

2010

Marriage and Parenthood as Status and Rights: The Growing, Problematic and Possibly Constitutional Trend to Disaggregate Family Status from Family Rights

Katharine K. Baker

January 2010

Marriage and Parenthood as Status and Rights: The Growing, Problematic and Possibly Constitutional Trend to Disaggregate Family Status from Family Rights

Katharine K. Baker

IIT Chicago-Kent College of Law, kbaker@kentlaw.iit.edu

Follow this and additional works at: http://scholarship.kentlaw.iit.edu/fac_schol



Part of the [Family Law Commons](#)

Recommended Citation

Katharine K. Baker, *Marriage and Parenthood as Status and Rights: The Growing, Problematic and Possibly Constitutional Trend to Disaggregate Family Status from Family Rights*, 71 Ohio St. L.J. 127 (2010).

Available at: http://scholarship.kentlaw.iit.edu/fac_schol/56

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.

**MARRIAGE AND PARENTHOOD AS STATUS AND RIGHTS: THE GROWING,
PROBLEMATIC AND POSSIBLY CONSTITUTIONAL TREND TO DISAGGREGATE
FAMILY STATUS FROM FAMILY RIGHTS**

KATHARINE K. BAKER*

Table of Contents

I. Introduction.....	1
II. The Disaggregation of Family Status from Family Rights (and Obligations) ..	7
III: Expressive Labels.....	13
A. Marriage	13
B. Parenthood.....	20
C. Summary	24
IV. The Constitutive Right to Relationship.....	24
A. The Law and the Importance of the Adult Relationships.....	27
1. Marriage as Constitutive.....	27
2. Marriage as Oppressive?.....	34
B. The Law and the Importance of Parental Relationships.....	38
1. Parenthood as Constitutive	38
2. The Parallels to Marriage.....	41
C. Summary	43
V. Constitutional Confusion.....	44
A. Confused Nomenclature.....	44
B. A Due Process Requirement?.....	46
C. Summary	48
VI. Consequences.....	48
A. Diminution in Meaning.....	48
B. Diminution in Burden, Diminution in Benefit	51
C. Diminution in Privacy	52
VII. Conclusion	55

I. Introduction

In May of 2008, the California Supreme Court held that same sex partners had a constitutional right to marry.¹ In November of 2008, the voters of

* Professor, Chicago-Kent College of Law. Many thanks to Anne Dailey, Stephen Heyman, Harold Krent, Michelle Oberman, Mark Rosen and Kimberley Yuracko for very helpful comments on earlier drafts. Thanks also to Marcia Lehr for exemplary research assistance.

¹ In *Re Marriage Cases*, 193 P2d 384, 399 (Ca. 2008) (“[The] core substantive rights [of marriage] include the opportunity of an individual to establish . . . an officially

California voted to amend the constitution to define marriage as between a man and a woman.² In May of 2009, deciding to uphold that voter referendum, the California Supreme Court held that same sex couples had a fundamental right to “establish an officially recognized family relationship,”³ but not a fundamental right to the name marriage itself. In doing so, the Supreme Court of California disaggregated family rights from family status, finding a constitutional right to the former even while accepting the voters’ ability to restrict access to the latter.

By disaggregating rights from status in this way the California Court was following a trend, not only for courts challenged by the same sex marriage question, but in family law generally. In the course of the last 30 years, courts and legislatures have often distilled the rights associated with family relationships from the traditional names or statuses associated with those relationships. Non-traditional family structures have put increasing pressure on the law and private parties to recognize different kinds of family relationships. In response, the law has started to grant alternative family members rights, without granting them family status.

Consider the well-known case of Michael H.⁴ Michael H. was the wealthy, worldly young man who bounced between homes in Los Angeles and St. Thomas, sometimes with the married woman with whom he was having an affair, sometimes with the child born as a result of the affair, but not always or in any permanent sense with either of them. Michael H. went to court claiming a constitutional right to parental status, just as plaintiffs in the same-sex marriage cases have claimed a constitutional right to marital status. Michael, like many of the same-sex marriage plaintiffs, was denied a right to family status, but he did not go home empty handed. Justice Stevens, the swing vote in *Michael H. v. Gerald D.*, voted to deny Michael the status of father because whatever the rights that his biological connection and relationship to his daughter gave him, they were honored by a state statute that allowed him to petition for visitation rights.⁵

recognized and protected family . . . [that is] . . . entitled to the same respect and dignity as marriage.”)

² The voter referendum was generally known as Proposition 8. See <http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop8>.

³ “Proposition 8 reasonably must be interpreted in a limited fashion, as eliminating only the right of same sex couples to equal access to the designation of marriage and as not otherwise affecting the constitutional right those couples to establish an officially recognized family relationship.” *Strauss v. Horton*, 207 P2d 48, 93 Cal Rptr 591, 642 (2009).

⁴ *Michael H. v. Gerald D.*, 491 US 110 (1989).

⁵ There was much dispute about whether someone like Michael actually could obtain visitation rights under the California statute. The dissent read the existing California family law precedent as precluding Michael from being awarded visitation against the

In other words, Michael was denied parental status but not necessarily all the rights of parenthood. Comparably, same sex couples have often won the right to the legal incidents of marriage, with Civil Unions and Domestic Partnerships, but been denied marital status.

Plaintiffs like Michael H. and the same sex couples who argue that they have a constitutional right to family status do not always lose.⁶ Constitutional doctrine suggests that there are fundamental rights to both marital and parental *status*, but those rights are limited, cabined by the social meaning of the terms marriage and parenthood. Constitutional doctrine also suggests that the law may be compelled to recognize family rights even if they do not grant family status. Constitutions may protect rights to be treated as in relationship with another as a legal matter. This latter protection is what Michael and many of the gay and lesbian plaintiffs went home with, even if it was not all that they wanted.

The trend to disaggregate rights from status does not always have a constitutional dimension. Sometimes judges, legislatures and private actors grant rights in the absence of status even if there is no recognized constitutional need to do so. One can remain agnostic on the question of whether state or federal constitutions mandate recognition of family relationship rights even in the absence of recognizing family relationship status, and still acknowledge that many legal actors feel an affirmative duty to honor relationship rights even in the absence of family status.⁷

mother's wishes. It is unclear what the 4 dissenters would have ruled if they had believed, as Justice Stevens did, that Michael had a reasonable chance of being awarded visitation – though not parental status – over the mother's objection.

⁶ See *infra* Parts IIIA and B.

⁷ For the most part, this article collapses the distinctions between the federal and state constitutions because they are not relevant to the arguments made here. First, the relationship between a state constitution and state family law is essentially the same as the relationship between the federal constitution and state family law. The constitutional questions, whether brought under a state or federal document, involve the same kinds of constitutional values (see *Baker v. Vermont*, 744 A2d 864, 870-873 (Vt. 1999) - discussing principle of equality under Vermont Common Benefits Clause, noting how it is slightly different than federal Equal Protection clause, but also explaining notions of equality; *Goodridge v. Dept of Pub. Health*, 798 NE2d 941, 956-960 (Mass. 2003) - discussing what it means for something to be a civil right, using U.S. supreme Court cases; *Lewis v. Harris*, 188 NJ 415, 434-436, 908 A.2d 196 (NJ 2006) - discussing meaning of the term fundamental liberty interest under the New Jersey due process clause using U.S. Supreme Court cases), the same kinds of analysis (see *Baker*, *Goodridge* and *Lewis*, *id.* - following U.S. Supreme court as guidance on questions of scrutiny), the same precedents (*Id.*) and the same balance of power issues (See in particular, *Baker* at 887-889 - discussing importance of deferring to legislature and *Lewis* at 458-462 – same.) Collapsing the federal/state distinction allows one to proceed with a constitutional analysis without having to filter through the different political and social perspectives that clearly do distinguish many state supreme courts from the federal one.

Conferring family status bestows on someone the legal rights and obligations accompanying that status, but it also honors the expressive value implicit in labeling. Conferring the legal rights and obligations of relationship honors the constitutive benefits that flow from being connected to another. The ability to disaggregate legal incidents from status allows courts and legislatures to recognize alternative relationships without necessarily disrupting the social meaning of either marriage or parenthood. This article explores the legal dimensions of family status and family rights, explains how they are different, and analyzes the potential problems with disaggregating them.

Critical to the analysis presented here is the recognition that, legally, marriage and parenthood are comparable institutions. To date, few scholars have embraced the links between the legal treatment of marriage and parenthood. Some scholars have clearly separated them, assuming or stating that they have nothing to do with each other.⁸ I argue that isolating the legal treatments, particularly the constitutional treatment, of marriage and parenthood from each other makes little sense. The vast majority of cases to ever discuss the constitutional dimensions of either parenthood or marriage refer to parenthood and marriage together, as if the rights are clearly akin to each other.⁹

⁸ Anita Bernstein writes that “marriage is different . . . from the other key status category of family law – parenthood – in that the relation between parent and child addresses a relatively clear and uncontroverted need. Infants cannot survive without resources from adults.” Anita Bernstein, *For and Against Marriage*, 102 MICH. L. REV. 129, 132 (2003). Not one of the cases addressing the right to parental status involved children’s needs though. In all but one case in which a man has claimed a right to parental status, the child’s needs were being readily met by both the mother and another man. See Michael H. v. Gerald D., *supra* 1; Quilloin v. Wolcott, 434 US 246 (1978); Lehr v. Robertson, 463 US 248 (1983); Caban v. Mohammed, 441 U.S. 380 (1979). In the one case when there was not another man to provide for the child, the state was claiming a desire to do so. See Stanley v. Illinois, 405 US 645 (1972). Cass Sunstein compares state conferral of marital status with parental status and assumes (wrongly, I think) that parental status is afforded substantially more protection. “If I am the biological parent of a child, the state must have an extremely good reason to sever my relationship with that child.” Cass Sunstein, *The Right to Marry*, 26 CARD. L. REV. 2081. Presumably, Sunstein was referring to the clear and convincing evidence the state must have of abuse and neglect before terminating a pre-existing parent’s legal status as parent, but all of the cases just cited involved biological fathers and Michael H. was biological father who also had an established relationship with his child. In all of those cases, the court vested parental status in someone else simply because the state thought that would be in the best interest of the child.

⁹ See e.g. Meyer v. Nebraska, 262 US 390, 399 (1923) “the right of the individual . . . to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children” “[I]t is clear that among the decisions that an individual may make without unjustified government interference are personal decisions ‘relating to marriage, procreation, contraception, family relationships and child rearing and education’” Zablocki v. Redhail, 434 US 374, 385 (1978), quoting Carey v. Population Services, 431 US 678. ; “This court has long recognized . . .

Traditionally, marital status determined parental status and the existence of parental rights was contingent on the state of one's marriage. And, even though parental rights are usually cast as negative rights and marital rights are usually cast as positive rights both sets of rights are usually protected for the same reasons.

The article proceeds as follows. Part II provides a brief description of what has been happening to claims for family recognition in the last 30 years. It describes the various ways courts and legislatures have embraced the disaggregation of family rights from family status in both the marital and parental contexts. "Domestic partnerships" and "Civil Unions," "De Facto Parents" and "Equitable Parents" are now widely used legal constructs that treat people as entitled to the rights (and sometimes liable for the obligations) of legally recognized relationship. The proliferation of these new legal categories demonstrates how the law has responded to the need to treat people as in relationship legally, even as the law has resisted expanding the traditional legal statuses of marriage and parenthood.

Part III explores the expressive value of marital and parental status. It examines why people may have an interest in the expressive value of marriage and parenthood and how and why courts have protected rights to those statuses. The expressive value of marriage is more obvious, both in practice and in the cases, than the expressive value of parenthood. But when analyzed together it becomes clear that the ability to claim either marital or parental status has expressive value. Because of the immensely meaningful role that family relationships play in our individual and collective lives, access to the family status label is very important to people. Thus, while no one refutes a state's ability to regulate aspects of marriage and parenthood, the cases strongly suggest that a state must be careful in restricting access to those labels. If an individual's relationship comports well enough with the social understanding of family status, he or she is constitutionally entitled to express him or herself through that status.

Part IV explores why and how the law protects not just marital and parental status but the kinds of relationships that have traditionally been known as marriage and parenthood. Drawing on psychological and philosophical theories of relationship, as well as on the legal scholarship of both marriage and parenthood, Part IV argues that the legal incidents of marriage and parenthood are recognized legally for similar reasons. They are recognized because being entwined with another legally, economically, morally, and socially has such a profound effect on who one is, what one wants and how one sees oneself in the world. When the law bestows the rights and obligations that treat one as in family relationship with another, the law honors the liberty associated with being able to exist with another as a unitary entity.

freedom of personal choice in matters of marriage and family life . . . " *Cleveland Bd of Educ. v LaFleur*, 414 U.S. 632, 639-640 (1974).

Part V elaborates on how the constitutional nomenclature surrounding the family, in particular the rhetoric of rights involving intimacy, privacy and autonomy has fostered confusion in this area. Part V then explores in some more detail why there might be a substantive due process right to the legal incidents of family relationship, even in the absence of a right to family status.

Part VI will argue that the tendency to disaggregate both marital and parental rights from marital and parental status jeopardizes the traditional constitutional protection of families. First, to the extent we value the expressive benefits associated with assuming family status, those benefits will dissipate as alternative family statuses proliferate. Getting married and being a parent will likely not mean the same thing if there are many other kinds of marriage-lite and parent-lite arrangements available. Some may view the availability of more family options as a positive development, but if nothing else, the same-sex marriage debate shows that many people on both the right and left side of the political spectrum want to retain some of the traditional expressive dimension of marriage.

Second, courts and legislatures have shown themselves much more willing to confer rights than impose obligations on non-traditional family members. By diminishing the legal responsibilities associated with family relationships, courts and legislatures diminish the constitutive nature of family relationships. The less formative and defining a relationship is to one's selfhood, the less it needs any legal protection at all. The need to recognize certain relationships because they are so important to the people in them diminishes if relationships come to be seen more as voluntary associations that bring with them rights and benefits but no responsibilities or obligations.

Third, the more legally varied and individuated family-like relationships become, the more necessary it will be for courts to insert themselves inside those relationships to ascertain individual rights and responsibilities. The more courts insert themselves inside some family relationships, the less likely courts will be to honor notions of relationship privacy and autonomy for all family relationships.

The recent legislative activity embracing same sex marriage¹⁰ and many public opinion polls showing increasing support for same sex marriage¹¹ suggest that the social meaning of marriage is changing. Enough people in enough places will soon believe that marriage is not essentially heterosexual. Once that happens, there will be less need to disaggregate marital rights from marital status because same sex couples will have access to marital status. But before same-sex marriage is fully recognized, many states will probably adopt an intermediary disaggregative position. States that cling to traditional definitions of marriage

¹⁰ Legislative bodies in Vermont, New Hampshire and Maine have all voted to recognize same sex marriages. See <http://www.hrc.org/issues/marriage.asp>

¹¹ See CNN Poll: Generations disagree on Same Sex Marriage, <http://www.cnn.com/2009/Us/04/samesex.marriage.poll/>

will adopt Civil Unions and Domestic Partnership regimes before they adopt marriage.

Comparably, courts and legislature will probably continue to grant parental rights without granting parental status.¹² As with marriage, it may be that the pressure to disaggregate is greatest in those political communities that most resist changing traditional family definitions. For instance, courts in states that neither recognize any form of same sex union nor allow second parent adoptions, often award visitation and custody to non-biological same-sex partners. The recognition of either the same sex partnership or the adoption would give the partner parental status and thus the automatic right to petition for visitation and custody. Yet several courts have found that the failure of the legislature to confer parental status is irrelevant to the question of whether the non-biological same sex partner is entitled to parental rights.¹³ These courts thus make a clear distinction between family status and family rights. They award the latter even if the legislature has resisted conferring the former.

Providing family rights without providing family status in this way may seem like a cautious, intermediary step, but in the end this article suggests that it may be a move that does more to threaten traditional constitutional protection of relationship than honor it.

II. THE DISAGGREGATION OF FAMILY STATUS FROM FAMILY RIGHTS (AND OBLIGATIONS)

In the past 30 years, it has become abundantly clear that many people, not just people in traditional family relationships, very much want the law to treat them as in relationship with a significant other. When asking for legal recognition of their relationships, these people do not make contract claims. They do not claim an entitlement based on an agreement with another. They make situational claims, or claims of entitlement based on the nature of their emotional and physical connection to another.¹⁴

¹² Many academic commentators endorse the idea of expanding rights without necessarily expanding status. See *infra* note 40.

¹³ *TB v. LRM*, 567 Pa. 222, 232, 786 A 2d 913, 918 (2001) (“The ability to marry the biological parent and the ability to adopt the subject child have never been and are not now factors in determining whether the third party assumed a parental status and discharged parental duties.”); *Mason v. Dwinnell*, 660 SE2d 58, 64 (2008) (“[W]e find immaterial Dwinnel’s arguments that she and Mason could not marry, and Mason could not adopt the child under North Carolina law. . . .”).

¹⁴ By situational, I mean claims based on their lives as lived, not on explicit or implicit agreements. See, for instance, the affidavit that UCLA uses to determine entitlement to domestic partner benefits. “We are each other’s sole domestic partner and intend to remain so indefinitely. We are in a relationship of mutual support, caring and commitment. We are financially interdependent.” Cited in Grace Blumberg, *The*

For reasons that have a great deal to do with the United States' "shadow" or "employee" welfare state, many of the initial claims to rights in the partner context were made in the private sector. They were made by employees who wanted to give their partners access to the considerable array of welfare benefits that, in the United States, are provided by employers to employees and their families.¹⁵ Notably, these claims were made predominantly by same-sex cohabitants, not by opposite sex cohabitants, even though opposite sex cohabitants outnumber their gay counterparts by a significant margin.¹⁶ Opposite sex couples may not have pushed as hard for these benefits because they knew their claims would ring hollow given their option to marry, or, they may not have pushed hard because they actually did not want them. If they had wanted to be treated as a unit by the outside world, they could marry. It was the same sex couples who had no other means of being treated as one.

The first employer to offer domestic partner benefits to its employees was the Village Voice, in 1982.¹⁷ In 1992, Lotus Development Corporation became the first publicly traded company to do so. By 2001, more than 2500 public and private employers extended health care benefits to domestic partners.¹⁸ These plans cannot be viewed as purely private agreements. Although the federal government has so far refused to confer the same tax advantages on same sex couple plans as it does on plans covering married couples,¹⁹ government policy-makers routinely rely on private employer plans when they design health care plans.²⁰ The availability of these plans lets people who might not otherwise have a reasonable chance of obtaining health insurance coverage do so. The existence of these private plans also influenced various governmental bodies, facilitating government recognition of same sex relationship, at least in the employment context.

Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State, 76 NOTRE DAME L. REV 1265 1289 (2001)

¹⁵ These benefits include health and disability insurance and access to retirement plans. In most other industrialized countries, these type of claims would be made in the public sector because it is the state that plays the primary role in providing social insurance programs.

¹⁶ See Blumberg, *supra* note 14 at 1286.

¹⁷ See Human Rights Campaign, What Are Domestic Partner Benefits, at http://www.hrc.org/worknet/dp/dp_whatisdpa.asp

¹⁸ *Id.*

¹⁹ 2003 TNT 188-24 Health Coverage for Dependent Domestic Partner Not Gross Income, Wages.

²⁰ None of the major health care reform proposals involve dispensing with employer-based health care completely.

At the same time employers were beginning to recognize relationship status in the private sector,²¹ same-sex marriage advocates were beginning their campaign for legally recognized gay marriage. In the last 18 years, same-sex marriage advocates have successfully argued that gays and lesbians are constitutionally entitled to marital status in five states.²² Just as important, they have forced courts and legislatures to articulate what same sex couples are entitled to if they are not entitled to marital status.

The state of Hawaii, after its Supreme Court ruled that the state Equal Rights Amendment forbade the state from prohibiting gays and lesbians from marrying each other, brokered a kind of compromise in which the voters approved a constitutional amendment defining marriage as “between a man and a woman,” but the state legislature passed domestic partner legislation allowing two people who could not marry each other the right to register as domestic partners.²³ In *Baker v. Vermont*²⁴ and *Lewis v. Harris*,²⁵ the supreme courts of Vermont and New Jersey required their state legislatures to pass legislation that allowed gay and lesbian couples access to a fully equal set of relationship rights and obligations as those available to straight couples.²⁶ New Jersey explicitly

²¹ Most of these employer based programs confer benefits without requiring significant obligation. To the extent these plans confer pension rights, they often do not require that an employee share pension accumulation with their ex-partner in the event of separation.. See Blumberg, *supra* note 14 at 1291-92. Married people, in contrast, are required to share pension benefits. Although there is virtually always fighting about how much should be shared and why, every state in the country gives a divorcing spouse a claim to pension rights earned by the other spouse during the course of the marriage.

²² Hawaii found the right to marry as a matter of gender equality. *Baehr v. Lwein*, 852 P2d 44 (Haw 1993), but a subsequent voter initiative restricted marriage to opposite sex couples. Connecticut and Iowa found that gays and lesbians were a suspect class and that restrictions on same-sex marriage constituted impermissible discrimination on the basis of sexual orientation. *Kerrigan v. Commissioner*, 951 A. 2d 407 (2008); *Varnum v. O’Brien*, 763 NW2d 862 (Iowa 2009). The Massachusetts Supreme Court relied little on either fundamental rights or equality jurisprudence, holding that in the family law area the doctrines were inextricably intertwined and that there was no rational reason to restrict marriage to opposite couples anyway. *Goodridge v. Dpt of Pub. Health*, 798 NE2d 941, 953, 961 (Mass. 2003). The California case, *In Re Marriage Cases*, 193 P2d 384 (Ca. 2008) was significantly altered by Proposition 8 and the subsequent judicial interpretation of what that meant. See *Strauss v. Horton*, 93 Cal Rptr 591 (2009).

²³ See Blumberg, *supra* note 14 at 277-78.

²⁴ 744 A.2d 864 (Vt. 1999).

²⁵ 908 A2d 196 (NJ 2006).

²⁶ Both courts decided this as a matter of equality doctrine, but the equality analysis did not extend to the label marriage.

found it permissible to deny opposite sex couples access to the marriage label.²⁷ Vermont implied the same thing, but did not technically reach the question.²⁸ After Proposition 8 and *Strauss v. Horton*²⁹ California's law now operates as New Jersey's does.³⁰

The Connecticut state legislature, aware that same sex marriage litigation was pending, voted without any court mandate to extend full Civil Union benefits to same-sex couples.³¹ New Hampshire, Maine, and Washington DC also adopted extensive domestic partnership protection before their legislatures voted to sanction same sex marriage.³² In addition, Oregon, Washington and hundreds of municipalities have adopted some form of domestic partner legislation.³³ The effects of these domestic partnership provisions vary. They can, but do not always, give the full panoply of marital state rights and obligations. Municipal regulations operate more like private employer recognition of same sex relationships because they involve few, if any, tax, property and future income consequences.

The American Law Institute's Principles of the Law of Family Dissolution³⁴ also recommends treating couples who do not acquire marital status as being legally in relationship to each other. Although some have criticized these provisions for denying couples who do not want to be treated as an entity the freedom to be single,³⁵ the ALI has recommended treating non-married people

²⁷ 908 A2d at 211 (“[W]e cannot find that a right to same-sex marriage is so deeply rooted in the traditions, history and conscience of the people of this state that it ranks as a fundamental right.”)

²⁸ 744 A2d at 886 (“We hold that plaintiffs are entitled to obtain the same benefits and protected afforded by Vermont law to married opposite-sex couples. . . . We do not purport to infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing this constitutional mandate. . . .”) Vermont subsequently became the first state to legislate same-sex marriage without being ordered to do so by the state Supreme Court. See www.nytimes.com/2009/04/08/us/08vermont.html.

²⁹ 93 Cal Rptr 591, see *supra* note 2.

³⁰ Though in California, same-sex couples have both a fundamental right and an equality right to all the legal incidents of marriage. See *Strauss v. Horton*, 93 Cal Rptr at 624, 627.

³¹ The Connecticut Supreme Court subsequently required the state to recognize marriage, on the theory that separate could not be equal. See *Kerrigan*, *supra* note 22.

³² See <http://lambdalegal.org/nationwide-status-same-sex-relationships.html>.

³³ See *id.* for summary of state legislation giving same sex couples some form of relationship status, but not marriage.

³⁴ See American Law Institute, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002) [hereinafter ALI PRINCIPLES], Chapter 6.

³⁵ See, in particular, Elizabeth Scott, *Domestic Partnerships, Implied Contracts and Law Reform*, in RECONCEIVING THE FAMILY: CRITIQUES ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 331 (Wilson ed.) (2006) [hereinafter

who have not contracted into or around the background rules of marriage, as if they were married. This treatment includes, importantly, holding both parties economically accountable to the other in the event of dissolution. Both property and compensatory payments (traditionally known as maintenance or alimony) are to be awarded to domestic partners in accordance with the same principles as those used in the marriage context.³⁶ In other words, the law is supposed to treat people as married even though they do not have the legal label of marriage.

In the parental arena, there has been a comparable and mostly concurrent trend. In part because adults tend to drift into and out of relationships more than they used to, in part because DNA testing allows us to determine genetic parentage with certainty, in part because artificial insemination has become so much more readily available, and in part because gay and lesbian parenting has become less taboo,³⁷ non-traditional parents now routinely petition courts for parental rights. And sometimes, legal parents petition courts in order to hold non-traditional parents liable for parental obligations.³⁸ Grandparents, step-parents and other third parties often enjoy statutorily protected rights to visitation,³⁹ and numerous scholars have called for a more expansive, less exclusive view of parenthood, one that leaves room for the law to recognize many different kinds of adult relationships in a child's life.⁴⁰

RECONCEIVING THE FAMILY] . See also , Margaret Brinig, *Domestic Partnership and Default Rules*, Id. At 269; Marsha Garrison, *Marriage Matters: What's Wrong with the ALI's Domestic Partnership Proposal* Id. At 305.

³⁶ See ALI PRINCIPLES, supra note 34 at §§ 6.05, 6.06

³⁷ For more on how all of these factors are forcing the law to come to terms with what it thinks the defining features of parenthood should be, see Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 Ga L Rev 649 (2008).

³⁸ See Katharine K. Baker, *Bargaining or Biolog: The History and Future of Paternity Law and Parental Status*, 14 Cornell J. of L. and Public Policy 1, 15-16 (2004).

³⁹ See e.g. Margaret Mahoney, *Step-parents as Third Parties In Relation to Their Step-Children*, 40 FAM. L. Q 81, n. 82 (2006) ("The visitation status in a number of states include stepparents under an umbrella provision that authorizes visitation petitions by 'any person.' . . . In other jurisdictions, the unrestricted category of stepparents is specifically included in the visitation statute. ") 21 J. FAMILY ISSUES 246, 247-248 (2000) ("Grandparent visitation rights law were enacted in all 50 states over a period of 23 years.") These rights must be treated as somewhat secondary to parental rights, but they are still cognizable, see *Troxel v. Granville*, 530 US 57 (2000). A host of grandparent visitation statutes have been upheld even after *Troxel*.

⁴⁰ Katharine T Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Laternative When the Premise of the Nuclear Family Has Failed*, 70 Va L Rev 879 (1984) (suggesting that legal notions of parenthood should be expanded for families that don't live as a traditional nuclear family); Naomi Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L. J 1 91997) (advocating the designation of many adults as "parents"); Barbar Woodhouse, *Hatching the Egg: A Child-Centered Perspective on*

In response to these trends, many courts have developed “de facto parent” doctrines, “equitable parent” doctrines, and “parenthood by estoppel” doctrines.⁴¹ Usually these doctrines involve giving non-traditional parents visitation rights. Less often, they involve holding non-traditional parents liable for child-support. As in the cohabitation area, the American Law Institute has called for legal recognition of these alternative parenting relationships. Advocating the adoption of both a “de facto parent” class and a “parenthood by estoppel” doctrine, the ALI supports an expansion of parental rights and, far more rarely, parental responsibility.⁴² In short there has been widespread creation of legally cognizable parental relationships, even in people who do not have the legal label of parent.⁴³

This article’s analysis of the dual dimensions of the legal treatment of relationship helps explain the widespread tendency to disaggregate relationship rights from relationship status. As family structures proliferate, something compels the law to recognize them even as something else restricts the law’s embrace of them. As Part III will argue, what keeps courts and legislatures from embracing many different kinds of marriage and multiple forms of parenthood is an allegiance to the social meaning of the institutions of marriage and parenthood. That social meaning is not fixed, but neither is it infinitely capacious. People only have a right to those institutions and to the expressive potential implicit in their labels if those individuals’ situations comport to the social understanding of those terms.

The law has been far more willing to legitimate claims for family rights though. It has been willing to treat two people as one and force others to do the same.⁴⁴ It has been willing to award visitation rights to people who never enjoyed the legal status of parent and never attempted to get it.⁴⁵ Although

Parent’s Rights, 14 CARD. L REV 1747 (1993)(advocating a more care-based approach to parental rights).

⁴¹ See Baker, *Bionormativity*, *supra* note 37.

⁴² For more on the asymmetrical way in which the ALI treats parental rights and responsibilities, see Katharine K. Baker, *Assymetric Parenthood*, in RECONCEIVING THE FAMILY at 121-128 *supra* note 35.

⁴³ The ALI Principles of Family Dissolution leave the determination of legal parenthood to someone else. One comment explains that determinations of legal paternity are “a matter outside the scope of these Principles.” § 3.03 cmt. D, at 418. It is not clear why the ALI draftsrs felt comfortable passing over the question of legal parentage (e.g. parental status) while embracing the task of determining parental-like rights and obligations, see Baker, *Assymetric Parenthood*, *supra* note 42 at 126-127.

⁴⁴ This is what many aspects of domestic partnerships and civil unions do.

⁴⁵ See ALI PRINCIPLES, *supra* note 34, Chapter 2 (describing de facto parent doctrine); *ENO v. LMM*, 711 NE2d 886 (Mass. 1999) (awarding visitation rights to a non-biologically related lesbian co-parent); *JAL v. EPH*, 682 A2d 1314 (Pa. Super. 1996) (same).

initially resistant,⁴⁶ many legal actors now feel compelled to honor most family relationships as lived, even if they do not feel compelled to change the definition of marriage and parenthood as legally defined. Parts III and IV explore why.

III: EXPRESSIVE LABELS

A. Marriage

As virtually every court⁴⁷ and commentary⁴⁸ to have engaged the question of same sex marriage has noted, there are numerous material and nonmaterial legal incidents of marriage. The legal incidents of marriage, for the most part, define the variety of ways in which the law requires the government and private actors to treat married people as a unit. But most people probably do not get married to secure the legal incidents of marriage. They get married because the act of getting married and being married conveys widely understood messages of unity and commitment.⁴⁹

Getting married – as opposed to just living together or making a promise to one's partner – signifies a greater commitment in part because it is public (it is harder to break a promise that everyone knows one has made), in part because state rules make it more onerous to break, but also because by marrying, people attach themselves to an institution that is bigger than themselves. Individuals may try to define the terms of their own marriage for each other,⁵⁰ but

⁴⁶ The early gay marriage cases did not fair well. See *Baker v. Nelson*, 191 NW2d 185 (Minn. 1971), 409 US 810 (1972) (denying gay male couple the right to marry); *Alison D. v. Virginia M.*, 572 NE2d 27 (NY 1991) (denying non-biologically related lesbian co-parent any visitation or custody rights). Several more state high courts have also resisted more recent claims to gay marriage, see e.g. *Conaway v. Deane*, 932 A2d 571 (Md. 2007) (denying any right to same sex marriage); *Hernandez v. Robles*, 855 NE2d 1 (NY 2006).

⁴⁷ See e.g., *Goodridge v. Dept of Pub. Health*, 798 NE2d 941, 955-56 (Mass. 2003); *Lewis v. Harris*, 908 A2d 196, 215 92006); *Baker v. Vermont*, 744 A.2d 864, 870 (1999); *Hernandez v. Robles* 855 N.E.2d 1, 2 (2006)

⁴⁸ See Bernstein, *supra* note 8; Sunstein, *supra* note 8 at 1090; David Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447 (1996)

⁴⁹ There is little question that, on average, those who commit to each other through marriage end up making a more binding commitment than those who commit to each other without getting married. See Marsha Garrison, *Marriage Matters*, *supra* note 35 at 308 (citing studies showing that only 105 of cohabitants who do not marry are together after 5 years, whereas 80% of first marriages survive past 5 years and 66% of first marriages survive past 1-0 years.)

⁵⁰ Many individuals may also not feel this freedom. Social norms exert powerful forces on the parties to a marriage and are likely to make them feel more committed and less free to define the relationship as they want. See Elizabeth Scott, *Social Norms and the Legal Regulations of Marriage*, 86 VA. L. REV. 1901 (2000).

if they associate themselves with the institution of marriage, their relationship will necessarily be interpreted by outsiders in certain ways.

For instance, it is very likely that others will view a marriage as a relationship involving shared values, shared resources and significant emotional support.⁵¹ Any given marriage may not involve these things and the state is limited in the extent to which it can enforce the sharing of these things, but sharing these things is what most people think married people do because that is what marriage *means*. Thus getting married is a way of sending a message about one's relationship. One sends that message to the world, to one's partner and quite probably to oneself. The ability to send that message and attach oneself to the institution of marriage appears to be enormously important to people. Most people do it and even more people want to do it.⁵² Perhaps for this reason, the Supreme Court has, at times, protected individuals' right to marital status.⁵³

The United States Supreme Court has decided three different right to marry cases. Richard Loving, a white man, and Mildred Loving, an African-American woman, married in the District of Columbia but wanted to reside and stay married in the state of Virginia.⁵⁴ Virginia prohibited interracial marriage. Roger Redhail wanted to marry his current girlfriend even though he was in arrears on a

⁵¹ People assume marriages involve this kind of sharing because of the social norms associated with marriage. See *id.*

⁵² See *infra* notes 173-175 (more than 83% of women ages 35-44 have married and even more women express a desire to get married.) Because getting married also involves getting a marriage license, marriage involves governmental speech as well. In granting the license, the state says "this relationship is worthy of the rights and obligations that we confer on married people" Gays and lesbians fighting for the right to marry are claiming a right to have the government legitimate their relationship too, but the arguments they have recently used as to why the government should do so have been rooted in the personal expressive value that marriage provides to the people who marry. See *infra* text accompanying notes 70-77.

⁵³ See *infra*, next paragraph. Two of the three state courts that have successfully awarded same-sex couples the label marriage have done so as a matter of equality, not fundamental rights theory. See *Varnum v. O'Brien*, 763 NW2d 862 (Iowa, 2009) and *Kerrigan v. Commissioner*, 951 A.2d 707 (Ct. 2008). That is, same sex couples have been more successful in claiming a right to the marriage label because straight couples have it then in claiming an independent right to the label itself. California originally said there was a fundamental right to the label marriage, but let that finding be overturned by Proposition 8. See *supra* text accompanying note 2 and *infra* text accompanying notes 76-77. The Supreme Judicial Court of Massachusetts, in the first Supreme Court decision to mandate same-sex marriage, said that equal protection and fundamental rights analysis were inextricably intertwined and therefore it was not important to separate them, but Massachusetts also found that the restrictions on same-sex marriage could not pass rational basis review. Thus, the particular constitutional doctrine was not that important. See *Goodridge v. Dpt of Pub Health*, 798 NE2d 941, 961 (Mass. 2003).

⁵⁴ *Loving v. Virginia*, 388 US 1 (1967)

child support obligation owed to a child he had sired, while a teenager, several years before.⁵⁵ Wisconsin law denied the right to marry to people who could not prove that their pre-existing children were “not then and not likely thereafter to become public charges.”⁵⁶ Leonard Safely was in jail in Missouri and wanted to get married. Prison regulations prevented him from doing so.⁵⁷

The first case, *Loving v. Virginia* is notorious for being simultaneously straightforward and obtuse. As a matter of equal protection doctrine, the ban on interracial marriage was readily struck down by the Supreme Court because the ban on interracial marriage was a transparent state endorsement of white supremacy.⁵⁸ But in the final three (very short) paragraphs of *Loving*, the Court declared that marriage was protected by the Due Process Clause because it was one of the “‘basic civil rights of man’ fundamental to our very existence and survival.”⁵⁹ The Court then quickly put in a qualification: “to deny this fundamental freedom [to marry] on so unsupportable a basis as the racial classification . . . is surely to deprive . . . due process of law.”⁶⁰ The first part of this short section at the end of the *Loving* opinion thus seems to suggest that the Constitution protects a right to marry because marriage is so fundamental to existence. The subsequent line qualifies that right by suggesting that denial of the right to marry may be permissible in some instances, but not “on so unsupportable a basis” as race.

Eleven years after *Loving*, Roger Redhail applied for a marriage license and was denied because he owed child support. As support for the idea that marriage is a fundamental right, the majority opinion cited almost every constitutional case having anything to do with parenting,⁶¹ procreation,⁶² marriage,⁶³ or other family

⁵⁵ Zablocki v. Redhail, 434 US 374 (1978).

⁵⁶ 434 US 374, 375 (1978)

⁵⁷ Turner v. Safely, 482 US 78 (1987).

⁵⁸ “The fact that Virginia prohibits only interracial marriages including white persons demonstrates [the law to be] designed to maintain White Supremacy.” *Loving*, 388 US at 11.

⁵⁹ *Id.* at 12, quoting *Skinner v. Oklahoma*, 316 US 538 (1942) (the invocation of *Skinner*, a case involving sterilization and thus a restriction on parenthood, is another example of the court referring to marriage and parenthood together, as if the rights are akin to each other, see *supra* text accompanying note 9)

⁶⁰ *Loving* 388 US at 12.

⁶¹ *Meyer v. Nebraska*, 262 US 390 (1923) (right of parents to hire someone else to teach children a language other than English); *Pierce v. Socy of Sisters*, 268 US 510 (1925) (right of parents to send children to private school); *Prince v. Mass.*, 321 US 158 (1943) (state’s *parens patriae* interest in children must be balanced against parents’ rights to raise children as they believe appropriate) are all cited, 434 US at 385.

⁶² *Eisenstadt v. Baird*, 404 US 438 (right of non-married people to contraception), *Roe v. Wade*, 410 US 113 (right to abortion); *Carey v. Population Services*, 431 US 678 (same)

relationships.⁶⁴ For reasons the Court did not make entirely clear, the totality of all of those cases suggested that there must be a fundamental right to marry.

When Leonard Safely wanted to get married, in jail, the Court finally felt compelled to explain in a little more detail why the Constitution protected a right to marry. Relying only on *Zablocki* for the idea that there is a fundamental right to marry, the Court tried to explain why. Marriage is “an *expression* of emotional support and public commitment.”⁶⁵ It “may be an exercise of religious faith as well as an *expression* of personal dedication.”⁶⁶ It “is often a precondition to the receipt of governmental benefits . . . property rights . . . and other, less tangible benefits (e.g. the legitimation of children born out of wedlock”).⁶⁷ All of those reasons augured in favor of letting Leonard Safely marry.

The expressive qualities of marriage, noted explicitly first by the *Turner* court, have been particularly important to the constitutional treatment of same sex marriage recently. In *Baker v. State*,⁶⁸ the Vermont Supreme Court acknowledged the symbolic importance of marriage, though it curiously determined that marriage’s symbolism was not at issue, writing that it was the “plaintiffs claim to the secular benefits and protections of . . . [marriage] . . . that . . . characterize[d] this case.”⁶⁹ In other words, the Court determined that there

Cleveland Board of Education v. LaFleur, 414 US 632 (right to not be fired for being pregnant)

⁶³ *Skinner v. Oklahoma*, 316 US 538 (1942) (prohibiting mandatory sterilization) *Griswald v. Connecticut*, 381 US 479 (1965) (finding that married couples have a right to privacy that includes the right to contraceptives) and *Loving* are all cited, 434 US at 385.

⁶⁴ *Smith v. OFFFER* (rights of foster parents), 431 US 816 (1977); *Moore v. City of East Cleveland*, 431 US 494 (1977) (rights of non-nuclear family to live together).

⁶⁵ *Turner v. Safley*, 482 US 78, 95 (1987) (emphasis added)

⁶⁶ *Id.* At 96 (emphasis added)

⁶⁷ *Id.* This last item explicitly invokes the legal incidents of marriage, not marriage’s expressive value, though the last “benefit,” the legitimation of children, is a particularly weak argument because for the most part, by this time, states not allowed to treat illegitimate children differently than legitimate children, see generally IRA ELLMAN, PAUL KURTZ, ELIZABETH SCOTT, LOIS WITHORN AND BRIAN BIX, *FAMILY LAW: CASES, TEXT, PROBLEMS* (4th ed.) 1035-1038 92004) (describing the evolution of the constitutional doctrine on illegitimate children), and legitimation could be accomplished by simply signing a birth certificate or acknowledging paternity. See Uniform Parentage Act, discussed *infra* note 91.

⁶⁸ *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

⁶⁹ *Id.* At 889. It is not at all clear why the court decided that the plaintiffs were not asking for the symbolic aspects of marriage itself. The dissent certainly thought that the plaintiffs were asking for the symbolic aspects of marriage.

was a an expressive component of marriage that was distinct from the panoply of rights and benefits marriage affords.

In *Goodridge v. Dept. of Public Health*⁷⁰ the Supreme Judicial Court of Massachusetts highlighted the expressive aspects of marriage in granting the right to same sex marriage. The first line of the opinion reads simply: “Marriage is a vital *social* institution.”⁷¹ It noted that marriage is a function of “community”⁷² and that it is “at once a deeply personal commitment to another human being and a *highly public* celebration”⁷³ No doubt, the Massachusetts court emphasized the expressive value in order to explain why it was going further and requiring marriage in a way that the Supreme Court of Vermont did not in *Baker*.

The New Jersey plaintiffs in *Lewis v. Harris*⁷⁴ adopted the Massachusetts Court’s rhetoric, arguing that marriage is the “ultimate *expression* of love, commitment and honor you can give to another human being.” “[O]thers know immediately that you have taken steps to create something special.”⁷⁵ The New Jersey Supreme Court did not deny the expressive value of marriage, but found that it was not protected for gays and lesbians under either the substantive due process or equal protection clauses of the New Jersey Constitution.

In *In re Marriage Cases*, California became the first and only state court to find that same sex couples had a fundamental right to the marriage label. Same sex couples already had the full panoply of Domestic Partnership rights, but the California Supreme Court held that gays and lesbians had a fundamental right to marry because the label marriage commanded the respect and dignity of others.⁷⁶ It was because of the positive way that others view people with marital status that the California court said marriage was a fundamental right.⁷⁷

⁷⁰ 798 NE2d 941 (Mass. 2003)

⁷¹ Id. At 948 (emphasis supplied).

⁷² Id. (marriage is “one of our community’s most rewarding and cherished institutions”)

⁷³ Id. At 954 (emphasis supplied)

⁷⁴ 908 A.2d 196 (NJ 2006).

⁷⁵ *Lewis v. Harris*, 908 A.2d 196, 225-26 (Poritz, C.J., concurring and dissenting) (quoting plaintiffs’ briefs)(emphasis added).

⁷⁶ “[O]ne of the core elements of this fundamental right [to marry] is the right of same sex couples to have their official family relationships accorded the same dignity, respect and stature as that accorded to all other officially recognized family relationships.” *In Re Marriage Cases*, 193 P2d at 434.

⁷⁷ “The current statuses – by drawing a distinction between the name assigned to the family relationship available to same sex couples and by reserving the historic and highly respected designation of marriage exclusively to same sex couples . . . pose serious risk of denying the official family relationships of same sex couples the equal respect and dignity that is a core element of the constitutional right to marry.” Id. At 435. After Proposition 8, the California Court decided the same sex couples still had a fundamental

The idea that marriage has an important expressive dimension is also evident from the way scholars discuss it. As David Chambers argued in his support of gay marriage, “marriage is the single most significant communal ceremony of belonging.”⁷⁸ Carol Sanger notes that civil marriage “is a convention that signals an acceptance of certain obligations. It does so publicly (often ceremoniously) and as a matter of law.”⁷⁹ Cass Sunstein has argued that the right to marry counts as fundamental only “because of the expressive benefits that come from official, state-licensed marriage.”⁸⁰

That marriage must serve some kind of expressive function becomes clear once one looks at the history of marriage. Every state and every religious tradition, at least for the last 600 years, has required that a witness be present at the marriage ceremony.⁸¹ Marriage, unlike other promises that we might ask the law to regulate, cannot be made “just” between two people. Others must be there. One needs to find a Justice of the Peace or a judge or minister even if one does not want a party with friends or family.

Common law marriage, the equitable legal doctrine through which courts conferred marital status on people who cohabited and acted as if they were married, has always required the parties to hold themselves out to the public as

right to the legal incidents of marriage, though not a fundamental right to the label itself. See *supra* text accompanying note 2. In essence, the court conceded what this article argues, which is that the right to a family status label is cabined by social norms regarding the social meaning of that status. Proposition 8 clarified the social norms.

As mentioned, Iowa and Connecticut rooted the right to marry in equality principles, see *Varnum*, 763 NW2d 862, and *Kerrigan*, 951 A2d, 407, which allowed the court to speak less about the nature of marriage itself and more about discrimination. Massachusetts did not reach the question of whether there was a fundamental right to same sex marriage. See *supra* notes 19, 50

⁷⁸ Chambers, *supra* note 48 at 450.

⁷⁹ Carol Sanger, *A Case for Civil Marriage*, 27 CARD. L. REV. 1311,1317 (2006).

⁸⁰ Sunstein, *supra* at 2096

⁸¹ See GEORGE P. MONGER, *MARRIAGE CUSTOMS OF THE WORLD: FROM HENNA TO HONEYMOONS*, (“The most important thing (about a wedding ceremony) . . . is that it be public;”) Edith Turner & Pamela Frese, *Marriage*, in *ENCYCLOPEDIA OF RELIGION*, Vol. 8 2d 2d. (“Two elements are used to mark a marriage whether there is a ceremony or not: the sharing of food between the bride and groom . . . and the necessity of a public statement on the requirement of witnesses.”) In Catholic history, the requirement that a priest be present at the ceremony started out as a custom, but later became a requirement. Glendon, *supra* note at 24. The Jewish tradition asks at least 2 or 3 witnesses to sign the Ketubah as evidence of their witnessing the promise. Muslim ceremonies also require witnesses. See Monger, *supra* this note at 170. Every state in this country requires someone, either an agent of the state or of a religious faith or some third party specially deputized for the task to be present at the marriage ceremony. It simply is not marriage if there is not someone else there.

married.⁸² Historian Nancy Cott entitled her comprehensive review of American marriage, “Public Vows.”⁸³ If marriage were only about privacy, as the Supreme Court’s rhetoric sometimes suggests,⁸⁴ than none of these public requirements would make any sense. The ubiquitous public requirements of marriage suggest that at some fundamental level marriage is about making a statement to others.

Expressive potential is necessarily limited by social meaning, however. Getting married makes a statement because of what people understand marriage to mean. Commitment is a part of that meaning, but it is not necessarily the only part of that meaning. The totality of the social meaning of marriage is indubitably informed by historical understanding. Marriage simply would not mean the same thing if it were created yesterday.

Thus, to the extent that the constitution protects people’s ability to secure marital status because marriage serves as a form of expression, that protection must be limited by social meaning. What “others know immediately”⁸⁵ about the statement of marriage depends on what others think marriage is, and that social understanding is not fixed. Marriage means something different today than it did 100 years ago. To some, that contemporary meaning is clearly capacious enough to include gay men and lesbians.⁸⁶ To others, it is not.⁸⁷ The fundamental rights language in *Loving* suggests that interracial marriage, even if nowhere near normative, was not inconsistent enough with the social meaning of marriage to permit states to ban it.”⁸⁸ The plaintiffs in *Zablocki* and *Turner* were entitled to marital status because what they were claiming was a right to express themselves through a very traditional form of marriage. As Sunstein notes, “the expressive benefits of marriage are contingent on a particular constellation of social norms; there is nothing inevitable about them.”

⁸² “[O]ne element essential to the proof of . . . [common law marriage] . . . is a general and substantial holding out or open declaration to the public . . . There can be no secret common law marriage.” In re Estate of Dallman, 228 NW2d 187, 190 (Iowa 1975)..

⁸³ See NANCY COTT, PUBLIC VOWS (2000).

⁸⁴ In *Griswold v. Connecticut*, 381 US 479 (1965) the Supreme Court held that married couples enjoy a privacy right that entitles them to use contraception. In Part IV, I suggest that marital privacy includes a right to be treated as an autonomous marital entity, but in this Part I argue that the Constitution also protects a right to marriage as expression. This right cannot be considered a privacy right because it is inherently public.

⁸⁵ See *supra* note 75.

⁸⁶ See *supra* note 11 (poll showing how many Americans believe that same sex couples should be allowed to marry). See also Goodridge, *supra* note 22 (no rational reason to restrict marriage to opposite sex couples)

⁸⁷ *Lewis v. Harris*, 908 A.2d 196 (NJ 2006) (accepting the state’s right to define the social meaning of marriage in heterosexual terms). As suggested, the voters defined the social meaning of marriage in California when they passed Proposition 8. See *supra* note 77

⁸⁸ Sunstein *supra* note 8 at 2098.

B. Parenthood

The Supreme Court cases addressing parental status suggest that the rights of people to secure parental status are also “contingent on a particular constellation of social norms.”⁸⁹ For the most part, parentage, like marriage, is a question of state law. State parentage acts determine who enjoys presumptions of parenthood (a woman giving birth to a child, for instance, or a man married to that woman or a man listed on a birth certificate), and what procedures, if any, exist for rebutting those presumptions.⁹⁰ State law also determines when a parent can be displaced as a parent, by whom, and when.⁹¹ For years, state statutes have assigned paternal status in cases of artificial insemination⁹² and

⁸⁹ Id.

⁹⁰ Virtually all states have parentage acts establishing not only presumptions of parenthood, but statutes of limitations for contesting those presumptions. Today, most states allow most presumptions of parenthood to be rebutted with DNA evidence, but the ability to do so can be limited temporally both by statutes of limitations, see e.g., Cal. Fam Code §§ 7540-7541 (giving those who wish to challenge a presumption of paternity two years from the discovery of relevant facts) and estoppel principles. See *Markov v. Markov*, 758 A.2d 75, 81 (Md. 2000) (denying husband right to challenge paternity because he accepted role as father despite having had a vasectomy before the children were born); *In Re Cheryl*, 746 NE2d 488, 497 (Mass. 2001) (holding non-biological father responsible for child support because he continued to fill the role of father even after acquiring reason to believe he as not the father)

⁹¹ See Uniform Parentage Act (2002). As a preliminary indication of how complicated parentage questions can become, the first Comment to the Act notes “[f]our separate definitions of ‘father’ are provided by the Act to account for the permutations of a man who may be so classified.” The Uniform Act generally requires that claims to establish paternity be brought within two years of the child’s birth, §607, or two years of an acknowledgement of paternity, §609. Actions to disestablish paternity of a presumed father may be brought at any time, but only if the presumed father never had sex with the mother at the probable time of conception and never held himself out as father. §607. The cases make clear that courts’ willingness to change a presumed father’s status is very fact specific. A genetic father can sometimes displace a presumed father but not always. A presumed father can sometimes relinquish his status if he can find the biological father or if the biological father willingly comes forward. On the other hand, if two men are competing for the status of father (or competing not to be the father) courts often disregard biology altogether and use a Best Interest of the Child standard to determine paternity. See Baker, *Bargaining or Biology*, *supra* note 38 at 12-14.

⁹² See e.g. Uniform Parentage Act, *supra* note 91, §§704, 705. Often, these statutes distinguish between formal inseminations performed by a licensed physician and those performed informally. The husband of the impregnated woman is considered the father if the insemination was done by a licensed physician, but not necessarily if it was not. See e.g. CALIF. FAM. CODE §7613 (2003). Although there may be reasons for making this distinction (a licensed physician lobby, for one), it is not clear that those reasons have

state statutes now routinely designate who should be considered the mother in cases of surrogacy.⁹³

Nonetheless, the Supreme Court has recognized some constitutional right to be declared a parent. In 1972, Peter Stanley, who had lived with his three biological children and their mother for most of the children's lives, challenged an Illinois dependency statute that presumed the children to be parentless if their unwed mother was dead.⁹⁴ The Court held that the Constitution guaranteed a man who had "sired and raised"⁹⁵ his children, an opportunity to be heard before the state could declare his children wards of the state. Thus, the Constitution seemed to protect Stanley's right to the legal status of father.

Several years later, Leon Quilloin tried to block the adoption of the 11 year old child he had sired (though never lived with) using a comparable claim: The Constitution guaranteed him rights as a father, including the right to keep someone else from becoming the father, because Quilloin had sired the child, periodically paid child support and seen the child on occasion.⁹⁶ The Supreme Court readily dismissed Quilloin's claim, finding that whatever constitutional interest Quilloin had in being a father was adequately protected at a Best Interest of the Child hearing in which a judge found that the child's best interest would be served by vesting fatherhood in someone else. Quilloin was stripped of his status as father.

A potential father named Robert Lehr tried again. He argued that the mother of his biological two-year old girl had prevented him from developing any kind of relationship with the girl and that fact, coupled with his biological connection and his willingness to assume parental responsibility, should guarantee him the right to block the child's adoption by another man.⁹⁷ The Court said no, finding that Lehr's failure to develop a relationship, even if it was due to the mother's intransigence, minimized any constitutional claim he might have. The Court explained: "Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring."⁹⁸ The state court was free to vest fatherhood in someone else.

much to do with protecting the interests of those whom we normally think of protecting in parentage determinations.

⁹³ See Institute for Law Science and Technology, *The Laws of Reproductive Technology*, <http://www.kentlaw.edu/islt/reprotech.html>.

⁹⁴ Stanley v. Illinois, 405 US 645 (1972).

⁹⁵ Id., 405 US at 651.

⁹⁶ Quilloin v. Walcott, 434 US 246 (1978)

⁹⁷ Lehr v. Robertson, 463 US 248 (1983).

⁹⁸ Id. At 260 quoting Caban v. Mohammed, 441 US 380, 397 (1979) (Stewart, J. dissenting). Caban involved a successful claim for paternal status, though the court decided the case as a matter of sex discrimination. Mr. Caban was trying to block the adoption of his children by another man, but what distinguished him from Quilloin was

In 1989, Michael H. seemed poised to capitalize on the idea that one's constitutional right to status as father turned on the twin requirements of biology plus relationship. Michael H. could establish that he was the biological father of a child, Victoria, whom he had lived with from time to time, who called him Daddy, and whom he had supported (though others had as well) throughout her life. The Court nonetheless rejected Michael's assertion that he had a constitutional right to be declared the father, finding that the state was free to vest paternal status in the husband of the biological mother, who had also supported Victoria, who was still married to the mother and who was willingly accepting paternity. The California statute at issue embodied a centuries old marital presumption of paternity.⁹⁹ Thus, the Court held that the Constitution did not stand in the way of the state conferring parental status on the husband of the mother in the same way it always had.¹⁰⁰

The potential fathers in these parenthood cases probably wanted more than just status. They wanted the rights, and maybe even the obligations, that accompany parental status.¹⁰¹ It is important to underscore though, that particularly at the time these cases were decided, most of these men would have gotten minimal visitation time with their children and no right to major parental decision-making.¹⁰² Judges routinely gave the vast amount of custodial time and

that he had developed a much more extensive relationship with his children. Given that relationship between father and children, the Supreme Court held that the mother and father were similarly situated and that therefore the adoption statute could not treat mothers and fathers differently for purposes of securing their consent to adoption. The *Lehr* court's subsequent decision strongly suggests that the relationship Mr. Caban developed with his children strengthened a constitutionally protected liberty interest in his children as well as his equal protection claim. See *Lehr*, 463 US at 267-268 (describing how a father's actual relationship with his child strengthens his liberty interest in paternal status for due process purposes and makes him similarly situated to the mother for equal protection purposes).

⁹⁹ See Baker, *Bargaining or Biology*, *supra* note 38 at 22-25 (analyzing the strength of and rationale behind the marital presumption of paternity.)

¹⁰⁰ As noted in the introduction, though, Justice Stevens, the swing vote, opted against giving Michael the right to parental status because the California statute already provided interested third parties (including Michael) a right to petition for the rights traditionally associated with parenthood. In other words, Justice Stevens thought Michael was entitled to the rights of parenthood, but not necessarily the status. 491 US 133-134 (Stevens, J. concurring in the judgment)

¹⁰¹ Comparably, the plaintiffs in *Loving*, *Zablocki* and *Turner*, see *supra* text accompanying notes 59-64, probably wanted the rights (and maybe the obligations) of marriage, not just the status.

¹⁰² The exception to this is Stanley, who, because there was no other parent at the time he petitioned, would have enjoyed exclusive parental rights.

all major decision-making authority to the custodial parent.¹⁰³ Most of what these men were fighting for was the right to be called a father. That parental status entitled one to exclude someone else from having the label father, but little else substantively. Thus, it seems likely that these men cared so much about the label father not because of the rights that accompanied it, but because the label itself had social value and social meaning.

Quilloin, *Lehr* and *Michael H.* all suggest limits on the scope of any constitutional right to parental status, but they also all take the question seriously. That is to say, none of them suggest that *Stanley* was wrongly decided and none of them simply state that the state is free to confer parental status on whomever it wants, free from any constitutional constraint on the definition of parenthood. In a thoughtful essay, Professor David Meyer has suggested that this limited, though probably existent, constitutional protection of parental status may be analogous to the constitutional treatment of property.¹⁰⁴ The Constitution forbids states from taking property¹⁰⁵ even as it gives states the extensive discretion to define it.¹⁰⁶

Virtually everyone concedes that states have the ability to modify the requirements of adverse possession or adopt a different rule for ground water use or tinker with the Rule Against Perpetuities, even though all of those changes affect property rights.¹⁰⁷ Comparably, few people question the state's ability to honor, or not, surrogacy contracts, to recognize, or not, second-parent

¹⁰³ See L. HARRIS, L. TEITELBAUM, J. CARBONE, FAMILY LAW 622-23 ("When the best-interest standard first took hold, the courts were convinced that custody needed to be awarded to one, and only one parent. . . . [T]he participation of the other parent . . . depended on the cooperation of the custodial parent. Certainty in decision-making authority was considered essential."); ALI PRINCIPLES, *supra* note 34 at § 2.08 cmt. a ("Traditionally, one parent received custody of a child . . . while the other parent was awarded visitation. Visitation . . . [was] . . . often quite minimal.")

¹⁰⁴ David D. Meyer, *Partners, Care Givers, and the Constitutional Substance of Parenthood*, in RECONCEIVING THE FAMILY, *supra* note 43 at 47, 61.

¹⁰⁵ U.S. Const., Amendment V.

¹⁰⁶ "Property interests are not created by the Constitution, 'they are created and their dimensions are divined by existing rules or understandings that stem from an independent source such as state law.'" *Cleveland Bd. Of Educ. v. Loudermill*, 470 US 532, 538 (1985) quoting *Bd. Of Regents v. Roth*, 408 US 564, 577 (1972). See also Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393, 1402, 1415 (1991) (Property rights serve "twin roles – as protector of individual rights against other citizens, and as safeguard against excessive government interference." "To reconcile American Law's double-edged reliance on property concepts, [we] must successfully distinguish between the courts' role as definers and defenders of property rights.")

¹⁰⁷ See JOSEPH SINGER, PROPERTY LAW: RULES, POLICIES AND PRACTICES 953-54 (4th ed., 2006)

adoption,¹⁰⁸ to determine, for the most part, who is entitled to parental status. This does not mean that states have the right to redefine property or parenthood beyond social recognition, however. Just as community expectations, or the social meaning of property, help set limits on state's ability to expand or contract property interests,¹⁰⁹ "social expectations about the nature of parenthood are likely to apply a constitutional brake on state-law efforts to withdraw and reassign parent status."¹¹⁰

C. Summary

Social expectations about the nature of marriage and parenthood inform the constitutional inquiry with regard to those statuses. Both marital and parental status bring with them rights and obligations, but the statuses have meaning apart from those rights and obligations. People claiming a right to marital or parental status are claiming a right to have their relationship understood by others in certain commonly understood ways. In granting family status, the state itself expresses something (that this is a relationship worthy of state-conferred status),¹¹¹ but it also enables the recipients of the status to proclaim to the world their unique relationship to another person. The analysis of marriage, which is perhaps more readily seen as expression, helps elucidate how claims to parental status are expressive claims also.

Expressive claims to status are necessarily cabined by the social meaning of that status, but nontraditional relationships can put pressure on and force courts to confront that social meaning. *Loving* recognized the legitimacy of a still very rare form of marriage and *Stanley* recognized the legitimacy of unwed fatherhood, an even more suspect form of parenthood then than it is now. In each case, though, the courts found that the plaintiffs were entitled to call themselves, respectively, "married" and "parent," notwithstanding the wide discretion that states have to determine access to and the substantive requirements of marriage and parenthood.

IV. THE CONSTITUTIVE RIGHT TO RELATIONSHIP

The legal incidents of marriage and parenthood provide those with rights to them some well-known legal advantages. One gets to visit one's family member

¹⁰⁸ Second parent adoption is the term of art used to describe adoption by two parents of the same gender. It is called "second parent" adoption because, usually, a new parent is adopting without any former parent relinquishing parental rights. See *Sharon S. v. Superior Ct.*, 73 P2d 554 n.10 (Cal. 2003).

¹⁰⁹ See Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 939 (2000) (Supreme Court's protection of property deeply informed by "general expectations about kinds of interests that are commonly regarded as being property in our society.")

¹¹⁰ Meyer, *Partners*, *supra* note 104 at 62.

¹¹¹ See *supra* note 52.

in the hospital. If needed, one gets to make decisions on behalf of one's family member. One gets to inherit one's family member's property if the family member dies intestate. There are many benefits attendant upon securing the legal incidents of marriage and parenthood, but those legal incidents can also be seen as thoroughly restrictive.

These are the kind of constraints the law imposes on married people. One loses control over approximately 50% of all the earnings one brings to the marriage.¹¹² One significantly curtails one's ability to pursue any non-remunerative life activity, if in so pursuing, one would be unable to meet future support obligations to one's spouse.¹¹³ One loses the right to mortgage any property held in tenancy by the entirety, unless one's spouse agrees. One loses the right to petition a court to enforce many explicit and implicit agreements between one's spouse and oneself, particularly if those agreements pertained to duties thought intrinsic to the marriage.¹¹⁴ One also often loses the right to keep inherited property if that property was used by both parties to the marriage.¹¹⁵ One loses the right to testify in court about what one has heard, if one's spouse

¹¹² In non-community property states, this is not technically true because the property is not conceived of as "marital property" until the divorce proceeding, but, at divorce, whether in a community property or equitable distribution regime, all earnings earned during the course of the marriage are considered property subject to distribution at divorce. See ELLMAN ET AL., *supra* note 67 at 270-276. Most jurisdictions divide marital property approximately evenly at divorce, *id.*, though sometimes the primary wage earner or the spouse with access to more other resources is left with significantly less than 50% of the marital property. See *In Re Marriage of Pierson*, 653 P.2d 1258 (Or. 1982) (wife got less than 50% of the marital property because she came into an inheritance after the couple had split.)

¹¹³ All states provide for some spousal maintenance in some instances. After some movement away from substantial spousal maintenance awards in the 1970s and 80s, the current trend is toward more substantial maintenance awards. See generally, ALI PRINCIPLES, *supra* note 34, Chapter 5.

¹¹⁴ *Balfour v. Balfour*, L.R. 2 K.B. 571 (C.A. 1919) (most agreements between husband and wife are not meant to be enforceable at law); *Borelli v. Brousseau*, 16 Cal. Rptr. 16 (Cal. App. 1993) (refusing to enforce a promise to leave more money for spouse because for lack of consideration because wife's promise to care for and support her husband was part of her marital duty); see generally, Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 Harv. L. Rev. 492 (2005) (law does not compensate women for work performed in marriage).

¹¹⁵ In some community property states, inherited property is considered marital property. See HARRIS, TEITELBAUM *supra* note 103 at 48. Many equitable distribution states treat any commingled property as marital property. For instance, in Illinois "the affirmative act of augmenting nonmarital property by commingling it with marital property" creates a presumption that the nonmarital (inherited) property is subject to distribution as marital property. See *In re Marriage of Smith*, 427 N.E.2d 1239, 1245-46 (Ill. 1981).

said it.¹¹⁶ In some states, one loses the right to sue one's spouse in tort, particularly if the tort was unintentional.¹¹⁷ Given this formidable – and not even complete – list of restrictions on one's autonomy, one might question why so many people are clamoring for the right to get married.¹¹⁸

The obligations the state imposes on parents are less numerous, but arguably stricter and more onerous. Once one is a legal parent, one simply loses the right to walk away from that relationship unless the state and the other parent agrees.¹¹⁹ One cannot unilaterally divorce one's child. A parent is obligated to support his or her child until the child is at least 18 years old. If one is a custodial parent – regardless of how the other parent left – one is responsible for physically caring for the child. Failure to do so is a criminal offense.¹²⁰ If one is a non-custodial parent, one loses the right to allocate one's resources for one's children as one chooses. In all states, parental support obligations are set

¹¹⁶ The spousal communications privilege treats as privileged any communication made in confidence from one spouse to another as long as the spouses are not accusing the other of wrongdoing. See GEORGE FISHER, EVIDENCE 839-841 (2002). Most jurisdictions extend the privilege to both the communicator and the listener, meaning that the either spouse can bar the other from revealing marital confidences. *Id.*

¹¹⁷ For a comprehensive discussion of the state of interspousal tort immunity, see Carl Tobias, *Interspousal Tort Immunity in America*, 23 Ga L Rev 359 (1989).

¹¹⁸ The idea that the acceptance of pre-nuptial agreements allows most of these obligations to be overridden by private contract is much exaggerated. The Uniform Premarital Agreement Act, adopted in the early 1980s suggested that premarital agreements should be interpreted like other commercial contracts, but many courts and the recent ALI PRINCIPLES soundly reject that standard, advocating instead some sort of review under the traditional unconscionability standard and/or procedural protections. See Ellman et al., *supra* note 67 at 737-766. Unconscionability is defined with reference to what the spouse would be entitled to under the state marital property distribution rules. Perhaps most persuasive to this author are comments relayed to me one day over lunch, by a practicing family law attorney in Chicago. He said “I don’t know a family law attorney who doesn’t think he can beat any prenup he sees.” (Comments of Joel Levin, June, 2007). Even if this statement exaggerates the situation somewhat, it suggests that there are significant and possibly insurmountable costs and roadblocks to contracting around the background marital property distribution rules.

¹¹⁹ One cannot effectively relinquish parental rights (put the child up for adoption) unless the other parent relinquishes also. If one legal parent wants to be a parent and the other parent does not, the first parent still has the right to hold the second parent responsible for child support. See Baker, *Bionormativity*, *supra* note 37. Once the child is old enough, even if both parents want to relinquish parental rights, it is highly unlikely the state would accept their relinquishment because it is highly unlikely the child could be adopted.

¹²⁰ The first parent to abandon a child is not charged with neglect as long as there is someone else to provide for the child. But if the “last parent standing” exercises similar agency, he or she is charged with abandonment and neglect. ELLMAN ET AL, *supra* note 67 at 1127-1139 (discussing general provisions for civil and criminal child abuse and neglect proceedings).

pursuant to rigid guidelines which allocate resources to the child based on a percentage of what the non-custodial parent earns.¹²¹ The constitutionally protected parental “right to the companionship, care, custody and management of . . . children [may be] . . . an interest far more precious than any property right,”¹²² but there seems much in the law of parenthood that is detrimental to parents’ autonomy and property interests.

Why do people care so much about entering into these statuses in which they compromise so much liberty and property? It is not just because of the expressive value that comes from making these commitments. To put it in economic terms, it is not just because when one weighs the benefits of the expressive utils, against the negative utility associated with the restrictions on autonomy and property, one still comes out ahead. It is instead because the restrictions on autonomy and property inform and enrich the relationships involved, thus providing their own form of positive utility. The legal incidents of marriage and parenthood, though sometimes harsh and restrictive, give meaning and content to those relationships and make them, hopefully, independent sources of happiness, autonomy and identity. Thus, the legal restrictions which so obviously inhibit individuals’ ability to shape their own lives as individuals help create relationships through which people (re)constitute themselves as something other than individuals.

A. The Law and the Importance of the Adult Relationships

1. Marriage as Constitutive

Contrary to the once popular slogan suggesting that people need relationships the way fish need bicycles,¹²³ it is by now conventional psychological wisdom that “[p]eople are constructed in such a fashion that they are inevitably and powerfully drawn together . . . wired for intense and persistent involvements with one another.”¹²⁴ Most of the pre-eminent latter 20th century psychoanalytic theorists constructed and worked within paradigms that assumed the primacy of relationship.¹²⁵ The foundational work of both Ronald Fairbairn and John

¹²¹ See Katharine K. Baker, *Supporting Children, Balancing Lives*, 34 PEPP. L. REV. 359, 362-363 (2007)(explaining child support guidelines).

¹²² *Santosky v. Kramer*, 455 US 745, 758 (1982) (quoting *Stanley v. Illinois*, 405 U.S. at 651).

¹²³ “A woman needs a man as much as a fish needs a bicycle.” None of the relational theory analyzed in the forthcoming paragraphs suggests that heterosexual attachment is necessary, only that attachment is necessary. Individuals need to exist in relationship much more than fish need bicycles. Who those relationships are with may not matter that much at all.

¹²⁴ STEPHEN MITCHELL, *RELATIONAL CONCEPTS IN PSYCHOANALYSIS: AN INTEGRATION* 22 (1988)

¹²⁵ Object-relations theory, upon which much of the following argument is based, was originally shunned by the American Psychoanalytic Association, but later was

Bowlby rested on the notion that one of, if not *the*, central human motivation is finding and maintaining strong emotional bonds.¹²⁶ Libido, in the words of Fairbairn, is “primarily object-seeking” not pleasure seeking.”¹²⁷ Law professor Kenneth Karst puts it in less technical language, “to be human is to need to love and be loved.”¹²⁸ Seeking relationships is a critical part of what human beings do. In turn, those relationships become a critical part of who human beings are.

That the law, particularly constitutional law, has seemed somewhat confused about the importance of relationship is not particularly surprising. Most liberal and social contract theory assumes that human beings are ontologically autonomous.¹²⁹ Isolated individualism is thought to be the primal human state, and the Bill of Rights was arguably drafted to protect people’s ability to maintain their distinctive individual identity free from state interference.¹³⁰ From a social contract perspective, people can be legally situated in relationship with others and develop obligations to those others only because those people consented to those relationships and obligations.¹³¹

At some exceedingly broad level, one can characterize both marriage and parenthood as choices in this way – one consents to be married for better or worse and one assumes the risk of onerous burdens when one becomes a parent - but choice is a remarkably thin way to describe how most people experience their familial obligations. One does not choose to take care of a permanently disabled spouse or choose to love an obstinate, rude and disloyal child; one just does it. It is more instinctive than chosen precisely because one is not just an individual who made commitments that may or may not have been chosen. Instead, one is part of a unit. As George Fletcher writes, when it comes to explaining one’s

incorporated into psychoanalytic thinking. See PETER FONAGY, ATTACHMENT THEORY AND PSYCHOANALYSIS

¹²⁶ MITCHELL, *supra* note 124 at 23-29

¹²⁷ Ronald Fairbairn, *An Object-relations Theory of the Personality* 84 (1952). See also *id.*, at 31 (“The ultimate goal of the libido is the object . . .”) The notion that the human desire for sex is related to the human desire for relationship could have important implications for understanding why and the extent to which the constitution protects sexual experience. See Ian Ayres and Katharine K. Baker, *A Separate Crime of Reckless Sex* 72 U. CHI. L. REV. 599, 662 (2005) (arguing that when it has protected sexual activity, the Supreme Court has been careful to define that activity as an important element of expression within a *relationship*, not a protected activity in and of itself)

¹²⁸ Kenneth Karst, *The Freedom of Intimate Association*, 89 YALE L. J. 624, 632 (1980).

¹²⁹ For a discussion of how both liberal and critical legal theorists conceptualize the self as ontologically autonomous see Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 14-15 (1988) .

¹³⁰ NANCY HIRSCHMAN, *RETHINKING OBLIGATION: FEMINIST METHOD FOR POLITICAL THEORY* 5 (1992).

¹³¹ *Id.*

primal loyalties, “logic runs dry and one must plant one’s loyalty in the simple fact [of belonging.]”¹³²

One meets others’ needs in family relationships because the interdependence that demarcates family obfuscates one’s sense of self. In Fletcher’s language “the distance between subject and object” is blurred.¹³³ Milton Regan writes that individuals core attachments “are not externally related to their self-conceptions. They are constituent of their identities and . . . premises for their agency.”¹³⁴ Karst comments that “our intimate associations are powerful influences over the development of our personalities.”¹³⁵ Loyalties and duties to the other are not something that one has earned or that one owes or that one chooses to accept, they are a matter of self-interest because the self and the other have become one.¹³⁶

The choice to enter a relationship is thus not just an expression about who one wants to be with, it is a choice that alters who one is.¹³⁷ It is constitutive as well as expressive.¹³⁸ Moreover, as Regan suggests “spouses . . . don’t simply help each other construct separate individual identities . . . [T]hey participate in the creation of a shared identity.”¹³⁹ When the law recognizes marriage, the shared identity created by the relationship comes to have a legal status – an autonomy - of its own.

As a matter of doctrine, the Supreme Court has recognized this form of marital autonomy only once, in *Griswold v. Connecticut* – when it articulated a

¹³² GEORGE FLETCHER, LOYALTY 61 (Here Fletcher is talking about the experience of loyalty generally. When discussing spouses in particular, he suggests that the marital evidentiary privileges essentially operate as privileges against self-incrimination because the distance between the object and the subject becomes so blurred that hurting one’s spouse is hurting oneself. *Id.* At 81).

¹³³ *Id.*

¹³⁴ MILTON REGAN, ALONE TOGETHER : LAW AND THE MEANINGS OF MARRIAGE 24 (1998).

¹³⁵ Karst, *supra* note 128 at 636.

¹³⁶ See LAURENCE D. HOULGATE, FAMILY AND STATE 39 (1988) (describing solicitude not as something that he owes his family members but as instinctive obligation) See also, MILTON REGAN, FAMILY LAW AND THE PURSUIT OF INTIMACY 113 (1993) (one dives into to save a drowning child (or spouse) as much to serve one’s own interest as the other’s.)

¹³⁷ Or at least it can alter who one is and, for relationships that do work out, it does alter who one is.

¹³⁸ For more on the constitutive aspects of accepting responsibility, see Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959 (1992) (developing the constitutive responsibility paradigm and suggesting that a person’s responsibilities define who a person is)

¹³⁹ REGAN, FAMILY LAW *supra* note 136 at 94.

right to marital privacy that allowed married couples to use contraceptives.¹⁴⁰ In *Griswold*, the court famously wrote:

Marriage is a coming together for better or for worse, hopefully enduring and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.¹⁴¹

Seven years later, in *Eisenstadt v. Baird*¹⁴² when the court found that unmarried individuals also had a right to contraceptives, Justice Brennan suggested that marital autonomy might not exist at all. “[T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.”¹⁴³

There is very little way to square this individualistic language in *Eisenstadt* with the notions of unity in *Griswold*.¹⁴⁴ Technically, one need not do so because subsequent cases strongly suggest there is an individual right to be free from state interference into reproductive decision-making (a right that would attach to the plaintiffs in both *Eisenstadt* and *Griswold*).¹⁴⁵ But if *Griswold* is nothing more than a case about contraception, it would make no sense to quote it, as the Supreme Court has consistently done, in the later cases having to do with family relationships in general and marriage in particular.¹⁴⁶ Moreover, there is a long,

¹⁴⁰ 381 US 479, 484 (1965). In finding a right to marital privacy, the Court relied heavily on cases that afforded privacy to the relationship between parents and children, *Meyer v. Nebraska* 262 US 390 (1923) (state cannot prohibit parents from hiring someone to teach their children a language other than English) *Pierce v. Society of Sisters*, 268 US 510 (1925) (state cannot require children to attend public school if there is an adequate private alternative).

¹⁴¹ 381 US at 486.

¹⁴² 405 US 438 (1972) (*Eisenstadt* involved state restrictions on the distribution of contraceptives to unmarried people.)

¹⁴³ 405 US at 453.

¹⁴⁴ See *supra* note 76.

¹⁴⁵ See *Roe v. Wade*, 410 US 113 (1973) (restricting the state’s ability to prohibit abortion); *Planned Parenthood v. Danforth*, 428 US 52 (1976) (striking down required spousal notification before abortion decision); *Planned Parenthood v. Casey*, 505 US 833 (1992) (“Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationship, child rearing . . .”)

¹⁴⁶ See *Stanley v. Illinois*, 405 US 645, 651 (1972) (involving the right to paternal status, citing *Griswold*); *Smith v. OFFER*, 431 US 110, 123 (1977) (involving the constitutional rights of foster parents, citing *Griswold*); *Moore v. City of East Cleveland*, 431 US 494, 495 (1977) (involving the rights of extended family members to be treated as a family, citing *Griswold*); *Zablocki v. Redhail*, *supra* note 55, 434 at 385 (right to marry, citing *Griswold*); See also *In Re Marriage Cases*, *supra* note 1, 49 Cal Rptr 3d at 715 (right to

deep and venerable common law history of treating the marital unit as an entity, with an autonomy of its own.¹⁴⁷ Justice Brennan completely ignored this well-established law in suggesting that married people do not constitute a unit. The law has always treated married people as an entity for economic, evidentiary, and other legal purposes.¹⁴⁸ In Martha Fineman's words, the doctrine "articulate[s] . . . what might be characterized as an ethic or ideology of family privacy,"¹⁴⁹ which she goes on to re-articulate as autonomy.

The autonomous treatment the law affords relationships enables a universe, or at least a community, that serves as a buffer against the outside world. "When we come home to our families," writes Laurence Houlgate "we return to a relationship of intimacy, defined by conditions of mind, not overt action, by trusts and devotion, instead of formal rules and duty."¹⁵⁰ The abstract and formalistic relationships that define most peoples' non-family life leave us searching for relationships that operate differently. Families provide those relationships by "emphasizing 'shared commitment' rather than rules."¹⁵¹

In her analysis of Americans' understanding of fairness, Jennifer Hochschild observes that norms of distribution and desert vary in different realms.¹⁵² In the socializing domain (which she describes as family, school, and friends) norms of equality and need predominate. What one is entitled to (love, care, even material goods, sometimes) depends not on what one has accomplished or what one promised, but simply on the fact that one is a member of that domain. Indeed,

marry, citing Griswold); *Goodridge v. Dept. of Pub Health*, supra note 7, 798 NE2d at 955 (right to marry, citing Griswold).

¹⁴⁷ *McGuire v. McGuire* is the most famous case. 59 NWd 336 (Neb. 1953). In *McGuire*, the Nebraska court refused to find justiciable a wife's claim to a higher living standard even though it was clear that the couple could afford to live more comfortably.

¹⁴⁸ The legal treatment of the marital relationship has been subject to severe criticism by feminists, see Reva Siegal, "The Rule of Love:" *Wife Beating as Prerogative and Privacy*, 105 YALE L. J 2117, 2161-2170 (notion of marital unity emerged to bar women from suing their husbands even as the common law evolved to allow married women to sue others in tort and contract.) Siegal refers the ways in which the law maintains traditional coverture principles that rob married women of their rights as individuals as "preservation through transformation." *Id.* at 2121. See also Katharine B. Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NORTHWESTERN L. REV. 1, (1996) (demonstrating how the law views women's labor as intrinsic to the marital relationship, not as an independent source of entitlement.) Part IIIB2 elaborates on the feminist critique of marriage.

¹⁴⁹ Martha Fineman, *What Place for Family Privacy*, 67 GEO WASH L REV 1207, 1215 (1999)

¹⁵⁰ HOULGATE supra note 136 at 35.

¹⁵¹ Karst, supra note 128 at 639.

¹⁵² Jennifer Hocschild, *What's Fair: American Beliefs About Redistributive Justice* 47-50 (1981).

psychological literature suggests that “promoting an ‘exchange orientation’ may be inimical to the process of establishing intimacy. It leads people to monitor their partners and keep running accounts in a way that makes momentary violations [too] salient. . . .”¹⁵³ It is being in the family, not what one does in the family that determines entitlement, just as it is being in the family, not what one has promised, that determines obligation.¹⁵⁴ The strength of the familial norms of entitlement explain how family can operate as such a haven. One is entitled because one is of the family. One need not prove anything.

The law honors these alternative norms of entitlement by leaving the families alone while in tact and by emphasizing membership not contribution at dissolution. As Fineman writes, the “ideology of state non-intervention is rooted in idealization, but also references the perceived pragmatics of family relationships and the acknowledged limitations of legal . . . systems as substitutes for family decision-making.”¹⁵⁵ By refusing to import its own rules, the law encourages parties to work things out on their own, to forge their own sense of purpose as an entity, and to develop norms that facilitate their lives together. The process of working it out bolsters a sense of intimacy precisely because the abstract and formalistic rules of law have no relevance. There are no universal truths for relationships.¹⁵⁶

¹⁵³ John G. Holmes and Susan D. Boon, *Developments in the Field of Close Relationships: Creating Foundations for Intervention Strategies*, 16 PERS SOC PSYCHOL BULL 23, 27 (1990). See also Lenahan O’Connell, *An Exploration of Exchange in Three Social Relationships: Kinship, Friendship and the Marketplace*, 1 J. OF SOC AND PERS RELAT. 333, 341-342 (1984) (finding no reciprocity norm in exchanges between kin members and close friends. “Many believe that friendship and kinship bestow a license to request help without imposing any imperative obligation to reciprocate.”)

¹⁵⁴ The familial norm of entitlement is very different than one’s sense of entitlement in more public spheres. Hochschild suggests that inequality norms are acceptable and even preferable in the market domain, where there is an acceptable theory of desert that explains disparity. HOCHSCHILD, *supra* note 152 at 49. Equality is the operative norm in the political realm, but it is not material or emotional goods that are distributed in that realm, it is political rights. (To the extent that one asks Americans to view economic rights as political rights, they usually deny or transform the hypothetical. Id. At 48). Law plays a huge role in constructing the theories of desert in the market domain and in constructing the nature of the participatory rights in the political realm, but it plays much of less of a role in the social domain. It defines the social domain and then usually lets distributions within that domain work themselves out, until parties within the domain call on the law to interfere, i.e. at divorce or termination of parental rights.

¹⁵⁵ Fineman, *supra* note 149 at 1214.

¹⁵⁶ As Hillary Clinton commented at a time when the entire world was looking at her marriage through a microscope and wondering how it could possibly work, “I have learned a long time ago that the only people who count in any marriage are the two people that are in it.” Maureen Downey, *Saturday Talk*. THE ATLANTA JOURNAL AND CONSTITUTION, Jan. 31, 1998.

The intimacy and trust of family relationships, an intimacy and trust born from sharing not only day-to-day life, but also the “distinctly personal aspects of one’s life”¹⁵⁷ create “attachments and commitments”¹⁵⁸ that the law honors by making exit difficult and by refusing to interfere in most day-to-day life.¹⁵⁹ These restrictions are simultaneously taxing and liberating. “Bonds of lasting intimacy leave family members undeniably vulnerable, but the same relationships and loyalties that seem to tie us down are, paradoxically, the sources of strength most likely to lift us up.”¹⁶⁰

The law’s treatment of relationships thus privileges the entity over the individual. Through property rules¹⁶¹ explicit statutes,¹⁶² and common law duties,¹⁶³ the law sets norms not just for sharing, but for fusing, for making it difficult for individuals to think about their property or their needs as distinct from those of their partners. In setting these norms, the law facilitates the fulfillment what may be core - or at least a widely held - human needs to transcend self in the context of relationship.

When legal relationships dissolve and the law does get involved in distributing financial assets, courts do not focus on particular individual contributions or needs, at least if the relationship has been relatively long-lasting. For the most part, courts distribute all property earned during the marriage evenly, regardless of who earned it.¹⁶⁴ With regard to maintenance, the divorce reforms in the 1970s and 1980s endorsed the idea of making maintenance a

¹⁵⁷ *Roberts v. United States Jaycees*, 468 US 609, 619-20 (1984).

¹⁵⁸ *Id.* Regan also suggests that trust flows from the intimacy of day to day life. “Trust “can flow out of the progress of a relationship with another, as daily experience incrementally and almost imperceptibly creates a milieu in which persons come to trust each other. . . . “ REGAN, *ALONE TOGETHER*, *supra* note 134 at 25

¹⁵⁹ The refusal to interfere, as manifested in the spousal immunity doctrines, the evidentiary privileges and the common law doctrine of non-interference, see McGuire v. McGuire, *supra* note 147, is a common law, not a constitutional doctrine. It operates in much the same way as the constitutional doctrine of parental autonomy does though. See *infra* part IVB1.

¹⁶⁰ Bruce C. Hafen, *The Family as an Entity*, 22 U.C. DAVIS L. REV 865, 912 (1989).

¹⁶¹ See *infra* note 164-66.

¹⁶² See e.g. Cal. Civil Code §5132 “A married person shall support the person’s spouse while they are living together, “ § 4802 “a husband and wife cannot, by any contract with each other, alter their legal relationship, except a to property . . . “.

¹⁶³ For instance, the necessities doctrine requires a spouse, if able, to pay for another spouse’s “necessaries.” See ELLMAN ET AL, *supra* note 67 at 159-161.

¹⁶⁴ At divorce, all property earned during the marriage is considered either community property (in community property states) or marital property (in common law jurisdictions). See HARRIS, TEITELBAUM AND CARBONE, *supra* note 34 at 98-40.

function of individual need or contribution,¹⁶⁵ but recent judicial and statutory trends have rejected these reforms as inimical to the idea of marriage and shifted the emphasis to the length of the marriage (the amount of time of belonging) not individual sacrifice or entitlement.¹⁶⁶ In other words, whatever one contributed or did as a spouse, if one was married for long enough, one is entitled to maintenance. It is the fact of belonging that matters.¹⁶⁷

2. Marriage as Oppressive?

This noble and psychological story about how and why the law respects relationship has thus far (purposefully) neglected to mention how very devastating the traditional treatment of relationship has been for many women, notwithstanding property and maintenance laws designed to protect them somewhat. As Lee Teitelbaum recognized over 20 years ago, “[w]hen courts refuse to resolve . . . [intra-family] disputes, that decision is sounded on the principle of family autonomy [H]owever, the practical consequence of many, if not all, of these decisions is to confer or ratify the power of one family member over others.”¹⁶⁸ Despite the reciprocal rights and obligations that the law imposed on husbands and wives, for hundreds of years, it was all too clear that the refusal of the law to interfere let a man abandon or ignore his obligations to his spouse and/or use force against his wife if he thought that, for any reason, she was ignoring her obligations.¹⁶⁹ Because women had so few options in life

¹⁶⁵ See ELLMAN ET AL, *supra* note 67 at 363-364 (discussing “reforms” in alimony laws) and at 380-386 (discussing the problems with the rationales that alimony “reform” relied on).

¹⁶⁶ See *id.* at 386 “Marital duration appears to be a critical factor for nearly every court asked to make an award for ‘support alimony’ – alimony with no definite termination date that is intended to provide the obligee with a more comfortable living standard.” . See also ALI PRINCIPLES *supra* note 34, § 5.04 Cmt. C “Despite the conceptual difficulties with the contract and contribution rationales, the cases reflect an enduring intuition that the homemaker in a long-term marriage has some claim on the other spouse’s post-divorce income. That intuition does not depend on any assumption that the parties made explicit promises to one another, but on the belief that the relationship itself gives rise to obligations. . . . The remedy is proportional to the marital duration because the obligations recognized under this section do not arise from the marriage ceremony alone, but develop over time as the parties’ lives become entwined.”

¹⁶⁷ Comparably, child support awards are set pursuant to rigid statutory grids as a way of preventing judges from making individual assessments about children’s needs or desires. What a child is entitled to is a function of the fact of her legal relationship to her parent, not as a function of her particular situation. See Baker, *Bargaining or Biology*, *supra* note 38 at 7-8.

¹⁶⁸ See Lee Teitelbaum, *Family History and Family Law*, 1985 Wis. L. Rev. 1135, 1144.

¹⁶⁹ See Elizabeth Schneider, *The Violence of Privacy* 23 CONN. L. REV. 973 (1991) (analyzing the myriad ways that privacy doctrine has allowed men to control and abuse women in marriage).

outside of marriage, they were completely dependent on the largesse of their husbands within it.

The fact that for centuries marriage has served as an institution that allowed the law to subordinate women's property interests and ignore women's physical and emotional well-being might well auger in favor of constitutional suspicion of marriage, not reification of it. One could easily argue that the equality principles embedded in the Equal Protection Clause require the law to scrutinize the ways in which the law privileges relationship precisely because, as Teitelbaum observed, by privileging relationships the law privileges the more powerful at the expense of the less powerful and thereby denies the less powerful full voice and participation in society.

Furthermore, the legal recognition of marriage may not be that important to women because they are already more likely to experience life as a web of connection to others. Women may not need marriage because they do not *crave* intimacy the way men do;¹⁷⁰ as Robin West writes, "We just do it. It is ridiculously easy."¹⁷¹ Perhaps, when the Supreme Court has referred to the human flourishing that marriage enables,¹⁷² it has been seeing the world through a distinctly male lens, and whatever values may be served by fostering the intimacy of marriage, those values pale in comparison to the equality concerns that seem antithetical to it.

Reasonable minds may well disagree on this question. The contemporary empirical evidence continues to show that the vast majority of women marry,¹⁷³ even more women express a desire to marry,¹⁷⁴ and those women who do marry

¹⁷⁰ See Katharine K. Baker, *Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection*, 59 OHIO ST. L J 1523, 1549-1558 (1998) (describing how the traditional justifications for the treatment of marriage ignore the substantial feminist literature that suggests that women may crave and need formalism and independence not altruism and intimacy because caring and connection seem to come so much more easily to women) Even if this is true, however, women may still support state-sponsored marriage because they recognize that the traditional legal treatment of relationship helps men overcome a more individualistic outlook toward life. See Baker, *id.* 1595 ("wives may benefit from the extent to which legal protection of marriage encourages their husbands to become more caring, intimate, and selfless.")

¹⁷¹ West, *supra* note 127 at 18. ("Intimacy is not something which women fight to become capable of. We just do it. It is ridiculously easy.") The gendered facility with intimacy may explain why, historically, marriage has been more psychologically beneficial to men. See generally STEVEN NOCK, *MARRIAGE IN MEN'S LIVES* (1998).

¹⁷² See Griswold, *supra* note 141.

¹⁷³ U.S. Census, S2201, 2006 American Community Survey. Of women over age 15, only 27.3% are never married. Of women between the ages of 35-44, only 16.4% are never married.

¹⁷⁴ Polling Nations, questions to 13-24 year olds, 52 % definitely want to get married and 40% probably want to get married. <http://poll.orspub.com> .

are happier, healthier and wealthier than those who do not.¹⁷⁵ To be sure, there are endogeneity concerns with this data. Marriage may make people happier, healthier and wealthier, but happy, healthy and wealthy people are probably more likely to marry.¹⁷⁶ Moreover, state policies and norms supporting marriage help explain why married people would feel happier (they are comporting with a social norm), healthier (they have easier access to health insurance) and wealthier (they get preferable tax treatment).¹⁷⁷ Maybe the only reason women want to marry is because they will be considered normal and get access to health care and tax benefits. After all, there are numerous women who cherish their “emotional individualism”¹⁷⁸ and flourish both psychologically and materially outside the confines of marriage. Maybe if the state stopped supporting marriage, women would run from it.

Maybe. But at times it seems as if the feminist critique of marriage is running into the same road block that the feminist critique of sexuality did.¹⁷⁹ For much of the 1980s feminism consistently emphasized how women’s

¹⁷⁵ Steven Nock writes “The many beneficial effects of marriage are well-known. Married people are generally healthier; they live longer, earn more, have better health and better sex lives, and are happier than their unmarried counterparts. . . . Some disagreement may exist about the magnitude of such effects, but they are almost certainly the result of marriage, rather than self-selection.” See STEVEN NOCK *MARRIAGE IN MEN’S LIVES* 3 (1998) (citing numerous studies). For a more recent study, see Alois Sututzer and Bruno Frey, *Does marriage make people happy or do happy people get married*, 35 J. OF SOCIO-ECONOMICS 326, 3--- (2006) (finding that marriage continues to be highly correlated with happiness for both men and women and that “[i]t is unlikely that . . . selection effects can explain the entire difference in well-being between singles and married people.”) See also, Goive Marriage, M. Hughes and C. Style, *The Family Life Cycle – Internal Dynamics and Social Research Consequences*, 58 Sociology and Social Res. 56-68 (1983) (marriage improves women’s lives substantially).

¹⁷⁶ Depressed, sick and poor people are not seen as particularly good marital prospects. Nonetheless, the studies cited in the note above suggest that it is unlikely that the benefits of marriage could be entirely do to selection effects.

¹⁷⁷ See Bernstein, *supra* note 8 at 161-163 (and notes cited therein).

¹⁷⁸ See Rachel F. Moran, *How Second-Wave Feminist Forgot the Single Woman*, 33 Hofstra L. Rev 223, 228 (2004).

¹⁷⁹ For recent contributions to the feminist critique of marriage and legal family, see Laura A Rosenbury, *Friends With Benefits*, 106 MICH L REV 189, 212 (2007) (“Elevating [family relationships] over friendships contributes to gender inequality by encouraging individuals to engage in domestic coupling rooted in a history of patriarchy and then stigmatizing those who lie outside of that coupling” (citations omitted)); Dan Markel, Jennifer Collins, and Ethan Leib, *Criminal Justice and the Challenge of Family Ties*, 2007 ILL. L. REV 1147, 1190 (“the family often served (and in some cases, continue[s] to serve) to perpetuate patriarchy, gender hierarchy, or domestic violence.”) See also, Nancy Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not Dismantle the Legal Structure of Gender in Every Marriage*, 110 U VA L REV 1555 (1993).

subordination was sexualized and how sexualized domination permeated women's lives.¹⁸⁰ In the words of Catharine MacKinnon, women's sexuality was "defined by men, forced on women, and constitutive of the meaning of gender."¹⁸¹ In response, numerous women - many of them self-defined feminists - challenged the feminist orthodoxy asking (to paraphrase Kathryn Abrams) "what are we supposed to do about sex while we are fighting for freedom?"¹⁸² The numerous women - many of them feminists - who continue to enter into the institution of marriage may be asking a comparable question, "what are we supposed to do about family while we are fighting for freedom?"

Much of the feminist critique of marriage argues that marriage is, as MacKinnon said women's sexuality was, "defined by men, forced on women and constitutive of the meaning of gender."¹⁸³ Yet despite what has been a century of feminist criticism of marriage,¹⁸⁴ there still appears to be something in marriage that many women - including women with a strong commitment to gender equality - value.¹⁸⁵ Even while conceding that the institution of marriage is deeply infused with patriarchal norms and hidden forms of oppression, most women enter it willingly. It could be that most women are just terribly misguided about how bad marriage will be, or it could be that many women have

¹⁸⁰ Kathryn Abrams, *Sex Wars Redux*, 95 COL. L. REV. 304, 307-310.

¹⁸¹ CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 149 (1989).

¹⁸² Abrams, *supra* note 180 at 311 ("sex radicals argued [that] the subordination of pleasure to a virtually exclusive focus on identifying and preventing danger deprived women of a resource vital to self-understanding and resistance. The sex radicals asked "what women were supposed to do about sex while they were fighting for freedom."")

¹⁸³ See Rosenbury, *supra* note 179 at 219 ("marriage, as shaped by the state, plays a vital role in maintaining gender inequality"); Markel, Collins and Leib, *supra* note 179 at 1193 ("benefits to the family facilitate the perpetuation of gender hierarchy and domestic violence"); Polikoff, *supra* note 179 at 1536 (marriage is "the worst of mainstream society" and "an inherently problematic institution.").

¹⁸⁴ For early critiques see Emma Goldman, *Marriage and Love*, in *Red Emma Speaks* 158, 164-65 (Alix Kates Shuman ed., 1972) (The institution of marriage makes a parasite of woman . . . It incapacitates her for life's struggle, annihilates her social consciousness, paralyzes her imagination, and then imposes it gracious protection, which is in reality a snare, a travesty on human character.")

¹⁸⁵ Commitment to gender equality is correlated to educational level, as is marriage rate. For the link between commitment to gender equality and education, see Richard J. Harris & Juanita M. Firestone, *Changes in Predictors of GenderRole Ideologies Among Women: A Multivariate Analysis*, 38 SEX ROLES 239, 240 (1998). For the link between marriage rate and education, see Dep. Health and Human Services, Natl. Center for Health Statistics, *Cohabitation, Marriage, Divorce and Remarriage in the United States* 4 (2002) ("In addition to race and employment status, other characteristics of individuals that have been found to be related to higher probability of getting married include higher education and earnings.") See http://www.aamft.org/Press_Room/CDC_series23_7_2002.pdf

decided that there is something worthwhile in the marital norms that state and culturally sponsored marriage impart. The analysis above suggests that what women may value is the human flourishing that seems to flow from fusion with another and the nourishment one gets from a defined community that can close its doors to the outside world.¹⁸⁶

This line of argument would also explain why so many gay men and lesbians want to get married. Some commentators bemoan the elevation of “we” language in contemporary gay discourse,¹⁸⁷ but there is little doubt that within the gay community there is a strong endorsement of the we.¹⁸⁸ Committed, interdependent, hard-to-break relationships matter powerfully to people and the law plays a role in making those relationships more committed, interdependent and hard to break. When the law recognizes marital relationships, it fosters and facilitates the formative and constitutive roles that those relationships can play in people’s lives.

B. The Law and the Importance of Parental Relationships

1. Parenthood as Constitutive

When the law recognizes parental relationships, it fosters and facilitates the formative and constitutive role that parenthood plays in people’s lives also. The justification for the legal treatment of parenthood almost perfectly parallels the justification for the legal treatment of marriage. Parenthood enables people to feel powerful love, to fuse with others and to reconstitute themselves in the context of relationship. Like marriage partners, children are critical sources of love. Adults have children, Jeffrey Bluestein writes “not because . . . [children] will continue the family, or are potential sources of relief and aid, but because they are new bonds of love.”¹⁸⁹ Like marriage, parenthood requires a relinquishment of self, a fusing of self with other such that a parent’s decision to

¹⁸⁶ As Anne Dailey remarked “while the closed doors of the home have shielded abuse, isolation and exploitation, they have at the same time nurtured love and commitment.” Anne Dailey, *Constitutional Privacy and the Just Family*, 67 TULANE L. REV. 955, 1021 (1993).

¹⁸⁷ See Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 239 (2006) (“the rights-bearing subject of the lesbian right movement has now become ‘the couple’ – a We. It is a domesticated couple and it is a couple that seeks a particular location within a genealogical kinship grid that sutures the couple to the nation.”)

¹⁸⁸ See e.g., JONATHAN RAUCH, *GAY MARRIAGE* (2004) and the numerous same sex marriage cases brought by claimants eager to be considered a “we.”

¹⁸⁹ Jeffrey Bluestein, *Child Rearing and Family Interests*, in *HAVING CHILDREN* 115, 118 (Onora O’neill & William Ruddick eds., 1979).

run into a burning building to save her child can hardly be construed as an act of altruism.¹⁹⁰ It is an act of self-interest.

Being a parent is also a means of re-constructing oneself.¹⁹¹ Parenting requires accepting the responsibility that allows one to achieve what Katharine Bartlett refers to as an “ennobled self.”¹⁹² The ability to construct oneself in this ennobled way, to accept the responsibility for “nurturing and loving and educating one’s children . . . is central to our conception of human flourishing.”¹⁹³ As David Richards suggests “[c]hild-rearing is one of the ways in which many people fulfill and express their deepest values about how life is to be lived.”¹⁹⁴

The constitutional parental rights cases, including *Meyer v. Nebraska*,¹⁹⁵ *Pierce v. Socy of Sisters*,¹⁹⁶ *Prince v. Mass.*,¹⁹⁷ *Wisconsin v. Yoder*,¹⁹⁸ and *Parham v. J.R.*,¹⁹⁹ particularly when coupled with other “parent-like” cases, *Moore v. City of East Cleveland*,²⁰⁰ and *Smith v. OFFER*,²⁰¹ recognize that parenthood plays a key constitutive role in people’s lives. Thus, allowing the state to bar parents from pursuing certain desired educational paths for their children would offend the “relation between individual and state . . . upon which our institutions rest”²⁰² because restrictions on children almost inevitably operate as restrictions on parents also. An adult must be free to steer a child in the “ways

¹⁹⁰ Mit Regan explores this kind of hypothetical, suggesting that a stranger’s decision to rescue a drowning child can barely be analyzed on the same terms as a mother’s because the mother’s “decision” seems so much like an instinctive act of self-preservation. REGAN *supra* note 136 at 113.

¹⁹¹ At a colloquial level every parent understands this. That is why so many parents come to see their lives as having two very distinct phases, pre-children and parental, and those phases are not just about sleep deprivation and the facility with which one changes a diaper or installs a car seat.

¹⁹² Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L. J. 293, 301 (1988) (citing Nel Noddings, CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION 5) (1984)).

¹⁹³ Stephen Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 938, 962 (1996)

¹⁹⁴ David A. J. Richards, *The Individual, The Family and The Constitution, A Jurisprudential Perspective*, 55 NYU L. REV 1, 28 (1980).

¹⁹⁵ 262 US 390 (1923).

¹⁹⁶ 268 US 510 (1925).

¹⁹⁷ 321 US 158 (1944)

¹⁹⁸ 406 US 205 (1972).

¹⁹⁹ 442 US 584 (1979).

²⁰⁰ *Moore v. City of E. Cleveland*, 431 US 494 (1977).

²⁰¹ *Smith v. OFFER*, 431 US 816 (1977)

²⁰² *Meyer*, 262 US at 628.

he should go.”²⁰³ The state cannot “standardize its children” by requiring that they go to public school.²⁰⁴ In dissent, in *Bowers v. Hardwick*, Justice Blackmun wrote that the Constitution protects parenthood because “parenthood alters so dramatically an individual’s self-definition.”²⁰⁵ The parent- child relationship serves as a source of independent identity for both parent and child.

The Court has also made clear that the “the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in ‘promoting a way of life’.”²⁰⁶ “It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”²⁰⁷ In *Prince* (a parenthood case), the Court foreshadowed the language in *Griswold* (a marriage case), referring to the interests at stake in child-rearing as “sacred.”²⁰⁸ That sacredness was made all the more explicit in *Wisconsin v. Yoder*,²⁰⁹ which respected parents’ rights to withdraw their children from public school at age 14 because the rights of parents include the right to raise children within the tenets of the Amish religion. It was impossible to afford the parents religious freedom without affording them parental freedom because the freedom to believe and act in accordance with their religious beliefs, a freedom that we often consider a basic *individual* right, includes a basic *relational* right, the right to raise one’s children in accordance with those beliefs.

The way the Constitution honors the potential for people to enrich and define themselves through parenthood is by leaving the parental relationship alone. “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”²¹⁰ Parents are allowed to structure their relationships with their children as they choose. There are mandatory schooling laws, and child labor restrictions and the outside boundaries of abuse and neglect,

²⁰³ *Prince*, 321 US at 164 (referring to parent’s interest in raising child as “sacred private interests”).

²⁰⁴ *Pierce v. Socy of Sisters*, 268 US 510, 535 (1925)

²⁰⁵ *Bowers v. Hardwick*, 478 US 186, 205 (1985) (Blackmun, J. dissenting) (citing *Moore* at 500-06). *Bowers* had to do with a consensual sexual relationship between two adults (in some sense, marriage-like); *Moore* had to do with a relationship between a grandmother and her grandchild (in some sense parent-like). Again, when the Court writes about why it protects either marriage or parenthood, it tends to conflate the reasons.

²⁰⁶ *Smith v. OFFER*, 431 US at 843 (quoting *Griswold*)

²⁰⁷ *Moore*, 431 US at 503-04.

²⁰⁸ *Prince*, 321 US at 165. See also *Griswold*, *supra* note 141 (marriage is “intimate to the degree of being sacred.”)

²⁰⁹ 406 US 205 (1972).

²¹⁰ *Prince v. Mass.*, 321 US 158, 166 (1944).

but, for the most part, the state steers clear of interfering with the parental relationship. Parents are presumed to act in their children's best interest.²¹¹ As recently as 1989, Justice Brennan re-affirmed the soundness of the substantive due process cases that treated the parental relationship as outside of the ambit of state regulation.²¹²

In most of these cases, the Court was not careful to separate out the interests of the parents and the interests of the children,²¹³ and in *Parham v. J.R.*, the court realized that such an effort was probably pointless. The child's "interest is inextricably linked with the parents' interest in and obligation for the welfare and the health of the child."²¹⁴ Child and parent are one for legal purposes.²¹⁵

2. The Parallels to Marriage

This explication of the parental rights cases suggests that parenthood and marriage are protected for comparable reasons. Indeed, the parental rights cases, more explicitly than the marriage cases, explain why it is that the law needs to care about relationship rights and obligations at all. The law needs to honor family relationship rights because family relationships provide critical sources of identity. They steer people in directions they would not go but for the relationship.²¹⁶ They afford people a sense of being "inextricably linked" with another,²¹⁷ and they treat "rights and high dut[ies]"²¹⁸ as coming of a piece.

²¹¹ *Parham v. J.R.*, 442 US 584 (1979).

²¹² Citing *Meyer v. Nebraska*, 262 US 390 (1923) and *Pierce v. Soc'y of Sisters*, 268 US 510 (1925), Justice Brennan wrote "I think I am safe in saying that no doubts the wisdom or validity of those decisions." *Michael H. v. Gerald D.*, 491 US 110, 143 (1989) (Brennan, J. dissenting).

²¹³ But see Justice Douglas dissenting in *Wisconsin v. Yoder*, 406 US 205, 244 (1972) ("On this important and vital matter of education, I think the children should be entitled to be heard"). See also Woodhouse, *supra* note 13 (arguing that the refusal to consider the children's perspectives in *Meyer* and *Pierce* reflects a paradigm that inappropriately treats children as property.).

²¹⁴ 442 US 548 [2503]. The Court acknowledged that "some parents may at times act against the interest of their children . . . but [that] is hardly reason to discard wholesale those pages of human experience that teach that parents generally do act in the children's best interest." [2504].

²¹⁵ In *Troxel v. Granville*, 530 US 57 (2000), the Court backtracked from this position somewhat, finding that grandparents may have a right to visit their grandchildren against the wishes of a parent, if it is in the child's best interest. Courts are still required to (rebuttably) presume, however, that parents do act in the best interest of their children.

²¹⁶ See *Prince* 321 US at 164 (parents have the right to steer children "in the way they should go.")

²¹⁷ *Parham*, 442 US at 2503-04.

²¹⁸ *Pierce*, 268 US at 535.

Family relationships allow us to share the “intimacy of daily association”²¹⁹ which in turn allows us to “pass on our most cherished values”²²⁰

In his article on marriage, Cass Sunstein writes that when the Court evaluated the constitutional dimensions of marriage it “went off track [and into the cases involving parenting and procreation] because of the intuitive connection between sexuality and reproduction (protected by substantive due process) and marriage (not easily analyzed in the same terms).”²²¹ To assume that marriage cannot be analyzed in the same terms as parenting and procreation may well be to assume something wrong about the legal treatment of parenting or marriage, however. Marriage, like parenthood, shapes identity. Both marriage and parenthood create sources of loyalty and intimacy that root one in something other than oneself or the state.²²² In striking down the regulations in *Meyer* and *Pierce*, the Court emphasized the important mediating function that families can play as an interim institution between the individual and the state.²²³ By citing *Meyer* and *Pierce* in *Griswald*²²⁴ and *Zablocki*,²²⁵ the Court suggested that marriage plays that intermediary role as well.

Comparably, the birth control and abortion cases, decided under substantive due process doctrine, say something about the constitutional import of

²¹⁹ *Smith v. OFFER*, 431 US at 844. ,

²²⁰ *Moore*, 431 US at 503-04

²²¹ Sunstein, *supra* note 8 at 2097.

²²² Intermediary institutions can be critical sources of identity, see Anne C. Dailey, *Federalism and Families*, 143 U PENN L. REV 1787, 1858-1960 (1995) (discussing the communitarian argument about the “constitutive effect that social affiliations have on the development of the human identity.”)

and critical buffers from the state. As Jean Elshtain writes, “it is no coincidence that all 20th century totalitarian orders labored to destroy the family as a locus of identity and meaning apart from the state.” JEAN ELSHTAIN, *THE FAMILY AND CIVIC LIFE* 55 For more on the importance of intermediary institutions, see Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1088 (1980).

²²³ The Court in *Meyer* explained that American values were critically different than those proposed by Plato in the *IDEAL COMMONWEALTH*. Plato described a world in which all training of young males was the responsibility of the state. The Court wrote: “Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and the state were wholly different from those upon which our institutions rest.” 262 US at 402. In *Prince* the Court wrote, “The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, couples with the high duty, to recognize and prepare him for additional obligation.” 268 US 510 at 535. For more on this, see Dailey, *supra*, note 186 at 1017 (“constitutional protection of the family ought to reflect an understanding of the family’s distinct role as a vital interim institution serving the communal ends of political life”)

²²⁴ 381 US at 481.

²²⁵ 434 US at 381.

relationship. The liberty interests served both by allowing people to procreate²²⁶ and allowing them not to²²⁷ have everything to do with affording people some measure of control over which and what kind of relationships will come to define them. The rights to abortion and birth control are not just about the rights to be free of an unwanted pregnancy, they are about the rights to be free of unwanted relationships.²²⁸ Those rights are important because of the ways in which relationships, particularly relationships that are understood by the parties and by others to be familial, define who we are.²²⁹

C. Summary

Just as the analogy to marital status helped elucidate what claims to parental status are, so the analogy to parental rights helps elucidate why the law should (or must) recognize marriage-like relationships. The parental rights cases suggest that the legal rights and obligations that accompany family relationship play a formidable and constitutive role in who is. The *status* of the parental figures in these cases was never doubt. What was in doubt was the extent to which that status included the right to be treated as legally connected and why. The cases suggest that the totality of the legal incidents associated with legally recognized relationships, including claims on the other, obligations to the other, and the right to be considered as a unit, shape people's understanding of who they are. This understanding of why parental relationships are important to parents and children

²²⁶ *Skinner v. Oklahoma*, 316 US 535 (1942) (striking down a state law requiring sterilization of developmentally disabled people)

²²⁷ See abortion and procreation cases, *supra* notes 52 and 145.

²²⁸ Admittedly, this right is gendered. Women have the right to terminate a potential relationship in a way that men do not and because a mother can effectively prevent a father from relinquishing his paternal relationship, see Baker, *Bargaining or Biology*, *supra* note 38 at 9-10. Men can have parental relationships forced on them. This gendered (and arguably unfair) treatment of relationship in the parental context may have come from the recognition that for years men just walked away from parental relationships without much fear of ever being dragged back into them., legally or emotionally.

²²⁹ To suggest that the constitutional treatment of marriage has nothing to do with these other treatments of relationship may be to suggest that marriage is some lesser form of relationship than parenthood, arguably either because the marital relation is somehow a legal construct in the way that other family relationships are not, or because parental relationships are simply more important to people than marital ones. Both of those assumptions are misguided. The law has always defined parental status pursuant to a set of criteria that it set, sometimes involving biology sometimes not. See *supra* notes 89-93 and text accompanying.. Parenthood, particularly fatherhood, is no more pre-legal than is marriage. Moreover, marriage appears to be just as, if not a more, important as parenthood in helping men define themselves in the world. See NOCK *supra* note 175 (passim). If the relation of parent to child is worthy of constitutional protection because of the way in which that relation shapes our identity, than the relation of spouse to spouse may well be also.

finds support in the psychological and philosophical theories of adult relationship and family.

V. CONSTITUTIONAL CONFUSION

A. Confused Nomenclature

Part of the reason the connection between marriage and parenthood has not been made more clearly may stem from the imprecise and somewhat circular language the Court has used to protect family relationships. Three related and overlapping terms are often used: intimacy, privacy and autonomy. When speaking about family relationships, the Supreme Court has used the word intimacy frequently,²³⁰ though it has never articulated a right to emotional or physical intimacy. Instead, there is (maybe) a right to privacy and there are doctrines of family and parental autonomy. Scholars of the court and of these concepts suggest that the terms all have something to do with each other.

In his famous article on privacy and autonomy,²³¹ published just after *Roe v. Wade*, Louis Henkin argued that when the Supreme Court used the word privacy it really meant autonomy, or the right to be free from governmental regulation.²³² In her famous article on privacy, Ruth Gavison argued that there are actually two kinds of privacy, the right to self-determination (often thought of as autonomy) and the right not to have facts about oneself known. In his article on intimate associations, Kenneth Karst argued that this latter right, the right not to have facts disclosed, is also part of our understanding of what constitutes intimacy.²³³ The other understanding of intimacy involves “close and enduring association between people”²³⁴ or relationship. Meanwhile, Jennifer Nedelsky argues that the term autonomy has no meaning outside the context of relationship. “When we ask ourselves what enables people to be autonomous, the answer is not isolation, but relationships.”²³⁵ Thus, a right to privacy may be a right to autonomy, which has no meaning outside the context of relationship.

Diagrammatically, the etymology looks something like this:

²³⁰ *Griswold*, 381 US at 486 (in context of marriage); *SMITH*, 431 US at 843 (in context of parental-type relationships).

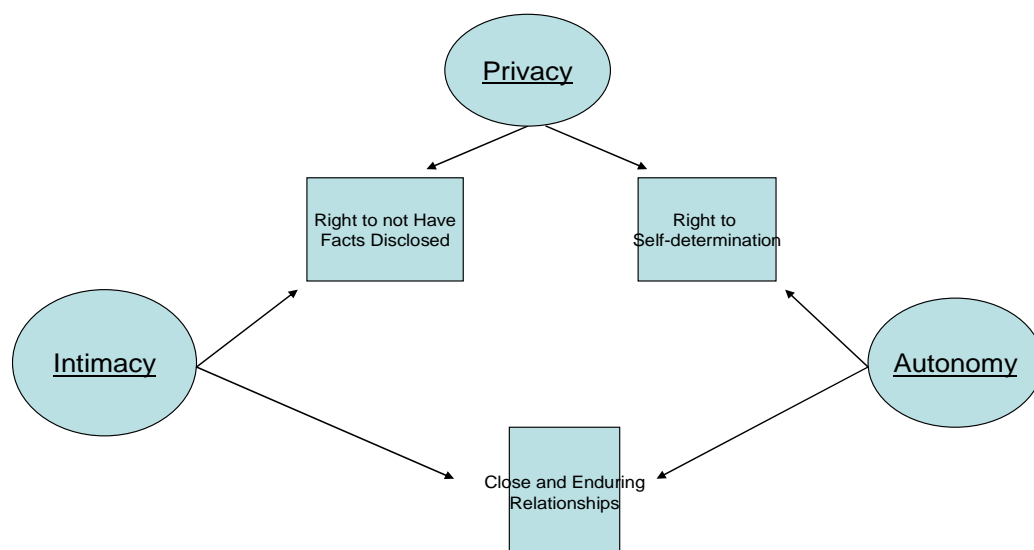
²³¹ Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV 1410 (1974).

²³² *Id.*

²³³ “The first meaning of intimacy is synonymous with one of the meaning of privacy: an intimate fact is a private fact, the sort of information about a person that is not normally disclosed.” Karst, *supra* note 128 at 636.

²³⁴ *Id.*

²³⁵ Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thought and Possibilities*, 1 YALE J. L. AND FEMINISM 7, 12 (1989).



This etymological overlap helps explain some of the doctrinal confusion with regard to relationship. Sometimes that which is protected when we protect relational privacy is the right not to have things disclosed,²³⁶ but sometimes it is the right to self-determination.²³⁷ Sometimes, by autonomy, we mean the right to be free from governmental regulation,²³⁸ but sometimes we mean the right to be

²³⁶ The communication privilege is the most obvious example, but so is the kind of privacy the court seemed eager to protect in *Griswold* – the right not to have the government snooping around one’s bedroom.

²³⁷ The right not to be a parent protected in *Roe* can be viewed as a right to self-determination as can the right of Mr. Redhail to reconstitute himself in the context of relationship. In both contexts, the Court used the word privacy to describe what it was protecting. See *Roe*, 410 US at 152-153; *Zablocki*, 434 US at 384.

²³⁸ The court in *Prince* referenced parental “freedom” to raise their children as they wanted, 321 US at 166 and the court in *Loving* spoke of the “freedom” of choice to marry, 388 US at 12.

treated as intertwined with others.²³⁹ What makes intimate relationships special is that they are both private and autonomous. The people in them exclude the rest of the world, but include each other in a way that makes them both independent and interdependent. When the Supreme Court recognizes the importance of relationship, it is acknowledging the critical role that relationship can play in our lives and it is acknowledging the importance of treating relationships as entities unto themselves.

B. A Due Process Requirement?

Given the primary role that legally recognized family relationships play and have always played in people's lives, there is a strong argument that the Constitution must recognize family rights in some way. In his article on the constitutional dimensions of tort law, John Goldberg argues that the Constitution requires the state to provide "bodies of law that fit certain descriptions, including laws of ownership, *familial relations* and enforceable agreements, as well as law for the redress of wrongs."²⁴⁰ Goldberg rests much of his argument on the historical role that the government has played in the redress of private wrongs,²⁴¹ but his arguments from history work just as well in family relations as they do in tort. Indeed, the Court has relied heavily on history to explain why it feels compelled to protect the family, despite there being no mention of the family in the Constitution. "The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family – a relation as old and as fundamental as our entire civilization – surely does not show that the Government was meant to have the power to do so."²⁴² "Our decisions establish that the Constitution protects the sanctity of the family because the institution of the family is deeply rooted in the Nation's history and tradition."²⁴³

Just as government has always provided some redress for private wrongs and therefore might be compelled to continue to provide some floor of redress, so the government has always recognized some family rights and obligations and therefore may be compelled to continue to do so. Exactly what the floor is, as Goldberg suggests, will be a function of a variety of factors, including

²³⁹ *Meyer, Pierce, Prince and Parham* all suggest that part of what parental autonomy means is the right to have the state view the parent-child relationship as an entity, instead of treating parents and children as separate.

²⁴⁰ John C.P. Goldberg, *The Constitutional Status of Tort Law*, 115 YALE L. J. 524 (2005) (emphasis added).

²⁴¹ Steven Heyman has also argued that history strongly supports a Constitutional requirement that the state provide a bare minimum of protection from for private wrongs. See Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L J 707 (1992).

²⁴² *Griswold*, 381 US at 496 (Goldberg concurring).

²⁴³ *Moore*, 431 US at 1938.

contemporary understandings of (in the tort context) wrongs and (in the relationship context) family.²⁴⁴ Thus, Goldberg finds no problem in the elimination of the torts of seduction or alienation of the affections because evolving understandings of women's rights and women's agency coupled with women's ability to sue in their own right rendered questionable whether the "wrongs" originally meant to be addressed were still considered wrongs.²⁴⁵

Comparably, the current tendency to recognize marital and parental rights even if not legal status as spouse or parent suggests that contemporary understandings of legally relevant relationships have progressed some. The state supreme courts in California, Vermont and New Jersey found themselves constitutionally obliged to grant the rights and obligations of marriage even though they did not feel compelled to grant marriage to gay men and lesbians.²⁴⁶ Courts and legislatures often feel compelled to grant parental rights even if not the status of parenthood.²⁴⁷

When someone who has lived with, cared for, shared with and provided for a partner for years on end, presents him or herself to a court, arguing that for the right to be recognized as a legally relevant person in that partner's life, the "relation between individual and state . . . upon which our institutions rest"²⁴⁸ may require the state to acknowledge the legitimacy of that relationship. When someone who has lived with, cared for, shared with and provided for a child presents him or herself to a court, pleading for the right to be recognized as a legally relevant person in that child's life, a court may be compelled to recognize a liberty interest in "the emotional attachments that derive from the intimacy of daily association."²⁴⁹ The floor for state-recognized relationship rights may be shifting up.

Professor Goldberg is careful to point out that his notion of due process does not treat "as natural or neutral a set of baselines for constitutional analysis arbitrarily drawn from the common law."²⁵⁰ Instead, he is suggesting that scholars should "self-consciously theorize a connection between public and

²⁴⁴ For the list of factors Goldberg would use to determine the floor, see Goldberg, *supra* note 240 at 613.

²⁴⁵ *Id.* (The conversion of the husband's property interest in his wife's body, or the disruption of the marital relation no longer seemed like wrongs).

²⁴⁶ See discussion of *Baker v. Vermont* and *Lewis v. Harris* *supra* notes 36-38 and text accompanying.

²⁴⁷ See *supra* text accompanying notes 13, 37-40.

²⁴⁸ *Meyer v. Nebraska*, 262 US at 628.

²⁴⁹ *Smith v. OFFER*, 431 US at 843. In *Smith*, the majority assumed without deciding that foster parents developed a protected liberty interest as parents by living with, providing for and loving their foster children, even if they never asked for legal status as parents.

²⁵⁰ Goldberg, *supra* note 240 at 625

private law.”²⁵¹ The tension between the lofty constitutional discourse protecting family status, on the one hand, and the statutory or common law incidents of legal relationship, on the other, cries out for such a unifying theory in the family law context. As Goldberg notes, “there is a long tradition of holistic thinking in Anglo-American constitutional law, one that treats private law not as sub or non-constitutional, but as part of an overall constitutional order.”²⁵² Understanding the constitutional protection of relationship as incorporating many of the state laws that treat two as one, in ways that both expand and restrict autonomy, follows that tradition of holistic thinking.

C. Summary

Though often confused by its own overlapping rhetoric, the Supreme Court has consistently recognized that significant autonomy, privacy and intimacy values are implicated by the legal treatment of family relationship. The law has always facilitated and helped sustain family relationships by treating them as distinct and free to flourish (or not) pursuant to their own rules, but governed, if at an end, by notions of fusing and sharing. Given how critical these relationships are to peoples’ lives and how strong a role the law has always played in protecting them, courts and legislatures seem to sense some affirmative obligation to recognize family-like relationships. The current trend to provide the rights of relationship to non-traditional family members, even while resisting the expansion of traditional notions of family status, may reflect a sense of this affirmative duty.

VI. CONSEQUENCES

Regardless of whether one thinks states must provide some minimal rubric of relationship rights, and regardless of whether one thinks the current tendency to disaggregate relationship rights from family status provides adequate redress to those who fail to secure family status, it is not clear that the tendency to disaggregate marital and parental rights from their corresponding statuses is a good idea for those who care about the legal protection of relationships. Disaggregation undermines the social meaning of both marriage and parenthood. It also tends to minimize the importance of family obligation and thus makes legally recognized relationship less formative. Finally, disaggregation makes it much less likely that courts will continue to honor the doctrine of family autonomy. This Part explores these likely consequences of disaggregation.

A. Diminution in Meaning

As the traditional incidents of marriage and parenthood are increasingly disaggregated from the statuses with which they are associated, the social meaning of the statuses themselves is diffused. It is harder to know what both

²⁵¹ Id.

²⁵² Id.

marriage and parenthood *mean* in a world in which many who do not have the status are treated as if they do. The Supreme Court of New Jersey recognized this irony when it denied same sex couples the right to the status of marriage in part because it had granted them the incidents of marriage: “plaintiffs’ claimed right to the name of marriage is surely not the same now that equal rights and benefits must be conferred on committed same-sex couples.”²⁵³ The Court thus explicitly acknowledged that the marital label loses some of its importance if people can acquire rights without the label.

In addition to the status losing potency when the rights with which it is associated can be dissociated from the label, the social norms that inform the status’ meaning (and are a key part of its stability) may be undermined by the existence of alternative legally recognized relationships. As Elizabeth Scott writes “marriage gets its stability in part from the intricate web of social norms regulating spousal behavior.”²⁵⁴ Marriage alternatives may not incorporate those social norms and it is not clear that marriage can retain them in the face of alternatives. If states develop many ways of viewing partners as in relationship with each other, there will be less reason for people to “know immediately” what the relationship means because it will be harder to internalize which social norms apply to which relationships.

Perhaps the social norms that we now associate with marriage will continue to attach to those who marry even if there are alternative relationships available, but alternative statuses will likely have a weaker norm network supporting them.²⁵⁵ This will affect not only the people in those alternative statuses, but people in marriages as well. If people who are in domestic partnerships feel less bound by norms of stability and fidelity and if a married person knows many people in domestic partnerships, the married person’s allegiance to those traditional marital norms may seem far less obligatory.²⁵⁶

If marriage does come to seem less important, as the New Jersey Supreme Court suggests that it will once alternative partnership paradigms are recognized, and if marital norms lose more of their strength, as may happen with alternative paradigms providing what will likely be weaker norms, then there is every reason to believe that the proliferation of alternatives to marriage, even though created in the name of preserving marriage, will ultimately undermine the institution. At

²⁵³ Lewis v. Harris, 908 A.2d at 450.

²⁵⁴ Elizabeth S. Scott, *A World Without Marriage*, 41 FAM. L. Q. 537, 562 (2007).

²⁵⁵ It is likely that any norms accompanying civil unions or domestic partnerships will be weaker than norms accompanying marriage simply because those statuses are new and people have not had time to internalize the norms associated with them.

²⁵⁶ It could cut the other way. Married people might feel more bound by traditional marital norms precisely because there were alternatives available and they chose marriage. I am not contending that the availability of alternatives will necessarily erode the social norms associated with marriage. I am only contending that it may.

a minimum, it will make claims to marital status seem more frivolous because it will be less clear that those who are deprived of marriage are deprived of anything significant.

Creating alternative legal forms of parent-like relationships will likely have a comparable effect. It is already clear that creating alternative forms of parenthood dilutes the parental rights of those who are otherwise parents. Here, it is important to underscore a key difference between marriage and parenthood. Expanding the kinds of marital-like relationships available does not alter the *legal* rights and obligations associated with marriage.²⁵⁷ The rights and obligations of different unions may vary depending on whether they are marriages or civil unions or domestic partnerships and, as just discussed, the social meaning and social norms associated with those unions may vary, but if A is married to B and C is domestic partnered with D, A's legal rights and obligations vis a vis B will not be affected by C's legal rights and obligations vis a vis D.²⁵⁸ Parenthood is more complicated legally. If A and B are parents of C, and D is a de facto Parent of C, then D's semi-parental status undermines the legal rights and obligations of A and B. The more of a privilege that D has to exercise visitation or custodial rights, the less exclusive are A and B's rights as parents.

If, as may well be the case,²⁵⁹ we are moving toward a world in which it is far more common for more than one or two people to have relationship claims to a child, then it is likely that the social meaning of parenthood will diminish in importance. If, for instance, it is relatively common for a child to have a de Facto parent in addition to one or two "regular" parents, then it is unlikely that claims for parental status per se will have much resonance. Why should someone like Michael H. be awarded the status of father if it is commonplace for people like him to get visitation rights without having parental status? Misters Quilloin and Lehr²⁶⁰ would not need to block the adoption of their biological child by another man; they could just assume 3rd party rights. Or the mother's new husband could. In other words, just as the proliferation of many legal forms of partnerships may make claims to marriage itself seem frivolous, so the proliferation of many forms of quasi-parenthood may make claims to parental status per se seem frivolous.

²⁵⁷ This assumes a world without polygyny and polyamory. A world with multiple marriage partners would present the same problems as the kinds of issues we currently have with multiple parenthood. For a thoughtful discussion suggesting that maybe we should not automatically take polyamory off the table, see Elizabeth Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 NYU REV. L & SOC. CHANGE 277 (2004).

²⁵⁸ As just suggested, the social norms associated with A's partnership with B may affect the social norms associated with C's marriage to D.

²⁵⁹ See Bartlett, *supra* note 40; Baker, *Bionormativity*, *supra* note 37.

²⁶⁰ See *supra* text accompanying notes 96-98.

B. Diminution in Burden, Diminution in Benefit

As detailed above, the often harsh and restrictive obligations that the law imposes on marital partners and parents makes sense in light of the ways in which people are enriched and ennobled when the law treats two as one. In crafting the legal rules that require sharing and assume fusing, the law helps people transcend self through relationship. It is because the desire to transcend self in this way is so primary and constitutive that the government may have an obligation to recognize family rights and obligations.

When separating the incidents of status from the statuses themselves, however, courts and legislatures have demonstrated a clear preference for bestowing the benefits of relationship, while not necessarily imposing relational obligations. In the domestic partnership area, employers and legislators are much more likely to allow partners access to third party benefits (health and disability insurance) than to require domestic partners to share property or assume long-term financial responsibility for each other.²⁶¹ In the parental area, courts and legislators are clearly more comfortable awarding visitation than imposing child support obligations.²⁶²

Creating these “marriage-lite”²⁶³ and “parenthood-lite” arrangements ignores the important psychological and constitutive benefits that come from obligation. The legal rules that make family members responsible for one another help define our social understanding of family obligation. That social understanding in turn informs our conceptualization of family and, most likely, our personal interpretations of connection and obligation. How fused does one feel with someone else if there is no mutual long term obligation to support? How much can a parental relationship change who one is if one is not legally required to do anything for or with the child?

To some, state-imposed family obligations may seem superfluous because the duty to care derives from emotional, not legal obligations. Yet millions of ex-spouses try to minimize post-divorce support, just as millions of parents try to

²⁶¹ See Blumberg, *supra* note 14 at 1290-1292 (noting how by failing to treat domestic partnership pension rights the way it treats marital pension rights, the UCLA domestic partnership program gives domestic partner’s less of a claim on each other’s financial assets). See also RAUCH, *supra* note 205 at 43-46 (referring to domestic partnership as “marriage-lite” and suggesting that such arrangements often don’t include all of the obligations of marriage.)

²⁶² Compare, e.g., *ENO v. LMM*, 711 NE 2d 886 (Mass. 1999) (awarding visitation rights to a non-biological lesbian co-partner in part because of pre-existing agreement to share parenting) with *TF v. BL*, Mass. No 09104 (Aug. 25, 2004) (ruling that a pre-existing agreement in which the non-biologically related lesbian partner agreed to provide support for the child was not binding). See generally, Baker, *supra* note 50 at 121.

²⁶³ See RAUCH, *supra* note 188 at 31.

dodge child-support obligations. Would marriage and parenthood carry with them the same personal or social meaning if their legal meaning changed such that the law lets people walk away from the family obligations they had once accepted? Without the traditional obligations of spouse and parent, the roles of partner and caretaker become much less formative and meaningful and therefore less worthy of constitutional protection. Over time, if more people in legally recognized relationships fail to live up to the traditional obligations associated with those relationships (because the law does not make them) then the need to honor any non-traditional relationship may decline because those relationships will be seen as more voluntary and less constitutive.

C. Diminution in Privacy

Finally, the less uniform the social meaning of marriage and parenthood, the less likely that the law will protect the negative rights and the ideology of privacy associated with family statuses. The Supreme Court of California emphasized the importance of family privacy in *In Re Marriage Cases*. “One very important aspect of the substantive protection afforded by the . . . constitutional right to marry is, of course, an individual’s right to be free from undue government intrusion (or interference with) . . . the right to marital and familial privacy.”²⁶⁴ Yet the more legally varied and individualized family-like relationships become, the less likely courts will be to respect family privacy because courts will need to insert themselves inside those families, in order to ascertain the individual rights and responsibilities involved.

For instance, domestic partners who have access to each other’s health insurance and rights to hospital visitation, but who do not live in states that treat domestic partners as married for financial purposes, will be left to rely on notions of constructive trust, quasi-contract or contract for adjudication of questions pertaining to property distribution and future financial support. Not only do these theories often fail to render just or consistent results,²⁶⁵ they involve searching inquiries into what actually happened during the course of the relationship. In order to prove a constructive trust that can secure for one an interest in an ex-partner’s property, plaintiffs must demonstrate the extent of their individual contributions to the relationship.²⁶⁶

²⁶⁴ *In Re Marriage Cases*, 76 Cal Rptr 3d 683, 733. The Court went on to say “the constitutional right to marry . . . obligate[s] the state to . . . protect the core elements of the family relationship from at least some types of improper interference by others.” *Id.*

²⁶⁵ See generally, Ira Mark Ellman, “*Contract Thinking*” was Marvin’s Fatal Flaw, 76 NOTRE DAME L. REV. 1365 (2001) (discussing the failure of contract doctrine to incorporate the variety of factors that should go into a spousal compensation award).

²⁶⁶ See, for instance, *Evans v. Wall*, 542 So.2d 1055 (Fla. Dist Ct. App. 3d Dist 1989) (evidence of plaintiff’s contributions of food, telephone service, furnishings, cooking, washing and cleaning services used to establish a constructive trust that would allow her to receive a share of her ex-partner’s property); *Sullivan v. Rooney*, 404 Mass. 160, 533

Comparably, plaintiffs using claims of implicit contract must parade the details of their relationship before the court in order to establish the agreement pursuant to which they expect to collect.²⁶⁷ Even with this evidence, courts often resist finding implicit contracts. As the New York Court of Appeals wrote in *Marone v. Marone*:

As a matter of human experience personal services will frequently be rendered by two people living together because they value each other's company or because they find it a convenient or rewarding thing to do. For courts to attempt through hindsight to sort out the intentions of the parties and affix jural significance to conduct carried out within an essentially private and generally noncontractual relationship runs too great a risk of error.²⁶⁸

Marone thus required that plaintiffs show an express contract before they can collect on any promise for future support.

Express contract theories prove to be just as intrusive, however, because prohibitions on contracts for sexual services mean that courts take the consideration inquiry very seriously. Thus, in two different cases involving express contract, California courts found consideration when an ex-partner served as chauffeur, bodyguard and social and business secretary,²⁶⁹ but not when another ex-partner served only as social companion and hostess.²⁷⁰ New York courts have found that foregoing a career opportunity for the sake of a

NE2d 1372 (1989) (evidence plaintiff gave up job as flight attendant and maintained home for defendant helped establish a constructive trust on the home purchased by her ex-partner); *Minors v. Tyler*, 137 Misc. 505 (City Civ. Ct. 1987) (constructive trust is the appropriate doctrine under which to evaluate male cohabitant's claim to his ex-partner's property); *Small v. Harper*, 638 SW2d 24 (Tex. App. Houston 1st Dist. 1982) (id. [with gender's reversed]).

²⁶⁷ See *Watts v. Watts*, 448 NW2d 292 (Wis. Ct. App. 1989) (court evaluating extensive evidence of parties' behavior and finances; *Glasco v. Glasco*, 410 NE2d 1325, 1331-32 (Ind. Ct. App. 1980) ("[r]ecover for parties seeking relief [sh]ould be based only upon legally viable contractual and/or equitable grounds which the parties could establish according to their own particular circumstance." (emphasis added). See also *Bright v. Kuehl*, 650 NE2d 311, 315 (Ind. Ct. App. 1995) (following *Glasco*).

²⁶⁸ *Marone v. Marone*, 413 NE2d 1154, 1157 (NY 1980).

²⁶⁹ *Wharton v. Dillingham*, 202 Cal. App3d 447 (4th Dist. 1988).

²⁷⁰ *Bergen v. Wood*, 14 Cal. App. 4th 854 (2d Dist. 1993) (Curiously, the court refused to find consideration here because the parties' never cohabited. Thus, apparently, cohabitation is an essential part of the consideration necessary for a support promise, even though sexual services alone are an impermissible basis for consideration.)

relationship is adequate consideration,²⁷¹ but they will not presume that an unemployed ex-partner forewent career opportunities.²⁷²

It is precisely these kinds of detailed particularities of different relationships that courts have traditionally eschewed in the name of allowing family relationships to construct themselves on their own. The parties to a marriage get to determine what is fair and reciprocal and courts except it as such to the extent that they are bound to divide the property in half, regardless of the roles taken in producing it. As discussed, legal obligations and liabilities have attached because of the fact of family status and regardless of the particular details of individual family arrangements. The more courts get into the details of relationships without that status, the less allegiance they may feel to the ideology of family autonomy in general.

Comparably, a child who has legally cognizable relationships with numerous adults is a child who is much more likely to have his schooling decisions, religious upbringing and extracurricular activities determined by a court than by one or two parents. As of now, adults with parental status have an almost irrebutable right to visitation and guaranteed standing to assert a claim for custody.²⁷³ If parents are married, their decisions regarding their children are presumed to be in their children's best interest. The quality and content of their relationships with their children is never at issue.

But if a third party has potential rights, the behavior of both the adults with parental status and those without it comes under scrutiny. In order to determine whether a third party non-parent has standing to make a visitation or custody claim, courts insist on analyzing "the nature of [the] parent and child relationship."²⁷⁴ "[W]hile it is presumed that a child's best interest is served by maintaining the family's privacy and autonomy, that presumption must give way where the child has established strong psychological bonds with a [a non-legal parent.]."²⁷⁵

²⁷¹ *McCullon v. McCullon*, 96 Misc 2d 962 (Sup. 1978).

²⁷² *Cohn v. Levy*, 725 NYS2d 376 (2d Dpt. 2001) (The Court emphasized that the plaintiff had not held a job in some time [she had been previously married], but the court did not explain how it thought she would have provided for herself if she had not been in the relationship. Presumably, she had to have foregone whatever other means of support would have kept her provided for, but the court did not acknowledge this.)

²⁷³ "Denial of visitation is an extreme remedy, rarely approved." HARRIS, TEITELBAUM AND Carbone, *supra* note at 103

²⁷⁴ *Mason v. Dwinnell*, 600 SE2d 58, 65.

²⁷⁵ *JAL v. EPH*, 682 A.2d 1314, 1319-20, (1996), quoted in *TB v. LRM*, 768 Ad 913, 917 (2001).

It is already clear that in cases of divorce, courts evaluate religious practices,²⁷⁶ choice of community decisions,²⁷⁷ and financial entitlements.²⁷⁸ For married parents, the ability of parents to make these difficult, value-laden child rearing decisions is what makes parenthood “central to our conception of human flourishing.”²⁷⁹ Yet the more people there are with rights to rear one particular child, the less able any of them are to “inculcate and pass down [their] most cherished values.”²⁸⁰ The more adults with relationship rights to a child, the more potential legal disputes there are and the more likely it is that a court, not a parent, will be determining what is in the child’s best interest. The constitutive benefits of parenthood, and the privacy of all parents involved, will be seriously compromised.

VII. CONCLUSION

There is an extensive academic critique of the family suggesting that perhaps the law should just get out of the family relationship business altogether.²⁸¹ Despite this critique, many, many people continue to ask the law to recognize their family relationships. Marriage and parenthood, partnership and caretaking may look very different today than they did fifty years ago, but for the most part, people are not rejecting any role for the law in shaping and defining family

²⁷⁶ *In re Hadeen*, 619 P.2d 372 9Wash 1980); *Mentry v. Mentry*, 190 Cal. Rptr. 843, 850 (Cal. Ct. App. 1983).

²⁷⁷ *Ramirez-Barker v. Barker*, 418 SE2d 675, 680 (NC Ct. App 1992 (holding that primary custodian could not move in order to be closer to relatives); *In re Marriage of Sheley*, 895 P2d 850, 856 (Wash. Ct. App 1995) (custodial mother could not move out of Seattle area).

²⁷⁸ If family income is over a certain amount, courts determine the “realistic needs of the children,” *Peterson v. Peterson*, 434 NW2d 732, 738 (S.D. 1989); See also, *In re Marriage of bush*, 547 NE2d 590, 596 (Ill. 1989).

²⁷⁹ See Gilles, *supra* note 193 at 962.

²⁸⁰ See *Moore, supra*, 431 US at 503-04.

²⁸¹ More commentators seem eager to dispense with marriage than parenthood, see, for instance, Martha A. Fineman, *The Meaning of Marriage* in MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS (A. Bernstein, ed. 2006) (advocating eliminating marriage, but strengthening parenthood); Sunstein, *supra* note 8 at 2104 (questioning the benefits of marriage while assuming that the law’s treatment of parenthood is appropriate). Polikoff, *supra* note 179 (arguing that marriage is irredeemably gendered). Few people argue for dispensing with the idea of parenthood, but several argue for opening the category up significantly. See Bartlett, *supra* note 40 (arguing that adults who have played significant roles in children’s lives should be given legal rights); Woodhouse, *supra* note 40 (arguing to provide parental rights to adults who have supported a mother during pregnancy). I have suggested that perhaps we should restrict our notion of parenthood, at least in infancy, so as to minimize the role of biology. See Baker, *supra* note 38 at 45-48.

relationships, they are asking the law to draw family shapes and make family definitions that include them.

To the extent that litigants have made constitutional claims to be included in traditional definitions of family, they have not been that successful. Constitutions do not afford particularly robust protection to family status. Claimants have been much more successful in securing relationship rights, however. Sometimes these rights are granted, under state constitutions, in lieu of conferring traditional status; sometimes these rights are granted legislatively; sometimes courts simply create doctrines that recognize relationship rights and obligations between non-traditional family members.

The prevalence of this legal recognition of non-traditional relationships suggests that legal actors appreciate the state's affirmative duty to recognize relationship rights. Courts and legislatures feel compelled to honor certain relationships legally even if they don't feel compelled to afford those relationships family status. When looked at as a whole, the Supreme Court doctrine on relationships suggests that there is some constitutional requirement that the law respect family relationships for reasons other than just their expressive potential, for reasons that have to do with the formative role that family relationships play in many people's lives.

If one believes that the law's role in fostering and promoting these relationships is beneficial and important, though, this article suggests that courts and legislatures should be wary of disaggregating relationship rights from relationship status in the way that they have. While jealously guarding what it means to be married and what it means to parent, courts and legislatures have created an alternative regime of relationship rights that ultimately may undermine some of the most important ways that the law honors relationship. Cafeteria-style family rights require a degree of judicial construction, monitoring and evaluation that is antithetical to the privacy, intimacy and autonomy values that motivate the law to respect relationship in the first place.

Concretely, what this means is that if one believes in the legitimacy and importance of legal marriage, then one should be wary of supporting "marriage-lite" arrangements because the very existence of alternative structures will foster a legal culture that is used to inserting itself inside relationships to define and evaluate them instead of leaving them alone. Comparably, if one believes in the importance of parental autonomy and privacy, one needs to be wary of alternative parenting constructs that give courts not only the discretion, but often the duty, to make traditional parenting decisions.

Conservative and (some) liberals can even agree on the analysis to this point. They can agree that the disaggregation of rights from status is dangerous. Where they will part ways is in what to do about it. To conservatives, the response to the danger will be to try to reign in the liberal social norms and values that have allowed alternative family forms to flourish. If alternative family forms cease to

exist in such numbers, the pressure on the law to recognize them will obviously dissipate.

To liberals who believe that many non-traditional relationships should be recognized by law, the response to the danger will be to try to fight all the harder for family status. If non-traditional family members are entitled to marital and parental rights then they should be entitled to marital and parental status. Affording them something lesser not only leaves alternative family members with something lesser, it undermines the institutions of marriage and parenthood for everyone.