the Supreme Court well understood the expansive reach of racial discrimination when it observed that everyone bore the burden of the state’s racial prejudice—not just those most immediately affected by it. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (stating that to deny the right to marry “on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive *all* the State’s citizens of liberty without due process of law” (emphasis added)).