2013

Staging the Family

Clare Huntington
Columbia Law School, ch104@columbia.edu

STAGING THE FAMILY

CLARE HUNTINGTON*

For many critical aspects of family life, all the world truly is a stage. When a parent scolds a child on the playground, all eyes turn to watch and judge. When an executive's wife hosts a work party, the guests are witness to traditional gender roles. And when two fathers attend a back-to-school night for their child, other parents take note of this relatively new family configuration. Family is popularly considered intimate and personal, but in reality much of family life is lived in the public eye.

These performances of family and familial roles do not simply communicate messages to others. They are also central to the deep structure of family law. Drawing on sociological and feminist theory, this Article argues that iterated, everyday performances are performative—that is, they create and then maintain collective understandings of mother, father, child, and family itself. The law plays an integral role in this by imbuing the performances with legal salience to define the categories at the heart of family law. This Article terms this dynamic process "performative family law."

Aspects of this mutually constitutive relationship between performance and family law are deeply troubling, raising significant concerns for core areas of doctrine, policy, and theory. First, family law's prevailing approach to defining familial categories is normatively narrowing because legal actors tend to give effect only to traditional, dominant images of the family despite seismic demographic changes in family form. Second, the obscuring effects of the public face of the family often warp the policies designed to address family violence, most notably child sexual abuse. Finally, by ignoring the pressure of performance, scholarly debates over the public-private divide are incomplete and have failed to explain why the concept of family privacy retains such enormous appeal.

In response, this Article proposes a new framework for family law that decenters dominant performances and provides an alternative means to define familial categories and counter family violence. It is not possible or even desirable to eliminate performativity entirely, but it is important to resist its more troubling aspects. A denaturalizing framework promises a more pluralistic approach to the emerging demographic transformation of the family and deeper engagement with the variety of family life today.

 Associate Professor, Fordham Law School; J.D., Columbia Law School; B.A., Oberlin College. For helpful comments and suggestions, I am grateful to Noa Ben-Asher, Nicholas Blomley, William Boyd, Nestor Davidson, Ariela Dubler, Elizabeth Emens, Sheila Foster, Katherine Franke, Suzanne Goldberg, Abner Greene, Jill Hasday, Leah Hill, Sonia Katyal, Robin Lenhardt, Solangel Maldonado, Camille Gear Rich, Pierre Schlag, Elizabeth Scott, Jane Spinak, Ed Stein, Susan Stiritz, Zephyr Teachout, and Kendall Thomas, as well as participants in workshops at Columbia Law School's Center for Gender and Sexuality Law, Cardozo Law School, Colorado Law School, Fordham Law School, St. John's Law School, the Emerging Family Law Scholars and Teachers Annual Gathering in June 2010, and the Family Law Scholars of Greater New York. An earlier draft of this paper was presented at the Annual Meeting of the Law & Society Association in June 2011. Thanks to Ashley Harrington, Jennifer Parker, Lauren Ristau, and Deena Schwartz for outstanding research assistance.

INTRODUCTION

Ask any parent for a version of the following story. It is time to head home from the playground, but the child has a meltdown, screaming at the top of her lungs that she *will not go*. Instantly, all eyes turn. How will the parent respond to the child? With bribes?

Threats? A raised voice? Dragging the child by the arm? Judgments are forming by the second, and the parent knows it. We tend to think of parenting as personal and private, but, like so many aspects of family life, it plays out on a larger stage.

This insight resonates viscerally for anyone who has ever built a Facebook page or hosted a holiday gathering. Performances—conscious and unconscious—permeate every aspect of family life, constantly sending both overt and subtle messages to others about family and familial roles.[1] Reflecting sociological and feminist theory, these performances can be understood as performative.[2] That is, repeated, everyday familial performances constitute and then reinforce the categories of father, mother, child, spouse, and family itself. People know what a mother is from watching mothers perform. Feminist theorist Judith Butler famously argued that gender is not a natural, stable category but rather "a compelling illusion," constructed through a series of acts.[3] This is equally true, if often more obscured, for a range of familial categories.

This process, in which repeated performances create and reinforce meaningful roles, is not just a phenomenon on the playground, but also plays an important role in courtrooms, legislatures, and government agencies. When legal institutions decide whether same-sex couples should be allowed to marry,[4] whether sperm and egg donors

---

[1] This Article uses "performance" to refer to family-related behavior that has a communicative effect on others and on the self. *See* ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE 15, 79 (1959) (defining performance to include "all the activity of a given participant on a given occasion which serves to influence in any way any of the other participants," and further noting that both individuals and "team[s]" perform). Performances can be conscious, contrived, and intended for consumption, such as when a political candidate takes the stage, accompanied by a warm and smiling wife and happy, well-dressed children. Often, however, performances are not conscious, contrived, or intended for a broader audience, such as when a mother breastfeeds her hungry child on a park bench. For an extended discussion of the conduct that qualifies as familial performance, as well as a description of conduct that is *not* performance, see *infra* Part II.B.1.

[2] As discussed *infra* in Part I.A, the linguistic philosopher J.L. Austin defined performativity as words that create, rather than simply describe, a reality—as illustrated in the difference between saying "I do" rather than "I am married." J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 5 (J.O. Urmson & Marina Sbisà eds., 2d ed. 1975). Feminist philosopher Judith Butler, among others, uses the term "performativity" more broadly. See *infra* Part I.A.2 for a discussion of Butler's work.

[3] Judith Butler, *Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory*, 40 THEATRE J. 519, 520 (1988); *see also id*. at 519 ("[G]ender is in no way a stable identity or locus of agency from which various acts proceed; rather it is an identity tenuously constituted in time—an identity instituted through a *stylized repetition of acts*.").

[4] *See, e.g.*, COLO. REV. STAT. § 14-2-104(1)(b) (2011) (limiting marriage to one man and one woman); N.Y. DOM. REL. LAW § 10-a(1) (McKinney Supp. 2012) ("A marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex."); Perry v. Brown, 671 F.3d 1052, 1063–64 (9th Cir. 2012), *cert.*

are parents,[5] and whether single-parent homes are suitable for adoption,[6] legal decisionmakers draw on, and in turn often shape, public images created through performance. When the lesbian partner of a biological mother seeks parental rights, for example, courts invoke the collective image—what Erving Goffman called the "social front"[7]—of motherhood.[8] The court compares the would-be mother's performance with the dominant social front, scrutinizing such details as whether the mother received a Mother's Day card or picked the child's pediatrician.[9] If the would-be mother has *acted* like a conventional mother, then she *is* a mother, legally speaking. This Article terms this process—of drawing on dominant performances to shape legal categories—"performative family law."[10]

To surface the constitutive relationship between law and performance is immediately to appreciate its normatively troubling effects. Performances may vary, but only some have legal uptake, and the law tends to enshrine traditional social fronts. Moreover, legal institutions typically fail to recognize the contingent nature of familial categories,

---

granted sub nom. Hollingsworth v. Perry, 133 S. Ct. 786 (2012) (No. 12-144) (striking down Proposition 8, which invalidated same-sex marriages in California, without reaching the larger question of whether the Federal Constitution would permit the denial of marriage licenses to same-sex couples).

[5] *See, e.g.*, Jacob v. Shultz-Jacob, 923 A.2d 473, 475–76 (Pa. Super. Ct. 2007) (addressing questions of parental rights and obligations where two women were jointly raising children with the help of a long-time friend who was the sperm donor for two of the children); Naomi R. Cahn, *The New Kinship*, 100 GEO. L.J. 367, 380–86 (2012) (describing the numerous definitional issues raised by assisted reproductive technology, such as whether children conceived by the same donor should have a legal relationship).

[6] *Cf.* SARA MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS 39–63 (1994) (describing the negative effect of single parenthood on child well being).

[7] *See infra* text accompanying notes 42–44 (discussing Goffman's work developing this term).

[8] *See, e.g.*, S.Y. v. S.B., 134 Cal. Rptr. 3d 1, 6 (Cal. Ct. App. 2011) (analyzing the actions of a woman seeking parental rights and noting with approval that she had volunteered in the child's classroom, attended his baseball games and practices, and displayed pictures of the family in her work cubicle); *In re* E.L.M.C., 100 P.3d 546, 559–61 (Colo. App. 2004) (describing the "psychological parent doctrine" granting rights to a caregiver who has established a parental relationship with a child and finding that the woman's actions in the case satisfied the standard); *see also infra* notes 181–85 and accompanying text (discussing these and other cases in which courts have invoked the social front of motherhood).

[9] *See* V.C. v. M.J.B., 748 A.2d 539, 542-44 (N.J. 2000).

[10] This Article defines family law as the legal regulation of families and family relationships, including the formation of families through laws governing marriage, divorce, parentage, contraception, abortion, and so on, and the supervision of families through laws governing domestic violence, child abuse, and the like. This Article does not address the role of performance in every aspect of family law, and instead chooses several illustrative contexts. A particularly fruitful path that this Article does not follow, for example, is the role of performance in the legal recognition of families with transgendered members.

relying on naturalized images to supply legal meaning.[11] In this way, performative family law too often leads legal actors to accept rather than interrogate the public meaning of familial categories.[12]

Performative family law comes at a great cost to pluralism and social change, especially at a time of significant demographic shifts in the American family. Two out of five children are born to unmarried parents,[13] cohabitation rates continue to rise steadily as marriage rates decline,[14] same-sex couples are far more visible than at any time in the past,[15] and assisted reproductive technology has opened the door to myriad familial configurations.[16] When the state decides who is a family and who is not, considerable tangible and intangible benefits hang in the balance.[17] Despite the accelerating reality of change in the

---

[11] *See infra* Part III.A.2.

[12] Unlike courts and legislatures, legal scholars usually recognize that family and familial roles are not preordained, natural categories. *See, e.g.*, MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 36–37 (2004) (arguing that the social construction of the traditional family, consisting of a male breadwinner and dependent wife and children, is responsible for the exploitation of women and the privatizing of dependency); Nancy D. Polikoff, *The Social Construction of Parenthood in One Planned Lesbian Family*, 22 N.Y.U. REV. L. & SOC. CHANGE 203, 211 (1996) (describing the construction of parenthood); *cf.* Janet Halley, *What Is Family Law? A Genealogy Part II*, 23 YALE J.L. & HUMAN. 189, 190–95 (2011) (describing the construction of family law itself). These arguments have had little effect on the law, however. What is missing is a clear understanding of the mechanism through which naturalized understandings are replicated. This Article develops such an account.

[13] The national rate of nonmarital births is forty-one percent. Joyce Martin et al., *Births: Final Data for 2009*, 60 NAT'L VITAL STATISTICS REPORTS, Nov. 3, 2011, no. 1, at 1, 8 (2011). In some communities, the rate of nonmarital births is even higher. Seventy-three percent of all African American children and fifty-three percent of Latino children are born to unmarried parents. *Id.*

[14] The national marriage rate is over forty percent, but in some communities it is as low as twenty-six percent. *See* PAULA Y. GOODWIN ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., MARRIAGE AND COHABITATION IN THE UNITED STATES: A STATISTICAL PORTRAIT BASED ON CYCLE 6 (2002) OF THE NATIONAL SURVEY OF FAMILY GROWTH 6, 10 (2010) (reporting, based on 2002 data regarding women aged fifteen to forty-four, that twenty-six percent of non-Hispanic Black women were married, forty-five percent of Hispanic women were married, and fifty-one percent of non-Hispanic White women were married). Cohabitation, once rare, is now quite common. *See id.* at 3–4 (reporting that from 1987 to 2002, the percentage of women between ages thirty-five and thirty-nine who had ever cohabited doubled, from thirty percent to sixty-one percent).

[15] The revised 2010 census recorded 646,464 same-sex couple households in the United States. Martin O'Connell & Sarah Feliz, *Same-Sex Couple Household Statistics from the 2010 Census* 26 (U.S. Bureau of the Census, SEHSD Working Paper No. 2011-26, 2011), *available at* http://www.census.gov/hhes/samesex/files/ss-report.doc.

[16] *See* Cahn, *supra* note 5, at 368–69 (describing the many different configurations of families that result from assisted reproductive technology).

[17] *See, e.g.*, 8 U.S.C. §§ 1151(b)(2)(A)(i), 1153(a)(2) (2006) (conditioning immigration benefits on marriage); Perry v. Brown, 671 F.3d 1052, 1075–76 (9th Cir. 2012), *cert. granted sub nom.* Hollingsworth v. Perry, 133 S. Ct. 786 (2012) (No. 12-144) (describing a finding by the district court that state-sanctioned marriage has tremendous societal and personal meaning).

American family, family law continues to instantiate narrow social fronts and naturalized categories.

Understanding family law in performative terms has significant consequences for doctrine, policy, and theoretical debates about the family. First, it casts serious doubt on the law's approach to nontraditional families.[18] The success of marriage equality, for example, has turned on the ability of same-sex couples to persuade legal decisionmakers that couples seeking legal recognition fit easily within the social front of traditional nuclear families, with lesbians held out as soccer moms and gay men as ball-throwing dads.[19] This normative narrowing is also on display in one of the most important contemporary family law reform efforts, the American Law Institute's (ALI) *Principles of the Law of Family Dissolution* (the *Principles*).[20] In a well-intentioned effort, the ALI's *Principles* assimilate nontraditional families into family law, but do so by requiring those asserting legal rights to act in ways that reflect dominant performances.[21] Families who do not fit within the familiar and iconic model are inherently suspect and less likely to win legal recognition. Although the ALI has taken a laudable step forward, it is important to question the means of recognition.

Second, conceiving of family law in performative terms has implications for the formulation of policies addressing family violence. Public performances of family tend to be a soft focus, portraying families as rich sites of affective ties. As the saying goes, "home is where the heart is." This vision may be an important social aspiration, but it obscures the dark corners of violence, abuse, and power imbalances, as well as the quotidian emotional slights, misattunements, and ambivalence that mark family life. Family law's reliance on performance misses the violence that happens just offstage, skewing policy

---

[18] *See infra* Parts III.B.1, III.C.1.

[19] *See, e.g.*, Varnum v. Brien, 763 N.W.2d 862, 872 (Iowa 2009) ("Like most Iowans, [plaintiffs] are responsible, caring, and productive individuals. They maintain important jobs, or are retired, and are contributing, benevolent members of their communities. . . . Like many Iowans, some have children and others hope to have children. Some are foster parents."); Natalie Wilson, *From Gestation to Delivery: The Embodied Activist Mothering of Cindy Sheehan and Jennifer Schumaker*, *in* MOTHERS WHO DELIVER: FEMINIST INTERVENTIONS IN PUBLIC AND INTERPERSONAL DISCOURSE 231, 243 (Jocelyn Fenton Stitt & Pegeen Reichert Powell eds., 2010) (describing the "500 Mile Walk for Togetherness" by Jennifer Schumaker, a lesbian who called herself a "lesbian soccer mom" in an effort "to create a sustainable link between forces that wish to 'other' her"); Gettoknowusfirst.org, *Xavier & Michael*, YOUTUBE (Jan. 21, 2009), http://www.youtube.com/watch?v=SeK-_wGyHD8 (depicting a happy, functional two-father family playing basketball and saying grace before dinner).

[20] *See generally* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002).

[21] *See infra* Part III.C.1.

responses, particularly in the area of child sexual abuse. Overwhelmingly positive images of family contribute to a collective cognitive dissonance, as parents and policymakers continue to approach child sexual abuse as a problem of strangers lurking in the shadows, rather than acknowledging the much greater risk presented by family members and friends.

Finally, understanding family law in performative terms sheds new light on one of the central debates in family law theory: the public-private divide. Scholars have long worked to undercut the prevailing myth that families are private, standing apart from the state.[22] But claims of family privacy remain viscerally appealing, and here, too, the role of performance has explanatory heft. Families with sufficient means to have private space may experience the home as a place to suspend performance. Although it is not possible to do so entirely, the belief that one can take off the wig and costume holds tremendous allure. When limited-government advocates call for keeping the state out of the home, it resonates at least in part because of a belief that the home is, and should be, free of performance. If scholarly critics and others better understood the instinctive appeal of family privacy, they could develop more effective strategies for overcoming the false public-private dichotomy.

To respond to the pernicious effects of performative family law, this Article proposes a new framework for denaturalizing family law.[23] Stepping outside of performance completely is impossible, and not necessarily desirable, but it is possible to decenter the valence of dominant performances in doctrine and policy. This Article identifies the essential components of a denaturalizing framework: (1) adopting broader social fronts, (2) developing alternative means for defining familial categories, and (3) rejecting demands for contrived performances. This framework leads to more pluralistic definitions of familial categories and policies that are more responsive to family violence.

Performance and performativity are well recognized by scholars in a range of fields. Indeed, there is now an entire field of performance studies.[24] Legal scholars have fruitfully applied performance theory to important aspects of identity and discrimination,[25] but

---

[22] *See infra* Part III.C.3 (describing this literature).

[23] *See infra* Part IV.

[24] The interdisciplinary field of performance studies is not unified by methodology but rather draws on multiple perspectives to deepen an understanding of the phenomenon. *See* Barbara Kirshenblatt-Gimblett, *Performance Studies*, *in* THE PERFORMANCE STUDIES READER 43 (Henry Bial ed., 2d ed. 2007) ("Performance Studies starts with a set of concerns and objects and ranges widely for what it needs by way of theory and method.").

[25] *See, e.g.*, Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262, 1267–79 (2000) (contending that "outsider group" members have to perform

engagement has been conspicuously absent in scholarly assessments of the law's treatment of the family.[26] This is all the more remarkable given the centrality of performance and performativity in family life and family law. This Article remedies this lacuna by developing a theoretical frame for understanding the performative dynamic of family law and providing an alternative to the normatively troubling reliance on performative categories.

To develop these insights, the Article proceeds in four parts. Part I provides an overview of performance theory and the legal scholarship that has drawn on this literature outside of family law. Part II explores the ubiquity of familial performances, identifying the many ways families perform in everyday life and in popular culture. Part III turns to the insights that flow from conceiving of family law in performative terms, arguing that the law's current uncritical incorporation of dominant performances obscures nontraditional families and undermines responses to familial violence. Finally, Part IV proposes

---

their identities to counter negative stereotypes and that "the nature of the work and the pressure to do it . . . is a form of employment discrimination"); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1158–59 (2004) (explaining that employers develop performance expectations for certain races and ethnic groups, including specific hairstyles, accents, and clothing styles). This literature is described in greater detail in Part I.B, *infra*.

[26] When scholars do note the role of performance in family law, they typically do so in passing and tend to focus on race, sexual orientation, and gender. *See, e.g.*, Katherine M. Franke, *Taking Care*, 76 CHI.-KENT L. REV. 1541, 1553–54 (2001) (describing how newly freed slaves during the Reconstruction Era had to perform marriage consistent with White norms as a condition of being recognized as citizens). One notable exception is Ariela Dubler's legal history of common law marriage. *See* Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 962–67, 1006–13 (2000) (demonstrating that in the early twentieth century the line between marriage and nonmarriage was far more permeable than commonly thought, that legal norms did not neatly reflect social norms and instead were a means for imposing judicial order in the face of ambiguity about what kinds of behavior counted as marriage, that the legal and social conceptions of marriage were heavily infused with changing gender norms, and that common law marriage was rejected at least in part because it could be reduced to a series of social performances, thus risking the exposure of all marriages as mere performance); *see also* Jessica A. Clarke, *Adverse Possession of Identity: Radical Theory, Conventional Practice*, 84 OR. L. REV. 563, 570–83 (2005) (exploring circumstances in which the law confers legal benefits on a person acting as if they had a certain legal status—such as that of property owner—by comparing adverse possession, common law marriage, functional parenthood, and 19th century doctrines of race determination); Marc R. Poirier, *Microperformances of Identity: Visible Same-Sex Couples and the Marriage Controversy*, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 3 (2008) (examining the role of "microperformances"—the identity-forming and identity-altering aspects of social interaction—in the same-sex marriage debate). In other fields, however, there is a closer treatment of performance and family categories. *See, e.g.*, ROBIN BERNSTEIN, RACIAL INNOCENCE: PERFORMING AMERICAN CHILDHOOD FROM SLAVERY TO CIVIL RIGHTS (2011) (using performance theory to examine theater productions, works of literature, and playthings, particularly dolls, to argue that until the civil rights movement, only White children were understood as innocent).

an alternative framework—a denaturalized family law—that promises a more pluralistic response to the demographic transformation of the American family and more effective engagement with the problems facing families today.

I
Performance and Performativity in Theoretical Perspectives

Scholars in sociology, anthropology, philosophy, and related fields have long theorized about performance and performativity. This Part focuses on sociologist Erving Goffman and feminist philosopher Judith Butler, whose works are central to performance theory and supply a useful framework for understanding performance and family law. As this Part describes, legal scholars have drawn upon performance literature to gain insights into the legal effect of the performance of race, sexual orientation, and gender, but they have not engaged in a similar exploration of the performance of family.

A. Theoretical Antecedents

In the 1955 William James Lectures at Harvard University, linguistic philosopher J.L. Austin outlined different aspects of speech.[27] He contrasted constative speech with performative speech, arguing that the former *describes* a reality while the latter *creates* a reality.[28] "I am married" is constative speech; saying "I do" in a marriage ceremony is performative speech.[29] The words "I do" create the marriage.[30] Austin understood these types of speech as overlapping, rather than distinct categories, because a set of words could be one or the other depending on the context.[31] As Austin elaborated, words have consequence because of the conventions surrounding their utterance.[32] The words "I name this ship the *Queen Elizabeth*" are

[27] The lectures were subsequently published. *See* Austin, *supra* note 2.

[28] *See id.* at 3–7.

[29] *See id.*; *see also id.* at 12 ("[T]o *say* something is to *do* something . . . .").

[30] *See id*. at 4–6. Austin refined the category of performative speech into "illocutionary" utterances, which "do" something directly, such as saying "I do," and "perlocutionary" utterances, which "do" something indirectly by having an effect on others, such as saying "shoot her." *Id.* at 98–108. Although this Article does not hew closely to Austin's definition of performativity, which focuses on speech, the distinction is still relevant. Some familial performances do directly affect familial categories, as with a wedding ceremony or a mother giving birth, but the primary focus of this Article is the effect of familial performances on others.

[31] *See id.* at 4–9.

[32] Austin identified six "felicity conditions," which are required for an utterance to be performative, including "an accepted conventional procedure" for "the uttering of certain words by certain persons in certain circumstances." *Id.* at 14–15. One of J.L. Austin's

performative only when said in a ship-naming ceremony, and then only because of the tradition of naming ships.[33]

Austin's insights provide a kernel for understanding a much broader phenomenon. Performance permeates daily life and is performative in the sense that it has actual consequences. The use of dramaturgical analogies—referring to roles, scripts, and performances—to understand social interactions is not new, but in the last half of the twentieth century, the field has developed, taking a more systematic and constructional approach.[34]

1. Performance

A leading figure in performance theory, Erving Goffman's particular insight was that much of daily life is performed. As he put it, "[t]he world, in truth, is a wedding."[35] Drawing on symbolic interactionism—which teaches that individuals' behavior constructs society through a particular process of creating shared meaning[36]—Goffman developed the dramaturgical analogy to understand the formation of identity. As he described in his seminal book, *The Presentation of Self in Everyday Life*, Goffman used the perspective of a theatrical performance to study how individuals in the workplace present

students, John Searle, developed the idea of context further, focusing particularly on the effect of institutional context in conveying meaning. Searle contended that simply describing a set of facts may have little meaning without a larger understanding of institutional practices. For example, to say that a woman in a dress walked a short distance next to one man and then joined another man has no particular meaning. But once these facts are conveyed as part of the institution of the traditional wedding ceremony, the acts take on meaning. *See* JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 50–53 (1969).

[33] *See* AUSTIN, *supra* note 2, at 5, 8, 14–24. As the marriage example illustrates, Austin was aware of the legal consequences of some speech, but legal significance was not the hallmark of his performativity—rather, the social convention that accompanied the speech was the dispositive feature.

[34] *See, e.g.*, CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 26–27 (1983) (deploying performance to develop anthropological theory); VICTOR TURNER, DRAMAS, FIELDS, AND METAPHORS: SYMBOLIC ACTION IN HUMAN SOCIETY 37–42 (1974) (describing how individuals' actions create space for societal conflicts to be laid bare and addressed, leading to the restructuring of social dynamics).

[35] GOFFMAN, *supra* note 1, at 36.

[36] *See* HERBERT BLUMER, SYMBOLIC INTERACTIONISM: PERSPECTIVE AND METHOD 1–6 (1969). In symbolic interactionism, the self is an object and its meaning to an individual is mediated through social interactions. *See id.* at 2, 12. To become an object to oneself, it is necessary to be outside the self. This is where performance enters. If an individual places herself in the position of others—thus, taking a role—then she is able to see herself and develop a sense of self. *See id.* at 13.

themselves to others and control the impressions others form.[37] Goffman referred to this process as "impression management."[38]

Central to Goffman's theatrical framework was the idea of the "front"—that which defines the situation for the audience. The front includes the setting[39] and the performer's "personal front," which are those characteristics and props that follow the performer everywhere.[40] The "back" is that which the audience is not meant to see and is where the performance is prepared.[41]

Individual performances are related to what he called the "social front," the shorthand that performers use to help orient the audience to the general meaning of a performance.[42] When professionals in disparate fields wear white laboratory coats, they can convey a general message of cleanliness and modernity to the audience without fleshing out the details of precisely how this particular professional is clean and modern.[43]

Goffman contended that social fronts become institutionalized, making it difficult for an individual performer to alter the meaning of the front. When an individual assumes an established social role, according to Goffman, she will find that there is a well-established social front in place for that role and that she must maintain both the tasks associated with the role as well as the social front.[44] In other words, the academic must publish or perish, but also wear tweed.

---

[37] *See* GOFFMAN, *supra* note 1, at xi. There are numerous criticisms of Goffman's dramaturgical approach, including Herbert Blumer's contention that Goffman focused too narrowly on face-to-face interactions without considering the broader social context or other ways humans interact. *See* Herbert Blumer, *Action vs. Interaction*, 9 SOCIETY, Apr. 1972, at 50, 52 (reviewing ERVING GOFFMAN, RELATIONS IN PUBLIC: MICROSTUDIES OF THE PUBLIC ORDER (1971)). Goffman himself was aware of the limits of his analogy. *See* GOFFMAN, *supra* note 1, at xi, 254 (describing "obvious inadequacies" of his model, such as the fact that the stage presents things that are make-believe while presumably life presents things that are real, and the fact that in a performance the audience creates a third party apart from the characters, whereas in real life the other characters are also the audience). *See generally* BRUCE WILSHIRE, ROLE PLAYING AND IDENTITY xiv–xvii, 258–81 (1982) (arguing that Goffman and others use the theatrical metaphor too simplistically because they conflate too many aspects of the actor and also cast doubt on the existence of a true self and of reality itself).

[38] GOFFMAN, *supra* note 1, at 208.

[39] A person who wants to convey her elevated social status, for example, will ensure that others see her surrounded by luxurious furnishings. *See id.* at 22–23.

[40] These characteristics are both immutable, such as race, and mutable, such as clothing and facial expressions. *See id.* at 23–24.

[41] *See id*. at 238.

[42] *See id.* at 26–27.

[43] *See id*. at 26. As Goffman explained, "[i]nstead of having to maintain a different pattern of expectation and responsive treatment for each slightly different performer and performance, [the audience member] can place the situation in a broad category around which it is easy for him to mobilize his past experience and stereo-typical thinking." *Id.*

[44] *See id.* at 27.

Performances of the self are idealized versions of reality,[45] but Goffman believed that these idealizations help confirm the values of the community as a whole, even when there is a discrepancy between the performance and reality.[46] The performer and the audience collude in perpetuating the illusion of the ideal. The performer maintains the ideal by engaging in discrepant behavior on the sly,[47] and the audience agrees not to pull back the curtain on the performance.[48]

To present an idealized self, performers engage in numerous small deceptions, such as correcting mistakes before the performance to create an impression of infallibility, showing only the end product of labor to conceal either the cursory or laborious work that went on behind the scenes, and hiding any dirty work that went into the performance, including degrading or semi-illegal actions.[49] Crucially, the performer keeps the audience out of the back.

Goffman resisted a dichotomy between real and contrived performances, contending that even "real" performances may be contrived—"while persons usually are what they appear to be, such appearances could still have been managed."[50] Thus, Goffman posited a continuum, with sincere performances at one end, where the performer truly believes in her performance, and cynical performances at the other end, where the performer does not believe in her performance.[51] Goffman argued that performers often traverse this

---

[45] The "self" is a complicated and contested notion. Scholars across disciplines have long debated different conceptions of the self and whether the self is knowable. *See, e.g.*, JEAN PAUL SARTRE, BEING AND NOTHINGNESS 82–83 (1943) (setting forth his waiter example, where the waiter is *playing* at being a waiter and thus transcends his social status). *See generally* THE BOOK OF THE SELF: PERSON, PRETEXT, AND PROCESS (Polly Young-Eisendrath & James A. Hall eds., 1987) (presenting a collection of views on the nature of the self, including self as person, self as pretext, and self as process). Some of the scholars discussed in this Article would take serious issue with the idea of a knowable self, especially Judith Butler. *See* JUDITH BUTLER, GIVING AN ACCOUNT OF ONESELF 19–21, 37–40 (2005) (arguing that the self is always partially hidden, "not only because the body has a formative history that remains irrecoverable by reflection, but because primary relations are formative in ways that produce a necessary opacity in our understanding of ourselves"). In describing different conceptions of the self, this Article acknowledges the impossibility of ever fully knowing the self—of having an irreducibly authentic identity—but it also assumes that it is possible to divine a *sense* of self, at least as a felt experience if not an absolute truth.

[46] *See* GOFFMAN, *supra* note 1, at 35–36.

[47] *See id.* at 41 ("[I]n this way the performer is able to forgo his cake and eat it too.").

[48] *See id.* at 229–33 (setting forth the numerous ways audience members collude in maintaining the illusion of the performance, including not insisting on seeing the "back," pretending not to see any slips in the performance that would reveal the discrepancy between performance and reality, and so on).

[49] *See id.* at 43–46.

[50] *Id.* at 71.

[51] *Id.* at 17–18.

continuum. An individual may begin with a cynical performance but ultimately come to believe it, or conversely, begin by believing the performance to be true but then lose such faith over time.[52]

Finally, Goffman was interested in the ways performances define membership and exclude others. For example, he noted that even though pharmacists do not require extensive training, sustaining the performance of elaborate graduate training is a way of maintaining pharmacists' social and economic status.[53] In this way, performances can define who is "in," but also, crucially, who is "out."

2. *Performativity*

The consequence of performance is what some scholars call performativity.[54] This can be narrow in the Austinian sense of a speech act but can also be much broader in the sense that performances create social categories. A foundational scholar in this vein is Judith Butler, who studies the social construction of gender identity. According to Butler, gender is socially constructed through a series of performative, iterative acts.[55] To Butler, "bodily gestures, movements, and enactments of various kinds constitute the illusion of an abiding gendered self."[56] The performance is so convincing that both the

---

[52] *Id.* at 19–21.

[53] *See id.* at 46.

[54] The exact relationship between performativity and performance remains contested. *See* Andrew Parker & Eve Kosofsky Sedgwick, *Introduction* to PERFORMATIVITY AND PERFORMANCE 2 (Andrew Parker & Eve Kosofsky Sedgwick eds., 1995) (noting that the word "performative," despite being a "common lexical . . . term," can have vastly different and even oppositional meanings in different contexts).

[55] *See* JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" 2 (1993) [hereinafter BUTLER, BODIES THAT MATTER] (discussing "the reiterative and citational practice by which discourse produces the effects that it names"); Butler, *supra* note 3, at 519 (outlining an idea of gender as "an identity instituted through a stylized repetition of acts"); *see also* BUTLER, BODIES THAT MATTER, *supra*, at 12 ("Performativity is thus not a singular 'act,' for it is always a reiteration of a norm or set of norms, and to the extent that it acquires an act-like status in the present, it conceals or dissimulates the conventions of which it is a repetition."). For more discussion of this theory, see generally JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990) [hereinafter BUTLER, GENDER TROUBLE]. Jacques Derrida also explored this broader understanding of performative acts and the idea that repeated acts construct an identity. *See* JACQUES DERRIDA, *Signature Event Context*, *in* MARGINS OF PHILOSOPHY 307, 307–30 (Alan Bass trans., 1982).

[56] Butler, *supra* note 3, at 519. The reproduction of a gendered identity occurs through the reenactment of certain bodily actions against the backdrop of gendered expectations and bodily styles. *See id.* at 521–24. Butler uses a broad understanding of an "act" to include political and social acts as well. *See id.* at 523. In Butler's theory, the body is central to performativity. Because biological sex is located in the body, Butler contends that it is crucial that a gendered identity reside in the body as well, with gender as "the cultural significance that the sexed body assumes . . . . " *Id*. at 524.

actors and the audience do not perceive the performance but instead see only the fact of gender.[57]

There is, however, some awareness of construction. Butler contends that the anxiety that attends gender performances—when gender is not performed properly, society is quick to sanction or marginalize the actor—is "sign enough that on some level there is social knowledge that the truth or falsity of gender is only socially compelled and in no sense ontologically necessitated."[58] There is also the possibility of subversion, as Butler illustrates with the example of men in drag: Through such performances, the performers "mock[ ] . . . the expressive model of gender and the notion of a true gender identity."[59]

Although gender performances are individual, they are also collective. As Butler argues, "there are nuanced and individual ways of *doing* one's gender, but *that* one does it, and that one does it *in accord with* certain sanctions and proscriptions, is clearly not a fully individual matter."[60] The performances take on a public nature because the acts both come from collective experience and recreate collective experience.[61]

In essence, Goffman and Butler both describe how performances—which are ubiquitous, permeating the self and society in far-reaching ways—can also be performative, doing significant social, cultural, and political work to create meaning. This is seen in Butler's contention that gender does not exist in a natural state but rather is created through iterative acts. It is also reflected in the symbolic-interactionist insight that there is no preexisting meaning that individuals express, but rather through interaction, meaning is formed.[62]

Goffman and Butler, however, are not an easy pairing, largely because of their different views about agency and the effect of performance. For Goffman, the actor typically chooses to perform and the performance has a beginning and an end.[63] The back is a

---

[57] *See id.* at 520, 527.

[58] *Id.* at 528.

[59] BUTLER, GENDER TROUBLE, *supra* note 55, at 136–38.

[60] Butler, *supra* note 3, at 525.

[61] *Id*. at 525–26.

[62] *See* BLUMER, *supra* note 36, at 10 ("By virtue of symbolic interaction, human group life is necessarily a formative process and not a mere arena for the expression of preexisting factors."); *id.* at 19 ("It is the social process in group life that creates and upholds the rules, not the rules that create and uphold group life."). Of particular relevance to this Article is the symbolic-interactionist insight that the meaning of a "thing" is neither fixed nor entirely subjective, but instead comes from an interpretive process; in short, meanings are social products. *See id.* at 5.

[63] Goffman did acknowledge that some performances are unconscious. *See* GOFFMAN, *supra* note 1, at 6 (explaining that sometimes "the individual will act in a thoroughly

performance-free zone. By contrast, Butler's understanding of performance is that the act constitutes the self and thus posits a distinct lack of agency.[64] There is no self to precede the performance, and there cannot be a back of the performance.

Although these divergent conceptions of the self underscore the lack of a unitary theory, Goffman and Butler are best understood as presenting different moments of the self. Gender may be a reality only because iterative acts shape the concept of gender, but in a society where gender is salient, individuals still make conscious choices, at least at the margins, about how to perform gender.

Moreover, individuals certainly perceive some agency. The familiar expressions of "knowing yourself" and having a "true self" or an "inner self" reflect a perception that there is an authentic identity that is, at least partially, knowable. Butler and others have claimed that any perception of an authentic self is delusional, but there are many times when we feel that we are stepping out of the scene, as when we may "debrief" with a co-worker or family member about a worrisome incident.[65]

Notwithstanding these conceptual tensions, Goffman and Butler both reflect an important insight into social construction. As the next

---

calculating manner," whereas other times the individual may be calculating but is unaware of it or may act in a certain manner because of habit and societal expectations). To Goffman, these variations were less important than the ultimate effect of the audience acting as though it believed the performance, in which case the performance can be considered effective. *See id.*

64 *See* BUTLER, BODIES THAT MATTER, *supra* note 55, at 15 (arguing that her account of performativity "in no way presupposes a choosing subject"); *see also id.* at x (arguing that if gender were performative, this "could mean that I thought that one woke up in the morning, perused the closet or some more open space for the gender of choice, donned that gender for the day, and then restored the garment to its place at night," but "[s]uch a willful and instrumental subject, one who decides *on* its gender, is clearly not its gender from the start and fails to realize that its existence is already decided *by* gender"). In this way, Butler does not conceive of gender as a role that one assumes, but rather as an act that creates the subject itself. *See* Butler, *supra* note 3, at 528. Butler then addresses the existential question begged by this analysis: What came before the subject, or who is doing the constructing? *See* BUTLER, BODIES THAT MATTER, *supra* note 55, at x–xi. She contends that we can answer this question only by rethinking the idea of construction itself. *See id.* at xi, 7 ("Subjected to gender but subjectivated by gender, the 'I' neither precedes nor follows the process of this gendering, but emerges only within and as the matrix of gender relations themselves.").

65 This Article thus uses both conceptions of performance—as a conscious act deployed to influence others and as a constitutive act that precedes any sense of self. To translate this into the context of families, families and familial roles exist only through performances, but individuals and families as a whole still choose to act in certain ways to influence how they are perceived by others. As described in greater detail in Part III, performative family law draws more on a Butlerian understanding of performance, but Goffman's concept of chosen performances is also relevant to how individuals try to fit within, and change, family law's categories.

Subpart demonstrates, legal scholars have drawn upon these insights to identify the role of law in performance and performativity.

B. Performance and Identity in Legal Scholarship

Legal scholars have relied on performance theory to develop substantive insights into identity and discrimination.[66] For example, Devon Carbado and Mitu Gulati have developed a theory about identity performance, positing that although a person's "status identity" (such as gender and race) informs experiences with, and vulnerability to, discrimination, "performance identity"—the choices a person makes about how to present their status—has distinct legal significance.[67] Carbado and Gulati give the example of African American women, whose decisions about hairstyles, clothing, and leisure activities have significant meaning in our race-conscious culture.[68] If an employer promotes one African American woman but not another, this decision may well turn on the performance choices of each employee. The employer may prefer the African American woman who relaxes her hair, wears khakis on casual Fridays, and plays tennis at a country club, rather than the woman who has her hair in braids, wears West African–influenced dress on Fridays, and does not belong to a country club.[69] But, as Carbado and Gulati argue, antidiscrimination law considers only status discrimination—whether the employer discriminated against African American women—not identity-performance discrimination, and thus the second woman has no claim under existing antidiscrimination law.[70]

---

[66] In the literature discussed in this Subpart, there is a tension about whether performances require individual agency. At times, scholars appear to assume that the performances are consciously chosen. The image of a worker deciding how to perform her race and gender in the workplace is more akin to Goffman's sense that individuals manage the impression they are making and is in stark contrast with Butler's belief that gender precedes the subject. Other times, scholars seem to adopt Butler's approach and conceive of performance as creating the category itself, as with the social construction of race in the nineteenth century racial identity trials.

[67] *See* Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 701–03, 710–19 (2001) (discussing and applying these concepts of status identity and performance identity); *see also* Carbado & Gulati, *supra* note 25, at 1263–67 (discussing the difficult decisions employees face when employers appear to value attributes that are hard to observe—such as collegiality—but such attributes conflict with the employee's sense of self, such as when an employee is shy).

[68] Carbado & Gulati, *supra* note 67, at 717–18.

[69] *Id.*

[70] *See id.* at 719–28. Carbado and Gulati argue that identity performances are particularly important in workplaces where the standards for advancement are difficult to quantify and turn on such factors as "social effort" and "collegiality." Carbado & Gulati, *supra* note 25, at 1260–61, 1263. In that context, an incentive exists for employees to "work their identities" to signal to the employer that they have the desired characteristics and thus counter negative stereotypes about an employee's status identity. *See id.* at 1260–63. One

Legal scholars also have used performance theory to help understand the social construction of race.[71] A legal history of nineteenth-century racial identity trials demonstrates the performative aspect of race.[72] The issue of racial identity arose in different contexts, such as whether a slave should be set free or whether a person could legally inherit or devise property, a right that only Whites could exercise.[73] The trials embodied twin anxieties of the time: the fear that a White person might be enslaved and the fear that a Black person might be "passing" as White.[74] The trial did not turn simply on ancestry. Instead, parties litigating racial identity introduced evidence about the physical appearance of the person in question and about the *conduct* of the person.[75] If a person acted in a way that was understood as White or Black, then a jury was more likely to determine that the person was White or Black.[76] To "act White" had a specific meaning. For men, it meant civic participation, such as voting or sitting on a jury, and for women, it meant acting honorably, both sexually and socially.[77] In this way, race was performative in the sense that it meant not just what someone looked like, but also how they acted in public.[78]

---

protection in this regard is that it is not permissible for employers to use stereotypes about a protected group to make an employment decision. *See, e.g.*, Back v. Hastings on Hudson Sch. Dist., 365 F.3d 107, 121–22 (2d Cir. 2004) (holding that "stereotyping of women as caregivers can by itself and without more be evidence of an impermissible, sex-based motive"); *see also* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 734 (2003) (finding that family responsibility stereotypes justified the Family and Medical Leave Act). Finally, Carbado and Gulati argue that employment discrimination law recognizes neither the tangible nor psychic costs of performance identity. As they contend, individuals incur real costs from the time and effort it takes to perform, a cost not borne by in-group members because they are not working against negative stereotypes. *See* Carbado & Gulati, *supra* note 25, at 1279–88. And individuals incur psychic costs from the need to deny the self in order to fit in. *See id.* at 1288–90.

71 *See, e.g.*, IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996) (describing how law both shapes and is shaped by dominant social understandings of race).

72 *See* Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 (1998) (examining trial records in local Southern courts during the antebellum period).

73 *See id.* at 120–21.

74 *See id.* at 122, 180.

75 *See id.* at 112, 132–37, 147–51, 156.

76 *See id.* at 157–76. Although the ultimate question was the "blood" of the person, conduct was relevant because of the belief that blood influenced action. *See id.* at 113, 156. If a person had "white blood," they would "act white." *See id.* at 131, 162.

77 *See id.* at 157–76.

78 *See id.* at 162–63 ("Race was not only something [the defendants] *were*, it was something they *did*. To be White was to act White: to associate with Whites, to dance gracefully, to vote.").

Finally, performance theory is central to the work of Kenji Yoshino, who draws on Goffman to explore the myriad ways gays and lesbians "cover" their sexual orientation.[79] Yoshino argues that covering demands can be understood as a new phase in the history of discrimination against gays and lesbians.[80] According to Yoshino, gays and lesbians first faced conversion demands (requiring an individual to deny and change her identity), then confronted passing demands (allowing a person to retain that identity if she kept it secret, as was true under the "don't ask, don't tell" policy), and now encounter covering demands (acknowledging the identity but requiring a person not to "flaunt" that part of herself).[81]

Covering can apply to other identity performances as well, such as race and gender,[82] as exemplified by a telling anecdote Yoshino relates about covering gender. When a female law student who is also a parent asked for advice about an upcoming clerkship interview, a professor cautioned, "don't front the kid to the judge."[83] The demand of the law student was not that she become a man or pass herself off as a man, but rather that she cover her gender and *act* more like one cultural image of a man, which is to say, someone without significant childcare responsibilities.

Yoshino uses his insights into covering to argue that the law should move away from a norm of group-based equality because this approach essentializes certain traits and assumes that they are central to that group.[84] Instead, Yoshino argues, civil rights law should be based on a universal right of elaborating a true, individual identity.[85]

---

[79] *See* KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006). Goffman first coined the term "covering" to describe the process an individual uses to downplay a stigmatized part of her identity. *See* ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 102–04 (1963). In Yoshino's words, covering "is to tone down a disfavored identity to fit into the mainstream." YOSHINO, *supra*, at ix.

[80] *See* YOSHINO, *supra* note 79, at 19.

[81] *See* YOSHINO, *supra* note 79, at 17–19. Yoshino's conception of performance envisions considerable agency, with individuals choosing whether to flaunt or cover, depending on the context. *See, e.g.*, *id.* at 76–77 (describing fights with his boyfriend about "how to perform our gayness" and describing debates in the gay community about "act[ing] straight").

[82] *See id.* at 111–64. Yoshino argues that "[e]veryone covers" and that this phenomenon is not limited to those in protected categories. *See id.* at ix; *see also id.* at 24–25 (acknowledging that straight White men also cover, concealing, for example, depression, shyness, or socioeconomic background).

[83] *See id.* at 143. Consciously or not, the law professor was using Goffman's terms of front and back. The demand of the law student was to keep the child and, more importantly, the student's identity as a mother, backstage.

[84] *See id.* at 189.

[85] *See id.*

In this literature on law and performance, scholars are careful to note that race, class, gender, and sexual orientation are not discrete performances.[86] Instead, these categories intersect to require and produce unique performances. An African American man, for example, may face fears that he is a physical and sexual threat, leading some to act in deliberate ways. The journalist and writer Brent Staples explains that as a tall African American male, he will whistle Vivaldi as he walks down a city street at night, reassuring White passersby that he is not a threat.[87] And class affects all performances. African Americans who have grown up in the middle class, for example, can recount the demands to act differently from lower-income African Americans.[88]

Familial status and familial roles are no less social identities than race and gender, and yet scholars have not examined the role of performance in family law.[89] As the remainder of this Article demonstrates, performance is a pervasive phenomenon in the context of the family, with significant consequences for the law. Indeed, perhaps more so than any other area of the law, performances are central to the conception and functioning of family law.

---

[86] *See* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991) (arguing that identity politics often "conflate[ ] or ignore[ ] intragroup differences," and using the example of violence against women to demonstrate the dangers of using only race or gender as salient categories without also analyzing "other dimensions of their identit[y]"); *see also* HANEY LÓPEZ, *supra* note 71, at xiii ("Race exists alongside a multitude of social identities that shape and are themselves shaped by the way in which race is given meaning. We live race through class, religion, nationality, gender, sexual identity, and so on.").

[87] Brent Staples, *Black Men and Public Space*, HARPER'S, Dec. 1986, at 19, 20. Or an Asian American man may contend with the perception that he is effeminate. *See* Robert S. Chang & Adrienne D. Davis, *An Epistolary Exchange: Making Up Is Hard to Do: Race/Gender/Sexual Orientation in the Law School Classroom*, 33 HARV. J.L. & GENDER 1, 11–16, 29–31 (2010) (discussing the stereotype that Asian American males are effeminate math experts who lack sexual prowess and exploring how this played out in the classroom as students assumed Chang was gay).

[88] Angela Harris and Leslie Espinoza have described the combination of race and class demands for African Americans, recounting that "[m]any of us who grew up in middle class, 'respectable' African-American homes can recall being told by parents or other relatives to stop 'acting colored.'" Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race*, 10 LA RAZA L.J. 499, 517 (1998). The authors relate that "[t]he image we were all fleeing was the image of the n[__], the lower-class Black person who talked too loudly in 'Black English,' laughed too heartily, and was vulgar in appearance, word, and deed." *Id.*

[89] *But see supra* note 26 (noting that some scholars have examined the role of performance in family life but have focused on race, sexual orientation, and gender).

II
Family Pictures

Much of family life takes place on a stage, with individuals performing specific roles, such as mother or son. Groups also perform the category of "family" itself, where the collective identity is the relevant role. From the subway to the office to the Thanksgiving table, these acts are performative in the Butlerian sense of constituting social categories with significant cultural meaning and relevance. The performances also shape the social fronts that become the shorthand for these categories.

Before describing these performances and the performative process in greater detail, however, it is important to clarify a key term. This Article defines a familial performance as family-related behavior that has a communicative effect on others or on the self.[90] The behavior must have some connection to family and familial status, which will often be context specific. The decision to wear a scarf in winter is not the performance of family, unless it is a head scarf worn to convey marital status, as in some religious communities.[91] Conducting a business meeting is not the performance of family, unless it is a family-owned business. But so much prosaic behavior *is* the performance of family, from wearing a wedding ring to picking up a child from school. Through their communicative impact, these performances, collectively and over time, have a tremendous performative effect on familial categories.[92]

---

[90] Calling this conduct a performance and not simply "behavior" serves as a point of entry into the literature on performance and performativity. It also resonates with much felt experience, in which family members often are aware of performing for others. *See infra* Part II.A (describing examples of this phenomenon). The scholarship on family law and social norms does some work to explain the communicative effect of family behavior. *See, e.g.*, Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 Va. L. Rev. 1901, 1907–12 (2000). However, this literature does not contemplate the much broader notion of performativity. Social norms and familial performances are related conceptually and practically, but ultimately are distinct phenomena. Social norms play a central role in regulating family life, but the typical definition of a social norm—the rules of behavior that individuals follow independent of any legal obligation or formal penalty for noncompliance—is decidedly narrower than this Article's working definition of familial performance. For example, social norms require a degree of consensus in any given community. By contrast, the salience of performance often comes from its nonconformity. Familial performances do, however, help shape social norms, and in this way many social norms around the family are rooted in performance.

[91] For example, Orthodox Jewish women cover their heads with a scarf, hat, or wig to show they are married. Susannah Heschel, *Gender and Agency in the Feminist Historiography of Jewish Identity*, 84 J. Religion 580, 580 (2004).

[92] This Article is interested in the effect of familial performances on others, and thus it focuses on the uptake of familial performances. In this way, the Article is concerned more with the felicity conditions that allow a performance to gain significance than with the

A. Ubiquitous Family Performances

Family is performed in a variety of settings, sometimes chosen, sometimes not. A playground is its own theater in the round, Twitter feeds memorialize family interactions,[93] and a simple cookie-baking session can become a performance for an audience of thousands through a parent's blog.[94] The workplace is another stage for the performance of family. Parents and spouses often choose to display pictures of family members.[95] Some workplaces demand a certain kind of familial performance. Lehman Brothers was not alone among Wall Street investment banking firms in putting tremendous pressure on (uniformly male) top executives to be married and have their wives act in a certain way.[96] At annual firm gatherings, wives were expected to hike, shop, and never complain about their husbands' frequent absences from family life.[97] Divorce was strongly frowned upon.[98]

Family members also perform within the home. When friends and relatives come over for a family gathering, hosts often clean the house, put on nice clothes, and serve special food.[99] And family members may perform for each other, as when a father hides his fear and pretends not to be scared of the big spider over the bed. In a less

fidelity of a performance to a family's felt experience. *See supra* note 32 (describing Austin's definition of felicity conditions).

93 *See* Peggy Orenstein, *I Tweet*, *Therefore I Am*, N.Y. TIMES, Aug. 1, 2012, (Magazine), at 11, 11–12 (describing the ways in which parenthood is performed via technology such as tweets, with parenting packaged for others as it is lived).

94 *See* Heather M. Armstrong, *Featured Community Question with Accompanying Wacky Antics*, DOOCE (Dec. 8, 2009), http://www.dooce.com/2009/12/08/featured-community-question-accompanying-wacky-antics (describing in intricate detail blogger's afternoon of baking holiday cookies with her daughter).

95 The calculus may differ for men and women and also depends on the particular workplace. In some settings, a woman may want to downplay her family (or, in Yoshino's words, cover her family) so as not to remind others that she is a mother and has childcare responsibilities. *See* YOSHINO, *supra* note 79, at 150–51 (describing how some women deliberately choose not to display photographs of their children at work). Men, however, typically do not face this problem because even if they have children, the assumption is that they do not have significant childcare responsibilities.

96 *See* Vicky Ward, *Lehman's Desperate Housewives*, VANITY FAIR, Apr. 2010, at 146 (noting that CEO Dick Fuld kept a "watchful eye on his executives' marriages").

97 *See id.*

98 *See id.* at 148.

99 In this way, not only adults, but also children perform, both as objects and subjects. Parents trot out children for the annual holiday card or at social gatherings to show "the family." Children can also be props in a parent's material world. *See* Rob Walker, *The Born Identity: Designer Diapers Join the Repertory of Child-as-Prop Tools*, N.Y. TIMES, Aug. 1, 2010, (Magazine), at 19, 19 (describing baby clothing accessories as "wearable billboard[s] for parental taste" and designer diapers as "an extension of the well-established tendency among contemporary parents to treat their children as identity props").

felicitous example, a family member may conceal substance abuse from others in the family.[100]

Popular culture, too, is rife with familial performances.[101] Family sitcoms are a staple of popular culture, from the iconic *Brady Bunch*, showing a blended family steeped in love and understanding (with those inevitable visits from Carol and Mike to the bedroom of an upset child), to *The Cosby Show*, featuring a functional and fun-loving African American family. And one need only glance at reality television shows to see familial performances in their most contrived, exaggerated sense. Whether it is Michelle Duggar wearing her fixed smile and brushing her children's hair on *19 Kids and Counting* or Ramona renewing her wedding vows on *The Real Housewives of New York City*, the cameras are always rolling. The families are aware of the audience and act accordingly, sometimes with the same transgressive glee Butler identifies in drag performances of gender, and other times affirming iconic familial images.

Political families are often only slightly less contrived than those on reality television, although far more may be riding on the performance than short-lived fame. Family is crucial to a candidate's success, particularly in presidential campaigns. The conventional political wisdom is that voters care about the candidate's spouse because that person speaks volumes about the candidate's character.[102] The candidate may be on the ballot, but the family is running for office, and politicians carefully craft the family's public persona, from John F. Kennedy's picture perfect family, with John Jr. peeking out from

---

[100] After a revealing event, family members will often say they had no idea that *X* was drinking or taking illegal drugs surreptitiously. *See, e.g.*, Susan Dominus, *'Perfect Mother,' A Vodka Bottle and 8 Lives Lost*, N.Y. TIMES, Aug. 8, 2009, at A1 (discussing Diane Schuler—a woman who drank a significant amount of alcohol and then drove the wrong way on a highway, killing eight people, including herself—whose husband was supposedly unaware of her drinking); Anahad O'Conner & Nate Schweber, *Driver Said to Have Used Marijuana Regularly*, N.Y. TIMES, Nov. 7, 2009, at A20 (describing revelations that Diane Schuler was a heavy drinker and marijuana user).

[101] Of course, it is not just popular culture that takes the family as its subject. Many classics are based on family dramas. *See, e.g.*, LOUISA MAY ALCOTT, LITTLE WOMEN (Little, Brown, & Co. 1922) (1868); JANE AUSTEN, PRIDE AND PREJUDICE (E.P. Dutton & Co. 1950) (1813); NATHANIEL HAWTHORNE, THE SCARLET LETTER (Brian Harding & Cindy Weinstein, eds., Oxford Univ. Press 2007) (1850); WILLIAM SHAKESPEARE, ROMEO AND JULIET.

[102] Jodi Wilgoren, *The Other Doctor in Dean's House Shuns Politics for Her Practice*, N.Y. TIMES, Jan. 13, 2004, at A1 ("Political experts say spouses often help humanize the candidates they are married to. A spouse, the person presumably closest to the candidate, also provides a window into a politician's character, they said, and acts as a kind of validator.").

under the Oval Office desk, to Ronald and Nancy Reagan appearing as the all-American family.[103]

B. Critical Reflections

1. Communicative Effect and Performativity

The central defining feature of these familial performances is their communicative effect, on others and on the self.[104] When it is predominantly mothers and female babysitters picking up children after school, this sends a message about the role of women as primary caregivers.[105] When an employee displays family photographs at work, this sends a message to coworkers about sexual orientation and family status. And when a father pretends he is not afraid of the spider, he is communicating to his children the supposed invincibility of parents. In popular culture, what is performed and what is consumed is an idealized or refracted image of family. And in politics, the images projected by political families, however dissonant with behavior behind closed doors,[106] speak volumes about the candidate's aspirations.[107]

---

[103] Political performances are also perilous. For example, Hillary Clinton set off a maelstrom in the 1992 election when she derisively said in response to a question about "whether [she] could have avoided an appearance of a conflict of interest when [her] husband was Governor": "I suppose I could have stayed home and baked cookies and had teas, but what I decided to do was to fulfill my profession, which I entered before my husband was in public life." HILLARY RODHAM CLINTON, LIVING HISTORY 109 (2003).

[104] Communication is complex and imperfect in many ways and an implicit message may be missed or misunderstood. When an African American woman picks up her biracial child from school, an observer may assume that she is the nanny, not the mother, and therefore the message that families can be interracial will be lost, at least on this particular audience. *See* Angela Onwuachi-Willig & Jacob Willig-Onwuachi, *A House Divided: The Invisibility of the Multiracial Family*, 44 HARV. C.R.-C.L. L. REV. 231, 240 (2009) (describing this phenomenon in other contexts). Similarly, some performances may be discounted. If voters know a candidate has been unfaithful to his wife, they may dismiss a calculated performance of togetherness just before an election. But much family-related behavior will convey a message, and over time iterated performances have tremendous communicative effect.

[105] For an excellent discussion of this dynamic, see Darren Rosenblum, *Unsex Mothering: Toward a New Culture of Parenting*, 35 HARV. J.L. & GENDER 58-78 (2012) (describing the multiple "ways in which legal and social norms configure parenting as a sexed endeavor," with mothers understood as the primary parent and fathers as peripheral caregivers).

[106] *See, e.g.*, JOHN HEILEMANN & MARK HALPERIN, GAME CHANGE: OBAMA AND THE CLINTONS, MCCAIN AND PALIN, AND THE RACE OF A LIFETIME 135–42, 166–69 (2010) (describing how, even after John Edwards revealed to Elizabeth his liaison with Rielle Hunter, they continued to appear together at campaign events to portray a strong marriage). The Edwardses' marriage was part of the appeal of John Edwards; therefore, the performance was crucial. The high stakes game was impression management in the extreme.

[107] The *absence* of a family can be almost as politically salient. After the White House announced the nominations of Justices Sonia Sotomayor and Elena Kagan for the Supreme Court, for example, a continuing theme in the media coverage was that both women were unmarried and childless. *See* Lisa Belkin, *Judging Women*, N.Y. TIMES, May 23, 2010,

The communicative effect of these performances is not necessarily diminished if the performance is insincere, unconscious, or not intended to send a message. Instead, what matters is the effect of the performance on the actor and the audience.[108] To begin, a contrived performance may still be highly communicative, even when the audience knows of the contrivance. Think of the effect of television sitcoms.[109] And both conscious and unconscious performances can have a communicative effect. Wearing a wedding ring and the fact of pregnancy are both examples of performing family. Wearing the ring is a conscious choice taken by a person, at least in part, to convey familial status. By contrast, a pregnant woman may prefer that no one knows about her pregnancy, or she may be indifferent about others knowing, but she likely cannot conceal her pregnancy in the later

(Magazine), at 11, 11 (using Justices Kagan and Sotomayor to argue that women's ability to pursue both family and career has increased only slightly over time); Maureen Dowd, *All the Single Ladies*, N.Y. TIMES, May 19, 2010, at A27 (describing public speculation about why Justice Kagan had not married). Justice Sotomayor staved off these concerns by presenting herself as having a family of friends, former clerks, and extended relatives, *see* Sheryl Gay Stolberg, *A Trailblazer and a Dreamer*, N.Y. TIMES, May 27, 2009, at A1, an image she affirmed in her memoir. *See* SONIA SOTOMAYOR, MY BELOVED WORLD 229 (2013) ("I have followed my mother's approach to family, refusing to limit myself to accidents of birth, blood, and marriage."). Women in public life are thus in a double bind. Having children often means losing career ground, *see* JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 64–80 (2000), but *not* having children can also be problematic politically.

[108] *See supra* note 30 (discussing Austin's theory of perlocutionary utterances—words that have an effect on others). Sometimes the audience is the self. Consider former senator Larry Craig, who performed heterosexual family on the Senate floor and in his personal life by covering his sexual attraction to men. *See* Dana Milbank, *A Senator's Wide Stance: 'I Am Not Gay,'* WASH. POST, Aug. 29, 2007, at A2 (describing Republican Senator Larry Craig's arrest relating to a homosexual encounter in the Minneapolis airport). If we speculate Craig had convinced himself that he truly was uninterested in having sex with men, then he also performed heterosexual family for himself.

[109] Moreover, although we are more apt to think of contrivance in negative terms, it need not take on this meaning and even manufactured performances can be normatively desirable. Just as Goffman argued that performers can traverse the continuum of sincerity, coming to believe an initially insincere performance, *see supra* text accompanying notes 45–52, the tactic known as "fake it till you make it" has an important place in family life. *See* WILLIAM IAN MILLER, FAKING IT 220–31 (2003) (suggesting that aspects of familial interaction involve performance). Indeed, scripts and social fronts can be constraining, but they are not always so. Sometimes they can help a person transition into a different stage of life. For a new parent uncertain how to care for a child, following the examples set by other parents can be an important source of information and acculturation to the world of parenthood. Parents may "fake it" at first, but will ultimately "make it" their own sincere performance. The writer Michael Lewis talked about faking attachment, noting that he did not immediately feel close to his children, *see* MICHAEL LEWIS, HOME GAME: AN ACCIDENTAL GUIDE TO FATHERHOOD 75–76 (2009), but that performing attentive fatherhood created a real bond—another example of performativity. *See id.* at 76–79. More generally, we often refer to "role modeling" as a positive force, and it is one way to think about the positive side of performance.

months. Her performance, then, is not necessarily conscious or chosen, but it is communicative nonetheless. Finally, even when the performance is not intended to send a message, it may still do so. A family living in an apartment building with thin walls may interact without thinking about the unseen audience in the apartment next door. The reception of the performance by the listening family is more important than the intention of the actors.

Performances have this communicative power in part because the intense fascination with other people's families creates a ready audience. Whether out of insecurity, the desire to show off, or the need for a dose of schadenfreude, most parents are deeply aware of the parenting choices of other parents.[110] Any parent can provide a story about the subway or supermarket checkout line, where performance critics feigned indifference while surreptitiously scrutinizing parenting choices. To parent is to perform. Romantic partners, too, are attentive to other intimate relationships, examining how couples interact and negotiate various issues.[111]

These performances do more than send messages about the family. As Butler's work in the analogous context of gender demonstrates, these performances are performative—helping shape familial categories and the notion of "family." We form an idea of a family by looking around us, at families on the bus, playground, television, and in each other's homes. When a mother breastfeeds on a park bench or at home with a friend over for coffee, she is making a choice about what she wants for herself and her child. But her act also sends a message, even if unintentionally, about mothers. When children watch family sitcoms, they internalize the performances when assessing their own families and family roles. When adults watch romantic comedies, they may know "it's just a movie," but the performance can still inform conceptions of romance, intimacy, and the place of

[110] *See, e.g.*, *Sanctimommy Definition: Top-Ten User Submitted Words*, MERRIAM-WEBSTER ONLINE, http://www.merriam-webster.com/top-ten-lists/top-10-user-submitted-words-vol-4/sanctimommy.html?&t=1287166944 (last visited Mar. 12, 2013) (defining "sanctimommy" as "a mother who points out perceived faults in the parenting of others"); Ayelet Waldman et al., *Who's the Best Mommy of Them All?*, N.Y. TIMES (Mar. 12, 2010, 7:11 PM), http://roomfordebate.blogs.nytimes.com/2010/03/12/whos-the-best-mommy-of-them-all/ (discussing how modern mothers are highly competitive about childrearing, vehemently defensive of their choice of parenting styles, and critical of those with styles different from their own).

[111] *See* LEWIS, *supra* note 109, at 11–13 (imagining a dinner party where the couples had struck noticeably different agreements about who does what in the relationship and arguing that these couples, once they realize this difference, will most likely no longer interact socially because of the discord this introduces to the marital relationship).

marriage.[112] In all these ways, iterated performances construct familial categories and create social meaning.

For the performance to be felicitous, to use Austin's term, there must be uptake from the audience, and this usually involves some element of convention.[113] For this reason, not all performances of family are read as such. Take, for example, two fathers pushing their child in a stroller down the street. Depending on the context, the men and their child may not be perceived as a family, but instead as one father walking his child accompanied by a friend.[114]

Goffman's insights about the relationship between performances and social fronts are also relevant to understanding the performance of family. Performances construct familial categories in the Butlerian sense, but performances also create recognizable social fronts.[115] The social front becomes the shorthand for the category, communicating

---

[112] To give just one truly performed example: Mainstream movies almost always portray heterosexual sex as vaginal intercourse culminating in a mutual orgasm. Despite evidence that most women do not regularly climax in this way, *see* SHERE HITE, THE HITE REPORT: A NATIONWIDE STUDY OF FEMALE SEXUALITY 184–85 (1981), many men and women feel inadequate when this result does not happen in real life. *See id*. at 181–84 (quoting study participants' feelings of dissatisfaction with the lack of female orgasm achieved through intercourse).

[113] *See supra* note 32 (explaining Austin's assertion that there must be accepted conventional procedure in order for an action to become performance).

[114] *Cf.* Rosenblum, *supra* note 105, at 58–78 (describing the lack of recognition for gay fathers, who are not seen as "real" parents).

[115] These social fronts are both literal and metaphorical. In the literal sense, new parents may find that it is difficult to act the part of mother or father anomalously because the front is already set. For example, fathers are taking on an increasing amount of responsibility for raising children. *See* SUZANNE M. BIANCHI ET AL., CHANGING RHYTHMS OF AMERICAN FAMILY LIFE 169 (2006) (stating that modern fathers are more active in the home, "increasingly taking on the responsibility for basic, routine aspects of caregiving" rather than just the "easier or more enjoyable activities of child care"). However, some fathers report the resistance they receive at work when these responsibilities conflict with work obligations. *See* Lisa Belkin, *When Mom and Dad Share It All*, N.Y. TIMES, June 15, 2008, (Magazine), at 44, 78 (describing the pushback many fathers have felt in the workplace as a result of attempting to share parenting equally). For an example of the metaphorical front of familial roles, consider the example of the nomination of Zoë Baird as the first female Attorney General. One theme in the intense media coverage of the nomination was Baird's ability to find powerful male mentors. *See* Sidney Blumenthal, *Adventures in Babysitting*, NEW YORKER, Feb. 15, 1993, at 53, 54. In the words of a friend, Baird was successful in these relationships because she "gives good daughter." *See id.* Beyond the obvious (although not irrelevant) sexual connotation is the idea that being a daughter is a familiar role that can be played in a variety of contexts, including professionally. It is an important role for a talented and ambitious woman because it is less threatening to be seen in the subordinate role of daughter. Ironically, her downfall was that she had failed to play "mother" correctly, and had incurred the wrath of the public by coming across as a wealthy woman who left her child behind. *See id.* at 58–59 (discussing the outcry over the revelation that Baird had hired an undocumented immigrant as a nanny for her son, which ultimately scuttled her nomination as Attorney General).

to others who is in the category and who is not.[116] A woman with a baby in a sling is a mother. A man wearing a wedding ring is a husband. And a group of individuals posing on the front of a holiday card is a family. But a group of five adults sharing a house is not.[117] Almost by definition, social fronts tend to be narrow, reflecting the typical (and sometimes idealized) performance.

Social fronts—and the categories themselves—change over time, of course, but the way they change is through other, iterated performances.[118] When fathers begin to pick up children from school, their performances may initiate, even if only fitfully, the slow process of changing the social front of fatherhood, and, more fundamentally, the category of fatherhood itself. Social fronts also differ from one community and culture to the next. There is not a universal social front for mothers or fathers, but within a given culture or community there likely is a dominant social front.

Finally, family members may deploy or resist dominant social fronts. When a candidate for public office brings his family to a campaign event, he deploys the positive associations of family and fatherhood. And when a mother decides not to talk about her children over the water cooler at work, she resists the equation of women with motherhood. But in both instances, the performances are part of the performative process, reaffirming and sometimes slowly altering social fronts.

---

116 *See supra* text accompanying note 53 (describing the exclusionary work of social fronts).

117 Although courts typically do not recognize groups of unrelated individuals living together as a family, there are exceptions, particularly when the group acts like a family, sharing expenses and the responsibilities of cooking and cleaning. *See, e.g.*, Borough of Glassboro v. Vallorosi, 568 A.2d 888, 893–95 (N.J. 1990) (establishing a definition of family that makes no explicit distinction between related and unrelated individuals).

118 As Goffman argues, performances help define membership in a group, *see supra* text accompanying note 53, and through this exclusionary work, performances simultaneously evoke and reflect anxiety about boundaries and larger cultural issues, such as proper gender roles. Debates about the proper role for mothers and fathers are really a tug of war over gender. The intense competitiveness around parenting in general, and mothering in particular, is about the value of these roles and the choices made within them, with mothers quick to chastise each other as a means of elevating their own choices.

There are numerous other insights from applying Goffman's work to familial performances. For example, Goffman argued that idealized performances can play an important role in reinforcing community values. *See supra* text accompanying notes 45–48. This can be true, too, with family life. Domestic violence may occur largely behind closed doors, with negative implications for the perception of the problem, *see infra* notes 214, 232, but this idealized performance of family helps reinforce the important message that violence has no place in the family.

2. *Intersectionality*

Familial performances inevitably interact with other socially salient aspects of identity, which in turn overlap with each other. Much of what gives heft to familial roles, and also makes them more fraught, is the connection with race, gender, sexual orientation, and class. The scene of an executive's wife hosting a party rings true (and also grates) because of the contested role of women in our society. The image of President Barack Obama's seemingly perfect family is powerful precisely because it contrasts so sharply with a cultural narrative about irresponsible Black fathers.[119] In this way, the performance of family can only be understood in context. Motherhood, for example, has a hallowed place in American culture,[120] but this is not true for all mothers. The single, low-income, African American mother—the "welfare queen"—is an object of continued derision.[121]

To play out the intersection of family with gender, race, and class, return to the performance of two men pushing a stroller down the street. Assuming that observers understand the men and the child to be a family, the basic family message is that a same-sex couple can be a family. More precisely, however, the performance sends the message that two *men* can be caregivers, in spite of a societal association with women and caregiving. Similarly, if one or both of the men are

---

[119] The performance of family by politicians exemplifies a gender differential. A male candidate for public office can deploy his family publicly as an asset, typically to humanize himself, whereas a female candidate's family may be perceived as a liability. *See, e.g.*, Jonathan Martin, *Sarah Palin Is Wreaking Havoc on the Campaign Trail, GOP Sources Say*, POLITICO (Oct. 21, 2010, 4:49 AM), www.politico.com/news/stories/1010/43936.html (discussing the GOP's difficulties in booking Palin for campaign events and noting that Palin has "certain responsibilities that other major figures in the Republican party don't have—in her case, five kids, one of whom is very young").

[120] Wiktionary, for example, defines "motherhood and apple pie" as "[p]rinciples or values with which few disagree." *Motherhood and Apple Pie Definition*, WIKTIONARY, http://en.wiktionary.org/wiki/motherhood_and_apple_pie (last visited Mar. 12, 2013).

[121] In the 2012 presidential election, for example, the Republican candidate Mitt Romney ran a political advertisement claiming that President Obama had eviscerated welfare reform by dropping work requirements. *See* Mitt Romney, *Long History*, YOUTUBE (Aug. 13, 2012), http://www.youtube.com/watch?v=j79YA1rRiWM. As commentators quickly noted, both the claim itself and the visual imagery in the advertisement—which shows only White people working and repeatedly shows President Obama's face—evoked the cultural script of Whites as industrious and African Americans as lazy. *See, e.g.*, Callum Borchers, *Points Amiss in Romney's Ads on Welfare*, BOSTON GLOBE, Aug. 17, 2012, at A2 (quoting analyses of the advertisement by numerous commentators). This script is encapsulated in President Reagan's use of the term "welfare queen." *See* Franklin D. Gilliam, Jr., *The 'Welfare Queen' Experiment: How Viewers React to Images of African-American Mothers on Welfare*, NIEMAN REPORTS, Summer 1999, at 49, 49–50 (describing the "narrative script" of the welfare queen and its continued salience).

African American,[122] then the performance sends a message that gay fathers can be African American, an identity not always embraced in at least some Black communities.[123] Finally, if the two men are pushing a basic umbrella stroller into public housing—as compared with a gay couple packing a Bugaboo into a Volvo—their performance conveys a message about the existence of gay fatherhood across class lines, in contrast with the cultural association of gay men and affluence.[124]

A performance may take on additional meanings depending on the overlap of salient aspects of identity within the performer. When a White man pushes a stroller with his husband, the message conveyed by the performance is largely about sexual orientation. But when an African American man pushes the stroller with his husband, the performance takes on a different meaning because of the intersection of race and sexual orientation within the performer. The performance communicates a message to both the "Black community," where the father may face demands of heterosexuality,[125] and the "gay community," where he may face racial stereotypes about his sexual prowess.[126] The performance thus sends a message that counters these stereotypes: African American men can be both gay and family oriented.

In short, the performance of family can be understood only by considering questions of race, class, gender, and other salient aspects

---

122 Interracial marriage is, of course, replete with performances and changing social fronts.

123 *See* Russell K. Robinson, *Uncovering Covering*, 101 Nw. U. L. Rev. 1809, 1819–23 (2007) (reviewing Yoshino, *supra* note 79, and emphasizing minority-imposed covering demands, including the demand that Black men be available for Black women, thus casting out gay Black men).

124 *See, e.g.*, Randy Albelda et al., *Poverty in the Lesbian, Gay, and Bisexual Community*, Williams Inst., 1 (Mar. 2009), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Albelda-Badgett-Schneebaum-Gates-LGB-Poverty-Report-March-2009.pdf (noting this stereotype). Although not directly related to intersectionality, it is worth noting that messages also depend on context. If the men are pushing the stroller down the sidewalk in a liberal college town, the performance will likely be unremarkable. If it is a conservative neighborhood, the performance could be highly transgressive. If it is a traditionally gay community, the performance could be simultaneously unremarkable and transgressive—two gay men would be commonplace, but participating in parenthood could be understood as joining the mainstream. *See, e.g.*, Michael Warner, *Beyond Gay Marriage*, *in* Left Legalism/Left Critique 259, 259–63 (Wendy Brown & Janet Halley eds., 2002) (criticizing some organizations in the same-sex marriage movement as "fundamentally alien" because of their emphasis on heterosexual norms).

125 *See* Robinson, *supra* note 123 (describing these demands).

126 *See id.* at 1819–23 ("Because White gay men establish the norms in gay communities like West Hollywood and Chelsea, they set the rules of engagement. Not infrequently, these rules call on men of color to play up the sexualized stereotypes ascribed to their racial group.").

of identity. These intersectionalities have important consequences for family law, as discussed in the next two Parts.

III
Performative Family Law

Beyond constructing categories with significant social meaning, the performance of family is legally performative as well. This is true in the Austinian sense, in which words and actions have a direct legal effect. More importantly, it is true in the broader sense of performativity, in which performances and the law work together to shape legally significant familial categories and legal doctrine.

This Part argues that there are three important insights that flow from conceiving of family law in performative terms. First, the law's approach to nontraditional families reinscribes traditional social fronts—a normatively troubling response to the significant demographic changes of the last decades. Second, a focus on performance tends to obscure family violence, leading to ineffective policy choices. Finally, the theoretical debate over the public-private dichotomy misses the instinctive appeal of family privacy as a space to suspend the performance.

A. Performance and the Law

In the most immediate sense, the law imbues certain words and actions with direct legal effect, as reflected in Austin's example of saying "I do" in a marriage ceremony.[127] Although the law does not require parties literally to say "I do," the law does require certain public actions and then grants legal consequences to those actions.[128] The performance thus has a legally performative aspect to it, as act and word create a marriage.[129] Similarly, common law marriage, still recognized in a minority of states,[130] requires a couple to follow a prescribed script.[131] In this way, some aspects of family law are

[127] *See supra* text accompanying notes 27-33.

[128] In most states, couples must solemnize the marriage through some form of ceremony, even if it is just before the city clerk. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-125(A) (2004); N.Y. DOM. REL. LAW § 11 (Consol. 2007).

[129] *Cf.* Parker & Sedgwick, *supra* note 54, at 11 (noting that weddings typically include a witness and therefore are theater).

[130] *See* GÖRAN LIND, COMMON LAW MARRIAGE: A LEGAL INSTITUTION FOR COHABITATION 8–10 (2008) (stating that Alabama, Colorado, the District of Columbia, Iowa, Kansas, Montana, Oklahoma, Rhode Island, South Carolina, Texas, and Utah still recognize common law marriage).

[131] *See, e.g.*, *In re* Estate of Garges, 378 A.2d 307, 309 (Pa. 1977) (describing the elements of common law marriage, including the requirement that the couple present themselves to others as married).

directly performative—to say something is to do something, legally speaking.

But performances and the law have a broader, more foundational relationship, creating, maintaining, and altering legal categories along with accompanying social fronts. This process remains largely below the surface, however, and legal actors do not acknowledge the performative nature of much of family law.

1. Category Creation, Maintenance, and Alteration

One of the primary functions of family law is defining categories—who is a father, mother, child, spouse, and even what counts as a family. Some of these categories have a biological basis. The traditional conception of family, for example, is based on the pairing of two opposite-sex adults who produce offspring. But the law has never limited legal families to this narrow definition. Opposite-sex adults who are incapable of, or not interested in, procreation are allowed to marry.[132] Adoption laws have long allowed adults to raise children to whom they are not biologically related.[133] And, more recently, parentage rules generally do not recognize sperm and egg donors as legal parents.[134]

In creating legal categories, then, biology is only part of the equation. A closer examination of the process of familial definition reveals that family law relies heavily on performances to determine who is in and who is out of the family.

As Part II demonstrated, familial performances play a central role in the social construction of familial categories. But if performances are the building blocks of these constructed familial categories,[135] then law is the mortar. When the law grants legal recognition to some relationships but not others, it amplifies what would otherwise be a personal performance and gives it greater sway than it might have absent legal acknowledgment. This affects the creation, maintenance, and alteration of familial categories and the accompanying social front.

---

[132] No state law limits marriage to couples intending to procreate.

[133] *See* Joan Heifetz Hollinger & Naomi Cahn, *Forming Families by Law: Adoption in America Today*, 36 HUM. RTS. 16, 16 (2009) ("[S]tates began enacting formal adoption laws in the mid-nineteenth century.").

[134] *See* Cahn, *supra* note 5, at 387–91 (describing these laws, although also noting numerous gaps and inconsistencies among states).

[135] *See supra* text accompanying note 53 (describing Goffman's argument that performances define and police membership in groups).

a. Creating Categories

To understand legal category creation and performance, consider the doctrine governing the legal rights of unwed fathers. In the landmark case *Stanley v. Illinois*, Peter Stanley was raising three children with his partner Joan.[136] Peter and Joan never married, although functionally they operated as a family, living together and jointly raising the children.[137] According to the majority opinion, Peter was an involved father, taking an active role in his children's lives and, crucially, providing economic support to the family.[138] After Joan died, Illinois invoked a state law providing that children of unwed fathers become wards of the state upon the death of the mother, and the state thus placed the children with court-appointed guardians.[139] The Court struck down the Illinois statute, holding that although many unwed fathers may well be uninvolved in the lives of their children, the state could not presume that this is true in all instances and instead must allow unwed fathers an opportunity to prove their commitment.[140] Eleven years later, in *Lehr v. Robertson*,[141] the Court affirmed that economic support was the hallmark of this commitment, holding that where an unwed father had taken no steps to establish a relationship with his child, and, importantly, had not economically supported the child, the state could order an adoption without his consent.[142]

In both *Stanley* and *Lehr*, the Court relied on the performance of fatherhood, examining the actions of the men to determine whether they had *acted* like fathers by supporting their children.[143] Indeed, much of the disagreement between the majority and dissent in both

136 405 U.S. 645, 646, 650 (1972) (noting that Joan and Peter had lived together "intermittently" for eighteen years and that Peter had "sired and raised" the three children).

137 *See id.* at 650 n.4 (concluding that Peter lived with the children and that he supported them for all of their lives).

138 *See id.*

139 *See id.* at 650 (describing the state's statutory scheme, including the provision that children can be removed from their homes if they have no surviving parent, and further defining parent to mean "the father and mother of a legitimate child, or the survivor of them; or the natural mother of an illegitimate child, and includes any adoptive parent") (quoting ILL. REV. STAT. ch. 37, § 701-14 (1967) (current version at 705 ILL. COMP. STAT. ANN. 405/1-3 (West 2007))).

140 *See Stanley*, 405 U.S. at 656–58.

141 463 U.S. 248 (1983).

142 *See id.* at 267–68.

143 *See id*. at 260 n.16, 261, 267–68 ("The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures." (quoting Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting))); *Stanley*, 405 U.S. at 645 (holding that an unwed father was constitutionally entitled to an individualized hearing regarding his parental fitness before his children could be taken from him by the state upon the death of their biological mother).

cases turned on an assessment of the performance. In *Stanley*, the majority portrayed Peter Stanley as a regular dad, actively raising the children and helping support the family financially.[144] By contrast, the dissent portrayed Stanley as an irresponsible mercenary, only too willing to place his children with another family and concerned primarily with his continued receipt of the children's welfare benefits.[145] Similarly, in *Lehr*, the majority began the opinion by framing the question as "whether New York has sufficiently protected an unmarried father's inchoate relationship with a child whom he has never supported and rarely seen in the two years since her birth."[146]

As these cases illustrate, when fathers act as breadwinners, they shape the category of "father" and give it a particular social front: Fathers are men who provide economically for their children. The law then takes this narrow, idealized social front, cements it into a legal category—fatherhood—and invokes the construction to judge all would-be fathers. Economic fatherhood thus becomes the legal definition of fatherhood—at least for unwed fathers. By transforming a social front into a legal category, courts and legislatures are not creating familial categories out of whole cloth; instead, they look for scripts in the world around them.

b. Maintaining Categories

Just as the law reifies social fronts into legal categories, it also helps maintain the accompanying social front.[147] The newly emerging rules around assisted reproductive technology, for example, reinforce the categories of mother and father as individuals who act a certain way toward a child and who need not be genetically related to the child. A man who donates sperm or a woman who donates her egg is

144 *See Stanley*, 405 U.S. at 646, 651 (describing how Stanley lived intermittently with the mother and three children and "raised" the children); *id.* at 663 n.2 (Burger, C.J., dissenting) (describing Stanley's assertion "that he loved, cared for, and supported these children from the time of their birth until the death of their mother").

145 *See id.* at 667 (noting that after the mother's death, Stanley left the children with another family, made no effort to regain custody of the children, and even after the state began dependency proceedings did not seek to assume legal responsibility for the children, but instead "seemed, in particular, to be concerned with the loss of the welfare payments he would suffer as a result of the designation of others as guardians of the children").

146 *Lehr*, 463 U.S. at 249–50.

147 *Cf.* Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 103 (1984) (arguing that law is never "peripheral to 'real' social relations," and instead "legal relations . . . don't simply condition how the people relate to each other but to an important extent define the constitutive terms of the relationship"). There are interesting, although ultimately unknowable, causation questions in the relationship between performance and the law. For purposes of this Article, it is sufficient to acknowledge a feedback loop between performance and law, working together to create and reinforce social fronts.

not considered the legal father or mother of any child that results from the gametes.[148] Adoption laws, too, confer parental rights on a person not biologically related to the child.[149]

In both instances, the law reaffirms that the social front of parenthood does not depend solely on a biological connection. Instead, to be a mother or father is to *act* like a mother or father. In this way, the legal system maintains the categories it helped to create.[150]

c. Altering Categories

The law also helps alter categories and here, too, performance is central. The ongoing debate over marriage equality, for example, is fundamentally about controlling the meaning (the social front) of marriage. This is best illustrated by the dispute in California, where same-sex couples are eligible for all the tangible benefits of marriage through that state's domestic partnership law, but advocates on both sides still focus on the importance of the term "marriage."[151] Same-sex couples claim that only marriage, not a domestic partnership, will give their relationships the recognition they deserve.[152] And opponents of marriage equality, many of whom support the domestic partnership law, contend that marriage is a unique institution intended only for one man and one woman.[153] In short, as the Ninth Circuit reasoned in *Perry v. Brown*, the marriage label matters because there is no social meaning attached to the term domestic partnership.[154]

---

148 *Supra* note 134 and accompanying text.

149 *See, e.g.*, CAL. FAM. CODE § 7664(a)–(b) (West 2004) (setting forth the procedures for terminating the parental rights of a biological parent and creating parental rights in the adoptive parent).

150 Another example is child support laws, which reinforce the social front of economic fatherhood. These laws require noncustodial parents to provide economic support, but not time or attention, to their children. *See, e.g.*, CAL. FAM. CODE § 4053 (West 2004) (setting uniform rules for the determination of child support and framing those support obligations under principles that prioritize financial payments); N.Y. DOM. REL. LAW § 240(1)(a) (Consol. 2008) (requiring non-custodial parents to pay a share of child support expenses but not mandating that non-custodial parents visit their children). These parents are overwhelmingly fathers. *See* TIMOTHY S. GRALL, U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2005, CURRENT POPULATION REPORTS 3 (2007), *available at* http://www.census.gov/prod/2007pubs/p60-234.pdf ("In 2006, 5 of every 6 custodial parents were mothers (83.8 percent) and 1 in 6 were fathers (16.2 percent).").

151 Perry v. Brown, 671 F.3d 1052, 1063 (9th Cir.), *cert. granted sub nom.* Hollingsworth v. Perry, 133 S. Ct. 786 (2012) (No. 12-144).

152 *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 933–36, 939–40 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir.), *cert. granted sub nom.* Hollingsworth v. Perry, 133 S. Ct. 786 (2012) (No. 12-144) (describing testimony from plaintiffs on this point).

153 *See id*. at 933–34 (describing testimony from defendants on this point).

154 *Perry*, 671 F.3d at 1078–79.

Thus, when courts and legislatures decide whether, as a matter of policy or constitutional necessity, same-sex couples should be allowed to marry, these legal institutions weigh in on the dispute over the social front of marriage. Iterated performances of commitment by lesbian and gay couples began the process of altering the social front of long-term relationships.[155] When courts and legislators open marriage to same-sex couples, this hastens the collective process. In this way, family law ratifies one performance in the face of contestation and ultimately helps change the public meaning of marriage.

Loss of control of the social front of marriage is precisely what concerns conservatives. If the social front of marriage is no longer one man and one woman, it will be that much harder for conservatives to pass along their preferred values to their children because the values are not reflected in the larger community. For example, a socially conservative family may believe that men and women have distinct roles to play in family life and that reserving marriage for opposite-sex couples reflects and reinforces these traditional gender roles. But it will be more difficult for the family to inculcate this value in their children if the social front of marriage does not reflect this traditional division.[156]

Advocates of marriage equality sometimes dismiss opponents of legal recognition by arguing that the opponents stand to lose nothing.[157] If anything, the argument goes, opening up marriage will strengthen opposite-sex marriage by confirming that marriage is the

---

[155] This process began with public performances of affection by gays and lesbians. Simply holding hands in public was a claim for inclusion in the category of romantic relationships. Much later, as the gay rights movement gained momentum, conducting (non-legal) wedding ceremonies in front of numerous guests and announcing the marriages in the newspaper were ways to lay claim more specifically to the category of marriage. *Cf.* Noa Ben-Asher, *Who Says "I Do"?*, 21 YALE J.L. & FEMINISM 245, 256–57 (2009) (reviewing JUDITH BUTLER & GAYATRI CHAKRAVORTY SPIVAK, WHO SINGS THE NATION-STATE? LANGUAGE, POLITICS, BELONGING (2007) (arguing that in the absence of legal recognition, there is still a role for public same-sex marriage ceremonies because, in contrast to same-sex marriage litigation, "by performing public marriage ceremonies one actually starts to take what one asks for," and thus, "these public wedding ceremonies would be viewed as a demand on the state to recognize these marriages")).

[156] *See, e.g.*, Ken Blackwell, *Civil Unions and True Marriage*, WORLD, Aug. 24, 2012, *available at* http://www.worldmag.com/2012/08/civil_unions_and_true_marriage (describing the dangers of allowing same-sex couples to marry, including the concern that "schoolchildren . . . [will be] proselytized in the early grades [with] the new definition of marriage"). Even if the same-sex couple assumes more traditional roles with one parent doing the majority of the child rearing and the other parent working in the paid labor market, there will still be one parent who is working against type.

[157] *See* Opening Brief of Plaintiff-Petitioner Proposition 22 Legal Defense and Education Fund at 17 n.9, *In re* Marriage Cases, 183 P.3d 384 (2007) (No. S147999), 2007 WL 1335194, at *17–18. Courts sometimes make this argument as well. *See, e.g.*, *Perry*, 671 F.3d at 1063 (holding that California's ban on same-sex marriages "serves no purpose, and

preferred site for long-term relationships and for raising children.[158] But arguments embodied in slogans such as "Focus On Your Own Damn Family!"[159] fail to account for the influence families have upon one another and underestimate the battle for definitional control of the social front. From the perspective of social conservatives, the Defense of Marriage Act is aptly named.[160]

2. *Uncritical Fealty to Naturalized Categories*

Despite the active role of the law in shaping familial categories, courts often are blind to performativity and instead assume the natural quality of familial categories and roles. Another unwed father case illustrates this tendency. In *Michael H. v. Gerald D.*,[161] the Supreme Court reviewed a state law that presumed a child born within a marriage is the child of both the wife and the husband.[162] In the case, it was a virtual certainty that the child was not the biological daughter of the husband but rather was the child of the neighbor, with whom the mother had an affair.[163] The husband, however, was on the birth certificate and had consistently held out the child as his daughter.[164]

Much of the plurality decision turned on the mismatch between the various family units in the case and the traditional social front of family. The plurality noted that during "the first three years of her life, [the child] remained always with [the mother], but found herself within a variety of quasi-family units."[165] These "quasi-family units" included time spent living with the neighbor, who held the girl out as his child, the husband, who did the same, and also a third man.[166]

In rejecting the parental claims of the biological father, the plurality embraced a naturalized understanding of the relevant legal

---

has no effect, other than to lessen the status and human dignity of gays and lesbians"). However, this argument ignores the importance of controlling the social front of marriage.

158 Opening Brief for the Plaintiff-Petitioner, *supra* note 157.

159 The bumper sticker for sale at http://www.cafepress.com/designedforyou.21312867 is an obvious play on the conservative organization, Focus on the Family. *See* FOCUS ON THE FAMILY, http://www.focusonthefamily.com (last visited Mar. 12, 2013).

160 This is not to argue that restrictive marriage laws should be upheld, but rather that, as argued in Part IV.B.1, there is a more persuasive, and arguably less provocative, way to uphold the right of same-sex couples to marry—an approach that acknowledges the performative conflict over the social front of marriage but still upholds principles of equal treatment.

161 491 U.S. 110 (1989).

162 *Id.* at 115.

163 *Id.* at 113–14.

164 *Id.*

165 *Id*. at 114.

166 *See id*.

categories, failing to realize that the categories are performative. The opinion reasoned that "California law, like nature itself, makes no provision for dual fatherhood."[167] The plurality thus dismissed the substantive due process challenge, noting that the Constitution protects only the "unitary family," and that there is no history and tradition of protecting a family unit that consists of "the relationship established between a married woman, her lover, and their child, during a three-month sojourn in St. Thomas, or during a subsequent eight-month period when, if he happened to be in Los Angeles, he stayed with her and the child."[168] Biology was not the deciding factor in the case, and it is not in this sense that courts adopt naturalized categories. Instead, acting like a father in a traditional sense—that is, caring for a child within a married family unit—was dispositive. The court naturalized the idea of family as married parents raising children.

Michael H.'s reflexive fealty to seemingly natural categories is emblematic of an unwillingness to interrogate the categories at the heart of family law. Rather than acknowledge that this was a nontraditional family that might deserve the same protection as a traditional family, the opinion simply assumed the force of the categories of "unitary family" and "father." By judging the neighbor's performance as too far afield from the social front of these categories, the plurality was unwilling to grapple with how the categories are not inviolable but instead are social constructions, capable of change. Further, the opinion contended that it was simply parroting nature without recognizing that at that moment it was constructing one family as natural and another as unnatural.

By enforcing the legal fiction that sex does not occur outside of marriage, the decision reinforced the dominant social front of marriage as a monogamous institution and prevented a nonconforming performance from upstaging the main actors—the married couple. The plurality did so in the face of a credible claim of falsity, a claim to "stop the show." The plurality opinion in essence decided, like an audience aghast at Brecht, that breaking the fourth wall separating the actors from the audience would be too destabilizing. Instead, the decision explicitly reinforced the fiction that wives have intercourse only with their husbands and that family units are impregnable, as it were. The decision thus validated the dominant social front of marriage, but did so in a way that reinforced the false naturalness of the category.

---

167 *Id.* at 118.

168 *Id.* at 123 n.3. The plurality did acknowledge that a unitary family could consist of unmarried parents and their children but that it was "typified" by the marital family and certainly excluded the unusual configuration at issue in the case. *Id.*

This reliance on a naturalized definition of family is not an isolated example. In *Nguyen v. INS*, for instance, the Supreme Court upheld a gender-based classification that made it harder for an unwed citizen father to pass on his citizenship to a child than for an unwed citizen mother.[169] The Court recognized that the government has an interest in ensuring an opportunity for the development of a close parent-child relationship before granting citizenship benefits. The Court reasoned that this opportunity is "inherent in the event of birth as to the mother-child relationship" but cannot be presumed to exist between the biological father and child.[170] As a result, it was constitutional for Congress to require an unwed father, but not an unwed mother, to take visible steps (including supporting the child financially) to establish a relationship with a child as a condition of passing on citizenship.

At heart, this is a determination that Congress is allowed to rely upon a seemingly natural category—motherhood—and draw legislative distinctions based on this category. The *Nguyen* Court did not ask about the construction of motherhood and fatherhood, or how this construction might lead to one set of assumptions over another. Instead, the Court simply presumed the category and the consequences: The process of childbirth bonds mothers to their children. Men have no such biological process and therefore no presumed connection.[171]

As a final example, *In re Adoption of Garrett* is a state court case in which a brother wanted to become the legal father of his sister's child, which would have made the brother and sister co-parents.[172] The court refused to approve the adoption petition, reasoning that although courts had extended the right to adopt to both unmarried and same-sex couples, these relationships were "the functional equivalent of the traditional husband-wife relationship."[173] The brother and sister were not intimate and therefore could not be co-parents. Again, the court assumed a naturalized definition of a

---

169 533 U.S. 53, 64–67 (2001).

170 *Id.* at 66–67.

171 *Id.* at 65–66. For an excellent discussion on why courts may be reluctant to acknowledge socially constructed categories, see Suzanne B. Goldberg, *Social Justice Movements and LatCrit Community: On Making Anti-essentialist and Social Constructionist Arguments in Court*, 81 OR. L. REV. 629, 644–46, 656–59 (2002) (arguing that courts are resistant to claims of social construction because of the challenges of defining the category with any certainty but further noting that this is less true if there is a "tangible distinguishing feature" that helps define the category).

172 *In re* Adoption of Garrett, 841 N.Y.S.2d 731, 732 (Surr. Ct. 2007).

173 *Id.* at 732.

familial category—sexual relations as the basis for shared parenthood—and imposed this on all would-be parents.

As these examples illustrate, Butler's insight about the force of performances carries great weight in the legal context. Performances may be broadly constructive, but the law is particularly constitutive in privileging one set of performances as natural.

B. Normative Narrowing

The central concern with performative family law is that the law tends to draw on, and reinforce, idealized performances and dominant social fronts.[174] This process assumes the essential value of the traditional performance and reaffirms and reinscribes iconic images of family. In this way, performative family law is not a neutral phenomenon. Instead, the constitutive relationship between performance and law undermines pluralism, which is particularly problematic in light of recent demographic changes in the American family.

1. Obscuring Nontraditional Families

The normative narrowing of performative family law is omnipresent, but it particularly affects those outside the marital family. In determining whether a nonmarital family should be treated as a legal family, for example, courts often engage in what amounts to an assessment of whether the family is a "real" family—that is, whether it sufficiently reflects the dominant social front. In the context of marriage equality, when courts and legislatures entertain the expansion of marriage to same-sex couples, they ask, in effect, whether same-sex couples are enough like opposite-sex couples that they deserve the right to marry.

Advocates of marriage equality understand this relationship between law and performance and so consciously deploy images of same-sex couples that are very close to the prevailing social front. Lesbians and gay men are portrayed as long-term committed partners and parents who seek nothing more than normalcy.[175] These are familiar types, easily recognizable to the audience. In test-case litigation, lawyers carefully select plaintiffs who have been together for a

[174] As discussed below, a performative family law need not draw upon narrow, dominant social fronts. For performances to have uptake, they must have some element of convention, *see supra* notes 32–33 and accompanying text, but the law could draw on an array of performances. Part IV.A develops this possibility in greater detail.

[175] *See supra* note 19 (describing examples of this strategy, used by advocates of marriage equality and the Iowa Supreme Court, to explain why same-sex couples would be allowed to marry).

long period to illustrate that same-sex relationships are stable.[176] Although it is difficult to establish definitively as a causal matter, the increasing support for same-sex marriage[177] is some indication that increased visibility, and especially increased visibility of same-sex couples playing familiar roles, is leading to increased acceptance.

It is precisely this kind of conformity to familiar family roles that concerns scholars such as Katherine Franke. She argues that the legal recognition of same-sex marriage risks bringing same-sex relationships within the constraints of heterosexual relationships and further marginalizing a conception of intimacy and desire not based on marriage.[178] She contends that both the decision in *Lawrence v. Texas*,[179] and the gay rights movement's response to it, reflect a narrow conception of liberty as residing within the domestic sphere; neither the decision nor the gay rights movement envisions a broad view of sexual liberty that would embrace non-normative visions of sex, sexuality, and relationships.[180] In this way, marriage equality can be understood as a conservative movement at its core, with same-sex couples asking for the attendant obligations and one-size-fits-all approach of marriage.

The same normative narrowing concern attends familial roles. One of the main goals and purposes of family law is to regulate the behavior of family members. By delineating clear categories and then specifying how a person should act in each role—parents do *X*, spouses do *Y*—family law writes the script for much of family life. The laws of marriage and divorce specify how spouses and ex-spouses should act toward each other, and laws setting forth parental responsibilities establish what parents should do for their children. This guidance may be helpful in some circumstances, but regulation can

---

176 *See, e.g.*, Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 933 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *cert. granted sub nom.* Hollingsworth v. Perry, 133 S. Ct. 786 (2012) (No. 12-144) (quoting the testimony of one of the plaintiffs: "I'm a 45-year-old woman. I have been in love with a woman for 10 years and I don't have a word to tell anybody about that").

177 *See, e.g.*, Damla Ergun, *Strong Support for Gay Marriage Now Exceeds Strong Opposition*, ABC NEWS (May 23, 2012, 12:01 A.M.), http://abcnews.go.com/blogs/politics/2012/05/strong-support-for-gay-marriage-now-exceeds-strong-opposition/ (reviewing recent polling data and finding that "53 percent of Americans say gay marriage should be legal . . . up from 36 percent in just 2006").

178 *See* Katherine M. Franke, *Longing for* Loving, 76 FORDHAM L. REV. 2685, 2688–89 (2008) (arguing that marriage equality advocacy risks "denigrating or shrinking an affective sexual liberty outside of marriage").

179 539 U.S. 558, 578 (2003) (invalidating as a due process violation a Texas statute that criminalized certain sexual conduct between members of the same sex).

180 *See* Katherine M. Franke, Commentary, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1415–25 (2004).

quickly become oppressive, requiring conformity in the most personal aspects of our lives.

For traditional families, there is considerable leeway in the performance.[181] The law demands a ritual performance, such as a wedding ceremony or a birth certificate signing. In exchange, the state generally does not critique the details of family members' performances, at least until some crisis emerges or the intact family breaks up.

By contrast, to gain legal recognition, nontraditional families must closely follow a prescribed script of how families are *supposed* to act. In cases where functional mothers seek legal recognition, for example, courts sometimes examine such minutiae as whether a would-be mother helped select a pediatrician and day care center,[182] volunteered in a child's classroom,[183] or drove a child to sports practice and games.[184] Legal rights are granted only after a searching review of the individual's performance to ensure consistency with the prevailing social front. Moreover, this dominant social front is often an idealized image of family. A legal family may eschew Mother's Day as an overly commercialized Hallmark holiday or may simply forget to celebrate it. But the failure to honor a functional mother on Mother's Day can become a point of evidence in a trial about whether to confer parental rights.[185]

2. Scrutinizing Marginal Families

The normative narrowing of performative family law has profound effects on the regulation of marginal families—particularly low-income, non-White families. The dominant social front of family historically in the United States has been nuclear, economically stable, patriarchal, heterosexual, and White.[186] Families that do not fit this

---

[181] *See* Mary Anne Case, *What Feminists Have to Lose in Same-Sex Marriage Litigation*, 57 UCLA L. REV. 1199, 1203–06 (2010) (describing her prior work developing the argument that marriage is far less constricting than domestic partnerships because the former requires only the entry ritual, leaving married couples free to organize their sexual, social, and financial lives as they choose; by contrast, the recognition of a domestic partnership turns on conformity with norms such as cohabitation, monogamy, and economic sharing).

[182] *E.g.*, V.C. v. M.J.B., 748 A.2d 539, 543 (N.J. 2000); *In re* E.L.M.C., 100 P.3d 546, 550 (Colo. App. 2004).

[183] *E.g.*, S.Y. v. S.B., 134 Cal. Rptr. 3d 1, 6 (Ct. App. 2011).

[184] *E.g.*, *In re* Parentage of L.B., 89 P.3d 271, 274 (Wash. Ct. App. 2004), *rev'd in part on other grounds*, 122 P.3d 161 (Wash. 2005).

[185] L.M.S. v. C.M.G., No. CN04-08601, 2006 WL 5668820, at *10 (Del. Fam. Ct. June 27, 2006). *Cf. S.Y.*, 134 Cal. Rptr. at 6 (noting that the plaintiff was celebrated on Mother's Day).

[186] *See generally* Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299, 309–12 (2002) (explaining the dominant historical norms of masculinity and fatherhood and noting that family law

social front are in a more precarious position, susceptible to greater scrutiny by the state. In the late nineteenth century, for example, White, upper class men and women established and ran child protection societies to "save" abused and neglected children from their largely poor, immigrant parents.[187] But instead of looking objectively at a child's health and safety, these "child savers" judged home life using White, upper-class norms.[188] Child savers, horrified by immigrants' use of garlic in cooking and their habit of drinking wine with dinner, were repulsed by their clients' home lives.[189] The child welfare system is the modern day version of this imposition of White, middle-class norms, with low-income children of color removed from their homes at far greater rates than similarly situated White children.[190]

Another aspect of this dynamic is that marginalized families have less influence on the construction of legal categories. Some performances simply count more than others. The performance of a single, African American mother receiving state aid, for example, has little uptake in the construction of the dominant social front of motherhood. Instead, it becomes the social front for deviant mothers.[191] This is primarily a result of power, class, and race, but those dynamics amplify or mute performances that might otherwise be received unmediated.

C. Implications

Conceiving of family law in performative terms leads to three central insights. First, it casts serious doubt on the law's recent attempts to address the deep demographic changes of the past few

---

interventions in the nineteenth century centered on changing the behavior of families that did not meet these norms).

[187] *See* LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE 8, 14–15 (1988) (describing major child protection agencies in Boston in the late nineteenth century and the common characteristics of their workers and clients).

[188] For example, one of the primary bases for removing children was the determination that the father was not able to provide financially for the entire family and that the mother and children were in the labor force. *See* Hasday, *supra* note 186, at 332 (explaining that child protection workers saw poverty, and the attendant requirement for children to work, as representing moral vices of parents).

[189] *See* GORDON, *supra* note 187, at 46–47 (explaining the importance of the "cultural lenses" through which child protectors viewed their clients).

[190] *See* MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 192–93 (2005) (arguing that the modern child welfare system still reflects a class-based orientation); DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 47–55 (2002) (describing evidence of race and class bias in the child welfare system).

[191] *See* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 203–07 (1997) (describing the historical exclusion of African Americans from the welfare system and the more modern construction of low-income, African American women who receive welfare as social deviants).

decades. Second, it demonstrates that the current policies designed to address family violence, most notably child sexual abuse, are misguided. Finally, it shows that scholarly debates over the public-private divide are incomplete and have failed to explain why the concept of family privacy retains such enormous appeal. This Subpart addresses each insight in turn.

1. Inscribing Dominant Performances

One of the most important recent family law reforms is the ALI's *Principles of the Law of Family Dissolution*.[192] Finalized in 2001, the *Principles* are an attempt by the ALI not simply to restate the law pertaining to family dissolution as it exists across jurisdictions, but also to provide normative guidance to courts and legislatures.[193] Notably, the ALI wanted to respond to the increase of family-like behavior outside of the traditional legal family.[194] Through an exhaustive process lasting more than a decade, the ALI reporters canvassed existing law and debated how the law could better address social needs.[195] The ALI *Principles* are intended as a resource for both courts and legislators to consult when deciding on family law policies.[196]

Viewed through the lens of performativity, however, the ALI's well-intentioned effort to treat alternative families more liberally by bringing them within the fold of family law looks more problematic. The primary concern is that the *Principles* recreate the normative narrowing of performative family law. To assimilate nontraditional families into family law, the *Principles* require those seeking legal rights to act in ways that reflect dominant social fronts as a condition of receiving legal benefits. This reinforces the primacy and normativity of the traditional family.

A core provision of the *Principles*, for example, provides for the assimilation of cohabiting couples into domestic partnerships.[197] If a couple shares "a primary residence and a life together"[198] for a significant period of time, then they are considered domestic partners.[199]

---

[192] *See* PRINCIPLES, *supra* note 20.

[193] *See* Ira Mark Ellman, *Chief Reporter's Foreword* to PRINCIPLES, *supra* note 20, at xv.

[194] *See* Lance Liebman, *Director's Foreword* to PRINCIPLES, *supra* note 20, at xii–xiv.

[195] *See id.* at xiii (describing the process of developing the *Principles*).

[196] *See* Robin Fretwell Wilson, *Introduction* to RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 3 (Robin Fretwell Wilson ed., 2006) (explaining that the *Principles* were written for legislators to use when reforming statutes, and that, given the prestige of the American Law Institute, courts will likely consult the *Principles* regularly as well).

[197] *See* PRINCIPLES, *supra* note 20, § 6.01(1).

[198] *Id.* § 6.03(1).

[199] Whether a couple is sharing a life together is determined by reference to a range of factors, including the extent to which the partners commingle finances, are economically

Similarly, the *Principles* confer parental rights on a functional, or "de facto," parent when the person lives with the child for at least two years and provides at least an equal share of the caretaking responsibilities for the child, for a primary purpose other than remuneration.[200]

Both provisions are a laudable attempt to recognize that families exist outside of marriage, but the provisions impose the dominant social front of marriage and parenthood on the would-be family members. Take, for instance, unmarried partners who are deeply committed to each other but who must live apart due to career demands.[201] Under the *Principles*, the failure to share a primary residence means that this couple would not qualify as domestic partners. Their performance of family thus falls short because they do not satisfy the dominant social front of married couples. Similarly, a would-be parent under the *Principles* must be responsible for half of the childcare responsibilities. Imagine a woman with a demanding job who is the lesbian partner of a child's biological mother. She cannot provide half of the childcare and so, under the *Principles*, is not a legal mother. Finally, the *Principles* do not conceive of multiple adults caring for a child, each with legal rights. The *Principles* thus reinscribe family law's "rule of two," which limits children to two legal parents.[202]

---

interdependent, "assume[ ] specialized or collaborative roles in furtherance of their life together," change each other's lives, share emotional and physical intimacy, and have a reputation as a couple. *Id.* § 6.03(7)(a)–(m). If a couple is in a domestic partnership and later terminates their relationship, the *Principles* counsel courts to impose the same principles of economic sharing that follow the dissolution of a marriage. *See id.* §§ 6.04–.06. Couples can, however, opt out of this imposed economic sharing if they have an enforceable agreement to the contrary. *See id.* § 6.03 cmt. b.

200 *See id.* § 2.03(1)(c).

201 *See, e.g.*, Jennifer Conlin, *Living Apart for the Paycheck*, N.Y. TIMES, Jan. 4, 2009, at ST1 (describing a 2006 report from the U.S. Census Bureau that 3.6 million married Americans are living apart from their spouses and providing anecdotal examples of this phenomenon showing that it is largely driven by economic necessity). The most recent report from the U.S. Census Bureau, based on the 2010 census, shows that 3.35 million married Americans are living apart from their spouses. *See The 2012 Statistical Abstract: Population*, U.S. CENSUS BUREAU (2012), http://www.census.gov/compendia/statab/cats/population.html (follow "57 - Marital Status of the Population by Sex and Age: 2010" Excel hyperlink) (last visited Mar. 12, 2013) (listing 1,756,000 men and 1,594,000 women in the "married, spouse absent" category).

202 No state allows a child to have three legal parents. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776, 778, 781 (Cal. 1993) (considering a situation in which three people claimed to be a child's parents and rejecting the argument that a child could have a father and two mothers). This doctrine ignores the social reality that some families function in this manner. *See infra* note 245 and accompanying text (providing the example of lesbian couples who choose to raise their children with the men who donated sperm to them).

Requiring functional families to act like traditional families places performance at the center of the analysis, entrenching traditional social fronts and undermining pluralism. This is particularly troubling because nontraditional families often do *not* act like traditional families. Many nontraditional families live in family circumstances that are not consistent with the dominant social front and thus are at considerable risk that their performances will fall short.

2. *Offstage Violence*

Legal valorization of familial performances and the emphasis on what others see contributes to a cognitive dissonance about what is largely unseen. From everyday disagreements to the violence and sexual assault that mark too many families, what goes on behind closed doors is not what is seen at the playground and the grocery store. When the audience does stumble into the back, the scene can be startling.[203]

The Van Derbur family provides a compelling example. In the 1950s, the Van Derbur family of Colorado was well respected and involved in the Denver community.[204] The Van Derburs, who had four

---

[203] For example, anthropologists and archaeologists at U.C. Irvine and UCLA recently conducted a study of thirty-two middle class, dual-income families with children in the Los Angeles area. *See* Belinda Campos et al., *Opportunity for Interaction? A Naturalistic Observation Study of Dual-Earner Families After Work and School*, 23 J. FAM. PSYCHOL. 798, 800 (2009). For two weekdays and one weekend, the researchers videotaped the families during waking hours when they were at home, and then coded their behavior. *See id.* Although the study generated numerous interesting findings, one revelation for the researchers was their own reaction to what they saw. The researchers without children reported their shock at the level of discord in family life. Benedict Carey, *Families' Every Hug and Fuss, Taped, Analyzed and Archived*, N.Y. TIMES, May 23, 2010, at A1. One researcher who was childless at the time of the experiment called his experience "[t]he very purest form of birth control ever devised. Ever." *Id.* The researchers experienced the reality that family life is often unappealing in ways that are surprising to those who typically see only the front, not the back, of other families' lives.

This discrepancy between the inside and outside of family life can also be surprising for new parents, who sometimes assume parenthood will be more exhilarating and rewarding than it often is, especially in the first few weeks. For an anecdotal account of this, see LEWIS, *supra* note 109, at 13–14 (explaining that his journal about fatherhood began because of "this persistent and disturbing gap between what I was meant to feel and what I actually felt"). *See also id.* at 75 ("Clutching [my first child] after she exited the womb, I was able to generate tenderness and a bit of theoretical affection, but after that, for a good six weeks, the best I could manage was detached amusement. The worst was hatred.").

[204] *See* MARILYN VAN DERBUR, MISS AMERICA BY DAY: LESSONS LEARNED FROM ULTIMATE BETRAYALS AND UNCONDITIONAL LOVE 9–11 (2004) (describing the civic involvement and status within the community of the author's parents).

daughters, were socially and economically successful.[205] The girls had a picture-perfect childhood, with weekly trips to church and summers split between a mountain retreat and a beach house.[206] Each daughter excelled in her own way; the youngest, Marilyn, was crowned Miss America in 1958.[207]

In contrast to this front, the back of the family was horrific. As Marilyn related in her 2004 autobiography, her father repeatedly raped her from age five to eighteen.[208] Marilyn wrote about her experiences as the "night child" who would wait, terrified, for her father to pad down the hallway into her bedroom.[209] She repressed the memories for years[210] and never told anyone until she was in her early twenties and a youth minister from her childhood church guessed her secret.[211] A theme throughout her childhood was the performance involved in covering the incest.[212] As she put it, "I began to see our family as a Hollywood set. We looked like a beautiful picture but if you walked through the front door of our set there was just rubble and trash."[213]

As this story illustrates, there is often a wide discrepancy between positive images of family and the lived experience. Although difficult to prove as an empirical matter, it is intuitive that the disconnect between the social front of family life and the private back contributes to a collective cognitive dissonance surrounding family dysfunction. Few may be surprised when a politician who sings daily paeans to his wife of many years turns out to have a child with another woman, yet it can be difficult to grasp the depth and breadth of familial

---

205 *See id.* at 11 (describing the Van Derburs' impressive home and their household employees, which included a nanny, a gardener, a woman who did the laundry, and two women who cooked and cleaned).

206 *See id.* at 12–14.

207 *See 1958: Marilyn Van Derbur*, MISS AMERICA, http://www.missamerica.org/our-miss-americas/1950/1958.aspx (last visited Mar. 12, 2013) (describing Marilyn Van Derbur's crowning as Miss America and her work since then).

208 *See* VAN DERBUR, *supra* note 204, at 21–28 (describing this abuse and noting that it happened regularly for thirteen years). Van Derbur does not reveal whether her father sexually abused her two middle sisters. *See id.* at 12 (noting that her two middle sisters asked not to be included in the story). She does describe his ten-year sexual abuse of her eldest sister. *See id.* at 192–93 (noting that her father abused her sister Gwen from age eight to eighteen and describing Gwen's reaction to the abuse).

209 *See id.* at 21–22 (explaining her survival mechanism of subconsciously splitting her daytime self from her nighttime self, who suffered the abuse).

210 *See id.* at 35, 192 ("I had no conscious memories of my nights.").

211 *See id.* at 30, 101–04.

212 *See id.* at 27–83 (explaining that she masked her loneliness, terror, and anxiety by constantly pushing herself to stay busy and to excel at everything she did).

213 *Id.* at 258; *see also id.* at 259 ("I have never met anyone, who was as good as my mother was, at playing the different roles.").

dysfunction.[214] In many families the back is not simply discrepant with the front, but rather is wholly at odds with it.[215]

Take child sexual abuse: Although statistics in this field have notable limitations,[216] there is evidence that approximately thirty percent of girls and thirteen percent of boys are sexually abused by the age of eighteen.[217] In nearly all cases, the perpetrator is known to the

---

[214] Although this Subpart focuses on child sexual abuse, much of the same could be said about domestic violence. Despite increased awareness of domestic violence, the extent of the problem can still be startling. A recent study by the Centers for Disease Control and Prevention found that nearly one in three women has been the victim of domestic violence. *See* MICHELE C. BLACK ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 2, 39 (2011), *available at* http://www.cdc.gov/ViolencePrevention/pdf/NISVS_Report2010-a.pdf.

[215] There are numerous other ways in which the back does not match the front. For example, the exaggerated performance of traditional family values often masks a more divergent reality. It has become almost commonplace to find prominent male social conservatives in sexual relationships with other men. *See, e.g.*, Milbank, *supra* note 108 (describing Republican Senator Larry Craig's arrest relating to a homosexual encounter in the Minneapolis airport); Frank Rich, *A Heaven-Sent Rent Boy*, N.Y. TIMES, May 16, 2012, at WK10 (describing Baptist minister George Reker's ten-day trip to Europe with a twenty-year-old male escort). These men seem invariably to be married with children and they uniformly support traditional family values, condemning homosexuality and other "deviant" behavior, such as single parenthood. *See, e.g.*, GEORGE ALAN REKERS, GROWING UP STRAIGHT 40 (1982) ("Homosexual activists seek to lure our children into a deceptive and destructive fantasy world that ignores the obvious physical, social and moral boundaries of sexual expression.").

[216] *See* DAVID FINKELHOR ET AL., U.S. DEP'T OF JUSTICE, SEXUALLY ASSAULTED CHILDREN: NATIONAL ESTIMATES AND CHARACTERISTICS 9 (2008) (concluding, after addressing various methodological concerns, that "[i]t may be inherently impossible to get a complete and unbiased accounting of all child sexual assaults close to the time they occur").

[217] *See* Ryan C.W. Hall & Richard C.W. Hall, *A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues*, 82 MAYO CLINIC PROC. 457, 460 (2007); *id.* at 457 (defining sexual abuse as "any sexual act directed against another person forcibly and/or against that person's will or not forcibly or against the person's will in which the injured party is incapable of giving consent"). This Article relies on studies seeking to determine the prevalence, rather than the incidence, of child sexual abuse. Incidence studies use official statistics, such as cases substantiated by the child welfare system or reported to the police. Prevalence studies ask a representative sample of the population retrospective questions about specific experiences. Incidence rates are notoriously low. *See, e.g.*, ANDREA SEDLAK ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4) 3-1 to 3-4 (2010), *available at* http://www.childwelfare.gov/systemwide/statistics/nis.cfm (finding that 135,300 children were sexually abused by a parent or caretaker in the 2005–06 study year). One of the hallmarks of child sexual abuse is that the child does not tell anyone, and even if the child does tell someone, the abuse is not reported to the police. *See* Diana E.H. Russell, *The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children*, 7 CHILD ABUSE & NEGLECT 133, 142 (1983) (finding that only two percent of the intrafamilial cases and six percent of the extrafamilial cases in her study were reported to the authorities). One study that strikes a balance between incidence reports and retrospective prevalence studies is a 1999 survey of adult caretakers and

family,[218] and for approximately thirty percent of the girls who are abused, the perpetrator *is* a family member.[219] Despite these high prevalence rates, only a small minority of victims reports the abuse to the authorities; this is particularly true when the offender is a family member.[220]

These statistics stand in marked contrast to the dominant legal response to child sexual abuse, which is to focus on the threat from strangers. Sex offender registries, for example, are intended to alert communities to the presence of sexual predators,[221] but in doing so, they reinforce the message that the danger is from the unknown, rather than the known. Similarly, popular AMBER Alerts are designed primarily to address abductions by strangers,[222] again reinforcing the idea that strangers pose the greatest danger to children. The problem is rarely characterized as a threat within the home or close to the home.[223]

Parents thus continue to misperceive the real threats to their children. The five greatest threats to a child's safety are car accidents,

---

youth aged ten to eighteen, which attempted to capture sexual abuse closer to the time it occurred. *See* FINKELHOR ET AL., *supra* note 216, at 1–4. This study found that an estimated 285,400 children had been sexually assaulted in 1999 (defined to include rape, attempted rape, and other unwanted sexual contact involving force or coercion). *See id.* at 2, 5.

218 *See* REBECCA M. BOLEN, CHILD SEXUAL ABUSE: ITS SCOPE AND OUR FAILURE 91–101 (2001) (discussing studies finding that abuse by strangers accounted for only seven percent of all sexual abuse and describing other types of extrafamilial offenders, including family friends, acquaintances, and people in positions of authority who are known to the family).

219 *See id.* at 113–14. Among family members, the offender is most often an uncle, *see id.* at 114, although in African American families, the most common offender may be a stepparent. *See id.* The second most common offender for all demographic groups is a father or cousin. *See id.* In the case of male victims, the offender is less likely to be a family member, with only eleven to twelve percent of all abuse of males occurring within the family. *See id.* at 114. To be clear, then, in the majority of cases for both girls and boys, the perpetrator is a nonfamily member, although not a stranger to the child. This Article focuses on intrafamilial child sexual abuse because of the connection to family performances.

220 *See supra* note 217 (discussing reporting rates).

221 *See* Kate Blacker & Lissa Griffin, *Megan's Law and Sarah's Law: A Comparative Study of Sex Offender Community Notification Schemes in the United States and the United Kingdom*, 46 CRIM. L. BULL. 987, 988 n.12 (2010) (listing the sex offender registry laws in all fifty states; pursuant to federal guidelines, the laws require that covered individuals provide law enforcement with specified information, such as an address, a photograph, fingerprints, a social security number, and information about the conviction).

222 *See* U.S. Dep't of Justice, *Guidelines for Issuing AMBER Alerts*, AMBER ALERT, http://www.amberalert.gov/guidelines.htm (last visited Mar. 12, 2013) (explaining that stranger abductions are "primary to the mission of an AMBER Alert").

223 *See, e.g.*, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, MANAGING SEX OFFENDERS: CITIZENS SUPPORTING LAW ENFORCEMENT 1 (2006) (describing the strong public demand that law enforcement prevent "violent sex offenders and predators" from victimizing the public).

homicide (typically by someone known to the child), child abuse, suicide, and drowning.[224] According to a survey by the Mayo Clinic, however, parents are most worried about kidnapping, terrorists, and dangerous strangers.[225]

There are numerous reasons for misunderstanding threats,[226] but part of the explanation lies in the nature of familial performances. The active management of the familial social front by public figures and everyday citizens alike makes it harder to believe that a father would rape his daughter or that an uncle would force his nephew to watch him masturbate.[227]

3. The Public-Private Divide

A central principle in family law is that the state should largely leave families alone to order their own affairs. Scholars have long challenged this concept of family privacy, and a critical step has been the argument made by feminists and others that the family is not a private institution.[228] As scholars have contended, the state's determination of which groupings of individuals will win the moniker "family,"[229] as well as who will receive the state's largesse and with what strings attached,[230] belies an institution that functions apart from the law. Further, the influence of laws regulating the workplace,

---

[224] *See* Lisa Belkin, *To Keep a Child Safe, Just . . .* , N.Y. TIMES, Sept. 19, 2010, at WK4; *see also Keeping America's Children Safe: Preventing Childhood Injury: Hearing of the S. Comm. on Health, Educ., Labor, & Pensions*, 110th Cong. 5–10 (2008) (statement of Ileana Arias, Director, Nat'l Ctr. for Injury Prevention & Control) (discussing significant threats to the health and well being of children).

[225] *See* Gunnar B. Stickler et al., *Parents' Worries About Children Compared to Actual Risks*, 30 CLINICAL PEDIATRICS 522, 526–27 (1991) (noting that 72% of parents worry about their child being abducted); *see also* JAMES R. KINCAID, EROTIC INNOCENCE: THE CULTURE OF CHILD MOLESTING 180–85 (1998) (discussing the unjustified focus on child kidnapping committed by strangers).

[226] *See, e.g.*, Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207 (1973) (discussing the availability heuristic as one reason for individuals' misperceptions of future probabilities).

[227] The vast majority of perpetrators are male. *See* FINKELHOR ET AL., *supra* note 216, at 2 ("[Ninety-five percent of] sexual assault victims were assaulted by a male.").

[228] *See, e.g.*, Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181, 1187 (1994) ("The dichotomy of 'separate spheres' always has been illusory. The state determines what counts as private and what forms of intimacy are entitled to public recognition. Policies governing tax, welfare, childcare, family, and workplace issues heavily influence personal relationships.").

[229] *See* Martha C. Nussbaum, *The Future of Feminist Liberalism*, *in* THE SUBJECT OF CARE: FEMINIST PERSPECTIVES ON DEPENDENCY 186, 199 (Eva Feder Kittay & Ellen K. Feder eds., 2002).

[230] *See, e.g.*, Martha Minow, *All in the Family & in All Families: Membership, Loving and Owing*, 95 W. VA. L. REV. 275, 280–82 (1992) (arguing that it is not possible for the state to be neutral about the definition of family because such definitions are necessary for the distribution of legal rights and state benefits).

childcare, tax benefits, and even zoning destabilize presumptions of autonomy.[231]

Understanding the role of performance in family law demonstrates that there is another important way in which the public collapses into the private: the performance in the home of collectively forged meanings of family and familial roles. In one sense, family privacy reflects the idea that the home is the back of the performance—a literal and conceptual space where families interact away from an outside audience. Indeed, families do save some behavior for the supposedly private sphere of the back. Think of an irate mother hissing at a child misbehaving in a grocery store, "just wait until we get home."[232]

But in reality, the front permeates the back. For some families, the private home is not a back because the family must still perform for outsiders, such as a child welfare caseworker conducting a home visit. More fundamentally, the front and back collapse for all families because individuals bring societal expectations of family and familial roles into the back. For example, much of motherhood may be performed behind closed doors, but a woman does not perform motherhood on a blank slate. Instead, she plays out collective meanings of this role, consciously and unconsciously juggling images of motherhood largely brought home to her through the iterated performances she sees in numerous settings, from the playground and grocery store to television, movies, and magazines. All of these images accompany a woman as she walks into the door of her home, ready to mother her children. These "public" images of motherhood come into the "private" space of the home.[233] This front-into-the-back dynamic is a crucial way in which the public-private distinction folds into itself.[234] It is

---

231 *See, e.g.*, Katharine B. Silbaugh, *Women's Place: Urban Planning, Housing Design, and Work-Family Balance*, 76 FORDHAM L. REV. 1797, 1798, 1825–39 (2007) (examining "the role of urban planning and housing design in frustrating the effective balance of work and family responsibilities").

232 The absence of an outside audience may encourage some family members to engage in behavior they would not otherwise do in front of others. For example, in physically abusive relationships, the perpetrator may verbally abuse the victim in public, but almost always saves actual blows for the home. *See Domestic Violence Awareness Handbook*, U.S. DEP'T OF AGRIC., http://www.dm.usda.gov/shmd/aware.htm (last visited Mar. 12, 2013) ("The abusive man—and men are the abusers in the overwhelming majority of domestic violence incidents—typically controls his actions, even when drunk or high, by choosing a time and place for the assaults to take place in private and go undetected.").

233 An internalized audience also exists when behind closed doors.

234 Conversely, the back also comes into the front, with depictions of the "private" home projected into the "public" space. Reality television shows give viewers the illusion of peering behind the curtain, even though viewers and performers alike know the scenes are staged. And classic family dramas are ways in which depictions of private family life are

nearly impossible to imagine a private family, somehow shielded from these outside influences.

Recognizing this dynamic helps explain the visceral appeal of claims to family privacy. The home is not private in the sense of a law-free zone, or even a performance-free zone, but family members do conceive of it as a (relatively) audience-free zone. For families with sufficient means to have a private space, the home is a place to relax and take off the make-up. A mother is likely unconscious of the images of motherhood that she brings into the home and therefore thinks of the back as a much-needed space where she can let go. The desire for such a space helps explain why the concept of family privacy retains such broad appeal and why it is so politically difficult to develop effective means of intervention. It is deeply unsettling to realize that the cameras really are always rolling.

IV
Denaturalizing Family Law

As an antidote to the normative narrowing and policy-distorting effects of performative family law, this Part proposes a framework for denaturalizing family law. As Judith Butler warns, it is not possible to step outside the performance entirely;[235] therefore, the goal is not the impossible task of creating a denaturalized family law or avoiding performativity altogether. Instead, the objective is to move away from naturalized, overly constraining standards that reinscribe dominant social fronts.[236] Given their deeply constitutive nature, familial performances will continue to inform familial categories and the law will play an active role in this process, ratifying some social fronts at the expense of others. The goal is to be conscious of this dynamic and resist its more troubling aspects.

---

shared with those outside the home. *See, e.g.*, William Shakespeare, King Lear; Leo Tolstoy, Anna Karenina (1877).

[235] *See supra* note 64 and accompanying text.

[236] In other words, the real problem with family law's reliance on performance is the emphasis on idealized performances, not on performance per se. *Cf.* Linda H. Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161, 1166 (1995) (arguing that society has "core stories [that] structur[e] the interpretation of experience and provid[e] the authors and audiences of future stories with commonly recognized plots, symbols, themes, and characters," and that the lawyer's task in a Title VII case "is to choose a core story from existing jurisprudence and then to construct, from the available facts, a new story that resembles the core story as closely as possible").

A. Decentering Dominant Performances

The critical feature of a denaturalizing framework is the effort to decenter dominant performances, which can be accomplished in a number of ways. This Subpart describes three such tactics.

1. Broader Social Fronts

A starting point for decentering dominant performances is recognizing broader social fronts, so that no one performance takes precedence over all others. One Supreme Court case addressing the family holds some lessons in this regard. In contrast to *Michael H.*, where the plurality opinion failed to see its own intervention in perpetuating a traditional social front,[237] a more nuanced judicial approach to role pluralism in familial performance could be modeled on the decision in *Moore v. City of East Cleveland*.[238] In that case, the Court struck down a local housing ordinance that had inscribed the traditional social front of family by limiting occupancy to single families.[239] The family at issue consisted of a grandmother, one of her children, and two of her grandchildren, who were cousins, not siblings—a configuration not allowed by the ordinance.[240]

The plurality opinion began by noting that constitutional protection for families should not be limited to a narrow conception of the family. Instead, it was important to examine a broader tradition of family patterns, including extended families.[241] Justice Brennan, in a concurrence, highlighted a role for the courts in promoting pluralism. He emphasized that the Constitution does not allow the government to impose "white suburbia's preference in patterns of family living" on the rest of society, especially in light of the long history of low-income families coming together to pool their resources.[242]

Unlike the judicial enforcement of the dominant social front of marriage in *Michael H.*, courts should take a cue from *Moore* and recognize multiple social fronts. The opinions in *Moore* do not speak in performativity terms, but they evince awareness of the value of not hewing too closely to one social front of family. The opinions denaturalize the category of family by decentering any one performance and

---

237 *See supra* notes 161–68 and accompanying text.

238 431 U.S. 494 (1977).

239 *See id.* at 505–06.

240 *See id.* at 495–96.

241 *See id.* at 504 ("Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.").

242 *Id.* at 508 (Brennan, J., concurring).

instead relying on a plurality of performances that reflected multiple lived experiences. In this way, *Moore* is a model not for abandoning performance altogether, but rather for allowing multiple performances to define familial categories.

In light of family law's typical resistance to recognizing intersectional performances,[243] *Moore* is all the more remarkable for recognizing different family forms and acknowledging the historical contingency of these forms. The case demonstrates that it is possible for the legal system to expand, rather than constrict, the relevant social fronts of familial categories, decentering any one performance and furthering the goal of pluralism.

2. *Alternative Means to Define the Family*

In addition to broadening the type of performances that count, another way to decenter dominant performances is to develop definitions of family and familial roles that are somewhat less reliant on performance. To do so, family law would give far greater leeway to parties to decide for themselves whether they constitute a family. A state could develop numerous opt-in familial categories that would allow individuals and groups to determine whether to assume familial rights and responsibilities by registering for one of the categories.[244]

To see how this might work in practice, consider the example of a lesbian couple choosing to raise a child together but with the additional help of a man who donated sperm informally.[245] Under the current approach to nontraditional families, which insists on only two parents, if the lesbian couple involves the man too much, they risk undermining the parental claims of the non-biological mother because a court would see the family as consisting of the two biological parents.

By contrast, an opt-in approach with numerous categories of "family" would allow the three adults to register their family form. If they chose to be a family, then the law would treat them as such. This kind of opt-in regime is loosely analogous to the civil contracts that gay and lesbian couples use to construct legal relationships in the absence of formal recognition.[246] The opt-in registry, however, would

---

[243] *See supra* Part II.B.2.

[244] *See* Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573 (2013) (discussing such proposals and offering an alternative, registered contractual relationships, which would allow couples to choose their own level and type of commitment and then register that commitment with the state).

[245] *See* John Bowe, *Gay Donor or Gay Dad?*, N.Y. TIMES, Nov. 19, 2006, at E68 (describing several such situations).

[246] *See, e.g.*, Craig M. Fowler, *New Issues and Strategies in Texas Family Law Cases*, *in* STRATEGIES FOR FAMILY LAW IN TEXAS 55, 58 (2012) (describing how same-sex couples in

confer the same benefits on all types of families, not elevating one family form over another. A traditional nuclear family would be a legal "family" just as a three-parent family would be a legal "family."

An opt-in regime with multiple categories would thus decenter the importance of any one social front and also would side-step the intrusive judicial scrutiny that accompanies a court's determination of whether a functional family meets the dominant social front. It would thus ensure that all families receive the advantage of the hands-off approach the state takes to formal families.

Of course there are numerous obstacles to be addressed, such as the limits, if any, on the different types of family forms, as well as the question of shared parental rights,[247] issues that are beyond the scope of this Article. Moreover, the process for defining the opt-in categories would, itself, likely rely on performances, as legislators determine the range of familial groupings that would be allowed. But this kind of reliance on performance is somewhat less troubling as it does not subject any one family to scrutiny, and also serves the broader interest of furthering pluralism by recognizing the inherent variety of contemporary family life.

A different way to define familial categories more broadly is to condition legal recognition on the subjective nature of the bond between the individuals, not the objective markers of conformity with the social front of traditional families. This is not to say that the state should grant legal recognition to any relationship, however loose, but rather that the relevant legal inquiry should be into the closeness of the relationship between partners or between children and caregivers. It is the texture of these relationships that should matter, not the similarity to familiar social fronts.

Consider how this might work in the judicial context. A court would still examine performance—indeed, there may be little else on which to rely—but the court would do so with a different eye. Instead of comparing the performance of the would-be family member with a dominant social front, the court would seek to understand this family on its own terms. If the family felt strongly about Arbor Day but not Mother's Day, for example, the question is whether the would-be parent was included in the celebration of Arbor Day. This unlikely

Texas, which does not permit such couples to marry, use private contracts to "set out the various rights, duties, and financial provisions pertaining to the couple's relationship—i.e., who owns what property, and whether there will be any children, whether they will be adopted or conceived by artificial insemination, and what the parental rights of each partner will be").

247 *See* Clare Huntington, *Parents as Hubs*, 94 VA. L. REV. IN BRIEF 45, 46–47 (2008) (describing the problems with multiple adults claiming legal rights to a child).

example highlights the individual nature of families; after all, it may well be that for some family Arbor Day *is* the highpoint of the year. But when a court looks only at what *other* families do, and asks whether this family performs similarly, it misses the point of this family. To be sure, this kind of inquiry may be challenging institutionally.[248] Neither legislatures nor courts are particularly well equipped to make these sorts of judgments. But the alternative of relying on the prevailing social front is even more unsatisfying.

3. Rejecting Command Performances

Divorce law is one area where family law has largely rejected command performances. Before the 1970s, every state required a party seeking a divorce to show that the other party had committed fault, such as adultery or cruelty.[249] But by the middle of the twentieth century, fault-based divorce proceedings had become a charade, with litigants, lawyers, and judges all engaging in Kabuki theater. The limited bases for divorce, combined with the need for evidence, led to many fabricated claims of adultery.[250] For example, lawyers would arrange for the wife, a private investigator, and a process server to find the husband in a motel room with a scantily clad woman.[251] This cottage industry led to newspaper articles, such as the famous 1934 series in the *New York Mirror*, entitled "I Was the 'Unknown Blonde' in 100 New York Divorces!"[252] The ensuing court proceeding would unfold according to a literal script, with the lawyers reading from a mimeographed list of questions and the clerk of court interrupting the lawyer if he deviated from the script.[253]

The move away from fault-based divorce was motivated, at least in part, by the recognition that divorce proceedings had become a

---

[248] *See* Goldberg, *supra* note 171 (discussing the reluctance of courts to engage in this kind of analysis).

[249] *See generally* J. Herbie DiFonzo, Beneath the Fault Line: The Popular and Legal Culture of Divorce in Twentieth-Century America (1997).

[250] *See* Nelson Manfred Blake, The Road to Reno: A History of Divorce in the United States 192–94 (1962) (providing examples of collusion between spouses to satisfy the requirements of fault-based divorce); Alison Clarke-Stewart & Cornelia Brentano, Divorce: Causes and Consequences 9 (2006) (describing collusion not only between spouses but also among lawyers and trial judges to circumvent the strict requirements of fault-based divorce); DiFonzo, *supra* note 249, at 9 (explaining that, while statutes and appellate courts continued to try "to reduce the realm of fault in an effort to slow divorce," trial courts "adopted a ministerial role" and, "[p]residing over charades of fault, trial judges usually acted as registrars ratifying divorce plans worked out by the parties").

[251] DiFonzo, *supra* note 249, at 89.

[252] Blake, *supra* note 250, at 193.

[253] *See id.*

sham, sullying the reputation of all involved.[254] With the introduction of no-fault divorce, every state now allows parties to obtain a divorce without engaging in this charade.[255] The standard in many states—"irretrievable breakdown" of the marriage[256]—would seem to invite judicial scrutiny of the marital performance, but in practice, divorces are generally granted on one party's demand.[257] This reform is an excellent example of how family law can transition away from performance demands.[258]

But other areas of family law—notably the child welfare system—still rely on set scripts that reinforce dominant images of the family. Child welfare proceedings in family court have been described as harried stages:

> In many jurisdictions, particularly those in large urban areas, the courts are overwhelmed by the size of their caseloads: Overtaxed judges hear "lists" of up to 100 cases a day, giving each case a maximum of five minutes. Families are sworn in *en masse* at the bar of the court, with little sense that what they say to the judge thereafter constitutes sworn testimony, rather than a free-for-all conversation. Judges bark at the parties, calling parents "Mom" or "Dad," rather than by their names. Orders typically are entered without any articulation of findings of fact, conclusions of law, or even a recitation of the relevant legal standards in justification.[259]

To prepare for these proceedings, parents are counseled about how to act before the court, the attorney for the child, and representatives of the social services agency. Indeed, a recent trend has been to assign a parent in the child welfare system a "parent peer advocate"

---

254 *See id.* at 216 (describing such a recognition in New York).

255 IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 267 (5th ed. 2010).

256 *E.g.*, CONN. GEN. STAT. § 46b-51 (2009); KY. REV. STAT. ANN. § 403.170 (LexisNexis 2010); MONT. CODE ANN. § 40-4-107 (2011).

257 *See, e.g.*, ELLMAN ET AL., *supra* note 255, at 272–74 (describing the absence of meaningful judicial inquiry into the breakdown of the marriage).

258 This is not to valorize divorce law. Related areas of the law, such as child custody decisions, often involve command performances. For example, when custody is contested, many state courts will engage an expert, called a forensic evaluator in some states, N.Y. FAM. CT. ACT § 251 (McKinney 2009), and a child and family investigator in others, COLO. REV. STAT. § 14-10-116.5 (2011), to make a recommendation about custody. Parents are then required to perform parenthood for this expert, who sits in judgment about who is the better parent. Leslie Eaton, *For Arbiters in Custody Battles, Wide Power and Little Scrutiny*, N.Y. TIMES, May 23, 2004, at A1; *see also* Katie Allison Granju, *Losing Custody of My Hope*, N.Y. TIMES, May 8, 2005, at ST9 (describing a personal experience of needing to prove to the custody evaluator that she was a "good mother"). This exacting scrutiny of non-intact families echoes a central theme of this Article—that traditional families are insulated from many performance demands, at least in degree if not in kind.

259 Emily Buss, *Parents' Rights and Parents Wronged*, 57 OHIO ST. L.J. 431, 434–35 (1996).

who is, in some senses, an acting coach, advising the parent how to behave in front of the judge, lawyers, and social workers.[260]

Allowing a judge—who is quite likely to come from a different socioeconomic background than the vast majority of the families in the child welfare system[261]—to critique the performance of the families is deeply troubling, and reminiscent of the judgments of the nineteenth-century child savers.[262] Moreover, the judicially driven system puts performance in its worst, most reductionist light. The process, with its rote roles and easy generalities, is not an effective inquiry into the dispositive question of whether a child is safe at home.

A far more meaningful process would engage parents in a problem-solving approach to the family's well being.[263] For example, family group conferencing has proven particularly effective at both keeping children safe and ensuring that parents address the real problems in their lives that led to the abuse or neglect at issue.[264] Family group conferencing, a form of restorative justice is a legal process for resolving child welfare cases without relying on a family court judge as the decisionmaker. After a report of child abuse or neglect has been substantiated, the state convenes immediate and extended family members and other important people in the child's life, such as teachers or religious leaders. This group works together to decide how to protect the child and support the parents. Professionals representing the state organize the meeting and share information, but only the family and community members actually sit down to devise the plan for protecting the child and addressing the issues facing the parents that led to the abuse and neglect. After the conference, participants and the state work together to support the family and ensure the child remains safe.

Family group conferencing is far from scripted, and parents are not processed like extras, nor held to a dominant social front that may not accord with their community standards. Instead, each group's engagement is unique and is tailored to a family's particular needs and circumstances. A family group conference is an excellent means for

---

260 *See, e.g.*, CHILD WELFARE ORGANIZING PROJECT ET AL., THE SURVIVAL GUIDE TO THE NYC CHILD WELFARE SYSTEM: A WORKBOOK FOR PARENTS BY PARENTS 25–32 (2007), *available at* http://www.cwop.org/documents/survivalguide2007english.pdf (advising parents how to act in front of investigating social workers). The concern is not with parents advising other parents, but rather that the system demands a certain performance.

261 *See supra* note 190 (providing sources describing race and class biases in the child welfare system).

262 *See supra* text accompanying notes 187–90.

263 *See* Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 674–95 (2006) (arguing in favor of a problem-solving approach to child welfare).

264 *See id.* at 680–85 (describing this process and the question of cost).

doing so because it assumes that parents, and those around them, are experts in their own lives and thus are well positioned to devise a solution for the problems facing a particular family. As one advocate of family group conferencing has explained, "[t]he relationships between all the parties, and out of which the problems have arisen, are so numerous and ever-changing, and so interconnected that it is folly to believe that *outsiders to those relationships* could ever 'know' them in a way that permits either accurate prediction or predictable intervention."[265] Instead, the parties are in the best position to do so.[266] Rather than rote performance and reductive role playing, an alternative process can recognize individuation and see beyond a set drama.

B. Denaturalization in Practice

To illustrate the benefits of the denaturalizing framework, this Subpart briefly sketches two examples: resolving the marriage equality debate without ratifying any particular social front, and developing more responsive policies to address family violence.

1. Marriage Equality

As Part III argued, the debate over marriage equality is so contentious largely because both sides are vying for definitional control of the social front of marriage. When courts and legislatures decide whether to permit same-sex couples to marry,[267] they are, in effect, weighing in on the proper social front of marriage. A truly pluralistic family law would decide this important question without unduly denigrating or devaluing any particular social front. A denaturalizing framework shows how to do so.

In the courts,[268] one reason why the cultural and political battle has been exacerbated and not tempered is because, when extending

---

[265] Rupert Ross, *Searching for the Roots of Conferencing*, *in* FAMILY GROUP CONFERENCING: NEW DIRECTIONS IN COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE 5, 13 (Gale Burford & Joe Hudson eds., 2000).

[266] *See id.*

[267] Courts were the first legal actors to extend the right to marry to same-sex couples. *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 968 (Mass. 2003). More recently state legislatures have acted to recognize marriage equality. *See, e.g.*, Marriage Equality Act, 2011 N.Y. Laws 749 (codified at N.Y. DOM. REL. LAW § 10-a (McKinney 2011)); Act of Feb. 8, 2012, 2012 Wash. Sess. Laws 199 (concerning civil marriage and domestic partnerships). Changes to state marriage laws have also come from ballot initiatives, where individuals are voting directly on the social front of marriage. *See, e.g.*, CHARLES E. SUMMERS, JR., MAINE CITIZEN'S GUIDE TO THE REFERENDUM ELECTION 3 (2012), *available at* http://www.maine.gov/sos/cec/elec/2012/CITIZENS%20GUIDE.pdf. The focus of this Subpart, however, is on state actors and institutions, not individual voters.

[268] As this Article is going to press, two marriage equality cases are pending before the U.S. Supreme Court. Perry v. Brown, 671 F.3d 1052 (9th Cir.), *cert. granted sub nom.*

the right to marry, some courts have relied on the substantive due process argument that marriage is a fundamental right that cannot be denied to same-sex couples.[269] The problem with a substantive due process analysis is that it invites an inquiry into the history and tradition of the claimed right.[270] By engaging in this kind of analysis, courts are explicitly determining the proper social front of marriage, elevating one front at the expense of another.

It is hardly surprising, then, that when courts decide that history and tradition weigh in favor of extending marriage to same-sex couples, social conservatives are offended and raise charges of judicial activism.[271] Indeed, the two most visible state court decisions, which both relied on substantive due process, led to immediate political backlash. The 2003 decision by the high court in Massachusetts was the precipitating factor in the rash of laws and constitutional amendments passed in 2004 limiting marriage to one man and one woman.[272] And the successful Proposition 8 campaign in California in November 2008 was a reaction against the California Supreme Court's decision earlier that year to open marriage to same-sex couples.[273]

Adopting a denaturalizing framework would allow a court to resolve the question of marriage equality without engaging in the dubious practice of choosing between contested social fronts. The denaturalizing framework begins with the proposition that marriage is

---

Hollingsworth v. Perry, 133 S. Ct. 786 (2012) (No. 12-144); United States v. Windsor, 699 F.3d 169 (2d Cir.), *cert. granted*, 133 S. Ct. 786 (2012) (No. 12-307).

269 *See, e.g.*, *Goodridge*, 798 N.E.2d at 968; *In re* Marriage Cases, 183 P.3d 384, 426 (Cal. 2008). *But see Windsor*, 699 F.3d at 180–85 (applying an Equal Protection analysis to a challenge of the Defense of Marriage Act); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 425–31 (Conn. 2008) (using an equal protection analysis to find Connecticut's limitation of marriage to opposite-sex couples violated the state's constitution).

270 *See, e.g.*, *Goodridge*, 798 N.E.2d at 959 ("Whether and whom to marry, how to express sexual intimacy, and whether and how to establish a family—these are among the most basic of every individual's liberty and due process rights.").

271 *See* Adam Nagourney, *California Ban on Gay Unions Is Struck Down*, N.Y. TIMES, Feb. 8, 2012, at A1 (quoting Mitt Romney as saying, after the announcement of the Ninth Circuit's decision in *Perry v. Brown*, that the decision by "unelected judges" was an attack on "traditional marriage"). Consider the official website for 2012 presidential candidate Newt Gingrich. Under a tab entitled "Protecting Life and Religious Liberty and Standing Up to Activist Judges" is a white paper stating that "[j]udicial solutions don't solve contentious social issues once and for all, especially when they are manufactured without regard to any constitutional basis." *Bringing the Courts Back Under the Constitution*, NEWT 2012, http://www.newt.org/sites/newt.org/files/Courts.pdf (last visited Mar. 12, 2013).

272 *See* Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1187–89 (2009) (describing the reaction to *Goodridge*, including the actions taken by more than half the states to ensure same-sex couples could not marry within the state).

273 *See* Perry v. Brown, 671 F.3d 1052, 1067 (9th Cir.), *cert. granted sub nom.* Hollingsworth v. Perry, 133 S. Ct. 786 (2012) (No. 12-144) (describing the history of Proposition 8).

performative. Marriage is entrenched as an opposite-sex institution only because iterated performances have created this particular social front. It has no greater claim as a natural category than any other social front.

The next step in a denaturalizing approach is to ask whether laws based on the dominant social front are impermissibly discriminatory. As a matter of institutional competence, courts are much better suited to the task of evaluating claims of equality and discrimination than choosing between contested social fronts. Moreover, there are considerable symbolic and substantive advantages to an equality analysis. Symbolically, an equal protection analysis acknowledges the stakes at play for both advocates and opponents of same-sex marriage, but does not denigrate or elevate claims for tradition—that is, the dominant social front—in the process of upholding individual rights. Under an equality analysis, a court can arrive at a basis for supporting the right for same-sex couples to marry without explicitly choosing one social front over another, thus disparaging social conservatives who feel that their own public conception of marriage is threatened.

Substantively, arguments based on equality sound in principles at the heart of the American legal system and therefore may be more persuasive than claims based on tradition. Indeed, one of the most resonant arguments in the marriage equality movement has been the comparison of domestic partnership regimes to racial "separate but equal" laws.[274] These arguments immediately and intuitively illustrate how restricting marriage to opposite-sex couples is discriminatory.

Admittedly, an equality analysis is not free from dominant performance demands. Equal protection analysis will require a court to identify the classification—limiting marriage licenses to opposite-sex couples—and then inquire into the state justification for this

[274] *See, e.g.*, Governor Christine Gregoire, Marriage Equality Speech (Jan. 4, 2012) (on file with the *New York University Law Review*) ("While I understand the experiences of racial minorities and lesbian, gay, bisexual, and transgender Americans are not identical, laws that keep some Americans in a separate status are inherently unjust."). This is not to argue that the analogy is uncomplicated. *See* R.A. Lenhardt, *Beyond Analogy:* Perez v. Sharp*, Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 CAL. L. REV. 839, 866–69 (2008) ("[A]dvocates have injected the case into a protracted and often virulent debate about the utility and appropriateness—from a constitutional as well as a historical perspective—of drawing an analogy between antimiscegenation laws and same-sex marriage restrictions."); *see also id.* at 879–99 (arguing that the analogy obscures more than it illuminates and that scholars and advocates should focus on the many ways "identity-based restrictions . . . have served primarily to police and restrain expressions of identity and, ultimately, the range of possibilities for human intimacy" (footnotes omitted)).

classification. Regardless of the level of scrutiny,[275] the judicial inquiry will focus on the nature of marriage for same-sex and opposite-sex couples, asking why the state can allow it for one group but not the other. The benchmark for marriage will likely still be heterosexual performance of commitment. Marriage equality advocates (for understandable strategic reasons) will advance plaintiffs who act just like long-term married couples, and courts will focus on the similarities and differences between the groups—a performance-based inquiry.

But in an equality analysis the court is not overtly choosing between social fronts. The court is not saying that marriage *is* traditional or marriage *is* more plural. Instead, a court would be espousing a thinner notion of marriage—that whatever its essential nature, it cannot be denied to a couple based on sexual orientation. In this way, the court is not defining the proper social front of marriage, but instead is determining the permissible grounds for state classifications.[276] The result will be the same, and social conservatives will likely still feel a strong sense of loss, but the rationale for the loss—that equality demands equal access, not that marriage is *X*—respects pluralist values while still upholding the Constitution.

If it is a legislature rather than a court deciding whether to extend marriage to same-sex couples, then a similar analysis would apply. A legislature may be better positioned institutionally to decide between contested social fronts, but given the strong views on the subject, a bill would likely garner greater support, and would risk less backlash, if the legislature used the denaturalizing framework to justify the new law. As described above, the framework moves the debate away from what is "natural," and instead focuses on the constitutional protections due all members of our society. In other words, this approach recognizes what is lost for social conservatives, but explains why this loss is necessary.

2. Family Violence

A denaturalizing framework for family law would open the door to a different policy response to family violence. An essential first step is for policymakers to address the tendency of both the public and policymakers to focus on more positive images of the family while blinding themselves to the darker side of familial interaction. It is important to unsettle the belief that family members do not abuse

---

[275] *See, e.g.*, Windsor v. United States, 699 F.3d 169, 180–85 (2d Cir.), *cert. granted*, 133 S. Ct. 786 (2012) (No. 12-307) (holding that classifications based on sexual orientation are subject to intermediate scrutiny).

[276] *See id.* at 185–88 (applying intermediate scrutiny to the Defense of Marriage Act without analyzing the meaning of marriage).

their own children. Although some of this work has been done for physical violence between adults and between parents and children,[277] child sexual abuse remains a glaring hole, where the collective resistance to seeing family members as abusers continues to skew policy. Policymakers also must address the uneven, intersectional nature of this selective blindness, as embodied in the particularly strong resistance to viewing White, middle class, heterosexual family members as perpetrators. Policymakers thus must portray all families as potential sites for child sexual abuse.[278]

There is a role for legal scholars as well, as contributors to an ongoing dialogue about family violence and the role of family privacy. A robust response to child sexual abuse will almost certainly entail some governmental involvement in the lives of families, even if only through public service announcements and educational programs in schools. In the current political climate, such seemingly innocuous efforts may well trigger claims of an overly interventionist state.[279] Part of the resonance of these calls for family privacy is that they echo an understanding of the home as a place to suspend the performance. Scholars can help, then, by doing more than simply making rational arguments about the multiple ways the state regulates the family. Scholars must also grapple with the emotional appeal of family privacy and develop an equally resonant response.

CONCLUSION

If, as Holmes argued, "The life of the law has not been logic; it has been experience,"[280] family life is experienced in the public eye. Iterated performances of family have a performative effect. In addition to creating social meaning, they permeate all aspects of family law, shaping legal categories and informing broad swathes of doctrine.

---

[277] *See* LEIGH GOODMARK, TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LAW 1–4 (2012) (describing the efforts over the last forty years to move domestic violence into the sphere of public concern); MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 2 (2005) (describing the widespread view that children should be protected from abuse inflicted by their parents).

[278] It is beyond the scope of this Article to explore specific policy changes, but for one proposal addressing sexual abuse within the family, requiring the custodial parent to take a class about warning signs of abuse and enroll the child in a prevention class, see Robin Fretwell Wilson, *Children at Risk: The Sexual Exploitation of Female Children after Divorce*, 86 CORNELL L. REV. 251, 298–315 (2001).

[279] *See, e.g.*, *13th Colony Patriots in Georgia*, TEA PARTY PATRIOTS, http://www.teapartypatriots.org/groups/13th-colony-patriots (last visited Mar. 12, 2013) ("[We] want government to get out of our homes, get out of our way, and get out of our pockets!").

[280] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 3 (Harvard Univ. Press 2009) (1881).

And yet legal and political decisionmakers continue to hew to naturalized definitions of familial categories, at tremendous cost to pluralism. This normative narrowing is particularly problematic in light of the dramatic shifts in American families, where much family-like behavior now occurs outside the traditional legal family. If family law is the gatekeeper of legal recognition, the price of admission has become conformity with the dominant social front.

As this Article has demonstrated, identifying the performative nature of family law provides scholars and lawyers with a greater range of tools for both discerning and critiquing doctrine and familial regulation more generally. It also provides the basis for an alternative framework for defining familial categories and familial roles—denaturalizing family law. It is not possible to step away from performance entirely, but an increased awareness of the place of performance is an essential step in exposing instances when legal analysis shades into policy preference, pulling back the curtain on purportedly neutral family law. Recognizing the omnipresence of performance may be an unsettling prospect, but it is also a productive means for thinking critically about how the state does and should regulate some of the most important aspects of our lives.