Book Reviews

Family Law's Loose Canon

FAMILY LAW REIMAGINED. By Jill Elaine Hasday. Cambridge, Massachusetts: Harvard University Press, 2014. 307 Pages. $45.00.

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I. Introduction

Family law has come a long way. Once occupying at best a marginal role in the law school curriculum—and an almost unmentionably low rank in the legal profession—family law has risen in every respect.[1] Now an undeniably complex, intellectual, and dynamic area for students, lawyers, and researchers alike, family law even has its own canon. The existence, content, scope and pitfalls of this canon—"the dominant narratives, stories, examples, and ideas that judges, lawmakers, and (to a less crucial extent) commentators repeatedly invoke to describe and explain family law and its governing principles"—are the centerpiece of Jill Hasday's thoughtful new book, *Family Law Reimagined*.[2]

The family law canon, Hasday argues, is not "limited to texts," and "does not take the form of a short and definitive reading list."[3] It is, rather, "a series of overriding stories that purport to make sense of how the law governs family members and family life," stories that are "so embedded in the field" and "reiterated, reinforced, and relied on" so often that "they are routinely assumed to be matters of common sense—so taken for granted as to supposedly require no explanation or defense."[4] But there's a cost to this level of comfort with the common narratives—the canon, Hasday suggests,

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1. *See* Nicholas Bala, *There Are Some Elephants in the Room: Being Realistic About Law Students, Law Schools, and the Legal Profession When Thinking About Family Law Education*, 44 FAM. CT. REV. 577, 580–81 (2006) (exploring why family law "has been low in the hierarchy" of legal education); Janet Halley, *What Is Family Law?: A Genealogy, Part I*, 23 YALE J.L. & HUMAN. 1, 1–6 (2011) (surveying the development of family law as a distinct area of study). On the historical role of family law in legal education and the legal profession, see SANFORD N. KATZ, FAMILY LAW IN AMERICA 2–9 (2003).

2. JILL ELAINE HASDAY, FAMILY LAW REIMAGINED 2 (2014).

3. *Id.* at 2.

4. *Id.* at 2–3.

"helps structure and constrain family law's imaginative universe."[5] Moreover, the canon "misdescribes the reality of family law, misdirects attention away from the actual problems that family law confronts, and misshapes the policies that courts, legislatures, and advocates pursue."[6]

In this Review, I will explore the main themes of the book, which first depicts the components of the family law canon and then suggests what is missing from it. Then, I will consider Hasday's normative claim—that the canon is ultimately more harmful than beneficial. I focus in Part III on the fall of the federal Defense of Marriage Act and suggest that the existence of a family law canon, even a flawed one, made it easier to smoke out Congress's true, and malignant, intent. Even a loose "canon" sometimes hits its target. In Part IV, I examine the perils of an imperfect canon, agreeing with Hasday that there are many concrete instances in which, relying on canonical narratives, courts and legislators have missed the opportunity to freshly evaluate or construct laws and policies appropriate for the modern family. Parentage law, which determines which adults have legal rights to which children, is just such a victim. Hampered by the narrative of family law's break from its past, and the narrative about the child-centric nature of family law, courts and lawmakers have struggled mightily to apply rules designed for an entirely different modal family to the vast spectrum of families they confront today.

II. The Crux of the Canon and Its Limitations

Family Law Reimagined opens, powerfully, with two canonical stories that shape our understanding of family law. But first, it asks, what do we mean when we talk about "family law"? Hasday relies on the following definition: "[F]amily law regulates the creation and dissolution of legally recognized family relationships and determines legal rights and responsibilities that turn on family status."[7] Defining family law is important, Hasday argues, because the canon is shaped by the notion of what she terms "family law's exceptionalism"—that the field is "distinctly set off from other areas of the law, so that legal rules and presumptions in force elsewhere do not apply or are actually reversed within family law."[8] And when we do talk about family law, she suggests, we tend to offer two common observations: (1) family law is a matter of state, rather than federal, law and (2) the family is insulated from the principles of market exchange that otherwise pervade law.

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5. *Id.* at 3.
6. *Id.*
7. *Id.* at 18.
8. *Id.* at 15.

Chapter 1 is devoted to the localism narrative, which, Hasday claims, is used both descriptively and normatively: Family law is, and ought to remain, reserved to the states.[9] She has two main quarrels with the localism narrative. First, she argues, it is "employed selectively against specific federal initiatives and not others."[10] An unpopular proposal is likely to be met with the criticism that it is inappropriate merely because it is on the federal level rather than because it is misguided or harmful, or simply better handled on a state or more local level.[11] And the firm belief that family law *is* a matter of local concern makes courts and lawmakers more inclined to ensure that it remains that way. The development of a seemingly rootless "domestic relations" exception to federal jurisdiction, which allows federal courts to sidestep messy divorce cases even when the requirements for diversity jurisdiction are otherwise met, is a good example of the spillover from descriptive to normative principles.[12] Second, she explains, this narrative is simply not true. Although it may have once been more true that the federal government largely steered clear of family law, the United States Code is literally littered with enactments that directly provide benefits and impose obligations based on family status.[13] And in some areas, such as child support law, Congress has deliberately usurped the field in order to change it, dictating to states the method that must be used for determining child support awards (guidelines) and the means of enforcement that must be made available (everything from registries to assignment of rights for welfare cases to sanctions for nonpayment).[14] Indeed, Hasday spends many pages exhaustively detailing federal family law, comprising issues as disparate as spousal immigration benefits to evidentiary privileges in federal trials to the military's law of adultery.[15]

Chapter 2 exposes the myth of the impenetrable barrier between family and the market. The family is no place, the narrative goes, for crass talk of economic exchange, much less reliance on it to determine the outcome of various conflicts.[16] Yet, Hasday argues, when courts invoke this narrative, they tend to "rely upon a few examples where family law loudly rejects

9. *Id.* at 17.

10. *Id.*

11. *Id.* at 17–18.

12. *See generally id.* at 25–26 (criticizing the judicially created "domestic relations" exception to federal diversity jurisdiction as "without constitutional basis or statutory codification").

13. *Id.* at 45.

14. *See* Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (codified in scattered sections of 42 U.S.C.) (requiring states to establish guidelines for child support awards and standardize enforcement programs); JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA 225–31 (2011) (discussing Congress' intervention in state child support enforcement).

15. HASDAY, *supra* note 2, at 44–59.

16. *Id.* at 67.

market principles," ignoring the more typical cases in which those principles are routinely put to use.[17] This separation between family and market is, for example, the basis for the rule that "agreements between spouses for domestic labor are categorically unenforceable."[18] Domestic labor is supposed to be performed lovingly, without resentment, and for free. Likewise, most courts have categorically refused to treat human capital such as a professional degree as divisible marital property, even when the non-degree-holding spouse has contributed substantially to its acquisition.[19] However, Hasday argues, outside of these two contexts "legally permissible and enforceable economic exchanges run through family law and family relationships."[20] Thus we see the routine enforcement of prenuptial and postnuptial agreements, which operate to fix the economic cost of divorce or the first spouse's death; tolerance of economic agreements among any family members other than legal spouses (including long-term cohabitants); and compulsory economic exchange, such as spousal support following divorce or separation or the elective share at death.[21] The problem with insisting that family law is insulated from economic exchange—when that clearly isn't true—is that it obscures the nature and effects of the economic exchange that the law does or does not tolerate. The monied husband, for example, can protect his assets against division at divorce, but the impoverished wife cannot extract a promise of payment for doing his laundry. The canonical narrative's insistence that marriage is no place for enforceable economic exchange "obscures this disparate distribution of injury."[22]

In Chapters 3 and 4, Hasday considers "family law's relationship to its past."[23] By this, she means that canonical stories "prominently feature progress narratives recounting family law's evolution over time," which stress "sharp breaks from history, dramatic transformations in family law rules and policies, and the abandonment of historical practices grounded in subordination and injustice."[24] The chapters, respectively, describe and critique what she terms "progress narratives for adults" and "progress narrative[s] for children."[25] For adults, she highlights two narratives that are oft repeated and yet less than accurate. The first "declares that family

17. *Id.* at 68.

18. *Id.* at 70.

19. *Id.* at 70–75. New York, which allows degrees and licenses to be valued and divided, is an outlier. *Id.* at 71 (citing O'Brien v. O'Brien, 489 N.E.2d 712, 713 (N.Y. 1985)).

20. *Id.* at 75.

21. *Id.* at 75–86.

22. *Id.* at 86.

23. *Id.* at 95.

24. *Id.*

25. *Id.* at 97, 133.

law has disentangled itself from a legal system that enforced the legal supremacy of husbands over wives. The other celebrates the rise of contract rules on the presumption that they are preferable to status rules."[26] The strength of the first narrative is more compelling than the second, as most scholars and judges understand that the move from status to contract is at best partial and certainly situational. But Hasday spins her own narrative, which convincingly demonstrates that gender equality in marriage is still an aspiration, not a *fait accompli*, and more importantly, that beliefs to the contrary have bred both complacency and some harsh results based on a reality that isn't.[27]

As just one small, but striking, example, she tells the story of James A. Hayes, who wrote a now-famous committee report for the California legislature explaining the recommendation to adopt the nation's first no-fault divorce law in 1970.[28] In the report, and in a bar journal article the following year, Hayes praised California for acknowledging that women's newfound equality justified more lenient divorce laws and a change to the rules regarding the economic incidents of marital dissolution.[29] He then turned to his own life and quoted his own report as justification for his request to stop paying alimony to his ex-wife, a woman who hadn't worked in twenty-nine years while raising the couple's four children.[30] If women have "full civil rights" and access "even" to the "professions," why should he have to continue supporting her?[31] But even with no personal interest, courts employed similar reasoning—all but ending permanent alimony on the theory that women could no longer be presumed or kept dependent after marriage.[32] But what "liberated" women also made them poor. Given the timing of many divorces in the life cycle, couples often have very little accumulated property to divide.[33] Moreover, due to the burdens of child rearing and choices to prioritize one spouse's education or career, couples

26. *Id.* at 97.

27. *See, e.g.*, *id.* at 128–30 (describing how no-fault divorce laws have made divorce "even more economically devastating for many women").

28. *Id.* at 104.

29. *Id.*

30. *Id.* at 104–05.

31. *Id.* at 104.

32. *See, e.g.*, Turner v. Turner, 385 A.2d 1280, 1281–82 (N.J. Super. Ct. Ch. Div. 1978) (observing that "women's liberation" had been transformed from "an elitist movement" to "profound and deep social change," the court queried: "If we are to encourage a woman to seek employment, what better way is there than to direct that alimony will be rehabilitative in nature and will cease on some predetermined date?").

33. *See, e.g.*, Marsha Garrison, *The Economic Consequences of Divorce*, 32 FAM. & CONCILIATION CTS. REV. 10, 11 (1994) (reporting a study that found that the median net worth of marital assets at divorce is less than $25,000).

often have vastly disparate earning capacity.[34] The rejection of alimony as an equalizer, whether rooted in false claims of equality or not, means that the spoils and losses of marriage are often distributed unfairly. Most studies have shown that divorce imposes harsher economic consequences on women and children than on men.[35] In this, Hasday is right to see the harm of a canon that paints with too broad a brush and a narrative that "treats history as safely in the past" when traditional family law principles "still operate to undermine women's equal status."[36]

Chapter 4's "progress narrative for children" tells a slightly more complicated—and less persuasive—story. This narrative "celebrates the supposed rejection of common law principles that prioritized parental prerogatives and the asserted triumph of a legal regime privileging children's interests."[37] A shorthand version of this story is that questions involving children are resolved based on their "best interests." And while it is true that custody disputes between two fit parents are resolved by that formal standard,[38] the standard embodies tremendous judicial discretion that can be deeply infused with bias—in favor, for example, of women as primary custodians whether or not that is in the best interests of a particular child.[39] Moreover, given the complexities of the modern family resulting from the dramatic rise in unmarried childbearing, parenting by same-sex couples, and the use of reproductive technology, an increasing number of disputes involving children are subject to different legal standards—ones that explicitly turn on parental prerogatives rather than children's interests.[40] Involuntary termination of parental rights, corporal punishment, child labor, and education are four other areas she cites for the proposition that we sometimes indulge parental prerogatives at the expense of children's interests rather than in service of them.[41] Thus, Hasday argues, "declarations that family law's regulation of the parent-child relation is now

34. *See generally* CYNTHIA LEE STARNES, THE MARRIAGE BUYOUT: THE TROUBLED TRAJECTORY OF U.S. ALIMONY LAW 6 (2014) (arguing for a new conception of alimony as a compensatory payment that would "go far in ensuring that primary caregivers are not thrown under the bus when their marriages end").

35. On the economic effects of divorce, see generally GROSSMAN & FRIEDMAN, *supra* note 14, at 202–05; James B. McLindon, *Separate but Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351, 381 & tbl.21 (1987) (summarizing data on the division of net family assets by gender).

36. HASDAY, *supra* note 2, at 120.

37. *Id.* at 133.

38. *Id.* at 135.

39. *Id.* at 141.

40. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 63 (2000) (plurality opinion) (holding that disputes between a parent and non-parent cannot be resolved by resorting to a simple best-interests analysis).

41. HASDAY, *supra* note 2, at 145–54.

organized around children's best interests can . . . significantly overstate the changes in family law over time."[42] This overstatement forestalls debate about whether children's interests should predominate in any particular context, as well as discussion about the merits of embracing parental prerogatives.

The final section of *Family Law Reimagined*, composed of chapters 5 and 6, considers "what the canon excludes and ignores."[43] She focuses here on the neglect of family ties other than "marriage, parenthood, and (sometimes) their functional equivalents" and the neglect of the law's regulation of poor families, which differs in material and sometimes stunning ways from the regulation of higher-socioeconomic-status families.[44] Hasday focuses on sibling relationships to emphasize the cost of being locked into a certain conception of the family ties that bind—and that deserve to be protected.[45] The compulsive focus on spousal and parent–child relationships leads to policy choices by omission. Although research suggests that "the sibling relationship is potentially one of life's most important connections," it is often ignored by courts, legislatures, and social workers.[46] Siblings have few if any rights against being separated after divorce, death of a parent, or when adopted.[47]

Hasday begins the final chapter of *Family Law Reimagined* with the strong and undeniably true statement that the poor are "noticeably absent from the family law canon."[48] There simply are no canonical narratives about poor families—how "family law has conquered problems of poverty."[49] This is because family law, frankly, has made no such effort. Nor have there been noticeable attempts to meld family law principles with those of welfare law or child protection law. Instead, family law, and its authors and advocates, are simply content to leave *those* families out. Family law, in its most common iteration, is for the middle class and up. Perhaps nowhere is this walling off of family law more evident than in the Supreme Court's jurisprudence, which, in family law cases, emphasizes privacy, autonomy, and freedom from unwanted governmental intrusion.[50] But in welfare law, which strikes at the heart of families, the default is just the opposite.[51] Government assistance comes at a steep cost—a weakening

42. *Id.* at 141.
43. *Id.* at 159.
44. *Id.*
45. *Id.* at 164–65.
46. *Id.* at 166.
47. *Id.* at 168, 176.
48. *Id.* at 195.
49. *Id.*
50. *Id.* at 197.
51. *Id.* at 198.

of almost every aspect of family and self-determination, including things as personal and fundamental as the decision to have children or to live with an intimate partner.[52] On the legislative front, Hasday conducts an insightful comparison of the family law norms embedded in Social Security, the safety net for wage-earning families, which emphasizes "privacy and autonomy," and those embedded in Temporary Assistance for Needy Families, the safety net for the poor, which relies on "highly investigatory, instrumental, and interventionist premises."[53]

Through these six chapters, *Family Law Reimagined* clearly establishes that there is a family law canon; that it is at times under-inclusive, overinclusive, and downright misleading; and that the cost of a canon that takes such liberties with the reality of family law (not to mention the messy realities of family life) can be substantial. The power of the canon, Hasday concludes, "lies in its ability to operate at the level of common sense, so that canonical narratives and modes of understanding the field appear to require no explanation or reexamination."[54] The canon not only misleads, it also takes on normative force and obscures the questions that really need to be asked and answered in order for families to flourish in a variety of contexts.

III. The Power of the Canon

Even if overbroad, underinclusive, and, in some instances, clearly inaccurate, might the existence of canonical principles of family law be helpful? This Part takes just one aspect of the canon uncovered by *Family Law Reimagined*, the localism narrative, and asks whether the generalizations about the level of government at which family law is made and enforced might be more complicated—and more useful—than Hasday lets on. It also asks, more importantly, whether the canon, even if inaccurate, might sometimes advance legitimate principles.

Hasday is certainly right that the common tropes about family law's localism belie the numerous and significant aspects of federal constitutional, statutory, and administrative law that regulate the family. But not all aspects of federal family law are created equal. Nor is it all obviously inconsistent with the platitudes about the reservation of family law to the states. In some key respects, federal law is circumscribed to avoid conflicts with state family law. For example, most federal benefit programs rely on state law determinations of family status when allocating

52. *See id.* at 198–208 (surveying Supreme Court decisions upholding state regulations tying eligibility for aid to family size, willingness to allow welfare officials to make warrantless home visits, and other family-status factors).

53. *Id.* at 208.

54. *Id.* at 221.

spousal or dependent- or surviving-child benefits. The Social Security Act is a case in point. Although a legal parent–child relationship is the basis for a dependent child to collect benefits when an insured parent dies, whether that relationship exists is a function of state law.[55] Thus, the Supreme Court confirmed in a 2012 case, *Astrue v. Caputo*,[56] that a posthumously conceived child might inherit from a deceased biological father in one state but not another, based solely on whether the laws of the child's home state recognize that man as a legal parent for purposes of intestate succession.[57]

In other contexts, federal law supersedes family law, but in a manner that's central to the federal–state balance of power and not unique to this area of law. Constitutional guarantees of equal protection and due process, for example, by design, supersede state law enactments. This has become more relevant in family law, as the Supreme Court has recognized more and broader protections for intimate and family relationships—a constitutional right to marry that brings heightened scrutiny upon state laws that directly and substantially interfere with marriage;[58] constitutionally protected parental rights, relevant in conflicts with third parties, the state, and would-be coparents;[59] constitutional protection for living with even distant relatives;[60] and constitutional protection for intimate relationships.[61] The federal–state balance that ensues is no different than the balance in criminal procedure, voting rights, or any number of other areas that touch on

55. *See* 42 U.S.C. §§ 402(d), 416(e), (h)(2)(A) (2012) (using state intestacy laws to determine whether a Social Security applicant is the child or parent of an insured individual); 20 C.F.R. §§ 404.354–.355 (2014) (same).

56. 132 S. Ct. 2021 (2012).

57. *Id.* at 2026, 2032.

58. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (recognizing the freedom to marry as a vital right); Zablocki v. Redhail, 434 U.S. 374, 386–87 (1978) (invalidating a marriage restriction that "directly and substantially" interfered with the right to marry); Turner v. Safley, 482 U.S. 78, 96 (1987) (finding constitutional protection for the right to marry even in the prison context).

59. The trilogy establishing constitutional protection for parental rights vis-à-vis the state includes *Meyer v. Nebraska*, 262 U.S. 390, 397, 401–03 (1923) (invalidating a Nebraska law banning instruction in a foreign language before ninth grade); *Pierce v. Society of Sisters*, 268 U.S. 510, 530, 534–35 (1925) (invalidating an Oregon law requiring children between the ages of eight and sixteen to attend public school); and *Prince v. Massachusetts*, 321 U.S. 158, 169–71 (1944) (upholding the conviction of a child's aunt for allowing the child to sell religious pamphlets in violation of state labor law). That parental rights are also protected vis-à-vis challenges by third parties was reinforced in *Troxel v. Granville*, 530 U.S. 57 (2000), in which a plurality ruled that a third-party visitation statute was unconstitutional as applied to a particular mother because it did not give special weight to her decision to deny more expansive visitation with her children's grandparents. *Id.* at 72.

60. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 495–96, 506 (1977) (invalidating, on constitutional grounds, an Ohio housing ordinance limiting occupancy of a dwelling to single nuclear families).

61. *See* Lawrence v. Texas, 539 U.S. 558, 562, 567 (2003) (invalidating law criminalizing same-sex sodomy on constitutional grounds).

individual constitutional rights. In still other contexts, the federal government regulates family only incidentally to administer a decidedly federal area of law—immigration, tax, or copyright, to take the most obvious examples.

The simple fact that there are federal law enactments that affect the family does not tell us much. Despite these various forms of federal family law, it is still by and large true that family law and family status are controlled by the states. The recent controversy over the federal Defense of Marriage Act (DOMA)[62] reveals how that generalization, blunt edged as it might be, can be important. DOMA, which passed through both houses of Congress by a wide margin with little by way of debate,[63] took steps to stop the potential spread of marriages by same-sex couples in the event any state legalized them. Section 2 amended the Full Faith and Credit Act to provide that states did not have to give effect to same-sex marriages from other states (a misguided and redundant provision to overcome a compulsion that didn't exist in the first place),[64] and Section 3 defined marriage as a union between a man and a woman for all federal law purposes.[65] In a 2013

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62. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2012) and 28 U.S.C. § 1738C (2012)).

63. *See* 142 CONG. REC. 17,094 (1996) (noting a 342–67 House vote); 142 CONG. REC. 22,467 (1996) (noting a 85–14 Senate vote); Peter Baker, *President Quietly Signs Law Aimed at Gay Marriages*, WASH. POST, Sept. 22, 1996, at A21 (noting that President Clinton "waited until the dead of night" to sign DOMA, "timing his action to minimize public attention and contain any political damage"). For a more detailed history of DOMA's enactment, see generally Joanna L. Grossman, *Defense of Marriage Act, Will You Please Go Now!*, 2012 CARDOZO L. REV. DE•NOVO 155, 156–59.

64. The Act states:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Defense of Marriage Act § 2(a), 28 U.S.C. § 1738C. On the inapplicability of full faith and credit principles to marriage recognition and the resulting redundancy of § 2, see generally Joanna L. Grossman, *Fear and Loathing in Massachusetts: Same-Sex Marriage and Some Lessons from the History of Marriage and Divorce*, 14 B.U. PUB. INT. L.J. 87, 105–06 (2004) [hereinafter Grossman, *Fear and Loathing*]; Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriages Laws*, 84 OR. L. REV. 433, 452 (2005) [hereinafter *Resurrecting Comity*].

65. The Act states:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

Defense of Marriage Act § 3(a), 1 U.S.C. § 7.

decision, a 5–4 majority of the Supreme Court ruled that Section 3 of DOMA was a violation of the equal protection principles embodied in the Fifth Amendment.[66] Congress enacted DOMA in 1996, as the controversy over marriages by same-sex couples was reaching fever pitch.[67] The catalyst was Hawaii, which was poised to legalize same-sex marriage because of a ruling from the state's highest court in 1993 that the ban merited strict scrutiny and was likely to be struck down after a trial on remand.[68] DOMA was followed by the enactment of statutes and constitutional amendments across the country designed to preclude the celebration of same-sex marriages and bar recognition of those validly celebrated elsewhere.[69] But at some point, the tilt of the country shifted, and states began to embrace marriage equality in droves.[70] While there are still many states that have remained steadfast in their opposition, the *Windsor*[71] decision marked the winding down of the wars marked by its enactment.

What does *Windsor* tell us about the relevance of the family law canon? To strike down Section 3 of DOMA, the Court could have taken a variety of different tacks. The broadest one would have rejected the federal government's attempt to deny recognition to marriages by same-sex couples because *all* laws restricting marriage to heterosexual couples are a violation of due process, equal protection, or both. In a companion case, *Holllingsworth v. Perry*,[72] the Court was asked to rule just so in a case challenging the constitutionality of California's Proposition 8, a voter referendum making marriages by same-sex couples unconstitutional.[73] In that case, however, the Court did not reach the merits question—whether a state can ban same-sex marriage without running afoul of the U.S. Constitution—but instead dismissed the case on standing grounds.[74] Although this led indirectly to the legalization of same-sex marriage in California, because of a ruling that denied Prop 8's defenders standing to

66. United States v. Windsor, 133 S. Ct. 2675, 2683, 2696 (2013).

67. *See* Grossman, *Fear and Loathing*, *supra* note 64, at 105–07 (discussing the legislative history of DOMA).

68. *Id.* at 105–06 (citing Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993)).

69. On these developments, see GROSSMAN & FRIEDMAN, *supra* note 14, at 146–49.

70. The current count is thirty-five states and the District of Columbia, but this continues to be an era of rapid change. For up-to-date information, see *Marriage Equality and Other Relationship Recognition Laws*, HUM. RTS. CAMPAIGN, http://www.hrc.org/campaigns/marriage-center, *archived at* http://perma.cc/5WAW-XWBR.

71. *Windsor*, 133 S. Ct. 2675.

72. 133 S. Ct. 2652 (2013).

73. *Id.* at 2659.

74. *Id.*

appeal an adverse judgment in the trial court, it left in place other similar bans, including DOMA.

The *Windsor* majority could also have ruled that Section 3 of DOMA was invalid because the federal government does not have the power to define marriage because marriage has traditionally been defined by the states. This tack would have been all but the grossest example of the misuse Hasday warns about—giving normative power not only to a description, but a misdescription. But there were briefs urging this approach, relying on the exact narratives Hasday relies on in *Family Law Reimagined*,[75] and the justices at oral argument seemed inclined to strike down DOMA because it represented an inappropriate federal incursion into family law.[76] Yet, there are many other instances in which the federal government utilizes its own definition of marriage—to judge entitlement to spousal citizenship, to give just one example—and thus it cannot be the case that the federal government is simply forbidden to define marriage.[77]

In the end, though, the *Windsor* opinion took a more nuanced approach that did rely on the localism narrative but stopped short of turning a description into a prescription or limitation. In fact, it made good use of the localism narrative to understand the Congressional purpose behind DOMA.

When first enacted, Section 3 of DOMA had no import because there were no states that allowed the celebration of marriages by same-sex couples—and thus no marriages for the federal government to refuse to recognize. But when first Massachusetts,[78] and then a cascade of other states, embraced marriage equality, this provision of DOMA wreaked havoc by refusing to acknowledge that same-sex marriages existed. As a practical matter, this meant that couples who were legally married in their home state or another state were nevertheless treated as single by the federal government for purposes ranging from immigration to taxes to Social

75. *See, e.g.*, Brief on the Merits for Amicus Curiae The Partnership for New York City in Support of Respondent Windsor and Affirmance of the Second Circuit at 10–16, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307).

76. *See* Transcript of Oral Argument at 56, 59, 67–68, *Windsor*, 133 S. Ct. 2675 (No. 12-307) (recording questions focusing on the traditional role of the state by Justices Ginsburg, Kennedy, and Sotomayor). *But see Windsor*, 133 S. Ct. at 2692 (deeming it "unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance").

77. *See, e.g.*, 8 U.S.C. § 1186a(b)(1)(A)(i) (2012) (providing that marriages "entered into for the purpose of procuring an alien's admission [to the United States] as an immigrant" will not entitle the immigrant to that status even if the marriage is otherwise valid under state law).

78. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969–70 (Mass. 2003) (invalidating state ban on marriages by same-sex couples and authorizing the issuance of licenses in May 2004). Until 2008, Massachusetts was the only state to allow the celebration of same-sex marriages. GROSSMAN & FRIEDMAN, *supra* note 14, at 152–53.

Security. Marital status, it turns out, is relevant to over 1,000 federal laws.[79]

Windsor involved a typical federal–state law conflict under DOMA. A woman's female widow—the couple had legally married in Canada and had their marriage given effect in New York—was charged over $300,000 in estate taxes.[80] Transfers to a legal surviving spouse are tax free under the federal estate tax,[81] but because the federal law provision of DOMA prevented the Internal Revenue Service (IRS) from recognizing the couple's marriage, this widow was taxed.[82] The widow, Edith Windsor, filed suit challenging the constitutionality of DOMA and requesting a tax refund as a "surviving spouse."[83]

A federal district court sided with Windsor, holding that this provision of DOMA was indeed unconstitutional.[84] Congress, the court reasoned, had no legitimate reason to refuse recognition to some marriages based solely on the sexual orientation of the parties.[85] Refusing to stay the judgment pending appeal, the court ordered the IRS to immediately refund over $350,000 to the decedent's estate.[86] Although the ruling was appealed, both parties asked the Supreme Court to hear the case while that appeal was still pending.[87] The Second Circuit Court of Appeals did rule—affirming the trial court's conclusion that sexual orientation classifications are entitled to heightened scrutiny and that the federal government had an insufficiently

79. *Windsor*, 133 S. Ct. at 2683; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT 1 (2004) (noting that there are 1,138 federal laws to which marital status is relevant).

80. *Windsor*, 133 S. Ct. at 2683.

81. *See* 26 U.S.C. § 2056(a) (2012) (excluding from taxation "any interest in property which passes or has passed from the decedent to his surviving spouse").

82. *Windsor*, 133 S. Ct. at 2682.

83. *Id.* at 2682. At the time, New York did not allow for the celebration of valid same-sex marriages, but it did give effect to those that were validly celebrated elsewhere. *See, e.g.*, Godfrey v. Spano, 920 N.E.2d 328, 336–37 (N.Y. 2009) (upholding validity of Executive Order recognizing out-of-state marriages by same-sex couples). Subsequently, the New York legislature passed a law to legalize same-sex marriage. Marriage Equality Act, ch. 95, 2011 N.Y. Laws 749 (codified at N.Y. DOM. REL. LAW §§ 10-a, 10-b, 13 (McKinney 2014)); Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES, June 24, 2011, http://www.nytimes.com/2011/06/25/nyregion/gay-marriage-approved-by-new-york-senate.html?pagewanted=all&_r=1&, *archived at* http://perma.cc/7VEH-YPSL.

84. Windsor v. United States, 833 F. Supp. 2d 394, 406 (S.D.N.Y. 2012)

85. *Id.* at 402–06.

86. *Id.* at 406.

87. Petition for a Writ of Certiorari Before Judgment at 1, *Windsor*, 133 S. Ct. 2675 (No. 12-307) [hereinafter Solicitor's Petition] (petitioning the Court on behalf of the United States); Petition for Writ of Certiorari Before Judgment at 1, *Windsor*, 133 S. Ct. 2675 (No. 12-307) (petitioning the Court on behalf of Edith Windsor).

compelling reason for refusing to give effect to marriages by same-sex couples.[88]

The Supreme Court considered whether "Section 3 of DOMA violates the Fifth Amendment's guarantee of equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State."[89] The majority said yes.[90]

Like his majority opinion in *Lawrence v. Texas*,[91] in which the Court ruled 6–3 that state criminal bans on same-sex sexual behavior violate the right to privacy protected in the Due Process Clause of the Fourteenth Amendment,[92] Justice Kennedy's opinion in *Windsor* showed sensitivity to emerging social norms about gay rights and relationships and performed a nuanced analysis of relevant constitutional principles

Justice Kennedy's constitutional analysis in *Windsor* began by noting the novelty of the arrangement the Court was being asked to consider: "[U]ntil recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage."[93] The novelty pushed both defenders and challengers into stauncher positions. For opponents of marriage by same-sex couples, the belief that a man and woman are "essential to the very definition" of marriage "became even more urgent, more cherished when challenged."[94] But others reacted to the suggestion of same-sex marriage with "the beginnings of a new perspective, a new insight."[95] Quickly, the "limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in New York and certain other States as an unjust exclusion."[96]

But the Supreme Court's role was not to mediate a political dispute. It was to determine whether Congress could constitutionally pick a side by refusing to acknowledge the marriages between same-sex couples validly authorized by certain states. Justice Kennedy began the constitutional analysis with a discussion of the traditional regulation of marriage—cue the localism narrative. "By history and tradition," marriage has been "treated as being within the authority and realm of the separate States."[97] Subject to

88. Windsor v. United States, 699 F.3d 169, 185, 188 (2d Cir. 2012).
89. Solicitor's Petition, *supra* note 87, at 1.
90. *Windsor*, 133 S. Ct. at 2695.
91. 538 U.S. 558 (2003).
92. *Id.* at 578–79.
93. *Windsor*, 133 S. Ct. at 2689.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 2689–90.

constitutional limitations, "'regulation of domestic relations' is 'an area that has long been regarded as a virtually exclusive province of the States.'"[98] Regulation of marriage is "the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.'"[99] Consistent with this tradition, "the Federal Government, through our history, has deferred to state law policy decisions with respect to domestic relations."[100] This "allocation of authority," the Court observed, "dates to the Nation's beginning."[101] It is thus a "long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next."[102]

Yet, the Court noted in *Windsor*, Congress does *have* the authority to "make determinations that bear on marital rights and privileges" when acting "in the exercise of its own proper authority."[103] Congress thus can, for example, refuse to grant citizenship rights to the noncitizen spouse in a sham marriage (one entered into solely for purposes of procuring immigration rights) even if the marriage would be valid for state law purposes.[104] Congress can also make its own determinations about what counts as marriage, if it chooses to, to avoid overpayment of Social Security benefits[105] or impose special protections on spouses under pension plans regulated by ERISA in furtherance of the statute's intent to protect retirement security.[106]

What makes DOMA different from these examples—and unconstitutional? In the three examples cited in *Windsor*, and noted above, Congress is regulating marriage "in order to further federal policy."[107] Justice Kennedy writes of DOMA's "far greater reach" a "directive applicable to over 1,000 federal statutes and the whole realm of federal regulations."[108] Moreover, DOMA is targeted at a single class of persons, a

98. *Id.* at 2691 (quoting Sosna v. Iowa, 419 U.S. 393, 404 (1975)).

99. *Id.* (quoting Williams v. North Carolina, 317 U.S. 287, 298 (1942)).

100. *Id.*

101. *Id.*

102. *Id.* at 2692.

103. *Id.* at 2690.

104. *Id.* (citing 8 U.S.C. § 1186a(b)(1) (2012)).

105. *Id.* (citing 42 U.S.C. § 1382c(d)(2) (2012)).

106. *See* 29 U.S.C. § 1055(c) (2012) (requiring that a spouse approve applicable pension-plan-beneficiary changes or loans secured by the pension); Egelhoff v. Egelhoff, 532 U.S. 141, 143, 150 (2001) (holding that ERISA preempts a Washington statute that placed an undue burden on divorced spouses).

107. *Windsor*, 133 S. Ct. at 2690.

108. *Id.*

class that some states have sought specifically to protect. But its reach alone does not dictate its validity. Rather, the majority opinion relies directly on the localism narrative—and DOMA's stark departure from it—to find an independent basis for deeming the law unconstitutional. Yes, the Court agreed, marriage has traditionally been the province of the states. Yes, states must conform to constitutional standards, but they have otherwise been left to determine the rules regarding entry into, conduct of, and exit from marriage. Whether or not the federal government has the *power* to define[109] marriage (or other aspects of family status) on a broad basis, it has largely chosen not to. The vast majority of federal laws that turn on marital status rely on state definitions rather than supplying their own.

Justice Kennedy does not suggest that the federal government cannot regulate marriage because it has traditionally not done so. Rather, he examines the tradition of deference to state definitions of marriage and concludes that DOMA is, at a minimum, *unusual*. And, according to the Court's ruling in *Romer v. Evans*:[110] "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."[111] This is so because they raise an inference of "improper animus or purpose,"[112] which is insufficient to sustain a law against an equal protection attack even under the lowest standard of review.[113] The "Constitution's guarantee of equality," Justice Kennedy wrote, "'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group."[114] DOMA could not survive this analysis. As Justice Kennedy concluded:

> DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.[115]

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109. *Id.* at 2693.

110. 517 U.S. 620 (1996).

111. *Windsor*, 133 S. Ct. at 2692 (quoting *Romer*, 517 U.S. at 633) (internal quotation marks omitted).

112. *Id.* at 2693.

113. *Id.* at 2695–96.

114. *Id.* at 2693 (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

115. *Id.*

When combined with the direct evidence of Congress's moral disapproval of marriages by same-sex couples,[116] the inference drawn from DOMA's unusual character was enough to sink it.[117]

Justice Kennedy makes clear that his disdain for DOMA is strong. The opinion concludes with a long and pointed critique of DOMA and its impact on same-sex married couples. The law diminishes "the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect."[118] It "undermines both the public and private significance of state-sanctioned marriages" by telling couples, "and all the world," that "their otherwise valid marriages are unworthy of federal recognition."[119] It imposes upon them a "second-tier marriage."[120] It "humiliates tens of thousands of children now being raised by same-sex couples" and "makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."[121] Same-sex couples "have their lives burdened . . . in visible and public ways."[122] The law touches "many aspects of married and family life, from the mundane to the profound."[123] And it does all this under the guise of a law whose "principal purpose and necessary effect" are to "demean those persons who are in a lawful same-sex marriage."[124]

It may be that the Court would have invalidated DOMA even if it hadn't starkly departed from the family-law localism tradition, but that narrative—with all its flaws—was the basis for the ruling in *Windsor*. Moreover, the departure-from-tradition argument has fueled litigation challenging the validity of state bans on recognition of marriages by same-sex couples.[125] The crux of the argument is that just as Congress departed from tradition in singling out a type of marriage for denial of recognition, states have departed from a long history of recognizing out-of-state marriages in order to deny recognition of marriages by same-sex couples.

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116. *Id.*

117. *See id.* at 2696 (concluding that DOMA "is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity").

118. *Id.* at 2694.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 2695.

125. *See, e.g.*, Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 993, 995 (S.D. Ohio 2013) (finding constitutional violation on Ohio's refusal to recognize out-of-state marriages by same-sex couples despite long history of recognizing other prohibited marriages), *rev'd*, DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014).

The tradition, embodied in the place of celebration rule followed by most states, is to exercise comity and give effect, in most instances, to marriages validly celebrated out of state.[126] Perhaps this is not a significant enough tradition to have canonical stature, but it is one of the mostly accurate truisms of family law that marriage is portable across state lines. Refusing to exercise comity for one particular type of marriage, when the tradition has been to give effect to marriages as long as they were valid where celebrated, is, the argument goes, also a "discrimination of an unusual character" that raises constitutional suspicion. Several federal district courts have embraced this argument in post-*Windsor* cases,[127] as has one federal appellate court (the first to reach the recognition issue). In *Baskin v. Bogan*,[128] Judge Posner invalidated the bans on celebration of same-sex marriages in three states, but also their separate bans on recognition of out-of-state marriages.[129] With respect to Indiana, he noted "the kicker" that the state "will as a matter of comity recognize any marriage lawful where contracted" but will not grant the same comity to marriages by same-sex couples; this "suggests animus."[130]

In *Windsor*, Justice Kennedy both avoids the trap Hasday warns about—turning a descriptive observation into a normative principle—*and* uses the localism narrative to smoke out Congress's true purpose. And in the post-*Windsor* cases—some of which the Supreme Court has agreed to review during the October 2014 term[131]—we see an extension of the same analytical approach, but with a smaller, less established narrative. We might draw two conclusions from these examples: (1) that the canon is more nuanced than Hasday describes or (2) that the canon, by definition a set of generalizations, can advance legal analysis whether or not it is exactly right in all the particulars. Either way, *Windsor* represents the power, rather than the peril of a loose canon.

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126. On the history of interstate marriage recognition, see generally Grossman, *Resurrecting Comity*, *supra* note 64.

127. *See, e.g.*, Whitewood v. Wolf, 992 F. Supp. 2d 410, 431 (M.D. Pa. 2014); Henry v. Himes, 14 F. Supp. 3d 1036, 1061–62 (S.D. Ohio 2014), *rev'd*, *DeBoer*, 772 F.3d 388; Tanco v. Haslam, 7 F. Supp. 3d 759, 772 (M.D. Tenn. 2014), *rev'd*, *DeBoer*, 772 F.3d 388; DeLeon v. Perry, 975 F. Supp. 2d 632, 662 (W.D. Tex. 2014); Bourke v. Beshear, 996 F. Supp. 2d 542, 543, 550–52 (W.D. Ky. 2014) (invalidating statutory and constitutional bans on recognition of marriages by same-sex couples from other states and noting that the reasoning in *Windsor* "establishes certain principles that strongly suggest the result here"); *Obergefell*, 962 F. Supp. 2d at 995 (invalidating Ohio's refusal "for the first time in its history" to recognize a particular type of out-of-state marriage, one between parties of the same sex), *rev'd*, *DeBoer*, 772 F.3d 388.

128. 766 F.3d 648 (7th Cir. 2014).

129. *Id.* at 657, 672.

130. *Id.* at 666.

131. DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, 83 U.S.L.W. 3607, 3608 (U.S. Jan. 16, 2015) (No. 14-574).

IV. The Perils of the Canon

As I argued in Part III, a set of generalizations or narratives about an area of law can be analytically useful, even essential. One might shudder to think what family law cases and statutes would look like if each were truly *tabula rasa*—handed down by some sort of alien invader who was in the dark about the history, traditions, and structure of this area of law. But Hasday is right that overreliance on common narratives can obscure as much or more as it enlightens. Family law's very success and growth as a field has, in this sense, endangered its content. This is, one might say, the peril of the canon.

Although *Family Law Reimagined* offers innumerable examples where proper policy or legal analysis is subverted by misuse of common narratives or platitudes, parentage law offers yet another. As discussed above, Chapters 3 and 4 tell family law's progress narratives—featuring the ways in which family law is alleged to have broken ties with its past and been reshaped around modern norms and ideals, including a strong preference for serving children's interests. One need only look cursorily (which is all the length of this Review permits) at the tenets of parentage law to see the strong, and yet often illogical, ties to the past, as well as a consistent prioritizing of adults' over children's interests.

Parentage law traditionally revolved around relatively simple questions of marital status and legitimacy.[132] Children born to married women had two parents—the woman who gave birth and her husband, who was conclusively presumed to be the child's father unless he was absent or impotent.[133] Although children born out of wedlock were considered *filius nullius*—the child of nobody—under English law,[134] by the end of the nineteenth century, most states considered a child born to an unmarried woman to have a legal mother but no legal father.[135] Legitimate children thus had two parents; illegitimate children had one. This system made a certain amount of sense in a world in which all children were conceived through sex, sex outside of marriage was socially taboo and legally

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132. For more on the entwining of parentage and legitimacy, see generally Joanna L. Grossman, *The New Illegitimacy: Tying Parentage to Marital Status for Lesbian Co-Parents*, 20 AM. U. J. GENDER SOC. POL'Y & L. 671 (2012).

133. S*ee* Michael H. v. Gerald D., 491 U.S. 110, 117 (1989) (upholding California's law providing that the "issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate" (quoting CAL. EVID. CODE § 621(a) (West Supp. 1989) (repealed 1992) (internal quotation marks omitted)).

134. MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 24 (1994).

135. On this history, see generally HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 28–36 (1971); John Witte, Jr., *Ishmael's Bane: The Sin and Crime of Illegitimacy Reconsidered*, 5 PUNISHMENT & SOC'Y 327 (2003).

forbidden, and science was not advanced enough to definitively tie any particular man to a child. The traditional rules thus operated within these parameters. The husband was presumed to be the father of a married woman's child both as a proxy for biology—he was the most likely candidate given social norms and practices[136]—and because allowing proof of a competing claim would invade the couple's privacy and likely unravel the marriage, all in pursuit of a "truth" that would be little more than conjecture based on rumor, innuendo, and suspicion. Better for a child to have the wrong father in a norm-compliant family than the converse—or no father at all. The child of an unmarried woman, on the other hand, might be deprived of a legal father under the conventional rules, but this was largely confirming the most likely social outcome given the societal sanctions for nonmarital sexual relationships, the unlikelihood of financial support from an unwed father, and the marginality of the relationships that might lead to an illegitimate child in those days.

It's not a stretch to say that everything has changed. Babies are conceived in test tubes with gametes from strangers; women have babies for people who can't; same-sex couples intentionally become parents together (using some of those test tubes and gametes); over forty percent of children are born to unmarried parents;[137] and DNA testing can tell us with almost 100% accuracy the identity of a child's genetic father. The legal changes have been almost as dramatic. Unwed fathers cannot, as a constitutional matter, be categorically disregarded.[138] The biological tie gives a man the unique opportunity to "develop a relationship" with his child; he has constitutionally protected parental rights if he "grasps that opportunity" and accepts some "responsibility for the child's future."[139] Meanwhile, illegitimate children have their own constitutional rights against discrimination,[140] and the constitutionally protected rights of an established legal parent (say, a mother who acquires legal parent status by the act of

136. *See* Chris W. Altenbernd, *Quasi-Marital Children: The Common Law's Failure in* Privette *and* Daniel *Calls for Statutory Reform*, 26 FLA. ST. U. L. REV. 219, 227–28 (1999) (citing a 1940s study finding 10% of children born to married women were conceived in adultery). On the powerful legal and social norms confining legitimate sex to marriage, see generally GROSSMAN & FRIEDMAN, *supra* note 14, at ch. 2.

137. *See* Brady E. Hamilton et al., *Births: Preliminary Data for 2011*, NAT'L VITAL STAT. REP., Oct. 3, 2012, at 1, 7 tbl.1 (reporting that 40.7% of births in 2011 and 40.8% of births in 2010 were to unmarried women).

138. *See* Stanley v. Illinois, 405 U.S. 645, 649 (1972) (invalidating Illinois's law that conclusively denied legal parent status to unwed father regardless of his ties to the children).

139. Lehr v. Robertson, 463 U.S. 242, 262 (1983).

140. *See, e.g.*, Levy v. Louisiana, 391 U.S. 68, 69, 71–72 (1968) (striking down law that precluded a deceased mother's five children from collecting damages for her wrongful death because they had been born out of wedlock).

giving birth) cannot be diluted by the recognition of a second legal parent without her consent.[141]

Yet, despite these oceanic social and legal changes—which led Justice O'Connor to declare in a 2000 opinion that the "demographic changes of the past century make it difficult to speak of an average American family"[142]—there is no effort in parentage *law* to break sharply from its past, even as families themselves have made such a break. Nor any to ensure that children's interests are protected in the increasingly complicated scenarios—involving, in some cases, as many as five different adults—that lead to their conception.[143] Rather, parentage law has developed primarily through analogy, seriously hampered by the fact that it is hard to construct a bridge between such different worlds. Even the Uniform Parentage Act, adopted in 1973 and substantially revised in 2000 and 2002, continues the traditional framework for determining parentage, simply expanding categories where necessary.[144] A married man who consents to the insemination of his wife with donor sperm is the child's legal father because his consent substitutes for his biological contribution.[145]

Consider the law of lesbian coparents' rights as just one example of the consequences of stumbling forward without, as Hasday urges, doing some reimagining and recasting. Most of the states that have embraced marriage equality have indicated through statute or case law that the traditional marital presumption of paternity applies with equal force to married lesbian couples.[146] In other words, a woman is presumed to be the "father" of her wife's child if they married before the birth of the child. But why? If marriage is a proxy for biology, it makes no sense to apply the presumption to a partner of the same sex, whom we know did not contribute sperm to conceive the child. If the presumption is a means to protect a

141. *See, e.g.*, Boseman v. Jarrell, 704 S.E.2d 494, 504–05 (N.C. 2010) (enforcing agreement to share parental rights with lesbian coparent because she acted inconsistently with her paramount legal status by "intentionally and voluntarily creat[ing] a family unit in which [the coparent] was intended to act—and acted—as a parent" to a child they "jointly decided to bring . . . into their relationship"); Janice M. v. Margaret K., 948 A.2d 73, 87 (Md. 2008) (refusing to recognize de facto parent status for fear of overriding a legal parent's parental rights without a showing of unfitness or exceptional circumstances).

142. Troxel v. Granville, 530 U.S. 57, 63 (2000).

143. Consider a case in which a child is conceived with donor egg and donor sperm, carried by a gestational surrogate, and raised by two intended parents with no genetic tie to the child.

144. UNIF. PARENTAGE ACT, 9B U.L.A. 295 (2001).

145. *Id.* § 703.

146. *See, e.g.*, WASH. REV. CODE. ANN. § 26.04.010(3) (West Supp. 2013) ("Where necessary to implement the rights and responsibilities of spouses under the law, gender specific terms such as husband and wife used in any statute, rule, or other law must be construed to be gender neutral and applicable to spouses of the same sex."); Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 971 (Vt. 2006) (noting that civil union partner was entitled to presumption of parentage with respect to her partner's biological child born during the civil union).

marriage that might be destroyed by proof of adultery, it would also make no sense to apply the presumption to a lesbian spouse because it is already apparent that she is not genetically tied to the child—and that fact does *not* give rise to an inference that the woman who gives birth has cheated. It is obvious to all but the completely uninformed that the conception involved a third party.

Yet, there might be very good reasons to assign parentage to a lesbian coparent. Perhaps the biological mother's decision to marry before or during a pregnancy signifies her intent to share parental rights. Perhaps the partner's decision to marry reflects her intent to function as a coparent of any child born to either of them. Or perhaps a child born into a married couple's home should be presumed to benefit from continuing the relationship with both spouses. But courts often ignore these questions, focusing instead on bright-line rules and concepts that are familiar and accepted in family law. Depending on the jurisdiction, a lesbian coparent's rights can turn on whether she was married to the biological mother before the birth of a child;[147] whether she qualifies as a de facto parent, who has earned rights through actual parenting;[148] whether she has entered into an enforceable coparenting agreement with the biological mother;[149] or whether she has legally adopted the child.[150] The relative importance of biology, intent, contract, and parental function varies tremendously by jurisdiction and even by individual case, adding confusion and unpredictability to a determination of critical importance. Moreover, nowhere in the determination of a lesbian coparent's rights, under any of these approaches, is there express consideration of a child's best interests. The battle is over parental rights, plain and simple. A better approach, as I have argued elsewhere, would be to start with a clean slate and articulate the basis on which parental status should be assigned, one that could be adapted across the increasingly complicated spectrum of scenarios in which children are brought into this world. This approach would honor Hasday's call for more focus on the actual questions facing courts and policy makers

147. *See, e.g.*, Debra H. v. Janice R., 930 N.E.2d 184, 195–96 (N.Y. 2010) (refusing to recognize de facto parentage status but granting parental rights to lesbian coparent because she entered a civil union with the biological mother prior to the child's birth); Grossman, *supra* note 132, at 692 (explaining the trend "towards recognition that marital status creates . . . a presumption of joint parentage for same-sex couples").

148. *See, e.g.*, *In re* H.S.H.–K, 533 N.W.2d 419, 421 (Wis. 1995) (establishing a four-part test for recognition of de facto parentage status).

149. *See, e.g.*, Frazier v. Goudschaal, 295 P.3d 542, 558 (Kan. 2013) (finding a coparenting agreement between a lesbian couple to be enforceable); *In re* Mullen, 953 N.E.2d 302, 305–06 (Ohio 2011) (ruling that a coparenting agreement could create binding rights for a lesbian coparent).

150. *See, e.g.*, Boseman v. Jarrell, 704 S.E.2d 494, 505 (N.C. 2010) (finding that a lesbian coparent is not a legal parent if the adoption decree was not authorized by statute).

today—and potentially deliver more sensible results than the current approaches.

V. Conclusion

Hasday proposes in her introduction not to eliminate the family law canon, but to recast it "to more accurately describe family law and its guiding principles" so that judges, lawyers, legislators, and families themselves can "assess family law as it is" and "debate the actual choices facing the field."[151] In this regard, she has certainly succeeded. Canonical crutches, like stereotypes or "conventional wisdom," often overgeneralize and oversimplify, sometimes with harmful results. Hasday's book is full of such cautionary, and expertly told, tales. The question she leaves for others is what family will look like if we shed the loose canon of family law and take the fresh look she invites.

151. HASDAY, *supra* note 2, at 6.