Toward a Culturally Cliterate Family Law

Susan Frelich Appleton

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Toward a “Culturally Cliterate” Family Law?

Susan Frelich Appleton†

A woman from the governing party in Ecuador has proposed that a woman’s right to enjoy sexual happiness should be enshrined in the country’s law. . . . Maria Soledad Vela, who is helping to rewrite the constitution, says women have traditionally been seen as mere sexual objects or child bearers. Now, she says, women should have the right to make free, responsible and informed decisions about sex lives. . . . Her comments have provoked a lively response—mostly, unsurprisingly, from men. Opposition assembly member, Leonardo Viteri, accused her of trying to decree orgasm by law.¹

* * *

Charla [Muller] apparently had no intention of writing about “the gift,” as she euphemistically refers to [the year of nightly sex she “gave” to her husband, which later prompted their book, 365 Nights]. She was simply a homemaker and marketing consultant, who in 2006 wanted to give her husband a special 40th birthday present. . . . “It didn’t cost a lot of money. It was highly memorable. It met all the criteria for a really great gift.”²

† Copyright © 2008 Susan Frelich Appleton, Lemma Barkeloo & Phoebe Couzins Professor of Law, Washington University in St. Louis—with thanks for important insights and valuable conversations to Karen Czapanskiy, Adrienne Davis, Elizabeth Emens, Joanna Grossman, Laura Kessler, Linda McClain, Andrea Perry, Laura Rosenbury, Jennifer Rothman, and Susan Stiritz; to students in Contemporary Female Sexualities (Washington University, Spring 2007); and to participants in the Washington University School of Law Faculty Research Seminar, the Washington University Women and Gender Studies Colloquium, the Cultural and Legal Cliteracy Panel at the 2007 Annual Meeting of the Law & Society Association in Berlin, and the Family Law & Norms Panel at the Inaugural Annual Midwest Family Law Conference in Indianapolis in 2008. Andrea Perry also provided excellent research assistance.

1. Daniel Schweimler, Sex on Ecuador’s Political Agenda, BBC NEWS, May 3, 2008, http://news.bbc.co.uk/2/hi/americas/7382010.stm. The report continues: “Another called the proposal ‘ridiculous’ and said that such an intimate topic should stay intimate and not be enshrined in law. Ms [sic] Soledad Vela responded to the criticism, saying she had never requested the right to an orgasm—merely the right to enjoy sex in a free, fair and more open society.” Id.

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I. INTRODUCTION

Sexual desire and sexual activity long have played central roles in family law, rationalizing its rules, informing its policies, and animating any number of calls for reform. From this sex-centricity, an ideal of monogamous marriage emerges as a focal point both for family law as it is, and for some of the most trenchant critiques of the field. Since the 1970s, formal gender equality, particularly within marriage, has also become a salient value in family law—purporting to correct legally imposed double standards of the past. Yet, despite the conceptual centrality of sexual desire and sexual activity, family law says nothing explicit about sexual pleasure. And despite the salience of gender equality in contemporary family law, the field remains preoccupied with
performances that produce heterosexual men’s orgasms while ignoring, marginalizing, or rejecting women’s interest in orgasmic pleasure. As a result, family law today is marked by fundamental omissions and inconsistencies.

This paper attempts to begin to fill the gap and to explore the incongruities. It does so by building on Susan E. Stiritz’s Cultural Cliteracy: Exposing the Contexts of Women’s Not Coming and by examining the relevance of Stiritz’s analysis for family law. According to Stiritz, “‘cultural cliteracy’ denotes what an adequately educated person should know about the clitoris, which is that it is a culturally despised body part because it is an obdurate reminder of women’s independence and power and supports women’s liberation.” Stiritz’s provocative paper tracks the role of the clitoris and women’s sexual pleasure through history, compares past and contemporary anatomical understandings of the clitoris, and then demonstrates in part through empirical studies based on her courses how cultural cliteracy can empower women and bring new insights to the reading of women’s texts. Ultimately, Stiritz calls for the integration of “adequate understandings of the clitoris” into a variety of different discourses, including law.

My effort to take up this challenge—to grapple with both cultural and “legal cliteracy”—brings together sex-positive feminist theory and mainstream family law. This project emerges from my more than thirty years of family law teaching and scholarship and from my recent experience as a student (along with about 20 undergraduates) in Stiritz’s course, Contemporary Female Sexualities. Further, this project unfolds against a background of work by other scholars who have called attention to women’s sexual pleasure in various legal contexts. In Theorizing Yes, Katherine Franke challenges feminist legal scholars “to pursue strategies that would elevate women’s sexual pleasure to the same level as that enjoyed by men.” Similarly, legal scholars such as Kathryn Abrams, Brenda Cossman, Janet Halley, Linda McClain, and Marybeth Herald (to mention

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4. Id. at 244.
5. These studies attempt to assess sexual self-efficacy. See infra note 327 and accompanying text.
6. Stiritz, supra note 3, at 266.
7. In Spring 2007, I took this course, offered in the Program of Women and Gender Studies at Washington University. I decided to participate after reading an early draft of Stiritz’s Cultural Cliteracy, supra note 3.
only a few) all have something to say about women, sexual desire, sexual activities, sexual performances, and contested understandings of all of these.

Still, for several reasons, this paper offers new contributions to the conversation. First, Cultural Cliteracy provides a uniquely rich and evocative point of departure, documenting “Western clitoridectomy—both discursive and actual” and exposing it “as part of systematic suppression of female sexuality.” Cultural Cliteracy thereby establishes and places in a larger context the law’s silence about women’s sexual pleasure, while also revealing the promise of “culturally cliterate environments [in which] a woman defines sex according to her own values, desires, and pleasures.” Second, my focus on family law allows me to engage both the centrality to the field of matters of sex and the field’s now professed commitment to gender equality. Put somewhat differently, my Cultural Cliteracy-inspired emphasis on the clitoris—though certainly not meant to identify it as the only source of sexual pleasure for women—illuminates and disrupts family law’s assumptions about sex, implicating several different aspects of the field. Last, this project, which began as a modest and largely conservative attempt to accept family law largely on its own terms while


13. Marybeth Herald, A Bedroom of One’s Own: Morality and Sexual Privacy after Lawrence v. Texas, 16 YALE J. & FEMINISM 1 (2004); see also Ellen Waldman & Marybeth Herald, Eyes Wide Shut: Erasing Women’s Experiences From the Clinic to the Courtroom, 28 HARV. J. L. & GENDER 285, 289, 295-309 (2005) (discussing “the impoverished medical discourse on female sexuality and how inattention to female sexual fulfillment has led to legal rules that disproportionately affect women’s expression as sexual beings”).


15. Stiritz, supra note 3, at 266. This is what Stiritz calls “sexual self-efficacy.” Id. at 264-66.

16. I considered the effort conservative because of this project’s emphasis on marriage. Cf. e.g., Judith Butler, Is Kinship Always Already Heterosexual?, 13 DIFFERENCES: J. OF FEM. CULTURAL STUD. 14, 21 (2002) (“the proposition that marriage should become the only way to sanction or legitimate sexuality is unacceptably conservative”).
making the case for attention to women's sexual pleasure, ultimately exposes profound paradoxes that merit analysis.

One such paradox is this: family law's existing silence about women's sexual pleasure coexists alongside a contemporary popular culture that makes information about women's sexual pleasure accessible—in books, television programs, product marketing, instructional sessions and films, and online fora. Yet, ceding all authority about sexual pleasure to popular culture entails risks, especially for women. Overall, popular culture remains notoriously androcentric, sexualizing even young girls in the interest of men, reinforcing traditional gender hierarchies, and creating dangers (including exposure of young persons to sexually transmitted disease) abhorred by family law. In this context, then, the silence reflects a reckless disregard for some of family law's own professed goals and objectives. Can't family law do better?

A second paradox is this: if family law were to rescue women's sexual pleasure from popular culture, our understanding of such pleasure would no doubt change. Would such "legitimating" efforts impose confining regulation, in turn defeating the individuality, diversity, and spontaneity necessary for the sexual pleasure that animates the enterprise? Can cultural cliteracy survive family law?

Finally, and again paradoxically, if we take modern family law on its own terms (in the sense of conceding, purely for purposes of analysis, its central objectives and ideals), then we must come to the conclusion that this field—which has sex as its conceptual core, which seeks to channel sexual desire into monogamous marriages, and which proclaims commitment to gender equality—would be far more coherent if it could achieve what Cultural Cliteracy establishes that women should be entitled to expect: sexual self-efficacy and sexual pleasure. Yet, this effort to make modern family law more coherent and more successful might well prove to be family law's own undoing, subverting the stated objectives that provided the starting point or "givens" of the analysis. Can family law survive cultural cliteracy?

My analysis proceeds as follows: Part II explains why family law offers an especially promising site for integrating cultural cliteracy into legal discourse. In particular, this Part explores the central role of sex in family law, with emphasis on how family law seeks to channel sexual desire into monogamous marriage and how this effort to manage sexual activity plays out, given the pervasive silence about and inattention to women's sexual pleasure. This examination, in turn, exposes significant inconsistencies, challenging the coherence of family law's own stated objectives and policies, including its simultaneous preference for monogamous marriage, acceptance of no-fault divorce, and commitment to gender equality. Part III turns to ways to achieve a culturally cliterate family law. The challenge here is to locate a space for family law between the poles

17. For a more detailed list of the goals and objectives that I attribute to family law, see infra notes 161-62 and accompanying text.
suggested by the epigraphs above—so that family law neither purports to “decree orgasm by law”¹⁸ nor perpetuates the understanding of sex exclusively as a “gift”¹⁹ that women give to men. This Part begins with consideration of two different approaches to cultural cliteracy: allowing individuals to learn what they can from popular culture, versus undertaking official “affirmative action” to promote such knowledge through educational programs. Part III then looks beyond educational programs to suggest how acknowledging and respecting women’s sexual pleasure might prompt rethinking other specific aspects of family law and connected fields. This inquiry considers in turn divorce; actions for sexual harm, both in consensual relationships and medical malpractice cases; and the legal treatment of various supports, interventions, and protections that facilitate sexual pleasure—from sex toys to reproductive autonomy. Finally, Part IV takes a deeper look at the prospect of a culturally cliterate family law, including the fundamental challenges and contradictions it might pose.

II. FAMILY LAW AS A PROMISING SITE FOR CULTURAL CLITERACY

A. Family Law’s Sex-Centricity

The law devotes considerable energy and attention to sex.²⁰ Most explicitly, as Justice Scalia famously reminded readers in his dissenting opinion in Lawrence v. Texas, criminal law prohibits and punishes certain sexual conduct, such as adultery, prostitution, incest, and bigamy.²¹ The ruling in Lawrence, holding unconstitutional Texas’s criminalization of same-sex sodomy by consenting adults in private, might well jeopardize other sex crimes legislation.²² Nonetheless, even if Lawrence limits the criminal law’s reach, it seems to leave ample space for other legal regulation of sex—including such regulation by family law, for example.²³

Although family law traditionally emanates from the states and observers

¹⁸. See supra note 1 and accompanying text.
¹⁹. See supra note 2 and accompanying text.
²³. See, e.g., Lofton v. Sec’y of the Dep’t of Children’s and Family Servs., 358 F.3d 804, 807 (11th Cir. 2004) (upholding Florida’s prohibition on adoption by “applicants who are known to engage in current, voluntary homosexual activity”), cert. denied, 543 U.S. 1081 (2005).
have identified important state-based differences in family law, the field as usually conceptualized today is more capacious, encompassing a host of family regulations and policies, some of federal origin. Thus, family law has a number of distinctive elements that transcend local variations. Most notably, sexual intimacy forms the nucleus of family law and underlies family law’s preoccupation with marriage. Family law long has privileged marriage. By licensing marriage and attaching to it material and status-based benefits, the state singles out the favored, “legitimate” site for sexual activity, and clearly communicates its preference for monogamy and (everywhere except in


25. See, e.g., Dubler, supra note 21. Recently, family law scholars have attempted to define the field. According to Martha Fineman, “family law” can be thought of as a system of exemptions from the everyday rules that would apply to legal interactions among people in a nonfamily context. MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 109 (2004). Vivian Hamilton writes: “Family law . . . comprises those sets of laws (1) whose purpose is to regulate relationships among intimates, or (2) whose operation hinges on the existence of a certain family status or relationship.” Vivian Hamilton, Principles of U.S. Family Law, 75 FORDHAM L. REV. 31, 36 (2006); see also id. at 66 (stating that a goal of Hamilton’s project is “to expose the structure of family law [because understanding] its structure helps us think more clearly about what U.S. family law is.”). Jill Hasday identifies as a “serviceable” definition of family law the following: “[F]amily law regulates the creation and dissolution of legally recognized family relationships, and/or determines the legal rights and responsibilities of family members.” Jill Elaine Hasday, The Canon of Family Law, 57 STAN. L. REV. 825, 871 (2004). Yet she criticizes the way the “family law canon . . . determines what is classified as family law” because it “mismeasures both the content of family law and its animating tenets, distorting how legal authorities and legal scholars understand family law in a way that can distort their judgments about particular family law debates.” Id. at 898. Although they both offer critiques, Hamilton comes closer than Hasday in trying to discern reasons that might explain why, for example, certain family relationships deserve legal recognition and others do not. Hamilton traces the explanation back to two fundamental principles she sees at work here, Biblical traditionalism and liberal individualism, Hamilton, 75 FORDHAM L. REV. at 34, and she identifies “the gravitational center around which family law revolves [as] the marital nuclear, family,” id. at 71. I do not regard my assertion that sex forms the center of family law as necessarily at odds with these analyses.


California (pending a ballot initiative), Connecticut, and Massachusetts\textsuperscript{30} heterosexuality relationships.\textsuperscript{31} Family law’s more progressive impulses, recognizing same-sex intimate relationships, nonetheless invoke marriage as a model, as one can see in \textit{Lawrence},\textsuperscript{32} the advent of same-sex marriage, and the rise of laws establishing civil unions and domestic partnerships.\textsuperscript{33}

Even when family law appears to shift its focus to children, as some feminists have urged,\textsuperscript{34} it often remains preoccupied with the children’s presumed origins—heterosexual intercourse, which might produce offspring even accidentally\textsuperscript{35}—although that is not the move that these feminist critics had in mind. According to several state supreme courts, deciding not to open marriage to same-sex couples, this possibility of “accidental children” purportedly justifies a marriage regime open exclusively to male-female couples.\textsuperscript{36} Moreover, the insistence on maintaining child support as a private, rather than a state, obligation has given rise to a legal emphasis on “personal responsibility,” notably in welfare reform and paternity law.\textsuperscript{37} “Personal


\textsuperscript{32} 539 U.S. 558, 567 (2003) (“To say that the issue in Bowers \textit{v}. Hardwick, 478 U.S. 186 (1986), upholding Georgia’s criminal sodomy law was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.”); \textit{see also} Dubler, \textit{supra} note 22, at 1181 (noting how \textit{Lawrence} is perceived “as a stepping stone to striking down” same-sex marriage bans); Katherine M. Franke, \textit{The Domesticated Liberty of \textit{Lawrence} v. Texas}, 104 COLUM. L. REV. 1399 (2004).

\textsuperscript{33} \textit{E.g.}, \textit{AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS} §§ 6.01-6.06 (2002) (principles governing domestic partners); \textit{see In re Marriage Cases}, 183 P.3d at 398 n.2 (listing states recognizing civil unions or domestic partnerships).

\textsuperscript{34} \textit{See, e.g.}, FINEMAN, \textit{supra} note 27 (urging focus on mother/child dyad, instead of marriage or “sexual family”).

\textsuperscript{35} \textit{See, e.g.}, Hernandez \textit{v}. Robles, 855 N.E.2d 1, 7 (N.Y. 2006); \textit{see also} Hamilton, \textit{supra} note 25, at 50 (identifying procreation and “libido control” as primary goals of marriage under Biblical view). For a contemporary effort to make the case that the “core need that marriage aims to meet is the child’s to be emotionally, morally, practically and legally affiliated with the woman and the man whose sexual union brought the child into the world,” see DAVID BLANKENHORN, \textit{THE FUTURE OF MARRIAGE} 175 (2007). \textit{See also id.} at 17, 91.


\textsuperscript{37} \textit{E.g.}, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105 (codified in scattered sections of, inter alia, 42 U.S.C.); \textit{see, e.g.}, State \textit{v}. Oakley, 629 N.W.2d 200 (Wis. 2001) (barring “deadbeat dad” from having more
responsibility” has become another path that takes family law back to its sexual starting point, because the slogan signifies that sexual activities producing children impose financial duties on the participants.

No doubt, constitutional law’s trajectory has contributed to contemporary family law’s sex-centricity. Family law, once heralded as the exclusive prerogative of the states, gained momentum as a focus of constitutional adjudication in a series of cases about contraception and abortion rights and equality for children born outside marriage. These sometimes still contested matters raise questions about the appropriate role of law in eliminating the risk of adverse and unintended consequences of sexual activities, particularly for women.

In short, sex pervades and informs family law. The placement of issues outside family law’s boundaries reinforces this conclusion. Family law does not address friendships; it has almost nothing to say about sibling relationships (except for incest bans, which focus on sex); and duties of adult children to support their indigent parents are on the wane (perhaps because the children, as a condition of probation); Fineman, supra note 27, at 208-17.


40. Commentators embracing a traditional approach to marriage, and thus opposing same-sex marriage, recognize that marriage (and, I would add, hence family law) is all about sex. See, e.g., Blankenhorn, supra note 35, at 15-16, 93-94, 148. On the other hand, some commentators have suggested that, today, family law’s focus has shifted from sexuality to childbearing. E.g., June Carbone, Is Fertility the Unspoken Issue in the Debate Between Liberal and Conservative Family Values?, 32 L. & SOC. INQUIRY 809, 828, 831 (2007). Yet, childbearing often (though not always now) has a close connection to sex.

For an argument that sex pervades legal discourse more broadly, see Neaçsu, supra note 20 (arguing that such discourse helps both liberals and conservatives limit social change).


43. Compare County of San Mateo v. Boss, 479 P.2d 654 (Cal. 1971), with Swoap v. Super. Ct., 516 P.2d 840 (Cal. 1973). See generally Seymour Moskowitz, Adult Children and Indigent Parents: Intergenerational Responsibilities in International Perspective, 86 MARQ. L. REV. 401 (2002). A recent study reports that 30 states have filial responsibility statutes, including 12 with criminal laws. Significantly, however, “the vast majority of state statutes requiring adult children to support their elderly or indigent parents have been enforced rarely or not at all, especially in the criminal context.” Collins et al., supra note 42, at 20.
lack the personal responsibility that the sexual origin imposes on the mirror-image relationship). Family law’s predecessor, domestic relations, once included the master-servant relationship, but contemporary approaches have relegated such matters to the law of agency or employment—again signaling the importance of sexual intimacy in defining family law. Accordingly, family law, as currently understood, should present a particularly apt site for considering the legal implications of Cultural Literacy.

B. From Repression to Channeling

1. The Channeling Story

Despite extensive support in the literature for the idea that sexual desire is the product of a socially constructed system of sexuality, rather than a “natural” biologically-driven feeling, the mainstream legal view has assumed the latter understanding. In general, the law regards sexual desires as antisocial forces that must be repressed in the interests of establishing and advancing civilization. Summarizing this understanding, Thomas Grey has explained that “[i]t is the view identified with Freud, with Marxist theorists, and with the central tradition of social theory stemming from Durkheim and Weber, that modern civilization is built upon repression, particularly the repression of sexual drives.” Under this view, “sex is a vastly important thing to people, so important that we characteristically deny its importance—but the repression of sex is of even greater importance to the general welfare of society.”

45. Of course, the master-servant relationship included slavery, and the sexual subjugation of female slaves by their owners is well known. See, e.g., DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 22-55 (1999).
47. See Grey, supra note 38.
48. Id. at 91.
49. Id. at 95. See generally FOUCALT, supra note 46. This repressive approach to sexual activity builds on traditional religious views that make the pleasure of sexual activity morally problematic: “Carnal pleasure, the canonists learned from their authorities, is a source of sin, and to delight in that pleasure makes the sin even worse . . .” James A. Brundage, Carnal Delight: Canonistic Theories of Sexuality, in SEX, LAW AND MARRIAGE IN THE MIDDLE AGES 361, 366 (James A. Brundage ed., 1993). Indeed, “the greater joy in the experience, the worse the sin involved.” Id. at 368. Even between spouses, “coitus for the sake of sexual pleasure was an abuse of marriage.” Id. at 367; see also, e.g., GRAFF, supra note 28, at 60-
More recently, however, the emphasis on repression has softened. Today, family law in particular claims not to repress sex, but to “channel” it into marriage. As Carl Schneider has spelled out family law’s “channeling function,” it creates and perpetuates social institutions, such as marriage, and it “channel[s] people into [these] institutions.” Instead of using a punitive regime to repress disfavored sex, family law directs sex toward marriage, the favored site for such activity. As Schneider explains, the law seeks to accomplish this objective in a multi-pronged effort—by according official recognition to marriage, attaching advantages to marriage, “disfavoring competing institutions,” and “directly penalizing [marriage’s] non-use.”

The less coercive approach that distinguishes channeling from repression gets reflected in the considerable “pull” that marriage continues to exert even for the many young adults who today experience a significant period of independence, including

62; Posner, supra note 46; Rubin, supra note 20, at 278.


50. True, “channeling” might simply be a new word for “repression.” But one can distinguish the forms of these efforts to control. While repression, as I use the term, seeks to prevent certain conduct from taking place at all, channeling seeks to direct it to certain approved sites and settings. Repression achieves its goals by prohibition, as typified by criminal laws like the same-sex sodomy ban overturned in Lawrence v. Texas, 539 U.S. 558 (2003). Channeling, sometimes working in tandem with repression, offers positive inducements and societal reinforcement for conduct that meets the favored norm. See, e.g., Stephanie Coontz, Marriage, A History: From Obedience to Intimacy or How Love Conquered Marriage 211-12 (2005); Kenneth L. Karst, The Freedom of Intimate Association, 89 Yale L.J. 624, 689 (1980) (distinguishing power to reinforce one type of relationship from authority to eradicate another); Rubinsupra note 20, at 279. Family law’s treatment of marriage, which the Lawrence majority distinguished from the issue decided, provides a detailed illustration. See 538 U.S. at 578 (“The present case... does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”); id. at 585 (O’Connor, J., concurring) (“Texas cannot assert any legitimate state interest here, such as... preserving the traditional institution of marriage.”).

One can find an analogous distinction in the Supreme Court’s current approach to abortion. The Court has held unconstitutional direct and substantial obstacles, such as criminal prohibitions, but has discerned no such infirmity in state action subsidizing childbirth but not abortion, nor in other state action discouraging abortion and encouraging pregnant women to carry to term. See Gonzales v. Carhart, 127 S. Ct. 1610, 1634-35 (2007); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 991-87 (1992); Harris v. McRae, 448 U.S. 297, 314-18 (1980).


52. See, e.g., In re Marriage Cases, 183 P.3d 384, 422 (Cal. 2008) (reciting channeling function of marriage).

53. Schneider, supra note 51, at 503.

54. Id. at 504.
sexual activity, before ultimately marrying. For example, Linda McClain concludes that the ideals underlying the channeling function retain their normative force notwithstanding contemporary data about how family life is performed today, including the rise of single parenthood by choice and the open emergence of same-sex couples for whom traditional marriage remains legally unavailable in most states.

Family law’s channeling function plays several roles. For one, it gives the field a teleology. Family law is not a haphazard series of regulations but an orchestrated effort designed to promote marriage.

Second, channeling sanitizes sex. According to family law’s conventional wisdom, enveloping otherwise commonly debased physical urges, activities, and connections within a reputedly more elevated relationship—marriage—transforms them. Under this view, which enjoys (and helps create) societal support, marriage makes sex and sexual desire clean, good, and even spiritually beneficial. Family law’s rhetoric reflects this understanding. In striking down Connecticut’s ban on the use of contraceptives even by married couples, the Court explained that “[m]arriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.” In declaring unconstitutional certain restrictions on prisoners’ marriages, the Court emphasized important aspects of marriage apart from sexual consummation—in particular, marriage as an expression of emotional support and public commitment, marriage as a relationship of religious significance, and marriage as a precondition for government benefits. Even in Lawrence v. Texas, while disclaiming recognition of any right to same-sex marriage, the Court found a way to disguise or at least subsume a brief same-sex encounter within a relationship that the law portrays as more valuable, a connection worthy of being considered “transcendent.”

55. See Cahn & Carbone, supra note 24, at 29.
57. See POSNER, supra note 46, at 15.
62. See id. at 578.
Third, channeling privatizes care and support of children as well as the dependency of those, usually mothers, who directly provide such care within the family. Several courts that reject arguments for making marriage available to same-sex couples invoke the channeling function in their reasoning. They tell a story, which I'll call "the channeling story," that goes like this: People are drawn irresistibly by their desires to engage in (heterosexual) sex; children sometimes result, whether intended or not; and marriage creates an efficient way to provide for their care and financial needs, without imposing excessive burdens on the state. Family law, therefore, seeks to channel such sexual desires and impulses into marriage—to protect the children who might follow, as well as the state.

Certainly, in choosing just one type of efficient response to the possible conception of children from sexual intercourse by embracing the channeling story, family law avoids other possible approaches. For example, publicly funded abortions would also address the financial consequences of at least some unplanned conceptions, but—as the Supreme Court has rationalized—government expresses a value judgment when choosing the more costly option of subsidizing childbirth but not abortion and doing so even when continued pregnancy threatens the woman's health. As several observers have pointed out, the value judgments reflected in abortion restrictions reinforce gender roles,


66. See Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 256-57 (2006); see also, e.g., infra note 87 (quoting Congressional finding that most family caretaking falls on women).


Judge Posner emphasizes that a law and economics perspective of the family makes reproduction the important variable, not sexual desire or activity:

The family is assumed to be a device for producing and rearing children, not for channeling sex drives. The sexual character of reproduction is assumed, but analysis would be unchanged if people had no sex drive and made babies exclusively by artificial insemination.


particularly women’s role as mothers (and thus as wives).  

2. Channeling, Family Law, and Gender

The channeling story rests on heteronormative and repronormative assumptions. Indeed, that must be the case to the extent that marriage is limited to cross-sex couples. Not surprisingly, then, the channeling of sex is often gendered, as all of family law once explicitly was. Further, channeling seems to exert more force on women than men, as even recent data about same-sex marriages might suggest. The late Mary Joe Frug explained in a slightly different context that, “[r]egardless of whether one is male or female, the pleasures and the virtue of sex are produced, at least in part, by [gendered] legal rules.”

At one time, gender-based role assignments provided a fundamental organizing principle of family law, so that the state accorded different incidents of marriage (both benefits and burdens) to husbands and wives. But family law has undergone a significant transformation in recent years, with the United States Supreme Court condemning as violations of the Equal Protection Clause a long list of family laws relying on or reinforcing traditional gender stereotypes. For example, gone are old rules about who may receive alimony (former wives


70. See, e.g., Adrienne Rich, Compulsory Heterosexuality and Lesbian Existence, in FEMINISM AND SEXUALITY: A READER 130 (Stevi Jackson & Sue Scott eds., 1996); cf. FOUCAULT, supra note 46, at 3 (discussing the Victorian era, when the “conjugal family took custody of [sexuality] and absorbed it into the serious function of reproduction.”).

71. See infra notes 75-79 and accompanying text.

72. See JESSIE BERNARD, THE FUTURE OF MARRIAGE 49-50 (1982) (“Women have internalized the norms prescribing marriage so completely that the role of wife seems the only acceptable one.”); Rich, supra note 70, at 141 (noting “absence of choice” in women’s heterosexual relationships); see also Katharine K. Baker, Family, the Law, and the Constitution(s), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1106423 (last visited Oct. 31, 2008), at 36 (“Even while conceding that the institution of marriage is deeply infused with patriarchal norms and hidden forms of oppression, women enter it willingly.”).

73. A report by the Williams Institute finds two-thirds of the legally recognized same-sex couples (from states that permit same-sex marriage or registration) are female. GARY J. GATES, M.V. LEE BADGETT, & DEBORAH HO, MARRIAGE, REGISTRATION AND DISSOLUTION BY SAME-SEX COUPLES IN THE U.S. 8 (July 2008), available at http://www.law.ucla.edu/WilliamsInstitute/publications/Couples%20Mar%20Reg%20Diss.pdf; see also, e.g., Ginia Bellafante, Even in Gay Circles, the Women Want the Ring, N.Y. TIMES, May 8, 2005, at § 9, at 1 (reporting similar information).


75. See NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 3 (2002) (describing marriage as “the vehicle through which the apparatus of state can shape the gender order”); see also id. at 49, 52 (discussing early, gendered approaches to divorce).
only), who needs education and training to play the provider role (young males only), who has the authority to manage community property (husbands only), and who will care for children after one parent dies (mothers only).

These constitutional rulings establish outer limits for permissible laws governing the family and thus narrow the range of policy choices any state or federal actor can make. In response, family law “on the books” now routinely and expressly embraces principles of gender neutrality, except for the cross-sex requirement for entry into marriage in most states. Indeed, as Carl Schneider sees it, many recent family law reforms “can be understood in terms of a desire to employ the [channeling] function to change the institutional basis of family life in order to change gender relations in American society.”

Consequently, for most official family law purposes, females and males are to receive the same formal treatment as subjects and agents, and even Massachusetts’s understanding of same-sex marriage, as articulated in Goodridge v. Department of Public Health, envisions a “channeled” monogamous relationship between two committed adults, regardless of gender. In other words, the channeling story has begun to acquire a life of its own, so that it now appears to transcend sexual orientation, shaping both the way family law has just begun to treat sexual relationships that cannot result in accidental procreation and the way members of the public respond. After all, we often think of marriage as one defining marker of adulthood, regardless of gender.

Nonetheless, family law’s recent aspirations and even its constitutional rules of equality have not remade the social norms that often reflect a gendered double standard, particularly within the family. So, for example, the practice of choosing marital names has remained gendered, even without laws mandating

80. See Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003); Susan Frelch Appleton, Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate, 16 STAN. L. & POL’Y REV. 97 (2005); Katharine T. Bartlett, Feminism and Family Law, 33 FAM. L.Q. 475 (1999); see also GRAFF, supra note 28, at 223 (“equality has triumphed as our operating theory and social ideology [of marriage]); cf. Hasday, supra note 265, at 841-48 (challenging family law’s purported rejection of coverture); id. at 866-70 (positing gendered impact of divorce reforms).
81. Schneider, supra note 51, at 523.
82. Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003). Certainly, those jurisdictions with civil unions and domestic partnerships also have extended the concept of “channeled” monogamous relationships to same-sex couples. See also infra text accompanying note 172; cf. ANTHONY GIDDENS, THE TRANSFORMATION OF INTIMACY: SEXUALITY, LOVE AND EROTICISM IN MODERN SOCIETIES 141-42 (1992) (describing monogamy as the ideal even in lesbian couples, based more on “a recognition of the centrality of trust than [on] an aversion to sexual experimentation as such”).
83. Of course, male-female couples who know they will not procreate (because of age, sterilization, or infertility) are channeled into marriage too.
that wives and children take the husband’s surname. Likewise, familial divisions of labor have remained gendered, notwithstanding laws, like the federal Family and Medical Leave Act, designed to mitigate the reliance on gender roles in the public sphere. Hence, it should come as no surprise that those whom channeling targets respond in gendered ways. Indeed, many contemporary understandings of the channeling story invoke sex stereotypes in explaining the development of marriage and its favored position—reciting, for example, that marriage’s purpose is to domesticate men or at least to bind them legally to their biological offspring, with women expected to play a policing function.

As practiced over the years, efforts to channel sexual desire and conduct into marriage have relied on official recognition through a licensing system, state benefits, social norms, and cultural inducements (such as ceremonial celebrations, marriage announcements in the newspapers, elaborate gifts, and a thriving wedding industry, to name a few examples). Families formed under

87. See 29 U.S.C. § 2601(a)(5) (2000) (stating that “due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men”); id. at § 2601(b)(4)-(5) (articulating purpose of providing leaves on a “gender-neutral basis” in order “to promote the goal of equal employment opportunity for women and men” consistent with Equal Protection Clause); Martin H. Malin, Fathers and Parental Leave Revisited, 19 N. ILL. U. L. REV. 25 (1998); Kari Palazzari, The Daddy Double-Bind: How the Family and Medical Leave Act Perpetuates Sex Inequality Across All Class Levels, 16 COLUM. J. GENDER & L. 429 (2007).
88. See, e.g., Anita Bernstein, Afterword: Narrowing the Status of Marriage, in MARRIAGE PROPOSALS, supra note 65, at 217, 222-24 (summarizing “the savage hypothesis” about men); McClain, supra note 56, at 2162-63 (discussing treatment of so-called “male problematic” by some judges and leaders in the “marriage movement”).
89. See, e.g., Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 995-96 (Mass. 2003) (Cordy, J., dissenting); COONTZ, supra note 50, at 208-09, 254; JOHN D’EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 67-71 (2d ed. 1997) (reviewing gender roles in sexual relations in nineteenth century); McCLELLAND, THE PLACE OF FAMILIES, supra note 12, at 258, 272 (critiquing treatment of women as sexual “gatekeepers”); see also Buchanan, supra note 64, at 1297 (detailing role stereotypes regarding sex); Michelle Fine & Sara I. McClelland, Sexuality Education and Desire: Still Missing after All These Years, 76 HARV. EDUC. REV. 297, 321 (2006) (burdens of abstinence-only sex education placed on girls and other marginalized groups). This gatekeeping role contrasts with an earlier (also gendered) claim that marriage helps tame women’s “strong and insatiable sexual appetites.” Brundage, supra note 49, at 376. This is also a way that women are depicted in so-called “soft porn.” GIDDENS, supra note 82, at 119-20.
90. See, e.g., Goodridge, 798 N.E.2d at 955-57 (listing state benefits triggered by marriage).
92. See Bellafante, supra note 73 (reporting popularity of weddings for lesbian couples and citing “the cultural programming that prompts fantasies of tiered cakes and lilies in 6-year-old girls”).
the influence of this channeling function reinforce its power.94

Indeed, one can find an important sign of the channeling function’s power in its quiet, insidious operation. At the same time that family law attempts to channel sexual desire and conduct into marriage, family law’s generally accepted rhetoric emphasizes choice, voluntariness, and agency. Family law reveres “freedom of personal choice in marriage and family life [as] one of the liberties protected by the Due Process Clause of the Fourteenth Amendment”95 and places “the decision to marry . . . among the personal decisions protected by the right to privacy.”96 Thus, individuals privately or autonomously “choose” to marry (or believe they are doing so) even while the state actively seeks to shape and steer their preferences.97

3. Channeling Out Loud

The move from repression to channeling might suggest a shift from blunt force to subtle encouragement. Recent developments, however, reflect a different approach: encouragement that is blunt and not at all subtle. Here I refer to the new, much more explicit messages that government has recently added to the channeling story through abstinence-only sex education and marriage promotion programs. Relying on advocacy and interventions developed by “the marriage movement,” the federal government and some states have undertaken to instruct citizens on the importance of marriage, techniques for choosing “smart marriages,” and ways to sustain marriage.98

During the Bush Administration, the federal government has embraced sex education that teaches abstinence only until marriage99 and has created the “Healthy Marriage Initiative” (HMI).100 Accordingly, federal funds are available to support sex education programs, but only if the programs exclusively promote

94. See Rubin, supra note 20, at 293; see also FOUCAULT, supra note 46, at 3 (In the Victorian era, the procreative “couple imposed itself as model, enforced the norm . . . “).
97. See, e.g., Rich, supra note 70; see also Meyer, supra note 56, at 474 (“The very point of this [channeling] function is to exert pressure on individual choice, to steer the private construction of intimacy toward models reflective of public norms.”); cf. HALLEY, supra note 11, at 301-02 (examining notions of “wantedness” and “unwantedness” in sex).
98. See generally Frontline: Let’s Get Married (PBS television broadcast Nov. 14, 2002). As the website for the broadcast introduces the topic addressed:
With the U.S. divorce rate at roughly 50% and one of three children growing up with a single parent, can—and should—government strengthen the institution of marriage?
abstinence from all sexual activity prior to marriage. For example, under welfare reform legislation, the term “abstinence education” means:

an educational or motivational program which:

(A) has as its exclusive purpose, teaching the social, psychological, and health gains to be realized by abstaining from sexual activity;
(B) teaches abstinence from sexual activity outside marriage as the expected standard for all school age children;
(C) teaches that abstinence from sexual activity is the only certain way to avoid out-of-wedlock pregnancy, sexually transmitted diseases, and other associated health problems;
(D) teaches that a mutually faithful monogamous relationship in the context of marriage is the expected standard of human sexual activity;
(E) teaches that sexual activity outside of marriage is likely to have harmful psychological and physical effects;
(F) teaches that bearing children out-of-wedlock is likely to have harmful consequences for the child, the child’s parents, and society;
(G) teaches young people how to reject sexual advances and how alcohol and drug use increases vulnerability to sexual advances; and
(H) teaches the importance of attaining self-sufficiency before engaging in sexual activity.

Applicable guidelines define “sexual activity” to refer “to any type of genital contact or sexual stimulation between two persons including, but not limited to sexual intercourse.” Federal funds reportedly have also been made available to encourage abstinence among unmarried adults, up to age 29.

Further, operating on the mistaken assumption that the target population—the poor—does not value marriage, the HMI seeks “[t]o help couples, who

101. A number of states that previously had comprehensive sex education programs have narrowed them to abstinence-only programs in order to qualify for federal funding. E.g., Mo. Rev. Stat. § 170.015 (LEXIS through 2007 legislation). Various studies have shown such programs to be less effective in delaying sexual intercourse than comprehensive sex education. See Health Policy: New Study—Same Verdict, Preventive Med. Week, Nov. 25, 2007, at 165. Fourteen states have declined federal funds for sex education because they have concluded that the abstinence-only approach does not work. See Just Say No: Mr. Kaine Is Right to Resist the Federal Push for Abstinence-Only Programs, Wash. Post, Nov. 19, 2007, at A16 (editorial prompted by Virginia’s decision to decline funding).
103. See Fine & McClelland, supra note 89, at 308 (quoting 2006 federal guidelines).
104. See Sharon Jayson, Abstinence Message Goes Beyond Teens; Millions in Federal Money Targeting Adults Up to 29, USA Today, Oct. 31, 2006, at 1A.
have chosen marriage for themselves, gain greater access to marriage education services, on a voluntary basis, where they can acquire the skills and knowledge necessary to form and sustain a healthy marriage. States may receive federal funding through the HMI for such activities as public advertising campaigns, education in high schools, relationship skills programs, pre-marital training, marriage enhancement training, divorce reduction programs, and marriage mentoring programs.

C. The Sexual Pleasure Void

Significantly, although the channeling story begins with and emphasizes sexual desire, until recently family law has had virtually nothing explicitly affirmative to say about sexual pleasure. Indirectly or implicitly, of course, men’s sexual pleasure has always loomed large. First, husbands long had exclusive control over whether and when to seek their own sexual pleasure with their wives because of the marital exemption to rape laws. Second, given family law’s almost exclusive concern with penile-vaginal penetration, that is, sexual activity that might have reproductive consequences, the channeling story necessarily relies on a male norm and incorporates heterosexual males’ orgasms. Complementing the channeling story, in some states today, the only relevant sexual conduct in annulment cases or in adultery-based divorce

106. See KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE (2005). Edin and Kefalos show that poor women value marriage, but these women often find that prospective husbands do not meet their high expectations, because of poverty, joblessness, and incarceration. See also COONTZ, supra note 50, at 287-88.


110. Cf. GIDDENS, supra note 82, at 62 (asserting that male sexuality is “so much an accepted part of everyday life that it is invisible”).


112. For one historical summary that finds unsurprising the “little emphasis placed on women’s erotic selves,” see Herald, supra note 13, at 18-20. See also Waldman & Herald, supra note 13.

cases is heterosexual intercourse. By contrast, references—explicit or even implicit—to the clitoris and women’s orgasms are nowhere to be found. At the same time that family law assumes heterosexual males’ orgasms, the preoccupation with penile-vaginal penetration—not the usual the route to orgasm for women—communicates the irrelevance of female sexual pleasure, or even its pathology. Family law thus constructs male orgasmic pleasure as worthy of concern and naturalizes anorgasmic sexual experiences for women. A recent gay-rights argument goes a step further, asserting that the legal preference for heterosexual relationships, such as the cross-sex marriage requirement, discriminates against women by ignoring the “climax asymmetry” (or “orgasm gap”) experienced by males and females in penile-vaginal intercourse.

Although I do not advance a constitutional argument, one might be tempted to respond to the law’s uneven treatment of men’s and women’s pleasure by invoking constitutional cases in which the Supreme Court has rejected claims for sex equality by citing “real differences” between men and women. This often-

114. In re Blanchflower, 834 A.2d 1010, 1012 (N.H. 2003) (relying on definition of adultery to include only intercourse that can produce “spurious issue” and excluding same-sex activities).
115. Indeed, heterosexual intercourse is typically what is meant by “to have sex.” See Rubin, supra note 20, at 307 (examining meaning of “to have sex”).
118. DOUGLASS & DOUGLASS, supra note 117, at 1-38.
119. DOUGLASS & DOUGLASS, supra note 117, at 1-38.
contested exception to the Court’s usual disfavor of gender classifications purports to distinguish biological differences from cultural stereotypes. Yet even in the contexts in which the Court has claimed to find such real differences for example, statutory rape laws and certain parentage rules dissenting opinions and commentators have discerned reliance on impermissible stereotypes. Thus, the would-be distinction between real differences and impermissible stereotypes reflects a judgment call, rather than a clearly fixed boundary. Indeed, despite men’s and women’s dissimilar genital anatomies and even their different “brains,” the question of the value or respect that the law ascribes to sexual pleasure depends on far more than physical factors. Moreover, the prospect of equal regard for women’s sexual pleasure requires nothing so daunting as, say, giving men the capacity to become pregnant. Thus, even as a matter of policy, the doctrine of real differences offers no satisfactory answer to a family law that disregards women’s sexual experiences while emphasizing men’s.

Rather, family law’s absence of concern, or worse, for female sexual pleasure no doubt has strong roots in the cultural and societal norms detailed in Cultural Cliteracy. For example, once-persistent messages about the superiority of vaginal orgasms in Freudian theory and popular culture might well have helped perpetuate family law’s preoccupation with penile-vaginal penetration, its silence about the clitoris, and the lack of positive attention accorded to women’s sexual pleasure. The epigraph about Charla Muller’s reported view of her year of nightly sex as exclusively a gift for her husband (according her only the satisfaction of giving “a really great gift”) offers a powerful illustration of the silence and invisibility that often surrounds women’s pleasure in our culture.

In addition to all the cultural forces at work, family law’s adherence to a

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122. E.g., Nguyen, 533 U.S. at 86 (O’Connor, J., dissenting, joined by Stevens, Ginsburg, and Breyer, JJ); Michael M., 450 U.S. at 496 (Brennan, J., dissenting, joined by White and Marshall, JJ); id. at 501 (Stevens, J., dissenting); Law, supra note 69, at 1000.

123. See LOUANN BRIZENDINE, THE FEMALE BRAIN (2006). This controversial book by a neuropsychiatrist posits that men and women have significant neurological differences primarily as a result of hormones. Men are more aggressive, focusing on sexual pursuit and fertility because of the effects of high levels of testosterone; women are less self-focused, valuing caring providers and long-term connections because of the influence of estrogen; cf. Rebecca M. Young & Evan Balaban, Psychoneuroim doctrinology, 443 NATURE 634, 634 (2006) (“despite the author’s extensive academic credentials, The Female Brain disappointing fails to meet even the most basic standards of scientific accuracy and balance”); Robin Marantz Henig, How Women Think, N.Y. TIMES, Sept. 10, 2006, § 7, at 12 (stating data to support Brizendine’s claims are hard to find).

124. See Michael M., 450 U.S. at 498 (Stevens, J., dissenting) (stating that “the capacity to become pregnant is what primarily differentiates the female from the male”). Yet now popular culture has introduced the world to a pregnant male. See, e.g., Guy Trebay, He’s Pregnant. You’re Speechless, N.Y. TIMES, June 22, 2008, Style section, at 1 (examining pregnancy of Thomas Beatie, a female-to-male transsexual).

125. Stiritz, supra note 3.

126. For a summarized analysis, see Herald, supra note 13, at 18.

127. See Gardner, supra note 2 and accompanying text. She later described the “marathon” as “my stupid idea” and “a hidden cross to bear.” Id.
doctrine of privacy provides substantial reinforcement for the status quo. Family privacy (or simply “privacy”) constitutes a central tenet of family law. This doctrine, which purports to advance pluralism, keeps the State out of the internal workings of the family. A form of liberty or autonomy, it encompasses, among other things, the division of labor and expenditures in the intact family as well as a broad range of childrearing decisions including those about education.

Within the “private realm of family life which the state cannot enter,” sexual pleasure seems to constitute an ultra-private realm, even more off-limits from State involvement or external scrutiny than other aspects of family or personal life. Griswold v. Connecticut memorably paid tribute to “the sacred precincts of marital bedrooms,” and Lawrence v. Texas lends new force to the notion that sexual activity (when consensual and between adults) creates heightened walls of privacy. The epigraph suggesting that the Ecuadorian constitution might “decree orgasm by law” or even protect “a woman’s right to enjoy sexual happiness” plays to this notion that sex is too private for the law to address.

The usual critiques of family law have not called for filling this gap. Most feminist skeptics of privacy primarily worry about coercion, the absence of genuine consent in intimate relationships, unequal power between the participants, and the risks posed to the vulnerable member or members of the

134. See, e.g., Abrams, supra note 9, at 351.
135. 381 U.S. 479 (1965).
136. Id. at 485.
139. See Schweimler, supra note 1 and accompanying text.
140. Fran Olsen stands out as a notable exception. In showing why the would-be dichotomy between intervention in the family and nonintervention (privacy) is largely meaningless, Olsen observes in a footnote:

Sex as currently practiced seems to be startlingly more satisfactory to men than to women. . . . Privatizing sex reduces discussion that might lead to change. Sex is private in part because the state makes it private and because keeping sex private seems to serve the interests of those with power. The taboo on inquiring into the quality of male-female relationships may be based more on a fear of exposing systematic inequality than on anything else.

family. Family privacy, traditionally a vehicle for enshrining the control of the strongest family members over the weak, has permitted exploitation, abuse, and even spousal rape. There’s little room to think about women’s sexual pleasure in a positive way here. Indeed, one participant’s sexual pleasure might well come at the price of another’s pain or harm, and dominance feminists have worked to expose the false consciousness and cultural influences that might trick many of us into thinking we are enjoying ourselves. Against this background, women’s sexual pleasure—to the extent it exists—probably isn’t an experience to be trusted.

Likewise, critics of family law’s sex-centricity complain that family law has no business considering citizens’ sex lives. These scholars find approaches like Hawaii’s Reciprocal Beneficiaries statute or the Canadian Law Commission’s 2001 report entitled Beyond Conjugality, to be much more sound precisely because these reforms do not use sexual affiliations and relationships as bases for legal recognition or consequences. Given the direction in which these scholars would like to see family law develop, affirmative attention to sexual pleasure would presumably have no place on their agenda.

Finally, a privacy-based approach is consistent with an appreciation of the

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144. See generally, e.g., Carole S. Vance, Pleasure and Danger: Toward a Politics of Sexuality, in PLEASURE AND DANGER, supra note 20.

145. Cf generally Abrams, supra note 9.


148. HAW. REV. STAT. ANN. §§ 572C-1, 572C-2 (LEXIS through 2008 legislation).


150. See supra note 147.
law’s limitations. As Kathryn Abrams has observed, although from outside the family-law zone, “[t]he enormous variability of sexual pleasure and its status as an affirmative good . . . [makes] it difficult to imagine . . . how it could be programmatically promoted by legislative or judicial officials.”\(^{151}\) And, as Katherine Franke has asked, “[c]an law protect pleasure?”\(^{152}\)

Given family law’s adherence to privacy and some commentators’ critique of family law’s emphasis on sex, government-sponsored sex education programs and the HMI stand out. They show how family law’s treatment of sex as “private” is neither complete nor inevitable. They also demonstrate that the state (here, the federal government) sees a role for itself in supporting and enhancing its citizens’ sexual lives.

A second notable feature, however, is that the content of these government initiatives reflects traditional gender stereotypes. Neither the clitoris nor women’s orgasms receive attention amidst preoccupation with penile-vaginal penetration—so that old discriminatory patterns persist even in this era marked by professed legal commitment to gender equality.\(^{153}\) According to these programs, females are expected to play the policing or “gatekeeping” role—a burden that leaves little room to prioritize or to indulge in pleasure.\(^{154}\)

Thus, for example, the HMI addresses men’s sexual pleasure, but not sexual pleasure for women or youth. Men are promised a “more satisfying sexual relationship” as a facet of healthy marriage.\(^{155}\) By contrast, healthy marriage promises women protection from dangers: a decreased likelihood of becoming “victims of domestic violence, sexual assault, or other violent crimes” and of contracting sexually transmitted diseases.\(^{156}\) And children and youth raised by parents in healthy marriages are promised the decreased likelihood of becoming sexually active teenagers.\(^{157}\)

The type of sex education approved by the federal government embodies similar assumptions. As one critic has written, “[t]he abstinence-only approach is permeated with stereotyped messages and sex-based double standards about

\(^{151}\) Abrams, supra note 9, at 316; see also id. at 348-50.

\(^{152}\) Franke, supra note 8, at 183; see also Franke, supra note 27, at 2704.

\(^{153}\) On how unconscious biases might help explain such inconsistencies, see Waldman & Herald, supra note 13, at 289-310.

\(^{154}\) See McCla\textsc{in}, THE PLACE OF FAMILIES, supra note 12, at 258, 271-72; see also, e.g., Cahn & Carbone, supra note 24, at 9.


\(^{156}\) Id.

\(^{157}\) Id.
acceptable male and female sexual behavior and appropriate social roles.”

Other critics attribute these messages to specific religious beliefs.

Yet, if the state can provide sex-negative messages that perpetuate the sexual subordination of women, the state could instead provide sex-positive messages that promote women’s sexual self-efficacy. Further, although one might criticize the government’s present approach purely in terms of gender discrimination, one might also challenge the ability of this approach to advance family law’s channeling objectives. A closer look at the channeling story in practice accentuates the inadequacies of existing initiatives like abstinence-only sex education and the HMI.

D. Playing Out the Channeling Story

1. Taking Family Law on its Own Terms

What is the place of sexual pleasure in a regime constructed around what Martha Fineman calls “the sexual family”? Shouldn’t women’s sexual pleasure play an important role in family law, even taken on its own terms? To be clear: my attempt to take family law on its own terms here signals no more than an assumption, for purposes of analysis, of the oft-stated values, goals, and principles that purportedly animate the field, even in its contemporary incarnation. These would include a preference for monogamous marriage (without necessarily a punitive approach to other adult sexual relationships); a commitment to formal gender equality, to family privacy and pluralism, and to privatized dependency; and respect for autonomy, at least to the extent of accepting no-fault divorce.


161. See FINEMAN, supra note 27, at 143-98. Fineman explains the term as follows: The sexual family is the traditional or nuclear family, a unit with a heterosexual, formally celebrated union at its core. I use the term “sexual” to modify “family” to emphasize that our societal and legal images and expectations of family are tenaciously organized around a sexual affiliation between a man and a woman.

Of course, many of these assumed normative starting points are fiercely contested—and all for good reason. For example, Naomi Cahn and June Carbone contend that we live in an era marked by two very different conceptions of family and family law, with one version prevailing in conservative “red states” and another ascendant in more liberal “blue states”—although I think it’s fair to say that marriage still occupies a favored place in both. Moreover, a considerable body of scholarship and popular opinion has made the case for family law to de-emphasize, privatize, or abolish marriage. Here, however, I bracket such challenges temporarily in order to take a close look at the channeling story, as now conventionally told, for internal consistency, even at a time when marriage has lost some of its privilege and power. If the channeling story fails even this test for coherence, then the need for a fundamental reconceptualization of family law becomes much more acute—in turn inviting even more serious consideration of the challenges provisionally put to the side.

How does family law effectuate its goal of making monogamous marriage the preferred site for sexual activity? Initially, one can see that, given family law’s focus on penile-vaginal penetration and its omission of any affirmative discourse of women’s sexual pleasure, the channeling story remains strangely incomplete. One need not contend that sexual activity is the most important aspect of marriage to reach this conclusion. According to the channeling story, sexual desire is purportedly channeled, but without attention to pleasure, what’s to keep desire focused where family law wants it, on a monogamous spousal relationship? That is, a rational system designed to direct sexual activity into legally favored relationships and to keep it there, notwithstanding the availability of divorce, would concern itself to some degree with sexual

165. See COONTZ, supra note 50, at 275-78.
166. See Lawrence v. Texas, 539 U.S. 558 (2003) (“it would demean a married couple were it said that marriage is just about the right to have sexual intercourse”).
167. Brinig and Nock assert that consideration of children’s wellbeing “suggest[s] that law and public policy (as an instrument of law) should encourage and support marriage, particularly marriages that last.” Margaret F. Brinig & Steven L. Nock, Legal Status and Effects on Children 2 (Notre Dame Legal Studies, Paper No. 07-21, 2008), available at http://ssrn.com/abstract=973826. Whatever their data and conclusions, few would dispute that family law’s marital ideal is a union that lasts “till death do us part.” See, e.g., Laura A. Rosenbury, Two Ways to End a Marriage: Divorce or Death, 2005 UTAH L. REV. 1227, 1231; see also Emens, supra note 29. E.J. Graff asserts that the norm of monogamous marriage represented an advance for women, “taking away . . . key political (let alone personal) options from the men in power.” GRAFF, supra note 28, at 170.
pleasure. Even Margaret Sanger and others of her time made this argument, connecting lasting marriage and sexual pleasure. To the extent that desire anticipates pleasure and pleasure follows desire, pleasure should constitute an important element in official channeling efforts, and for channeling to succeed, the paradigm must expand beyond its exclusive focus on men.

Even the modernized, degendered definition of marriage articulated in Goodridge v. Department of Public Health, "the voluntary union of two persons as spouses, to the exclusion of all others," fails to explain how the hoped-for "exclusion" is to be accomplished and perpetuated. Many of the purported benefits of marrying, such as legitimacy for children or financial incidents, survive a spouse's sexual infidelity or even legal dissolution. Although a pleasurable sexual relationship in marriage would not guarantee family law's ideal of ongoing monogamy, an effort to channel sexual desire that categorically ignores the sexual pleasure of one class of spouses looks entirely quixotic.

Several different authorities—from judicial opinions to the counsel of popular advice columnists—have attempted to explain what marriage offers over and above a nonmarital relationship. "Commitment" emerges as the defining value. Goodridge, among other cases, identifies "the exclusive and permanent commitment of the marriage partners to one another" as the "sine qua non of civil marriage." Syndicated columnist Amy Dickinson, struggling with a couple's decision to "Ask Amy" about the meaning and purpose of marriage, apart from its religious significance, finally opines: "I believe that marriage signifies a deepening of your commitment to each other. Marrying is a way of

168. Linda McClain suggests, however, that one understanding of marriage sees it as an institution designed to reconstruct desire, "to change the way [people] think about finding happiness." McClain, supra note 160, at 115.

169. See, e.g., COONTZ, supra note 50, at 204 (quoting Sanger and William Robinson). However, it is not at all clear that such efforts accorded equal regard to women's sexual pleasure. See id.

170. Data show that women, although more eager than men to marry, are more likely to become dissatisfied and to seek divorce. See COONTZ, supra note 50, at 290; cf. id. at 300 (reporting recent increase in men's positive view of marriage). But see infra note 191 and accompanying text.


172. Id. at 969; see also id. at 954 ("Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family.")

173. See, e.g., COONTZ, supra note 50, at 309; JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA 89-93 (2004); Mary Lyndon Shanley, Just Marriage: On the Public Importance of Private Unions, in JUST MARRIAGE, supra note 164, at 3, 27-28; see also GIDDENS, supra note 82, at 137; GRAFF, supra note 28, at 207. For a critique of this approach and an argument that marriage is instead a social institution designed for children, see generally BLANKENHORN, supra note 35. See also, e.g., Helen M. Alvare, The Consistent Ethic of Life: A Proposal for Improving Its Legislative Grasp, 2 U. ST. THOMAS L.J. 326, 337-39 (2005).

174. Goodridge, 798 N.E.2d at 961; see also Turner v. Safley, 482 U.S. 78, 94 (1987) (marriages "are expressions of emotional support and public commitment"); In re Marriage Cases, 183 P.3d 384, 425, 433, 441 n.59 (Cal. 2008) (using terms such as "long-term commitment," "life partner," and "ongoing commitment").
announcing to your family and the community that you share this deep commitment; in doing so you involve the community in your marriage’s success. And, as these authorities show, this commitment is understood to be voluntary, and personal, notwithstanding all the legal and cultural forces expressly designed to steer individual choices toward marriage.

This emphasis on voluntary commitment coincides with Brenda Cossman’s notion of marriage as a project of self-governance. As understood today, marriage, once entered, calls for hard work; adultery—or any type of infidelity—is a failure of self-discipline. Yet, even under this diluted version of the channeling story, in which individuals assume responsibility for some of the regulatory functions once performed by the state, facilitating sexual pleasure in marriage would presumably help inspire and sustain the necessary hard work and self-discipline.

Janet Halley ascribes far more coercive force to marriage than one might find in Cossman’s conceptualization. According to Halley, “[m]arriage provides spouses with an amazing power over each other: the power to perform (and inflict), and to prohibit (and punish), infidelity. The monogamy rule and all the possible ways of breaking it provide rich social scripts, carefully elaborated at every level of cultural detail.” As a matter of law, Halley surely overstates the power of the “monogamy rule.” Courts have refused to recognize a spousal duty of monogamy. Further, in the prevailing no-fault divorce regime, adultery provides neither a necessary nor a sufficient condition for divorce, so marriages...

175. Amy Dickinson, Ask Amy: Couple Wonder What the Point of Marriage Is, CHIC. TRIB., Nov. 17, 2007, at C2 (advice column); see also Karst, supra note 50, at 632, 652; Shanley, supra note 173. In explaining why the opportunity of same-sex couples to enter domestic partnerships but not marriages violates the state constitution, the California Supreme Court has emphasized the expressive function of marriage and its ability to communicate publicly one’s love and long-term commitment. In re Marriage Cases, 183 P.3d at 425, 434-35, 445-46 (Cal. 2008).

176. See supra note 172 (quoting Goodridge).

177. See Karst, supra note 50, at 632, 637.

178. COSSMAN, SEXUAL CITIZENS, supra note 10, at 69-114; see also COONTZ, supra note 50, at 282-83.

179. COSSMAN, SEXUAL CITIZENS, supra note 10, at 89-90.

180. Id. at 84.

181. See id. at 107 (“Channeling sex into marriage—as opposed to extramarital liaisons—is now the work of individual couples.”); see also MCCLAIN, THE PLACE OF FAMILIES, supra note 12, at 4 (summarizing argument outlining roles for both families and government).

182. See COSSMAN, SEXUAL CITIZENS, supra note 10, at 79 (“reciprocal sexual pleasure”).

183. HALLEY, supra note 11, at 362.

marked by adultery may or may not survive. In addition, fault plays a waning role in determining the financial consequences of divorce. Finally, Halley exaggerates the significance of infidelity in Twyman v. Twyman, the case that prompts her observations about a would-be monogamy rule; the case does not recognize a cause of action for intentional infliction of emotional distress based on adultery alone; and, beyond Twyman, the cause of action remains a contested and unusual spousal remedy in any event.

As a matter of what Cossman calls self-governance, however, the monogamy rule might prove stronger, with adultery possibly constituting a breach that causes the other spouse to halt the project—or not. Halley is correct to that extent, and it is true that, under current social norms, infidelity by wives provokes dissolution far more often than infidelity by husbands. Still, adultery has no special power in the no-fault regime. Once spouses have the discretion to decide what makes the continued hard work and self-discipline of marriage worthwhile, as no-fault divorce laws entitle them to do, a spouse can exercise similar power for any reason that might make exit preferable. With

185. For a more detailed look at no-fault divorce, see infra notes 342-53.
186. See AMERICAN LAW INSTITUTE, supra note 33, at 42-54.
187. 855 S.W.2d 619 (Tex. 1993). Janet Halley provides an extended analysis of Twyman; her comments about monogamy emerge from one of several different readings of the case, HALLEY, supra note 11, at 348-63; see infra notes 367-80 and accompanying text (discussing this case). In my view, those members of the Twyman court who would recognize a cause of action in the case emphasize the bondage activities the husband asked the wife to perform, despite her distress attributed to a past rape, and the husband’s decision to make such sexual activities essential to the continuation of the marriage. Twyman, 855 S.W.2d at 620 (plurality opinion); id. at 626 (Gonzalez, J., concurring); id. at 641 (Spector, J., dissenting). The initial bondage activities preceded his affair, and the wife did not seek recovery for the despair she experienced from knowing that he was involved with another woman. See id. at 636 (Hecht, J., dissenting); id. at 627 (Phillips, C.J., concurring and dissenting).
188. If every instance of adultery gave rise to the cause of action, then we should expect frequent litigation of the issue. See Twyman, 855 S.W.2d at 636 (Hecht, J., dissenting). In addition, the element of “outrageousness” required by the controlling opinions in Twyman would become meaningless. Id. at 622 (plurality opinion); id. at 645 (Spector, J., dissenting).
189. See Harry D. Krause, On the Danger of Allowing Marital Fault to Re-Emerge in the Guise of Torts, 73 NOTRE DAME L. REV. 1355, 1363-1366 (1998). Such remedies find more support in the divorce context when arising from domestic violence. See, e.g., Feltmeier v. Feltmeier, 798 N.E.2d 75 (Ill. 2003); Sarah M. Buel, Access to Meaningful Remedy: Overcoming Doctrinal Obstacles in Tort Litigation Against Domestic Violence Offenders, 83 OR. L. REV. 945 (2004). Indeed, to the extent that the bondage activities in Twyman were regarded by some of the judges as a form of domestic violence, see supra note 187, this case would support the generalization, rather than constitute an exception.
190. See COSSMAN, SEXUAL CITIZENS, supra note 10, at 84, 96.
191. See, e.g., Philip Weiss, The Affairs of Men, N.Y. MAG., May 26, 2008, available at http://nymag.com/relationships/sex/47055/ (noting, in examination of adultery sparked by the exposure of former Governor Eliot Spitzer’s sexual activities, that “infidelity is more costly to a woman than a man: It tends to end a marriage when a woman is discovered, while a marriage ‘absorbs’ it in the man’s case.”).
192. See, e.g., COONTZ, supra note 50, at 268 (“For better or worse, people decide what they will and won’t put up with in a relationship today on a totally different basis from before.”). Thus, the public often finds interesting stories of couples who stay together despite differences many would find “irreconcilable.” See, e.g., JENNIFER FINNEY BOYLAN, SHE’S
some scholars discerning a constitutional right to no-fault divorce, the absence of a sexually satisfying relationship could well provide one reason for exercising this authority.

Marriage historian Stephanie Coontz has observed that marriage over the past century has become both more optional and more fragile, suggesting a weakened channeling function. In examining the “new crisis of adultery” (nonmonogamous wives) and the current “epidemic of adultery,” Cossman also asserts that family law’s channeling function is not working very well today. Indeed, although we don’t know what the data would show if family law relinquished its channeling function, we do know that its efforts have produced at best only mixed success—even though the idea of monogamous marriage remains highly regarded. The later age of those marrying makes the prospect of delaying sexual activity until marriage even more implausible than it might have been in past times. Most adults live outside of marriage today, and—as Elizabeth Emens has shown—the prevalence over the years of “polyamorous existence” belies the norm of monogamy within marriage. Certainly, the significant number of nonmarital births has received its share of publicity.

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194. COONTZ, supra note 50, at 301. However, at the same time, marriage reportedly has become more fulfilling, Id.


196. See EDIN & KEFALAS, supra note 106 (showing how unmarried mothers value marriage); Robert E. Billingham et al., College Women’s Rankings of the Most Undesirable Marriage and Family Forms, COLLEGE STUDENT JOURNAL (Dec. 2005), available at http://findarticles.com/p/articles/mi_m0FCR/is_4_39/ai_n16083965/pg_2 (survey finding disfavor of polyamorous marriages).

197. See COONTZ, supra note 50, at 271, 275; Cahn & Carbone, supra note 24, at 29. One report attributes to research at the Kinsey Institute for Research in Sex, Gender, and Reproduction at Indiana University findings that on average women have 8.2 years of premarital sex and men have 10.7 years. Weiss, supra note 191.


199. Emens, supra note 29.

200. See, e.g., Frontline: Let’s Get Married, supra note 98.
Among today’s young persons, even very young persons, “hooking up” has become a prominent practice; this notably ambiguous term refers to sexual behavior, though not necessarily intercourse, with no expectation that the parties will move toward a relationship. This phenomenon, together with data showing significant rates of sexually transmitted disease among teenage girls and a resurgence of teen pregnancies and births all indicate that many young persons engage in sexual activities. Whatever one’s value judgments about these realities (healthy, dysfunctional, or otherwise), this much is clear: if family law remains serious about channeling and treating monogamous marriage as the preferred site for sexual activity, then the system, even taken on its own terms, leaves considerable room for improvement.

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205. One can find a range of judgments about the facts revealed by such evidence. The term “hooking up” is sufficiently ambiguous that the practice is acceptable to many who disapprove of casual sex. See England et al., supra note 201, at 534. Nonetheless, some of the literature reflects negative views of the practice, as some critics have noted. See, e.g., Rosenbloom, supra note 202 (noting value judgments conveyed in Stepp’s book, supra note 201). One view regards teen pregnancy and birth as a death knell for a young female’s life opportunities. See, e.g., Martin Guggenheim, What’s Wrong With Children’s Rights 237-40, 244 (2005) (invoking this perception to explain the Supreme Court’s minors’ abortion cases). Others regard the phenomenon as a practical response to certain life circumstances. Arline T. Geronimus, Teenage Childbearing and Social and Reproductive Disadvantage: The Evolution of Complex Questions and the Demise of Simple Answers, 40 FAM. RELATIONS 463, 465-66 (1991) (suggesting childbearing for some African-American teens rationally responds to their situation).
2. Marriage and Monogamy without Pleasure

Despite family law's silence about and apparent inattention to women's sexual pleasure, one could rationalize the channeling story by presuming that such pleasure flourishes on its own, "privately" and "naturally," in marriage. But that hypothesis fails when one takes into account the background assumptions exposed in Cultural Cliteracy.\(^\text{206}\) empirical data about orgasm gaps,\(^\text{207}\) and evidence showing how little many women know about their bodies, including married women.\(^\text{208}\) How then might the channeling story be thought to accomplish and sustain its objectives? Consider as possibilities the following stylized understandings about how the entire system, taken on its own terms, is supposed to work if it is to succeed at all. Upon inspection, all of these possible understandings fail to meet some stated value or aspiration of contemporary family law, often gender equality.

a. She Can't Leave

At one time, family law presumed wives were economically dependent on their husbands.\(^\text{209}\) Simultaneously, restrictive divorce laws gave sexually unsatisfied wives no exit opportunities on that basis alone. Indeed, this regime so ignored and denigrated women's sexual interests that a husband's prerogatives included rape.\(^\text{210}\) Clearly, the absence of attention to women's sexual pleasure would have no consequences under this system because wives were "stuck"—whether happy or not and regardless of their sexual experiences in marriage.\(^\text{211}\) Perhaps despite the recent application of equality principles to family law and the relaxation of divorce laws, expectations persist that women will behave as they did before these changes,\(^\text{212}\) and family law's professed commitment to gender equality is thought to have little application to lived experience in many cases. Certainly, responses to the persistent refrain in domestic violence cases, "Why didn't she leave?",\(^\text{213}\) suggest that at least some women can't leave, whatever the law might say. No doubt, continuing gender-based disparities in

\(^\text{206}\) See generally Stiritz, supra note 3.
\(^\text{207}\) See DOUGLASS & DOUGLASS, supra note 117, at 1-38.
\(^\text{208}\) PEGGY ORENSTEIN, FLUX: WOMEN ON SEX, WORK, LOVE, KIDS, & LIFE IN A HALF-CHANGED WORLD 65-66 (2001). This book was one of those assigned in Contemporary Female Sexualities. See supra note 7 and accompanying text; see also infra note 327 and accompanying text (quoting and discussing Stiritz's findings).
\(^\text{209}\) See, e.g., COONTZ, supra note 50, at 185 ("women needed to marry in order to survive").
\(^\text{212}\) See GRAFF, supra note 28, at 33 (observing that society could reduce divorce by barring women from the workforce).
pay and the undervaluation of women’s labor do make leaving difficult as a practical matter. Whatever the elaborations, however, “she can’t leave” fails to explain the pleasure gap without undermining principles of gender equality.

b. Low Expectations

Perhaps the Western clitoridectomy explained in Cultural Cliteracy means that women are channeled into marriage, but no one (including these women themselves) expects them to have a fulfilling or pleasurable experience once there. Joylessness is an inherent component of the “feminine mystique,” to use Betty Friedan’s famous phrase. Robin West’s recent examination of consensual but unwanted sex offers one analysis of why married women might accept this state of affairs. Or suppose, for women, sexuality means only wanting to be wanted. Although women can leave under modern no-fault divorce laws, family law’s channeling system works because sexual pleasure may be so elusive, unanticipated, and foreign that its absence in marriage seems unremarkable and well-deserved, obliterating any belief that one might find it elsewhere—so there is no incentive to search. (After all, if a wife’s sex with her husband is to be understood only as a “gift” to him, then we must assume any enjoyment comes solely from the experience of giving pleasure, not receiving it.) Further, if a woman’s husband is not seeking a divorce, then she is sufficiently wanted. Again, this understanding of channeling conflicts with family law’s contemporary aspirations of treating women and men with equal respect and rejecting traditional gender stereotypes.

216. See, e.g., Deirdre English et al., Talking Sex: A Conversation on Sexuality and Feminism, 11 FEMINIST REV. 40, 41 (Summer 1982) (conversation among English, Amber Hollibaugh, & Gayle Rubin in which Hollibaugh states: “My fantasy life has been constructed . . . . What it says is that I have no notion of healthy sexuality . . . because of the culture I live in. So the notion of pleasure in sex is now a forbidden one—it’s a contradiction in terms.”).
217. BETTY FRIEDAN, THE FEMININE MYSTIQUE (1963). In this classic book, Friedan exposes the problem that has no name—that is, a “nameless, aching dissatisfaction” expressed by wives and mothers interviewed in 1957. COONTZ, supra note 50, at 251; Margalit Fox, Betty Friedan, Who Ignited a Movement with “The Feminine Mystique,” Dies at 85, N.Y. TIMES, Feb. 6, 2006, at A20 (obituary).
218. See West, supra note 14, at 23-24.
219. See, e.g., GIDDENS, supra note 82, at 128 (summarizing Freudian view of women who, mourning their “castration,” “only find security in the mirror of love provided by the adoring other”); Frug, supra note 74, at 1053 (reporting and critiquing Catharine MacKinnon’s view that the sexual experience of all women may be, like sex work, the experience of having sex solely at the command of and for the pleasure of another”).
220. See D’EMILIO & FREEDMAN, supra note 89, at 71 (noting nineteenth century view that “women lacked innate sexual desire”).
221. See Gardner, supra note 2 and accompanying text.
c. “Adaptive Desires”

Elizabeth Emens has begun a project to articulate a theory of what she calls “adaptive desires” that might explain how channeling could work even in the absence of attention to women’s own sexual pleasure.\(^{222}\) Recalling the tale of the fox who decided the unattainable grapes must be sour, Emens explores adaptive preferences in the erotic realm. As she states: “Jon Elster’s idea of adaptive preferences—those preferences that adapt to the impossibility of certain options or outcomes—is important for feminist theory as it pertains to the choices women make in an era with few express legal restrictions on those choices.”\(^{223}\) Emens continues, “the possibility of adaptive desires—adaptive preferences in the erotic realm—is important for women’s sexual choices.”\(^{224}\) Although Emens thinks sexual empathy can be a good thing, she also raises concerns that women in relationships with men might well adapt more than the men, so that even without legal constraints women “choose” to value a partner’s sexual pleasure more than their own, making his pleasure her preferred erotic experience. According to Emens, feminists confront a challenge in determining how to approach women’s ostensible choices to “lose themselves” in another.\(^{225}\)

One might invoke Emens’s analysis to show the limits of an equality-minded family law that regards “private” discrimination—inequalities practiced within the family—as beyond the law’s reach.\(^{226}\) Another implication might be to help show that the very notion of channeling unmask the impact that family law has, and is designed to have, on would-be “private” decisionmaking and preferences.\(^{227}\) Alternatively, one might ask what it means for women to want to “lose themselves” in a context in which their own sexual pleasure has remained elusive and ignored. When queer theorists have taken up such topics, writing about the undervalued nature of powerlessness in sex—including the pleasure of “human erasure,” exploded limits,” and disturbance of “the organization of

\(^{222}\) Elizabeth Emens, Adaptive Desires (Dec. 2007) (unpublished manuscript, on file with author).

\(^{223}\) E-mail from Elizabeth Emens, Associate Professor, Columbia Law School, to author (Aug. 4, 2008, 15:00 EDT) (on file with author) (citing JON ELSTER, SOUR GRAPES (1985)).

\(^{224}\) Emens, supra note 222 (emphasis added).

\(^{225}\) E-mail from Elizabeth Emens to author, supra note 223; see also Emens, supra note 86 (using similar analysis in examining marital-names practices).

\(^{226}\) See Susan Frelich Appleton, Equalizing Family Law (work in progress, presented at annual meeting of Association of American Law Schools, Family Law Panel, Jan. 5, 2008, New York, N.Y.); see also, e.g., Emens, supra note 86 (showing how law can reframe questions that individual actors must answer); Spindelman, supra note 84, at 1381-82 (noting how law’s absence, not just its presence, can promote discrimination).

\(^{227}\) See Appleton, supra note 226.


\(^{229}\) Id. at 153 (quoting Bersani, supra note 228, at 217).
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the self," their rhetoric evokes the very orgasms that elude many women in heterosexual intercourse, that family law deems irrelevant for women, and that Emens theorizes women may choose to forgo. Regardless, if adaptive desires are part of the channeling story, then they may help to explain family law's disregard of women's sexual pleasure and privileging of penile-vaginal penetration as the center of its concern—in effect, relying on gender inequality while disguising it as choice.

d. Legitimacy and Repeated Channeling

Perhaps family law can adhere to the channeling story and this story's objectives while ignoring women's sexual pleasure by conceptualizing procreation and the assignment of responsibility for the resulting children as the sole purposes of marriage. Once a woman marries, family law has achieved its desired consequences—legitimacy and hence a private source of support. Family law does not care that wives might seek sexual pleasure elsewhere because their children are still born with a presumption of legitimacy, which in many states even today would not be rebutted without the establishment of paternity for another man, who in turn could provide the private source of support. Of course, the availability of divorce, either on the traditional ground of adultery or under modern no-fault laws, would simply set the stage for channeling to begin anew.

Indeed, one could read Lawrence v. Texas as a message that family law must lower the stakes for nonmonogamous, nonreproductive sex, which does not present the problem of responsibility for children. Under this hypothesis, woman's sexual pleasure remains beyond family law's sphere of concern.

230. Id.
231. As Halley describes:

The "jouissance of exploded limits," the deep savoring of "that sexual pleasure [which] occurs whenever a certain threshold of intensity is reached, when the organization of the self is momentarily disturbed by sensations or affective processes somehow 'beyond' those connected with psychic organization"—for Bersani those are so characteristic of the orgasmic aim that he is led to propose that "[s]exuality... may be a tautology for masochism..."

Id. (emphasis added). For another examination of such language which provides support, albeit indirect, for my point, see Adler, supra note 64, at 31-34.

232. True, Bersani and hence Halley focus on the powerlessness from being penetrated. See Halley, supra note 11, at 151-67. Still, the quoted language certainly suggests the powerlessness and self-erasure experienced through orgasm, thus arguably connecting penetration and orgasm. See supra notes 228-31 and accompanying text. Further, Halley herself notes that we should realize that losing track of our gender is part of the "orgasmic aim." Halley, supra note 11, at 166. This observation is consistent with reports of scans showing, during orgasm, that people lose their sense of time, "the brain's higher faculties quiet down, and more primitive structures light up." Roach, supra note 117, at 241.

233. See generally Appleton, supra note 66, at 234-37.
235. See Carbone, supra note 40, at 831 (in "new middle-class morality," managing fertility is most important).
Instead, to the extent that family law must expand its focus, it should include children born outside traditional marital families, including those born to same-sex couples through assisted reproductive technology. A number of recent developments reflect just this approach. For this explanation of the channeling story to prevail, however, family law would have necessarily relinquished its professed preference for monogamy and commitment.

e. Motherhood and Exhaustion

In a variation of the bleak and cynical understandings sketched out above, one might imagine another attempt to explain why anyone could expect women channeled into marriage to stay there even in the absence of pleasure. Under this version of the channeling story, sexual pleasure becomes so subordinate to other marital concerns—particularly the day-to-day immersion in childrearing—that pleasure’s absence is accepted and tolerated, eclipsed by different priorities. Family law’s preoccupation with the procreative possibilities of sex and reppronormativity more generally contribute to a conceptualization of women as, first and foremost, mothers. Mothers are not expected to care about sexual pleasure, as suggested by the asexuality of the iconic mother, the Virgin Mary, and also by the modern belief that motherhood redirects a woman’s passion and energy to her child. Even if mothers long for sexual pleasure, their role stereotypically calls for self-sacrifice. Popular culture has reflected this phenomenon, with newspapers examining the “sexless marriage” and a radio

237. See, e.g., Elisa B., 117 P.3d 660; AMERICAN LAW INSTITUTE, supra note 33, §§ 2.03, 3.02, 3.03.
238. See, e.g., GIDDENS, supra note 82, at 154-55.
240. See, e.g., Ayelet Waldman, Truly, Madly, Guiltily, N.Y. TIMES, Mar. 27, 2005, § 9, at 11 (“Modern Love” column); see also GIDDENS, supra note 82, at 46-47 (noting the association of love with marriage and motherhood); id. at 174-75 (“Sexual activity was divided up between an orientation to reproduction and the ars erotica—that split which also classified women into the pure and the impure.”); Frug, supra note 74, at 1050, 1061 (how legal rules “maternalize” the female body). One might also profitably consider the cautionary tale presented in Sue Miller’s novel, The Good Mother, and the film based on the book. The story presents the challenges faced by a divorced woman whose ex-husband sues for custody of their daughter on the grounds that the protagonist’s sexual activities with a new lover place the child at risk. SUE MILLER, THE GOOD MOTHER (1986); THE GOOD MOTHER (Buena Vista Pictures 1988).
broadcast by a former U.S. Secretary of Labor alluding to “DINS” or “double income no sex.” 243

Those attuned to the way our social practices keep women subordinated through their own “choices” 244 even while the law purports to respect gender equality will find a ring of truth in an account reported in Peggy Orenstein’s Flux: Women on Sex, Work, Love, Kids, & Life in a Half-Changed World. 245 Here, Orenstein comments on what she learned from a conversation with “Helen, a forty-four-year-old arts administrator and mother of three”; 246 Debbie, a forty-one-year-old education consultant and mother of two, who worked as her family’s primary breadwinner during most of her marriage; 247 and Susannah, age forty:

Maybe it’s not surprising, given how problematic sexual pleasure could be for women, that by midlife, desire was often pushed to the periphery. In fact, the first ever national study of sexual dysfunction to include women (which didn’t take place until 1999) found that lack of interest in sex was their number one complaint. As I traveled the country, interviewing women, I began to feel like a naif for asking about it, as subtly silenced myself as the voice of desire had been within them. Yet, I wasn’t willing to let sexuality slide off my radar. According to psychologist Judith Wallerstein, developing a “richly rewarding sex life” is the central task of a good marriage, essential in maintaining stability and “replenishing emotional reserves.” The area of greatest contrast between those who were happily married and those who were divorcing, she found, was that in the latter group couples had often endured years of celibacy.

Why were women resigned to low desire? Some, doubtless, had never discovered their sexual potential or were incompatible with their mates. Others were simply exhausted: The physical demand of infants nursing at their breasts or toddlers tugging at their arms which had depleted them during [the “Crunch years”], had been replaced by the equally draining psychological demands of mother-managing school-aged children. “One of the many things that has not changed in most families is that there is only one person in the


244. See, e.g., PEW RESEARCH CENTER, FROM 1997-2007: FEWER MOTHERS PREFER FULL-TIME WORK (July 12, 2007), available at http://pewresearch.org/assets/social/pdf/WomenWorking.pdf (reporting that 6 in 10 women with children polled expressed a “preference” for part-time over full-time work and 1 in 10 expressed a preference not to work outside the home at all, while noting that this “lack of enthusiasm” for full-time work was not shared by male participants, with more than 7 in 10 men saying full-time work was the ideal for them).

245. ORENSTEIN, supra note 208.

246. Id. at 229.

247. Id. at 217, 226.
family who always knows where everyone is,” Helen says. “You could poll
anybody else from the family and nobody knows. But you know, and you walk
around with that all the time. It’s amazing. It’s just—brain space.” She grins.
“I guess it’s space that men use for sports.”

“Or sex drive,” says someone else. . . .

. . . Sexual desire invariably returned when a woman felt like “myself,” when
she surfaced from the roles of wife and mother.248

Contemporary family law scholarship includes an extensive literature on
the challenges of balancing family responsibilities and work outside the home—
challenges that women have shouldered more than men.249 But the stereotypical
scenario concerns carework for a child, an ill family member, or an elderly
parent. The conversation has not included the difficulties of making room in the
balance for women’s own sexual pleasure. Channeling plus sheer exhaustion
enforce monogamy, according to this reading. But the enforcement remains
fairly weak, because these tired women might “wake up.” The new “epidemic of
adultery” among women, explored by Brenda Cossman,250 demonstrates the
fragility and shortsightedness of this approach. This fragility and shortsightedness
then together with the stereotypical role of women as family
caregivers leaves this understanding of the channeling story less than satisfactory
in light of family law’s professed goals and policies.

III. ADVANCING CULTURAL CLITERACY IN FAMILY LAW

A. Telling a Culturally Cliterate Channeling Story

Each of the scenarios sketched above conflicts with some important
principle or aspiration of contemporary family law: gender equality, the
acceptance of a no-fault divorce regime, or the vision of marriage as an exclusive
commitment that transcends purely instrumental consequences such as
legitimacy and private care and support for children. Even for conservative
commentators like David Blankenhorn, writing in support of a traditional, child-

248. Id. at 230-31 (quoting JUDITH WALLERSTEIN & SANDRA BLAKESLEE, THE GOOD
MARRIAGE: HOW AND WHY LOVE LASTS 192 (1996)); cf. GRAFF, infra note 251 (noting
“refreshing” view of sexual intimacy).

249. See, e.g., ANNE L. ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT
SOCIETY OWES PARENTS (2004); JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY
AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2000); Symposium on the Family and
Medical Leave Act of 1993: Ten Years of Experience, 15 WASH. U. J.L. & POL’Y I (2004);
Symposium on the Structures of Care Work, 76 CHI.-KENT L. REV. 1389 (2001); see also,
e.g., Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003); cf. Franke, supra note 8
(critiquing legal feminism’s failure to challenge this “repronormativity”).

250. See COSSMAN, SEXUAL CITIZENS, supra note 10, at 94; supra note 195 and accompanying
text.
centered understanding of marriage, the absence of women’s pleasure should stand out as a notable gap in a rationale claiming that “human sexiness is fundamentally about creating the couple that will raise the child.” Thus, contemporary family law’s reliance on the channeling story without explicit attention to women’s pleasure emerges as disingenuous or, more likely, incoherent.

There’s yet another way to tell the channeling story, however—one that can be imagined, but only with widespread cultural cliteracy. Orenstein notes how little the women she interviewed had been taught about sexual pleasure at all. Orenstein’s observation receives reinforcement from Cultural Cliteracy, especially the data gleaned from Stiritz’s students. These data show that even well-educated and sexually active women often know very little about their bodies, their capacity for pleasure, and the benefits for all aspects of their lives.

Suppose that women routinely acquired the knowledge and developed the sexual self-efficacy that Stiritz advocates, so that those channeled into marriage would expect, seek, and regularly experience pleasure as part of an ongoing, intimate, and committed relationship. Would this “marriage cure” address the joylessness and oppression found in many wives’ accounts? Might it provide a way to address data showing that, although women remain more eager than men to marry, women more often become dissatisfied with marriage and seek divorce?

One can catch a tiny (and certainly not dispositive) glimpse of a reply in an ultimately unsuccessful challenge to Alabama’s prohibition on the distribution of sex toys. No doubt, the challengers’ attorneys strategically chose to emphasize

251. Blankenhorn, supra note 35, at 33 (emphasis omitted); see id. at 35; cf. id. at 215 (“[L]ove does not make the marriage last. The marriage makes their love last.”) (emphasis omitted). According to E.J. Graff, under the traditional Jewish view, the husband had a duty to attend to his wife’s sexual pleasure, and this view saw voluntary sexual acts of any kind as a means of “refreshing” intimacy. Graff, supra note 28, at 69-70. This religious view legitimated the use of contraception. See also id. at 72, 81. Today, one can find some religious movements emphasizing women’s sexual pleasure in the effort to promote marriage. See, e.g., Tim LaHaye & Beverly LaHaye, The Act of Marriage: The Beauty of Sexual Love (1998) (self-help book directed at Christian married couples); see also Graff, supra note 28, at 83-84 (noting LaHayes’ work); Next Level Church, My Crappy Sex Life, http://www.mycrappysexlife.com (last visited Oct. 31, 2008); The Joy of Christian Sex Toys, National Public Radio, Mar. 21, 2008, http://www.npr.org/templates/story/story.php?storyId=18975616.

252. Stiritz, supra note 3.

253. See Orenstein, supra note 208, at 65-66; see also Tuana, supra note 117 (examining the extent of knowledge about female orgasms in both the scientific community and the population at large through the lens of the politics of ignorance).


255. For others who have recently used this term, albeit with different meanings, see Dubler, supra note 21; Angela Oluwuachi-Willig, The Return of the Ring: Welfare Reform’s Marriage Cure as the Revival of Post-Bellum Control, 93 CAL. L. REV. 1647, 1683-88 (2005).

256. Coontz, supra note 50, at 290; cf. id. at 300 (reporting recent increase in men’s positive view of marriage). But see supra note 191 and accompanying text.
the use of such toys in marriage, rather than in other settings. So, wives testified how the devices not only improved their sexual experiences but also "saved" their marriages, by promoting communication and enhancing intimacy. Such evidence suggests a picture—consistent with family law's ideal of monogamy—of a developing relationship, growing over time, based on commitment and closeness. It evokes the prescription of psychologist Judith Wallerstein, quoted earlier, that "developing a 'richly rewarding sex life' is the central task of a good marriage, essential in maintaining stability and 'replenishing emotional reserves.'"

Of course, I can neither predict nor evaluate the results of a counterfactual based on widespread cultural cliteracy. Nonetheless, a channeling story incorporating women's sexual pleasure would have an internal logic that the present story lacks. In other words, its underlying theory works, even if it leaves many questions to be answered. It stands out as the only version of the story that depicts women as subjects, not objects, and that synthesizes all of the goals and policies that family law purports to embrace. Women—and family law itself—should find this affirmative case for channeling and monogamy far more attractive than the alternative versions of the story.

**B. Working With and Against Popular Culture**

How might widespread cultural cliteracy be achieved, to change family law and the social environment that it helps construct? One approach would simply allow women and families to discover such information from the existing "marketplace of ideas." This approach would respect not only family law's adherence to privacy but also American values of free expression and a market


258. Williams v. Pryor, 220 F. Supp. 2d 1257, 1297 (N.D. Ala. 2002), rev'd & remanded, Williams v. Att'y Gen., 378 F.3d 1232 (11th Cir. 2004), cert. denied sub nom. Williams v. King, 543 U.S. 1152 (2005), subsequent summary judgment for defendants aff'd in Williams v. Morgan, 478 F.3d 1316 (11th Cir. 2007); see, e.g., COSSMAN, SEXUAL CITIZENS, supra note 10, at 34-35; cf. Herald, supra note 13, at 36-37 (arguing that lawmaking bodies like the Alabama legislature would have difficulty arguing that sex toys have no legitimate purpose, given the medical literature indicating their usefulness in increasing women's sexual satisfaction). For additional analysis of access to sex toys, see infra notes 414-54 and accompanying text.

259. See supra note 248 and accompanying text (quoting Peggy Orenstein, who in turn quotes Judith Wallerstein); see also GIDDENS, supra note 82, at 12 (noting women's expectations of sexual pleasure in marriage); id. at 62-63 (describing "confluent love"); id. at 178 ("The claiming of female sexual pleasure came to form a basic part of the reconstitution of intimacy, an emancipation as important as any sought after in the public domain.").

economy. This approach would also track Brenda Cossman’s observations that marital success, including a satisfying sexual relationship, has become a project of self-governance.261

One favoring this approach can find a number of promising signs in popular culture. Despite family law’s silence about sexual pleasure and the very narrow approaches expressly promoted by the federal government, sex talk aimed at women of all ages has become increasingly accessible to those seeking such information.262 Popular book titles include sisters Lisa and Marcia Douglass’s *The Sex You Want: A Lovers’ Guide to Women’s Sexual Pleasure.*263 Septuagenarian Canadian nurse Sue Johanson holds forth regularly on television (in the U.S. on the Oxygen channel), ready to take calls and answer questions on all manner of sexual activities, conditions, toys, and practices on *Talk Sex with Sue,*264 and—following in the footsteps of “Dr. Ruth”265—she often visits college campuses to participate in such conversations in person.266 Trendy sex-toy parties267 and stores operated by and for women, such as Good Vibrations (based in the Bay Area)268 and Babeland (based in Seattle and New York),269 have

261. *See supra* notes 178-80 and accompanying text.

262. Perhaps we have arrived at this apparently contradictory approach to sexual pleasure—official silence and a vibrant popular culture on the subject—because it reflects a desirable balance, analogous to Lawrence Friedman’s description of divorce law of the late nineteenth century:

[J]morals had their symbolic victory, a stringent law strutting proudly on the books. But nobody enforced these laws, least of all the judges. A cynical traffic in runaway and underground divorce flourished in the shadows. Divorce law stood as an egregious example of a branch of law tortured by contradictions in public opinion.

**Lawrence M. Friedman,** *A History of American Law* 381 (3d ed. 2005); cf. *Coontz,* *supra* note 50, at 198-202 (noting how in the 1920s sex pervaded popular culture, which also elevated the importance of sexual pleasure in marriage).

263. *See Douglass & Douglass, supra* note 117.


265. For the biography of Ruth Westheimer, Ph.D., see Dr. Ruth.com—Get Some!, http://drruth.com (last visited Sept. 6, 2008).

266. Johanson was a featured speaker at Washington University’s “Sex Week” in February 2007. There was standing room only, although several of those present criticized Johanson’s heterosexist assumptions, which are not apparent on her television show. *See Stepp,* *supra* note 201, at 157 (discussing the popularity of sex workshops on college campuses, including Washington University’s “Good Vibrations: Women and Orgasms”).


proliferated. Instructional videos, such as Betty Dodson’s films on masturbation, now often called “soloing,” and workshops on the same subject offered by Good Vibrations (every May, in honor of National Masturbation month) abound. Access to a computer and to online fora no doubt increases the learning opportunities exponentially. Recently “Marketplace,” a radio program, featured the booming business in products designed for women’s sexual pleasure. Moreover, some speaking on behalf of religious movements have offered information about women’s pleasure in their effort to promote lasting marriages.

Yet, relying on the “free market” and popular culture entails significant risks, especially for women. First, despite the availability of information and other materials related to women’s sexual pleasure, ignorance remains pervasive. Cultural Cliteracy certainly makes this point. Further, as Nancy Tuana has observed, such ignorance “should not be theorized as a simple omission or gap but is . . . an active production . . . linked to issues of cognitive authority.” It seems risky to entrust the elimination of this ignorance to the very sources that produced it.

In addition, popular culture also transmits the gender scripts that Stiritz and other feminists critique. The recent report of the American Psychological Association (APA) documents how contemporary culture sexualizes girls, teaching them that their primary value lies in pleasing men, in turn resulting in a host of physical and emotional problems, including self-objectification, damaged self-esteem, body dissatisfaction, and appearance anxiety. In investigations of the hooking up culture, what stands out is not the prevalence of casual sexual encounters among youth, but rather the fact that the female participants report peer pressure as the underlying explanation and little or no sexual pleasure or

273. See LAHAYE & LAHAYE, supra note 251.
274. See, e.g., Tuana, supra note 117, at 195.
275. See Stiritz, supra note 3, at 264.
277. See STEPP, supra note 201, at 203. But see id. at 34.
satisfaction for themselves.²⁷⁸ According to one study of hooking up that uses orgasm as “one good barometer of sexual pleasure,”²⁷⁹ “[m]en’s sexual pleasure seems to be prioritized,”²⁸⁰ and men have a strikingly disproportionate number of orgasms on hook ups.²⁸¹ In other words, many young women are defying channeling efforts and the federal government’s explicit sexual curriculum, and they are doing so while accepting very disappointing sexual experiences. This phenomenon explains why the APA sounds the alarm about the consequences of sexualization: self-objectification and loss of self-esteem. A view of female sexuality in which women want only to be wanted emerges once again.²⁸²

Perhaps, then, achieving widespread cultural cliteracy requires active intervention rather than deference to popular culture, individual self-help, and privacy—a type of official affirmative action to counter deep-seated assumptions, norms, and values concerning women and pleasure.²⁸³ Consider as an example of such affirmative action the official effort to degender carework embodied in the Family and Medical Leave Act,²⁸⁴ and the Supreme Court’s interpretation of this legislation as a measure expressly designed to attack the “formerly state-sanctioned stereotype that only women are responsible for family caregiving.”²⁸⁵ Alternatively, consider the sea change over the past 30 years or so in response to domestic violence—including spousal rape—even though state intervention was once considered beyond the purview of the law because of the imagined impenetrability of family privacy and the supposed immutability of gender norms.²⁸⁶ State intervention is now not just tolerated but generally

²⁷⁸. See Stepp, supra note 201, at 111, 243; see also Fine & McClelland, supra note 89, at 300 (“Little has actually been heard from young women who desire pleasure...”). Id. at 313 (“statistics...tell us something about what young women are doing with their bodies, but they do not tell us about sexual subjectivities...—that is, if these activities were wanted or enjoyed by these young women”). Such descriptions contrast with accounts of women’s open sexual lives characterized by pleasure. See, e.g., Dossie Easton & Catherine A. Liszt, The Ethical Slut: A Guide to Infinite Sexual Possibilities (1997).

²⁷⁹. England et al., supra note 201, at 535.

²⁸⁰. Id.

²⁸¹. Id.

²⁸². See supra note 219 and accompanying text.

²⁸³. Cf. Olsen, supra note 140, at 848-49 (stating that “enforcement of family roles, which is what many people mean by ‘nonintervention,’ requires the state to make continual policy choices”).


expected in such cases, even when such violence includes sex. Is it possible to imagine a similar change in attitude so that the knowledge necessary for pleasurable, rather than objectifying, sexual relationships could break free from the constructs of privacy and gender to become a suitable topic for teaching and learning? Is it entirely and permanently true, as Martha Fineman writes, that “[t]he practice of gender equality exists only to the extent that individual married couples chose to embrace it, unsupervised by the state”? Can we probe the forces that shape such choices and consider a more nuanced meaning for “unsupervised by the state” that would permit such affirmative action? Put differently, can we find a space for family law in between “decree[ing] orgasm by law” and perpetuating a view of women’s sexual activity as exclusively a “gift” for men?

For now, federal projects like the HMI and supported sex education offer a useful template, to the extent they make significant inroads into the private realm, in turn helping us envision how such official affirmative action might take shape. Yet, the present content of such government sponsored programs is deeply and thoroughly flawed, as many critics, including public officials, have pointed out. Judith Levine theorizes that the abstinence-only approach to sex

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288. See Sarah Y. Lai & Regan E. Ralph, *Female Sexual Autonomy and Human Rights*, 8 HARV. HUM. RTS. J. 201, 203 (1995) (noting how gender bias becomes part of a cultural norm that seems beyond the state’s responsibility); id. At 205 (noting how domestic violence, perpetrated by private actors, is argued to lie beyond state’s responsibility in some countries).

289. See Fineman, supra note 27, at 164.


291. See Schweimler, supra note 1 and accompanying text.

292. See Gardner, supra note 2 and accompanying text.

293. The idea of instruction designed to improve sex in marriage is not new. See, e.g., Coontz, supra note 50, at 213 (citing efforts in 1920s of Ernest Groves and Robert Dickinson to promote marriage counseling for “sexual adjustment”). And one account credits Dickinson with “usher[ing] the clitoris into the spotlight.” Roach, supra note 117, at 24.

294. See, e.g., Gardiner Harris, *Surgeon General Sees 4-Year Term as Compromised*, N.Y. TIMES, July 11, 2007, at A1 (reporting testimony of former Surgeon General of the United States that politics behind abstinence-only approach trumped scientific evidence in favor of comprehensive sex education, including discussion of contraceptives); Just Say No, supra note 101 (editorial praising Virginia Governor’s decision to decline federal funds for abstinence-only education).

295. Empirical studies have shown that abstinence education might briefly delay sexual activity, which—once it occurs—proves more risky than that pursued by young persons who had been exposed to more comprehensive sex education. See, e.g., Sharon Smith, *No, No, No... Yes, Yes, YES! Abstinence Backfires*, COUNTERPUNCH, May 10, 2006, available at http://www.counterpunch.org/sharon05102006.html; The Abstinence-Only Delusion, N.Y. TIMES, Apr. 28, 2007, at A16 (editorial); see also Vivian Hamilton, *Religious v. Secular Ideologies and Sex Education: A Response to Professors Cahn and Carbone*, 110 W.VA. L.
education reflects adults’ hysterical fear of children’s sex play and sexuality;\textsuperscript{296} she concludes that, worse yet, this approach ill prepares children for genuine consent to sexual activity later in life.\textsuperscript{297} Such programs convey false information\textsuperscript{298} and remain preoccupied with a focus on sexual intercourse, even as a “Main Event” to be avoided at all costs, with particularly negative consequences for girls.\textsuperscript{299} Similarly, the HMI perpetuates demeaning double standards.\textsuperscript{300}

In other words, these programs indicate that the “privacy” customarily shrouding sex and sex talk is not the primary obstacle. The government has already assumed an active and explicit role in teaching about sexual behavior.\textsuperscript{301} But, so far, the government’s intervention has reinforced traditional patterns and gender stereotypes, rather than disrupting them.\textsuperscript{302} Completely apart from the well-examined political agenda reflected in the federal programs,\textsuperscript{303} no doubt many of the lawmakers themselves are culturally illiterate!\textsuperscript{304}

Equally troubling, however, is the very idea of legitimizing cultural cliteracy. What would it mean for women’s sexuality to become an appropriate subject of government action and concern—even action and concern designed to be sex-positive? Perhaps we should celebrate family law’s decision to ignore women’s sexual pleasure—following the lead of Katherine Franke, who shows the benefits of the law’s decision to ignore friendship.\textsuperscript{305} Would legal recognition, in according respect and value to women’s pleasure, also prove confining, chilling, and repressive? More specifically, just as critics of the “No Child Left Behind Act”\textsuperscript{306} claim that teaching to standardized tests\textsuperscript{307} leaves little

\textsuperscript{296} JUDITH LEVINE, HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX 187, 190 (2002); see also Rubin, supra note 20, at 290 (“The law is especially ferocious in maintaining the boundary between childhood ‘innocence’ and ‘adult’ sexuality.”).

\textsuperscript{297} See LEVINE, supra note 296, at 195.

\textsuperscript{298} See id. at 215.

\textsuperscript{299} Id. at 195.

\textsuperscript{300} See supra notes 155-158.

\textsuperscript{301} See supra notes 152-154.

\textsuperscript{302} See JONES & MOVAHED, supra note 158.

\textsuperscript{303} See, e.g., Harris, supra note 294; Michael Specter, Political Science: The Bush Administration’s War on the Laboratory, THE NEW YORKER, Mar. 13, 2006, at 58.

\textsuperscript{304} For an analysis of unconscious biases about female sexuality that affect judicial decision-making and, by extension, other governmental actors, see Waldman & Herald, supra note 13, at 290-310.

\textsuperscript{305} Franke, supra note 27.

room for “education and ecstasy,” one must wonder whether the ecstasy, freedom, and even transgressiveness envisioned by Cultural Cliteracy can survive family law. Thus, efforts to integrate cultural cliteracy into legal discourse will necessarily encounter a paradox.

The risks and the paradox of entrusting cultural cliteracy to law, however, dissipate with acknowledgement of the role that the law plays even when it remains silent. Thus, under the status quo, women’s sexual pleasure does not occupy some idealized law-free zone.

Further, visible official interventions, such as sex education programs, in contrast to popular culture, at least offer the possibility of a consistently constructive message. Cornelia Pillard sees sex education as a promising forum for implementing the twin underpinnings of gender equality law: recognition of “real sex characteristics and sexual harms,” as well as aspirations that seek “to promote equality by treating us as the equals that we are.”

With sex education, she observes, “[b]ecause young people are involved, our desire to equip them to fend off real harms in a gender-scarred world is intensified, even while we pin ambitious hopes on them to exemplify egalitarian ideals.”

Suppose that the content of federally funded sex education programs were changed accordingly. Similarly, if Congress wishes to strengthen channeling by promoting “healthy marriages,” suppose it were to develop or support programs teaching an affirmative discourse of sexual pleasure that includes women, and disseminate such information among wealthy and poor alike. Perhaps “marriage preparation” classes that some experts have advocated might encompass this approach.


308. I have borrowed this phrase from the title of a popular book critiquing traditional educational methods well before the No Child Left Behind Act’s emphasis on testing. GEORGE B. LEONARD, EDUCATION AND ECSTASY (1968).

309. See, e.g., Olsen, supra note 140 (explaining the incoherence of any asserted distinction between intervention and nonintervention in the family); see also, e.g., Franke, supra note 27, at 2696; Rosenbury, supra note 41; cf. JAMES G. DWYER, THE RELATIONSHIP RIGHTS OF CHILDREN 26, 135 (2006) (explaining that the State is always involved in identifying parents, even when it chooses to defer to biological criteria).

310. Pillard, supra note 158, at 959.

311. Id.

312. As Stephanie Coontz points out, the HMI’s designers mistakenly assumed that the target population does not value marriage. COONTZ, supra note 50, at 287-88; see EDIN & KEFALAS, supra note 106. Critics have also condemned the existing program as class-based experimentation that fails to address the real obstacle to marriage for many people—poverty. See, e.g., Nice, supra note 105; Onwuachi-Willig, supra note 255, at 1683-88. Empirical data fail to support the underlying premise of the HMI—that marriage necessarily provides benefits for children that are unavailable in the absence of marriage. See, e.g., Hamilton, supra note 51. Further, the HMI rests on racist impulses and thinly disguised efforts to “domesticate unruly welfare recipients.” Onwuachi-Willig, supra note 255, at 1680, 1689.

313. See COONTZ, supra note 50, at 289.
Alternatively, to the extent that sex education offered directly to students inevitably raises concerns about the state’s assumption of a role that parents ought to play, a different or complementary approach might seek to help parents become culturally cliterate, enabling them to pass such knowledge on to their children. How many parents talk to their daughters about sexual pleasure—or even name the clitoris—despite increasing parental efforts to otherwise use medically accurate terminology? How many know how to do so? How many have fully thought through the larger messages reinforced by indulging a young daughter’s wishes (constructed by the culture and the market, of course) to attend a “Princess-Makeover Birthday Party” at Club Libby Lu? Whether for students, parents, or others, what might be the content of such programs? Several authorities have addressed this question in the context of sex education programs. For example, Levine insists that providing comprehensive sex education in place of abstinence-only, and supporting “outercourse” would promote safety, communication, pleasure, and gender equality far better than existing educational efforts. Linda McClain contends that “[a]n adequate


315. See Stiritz, supra note 3, at 259; see also, e.g., Elizabeth Crow, Children’s Books: Show and Tell, N.Y. TIMES, May 21, 1989, § 7, at 32 (reviewing book that teaches girls that they have a vagina and a vulva, while boys have a penis and testicles); Jodi Kantor, Sex Ed for the Stroller Set, N.Y. TIMES, Nov. 17, 2005, at G1 (noting trend to teach girls words such as “vagina”).

316. Stiritz emphasizes the cultural relativism of the way that one generation passes along to the next information about sexuality:

In cultures that privilege the sexual pleasure of women over that of men and that consider women’s orgasms as signals for the completion of sex acts rather than men’s ejaculations, as in Western societies, female sexual dysfunction does not exist. For instance, adult women can expect to have three orgasms a day in Mangaia, one of the Southern Cook Islands, where older women initiate young men into partnered sex by teaching them techniques of stimulating the clitoris. In Mangaia, a man learns to feel shame if he fails to bring his partner to orgasm before he ejaculates and to feel pride to the degree he contributes to his partner’s sexual pleasure.

Stiritz, supra note 3, at 248 (footnotes omitted).

317. For a thoughtful analysis of a feminist parent’s dilemma, see Peggy Orenstein, What’s Wrong with Cinderella?, N.Y. TIMES, Dec. 24, 2006, § 6 (Magazine), at 34; see also, e.g., Camille Sweeney, Never Too Young for That First Pedicure, N.Y. TIMES, Feb. 28, 2008, at G3.

318. According to Levine:

Sex therapists use the term outercourse for the infinite collection of acts that can be done with the body to create sensual and sexual pleasure but that do not include penetration. But outercourse doesn’t even have to include two bodies touching. Writing a letter or having phone sex can be outercourse, and so is masturbation.

LEVINE, supra note 296, at 195.

319. See, e.g., J. Shoshanna Ehrlich, From Age of Consent Laws to the “Silver Ring Thing”: The Regulation of Adolescent Female Sexuality, 16 HEALTH MATRIX 151 (2006); Danielle LeClair, Comment, Let’s Talk About Sex Honestly: Why Federal Abstinence-Only-Until-Marriage Education Programs Discriminate Against Girls, Are Bad Public Policy, and Should be Overturned, 21 WIS. WOMEN’S L.J. 291 (2006); McClain, Some ABCs of Feminist Sex Education, supra note 12; see also LUKER, supra note 314.
program on sexuality and sex education should address salient gender issues that
shape the environment within which girls and boys act and choose.”

According to McClain, such issues include “cultural scripts about female and
male sexuality,” “the persistence of the sexual double-standard,” and the
conflation of “‘sex’ with sexual intercourse, thus reinforcing the association of
desire with danger and hindering the development of a broader conception of
sexuality that is consonant with developing a sense of responsible sexual
agency.”

There are several models for such reforms. Sweden, for example, has quite
elaborate programs of comprehensive sex education that include attention to the
capacity for and rewards of sexual pleasure as well as the need for safety.

Planned Parenthood’s recent initiative, “Real Life Real Talk,” offers programs
designed to help parents discuss sex and health with teenagers. Many schools,
especially at the college level, provide opportunities for such learning and
discussion, and some follow highly developed curricula.

The model that I happen to know best, however, is Stiritz’s approach,
based on my semester-long participation in her course, Contemporary Female
Sexualities. Although offered at the college level, many features of the course
lend themselves to exploration with younger students or even older individuals,
including parents. The course combines examinations of literature and art with
detailed information about the female body, analysis of the gender scripts
imposed by the dominant culture, and discussion of students’ aspirations for their
own futures, all in order to promote sexual self-efficacy. The clitoris provides
both a literal and metaphorical theme, rich as it is, with implications for the
traditional hidden quality of women’s excitement and pleasure, the
pervasive phallocentric norm, and women’s capacity for sexual self-care.

As Stiritz reports, based on her investigation of the results of such courses

320. McClain, Some ABCs of Feminist Sex Education, supra note 12, at 68.
321. Id. at 68-69; see also Carbone, supra note 40, at 822 (reviewing McClain’s position).
322. See Luker, supra note 314, at 207-15; Thomas K. Grose, Straight Facts About the Birds and
would receive support from bills introduced in Congress, but the proposed legislation
contains no mention of the clitoris, pleasure, or “outercourse.” Responsible Education about
323. See Real Life Real Talk: Encouraging Open, Honest, and Balanced
324. See, e.g., Lorna J. Sarrel & Philip M. Sarrel, Sexual Unfolding: Sexual
Development and Sex Therapies in Late Adolescence (1979) (based on authors’
work as sex educators and counselors at Yale); Unitarian Universalist Association of
Congregations, Our Whole Lives: Lifespan Sexuality Education Curricula,
http://www.uua.org/religiouseducation/curricula/ourwhole/index.shtml (last visited Sept. 25,
2008) (describing program of sexuality education, for kindergarteners through adults).
325. See supra note 7 and accompanying text.
326. See Stiritz, supra note 3, at 265-66; see also id. at 264 (“Today, sexual self-efficacy in young
women—supported by education that is culturally cliterate—is increasingly recognized as an
anodyne to ‘pornifying’ forces in our culture.”) (footnotes omitted).
Students’ scores on a sexual self-efficacy scale rose significantly after they took a course that investigated the social construction of sexuality; provided gynocentric views of relationships, the female body, and sexuality; exposed them to literature that helped them talk more openly about sexuality; and gave them a safe space in which to share their sexual experiences. As they felt more sexually articulate and empowered, they reported advances in other areas of their lives: “I gained confidence to try to shape my life and my sexuality better”; “I can talk to my boyfriend about sex for the first time”; “I have gotten the nerve to seek help with my anorexia”; “I came out”; “I am overwhelmed by the female body’s ability to derive pleasure from itself.... As I’ve come to see myself more as a sexual person, I have also gained confidence in myself to pursue my goals.” One student finally faced the domestic abuse she grew up with and stood up to her abusive father when he tried to regain his position in the family he had fractured. At the same time her panic attacks subsided. When women are offered the opportunity to consciously address the hostility directed against their bodies and the pleasures of which they are capable, their anxieties abate, self-efficacy improves, and female sexual subjectivity comes into view.  

Although such findings await additional empirical scrutiny, they provide a concrete point of reference for imagining an alternative to the present system. Significantly, the students in class with me, regardless of sexual orientation, enhanced their sexual self-efficacy over the course of the semester while retaining very mainstream aspirations: committed, monogamous relationships, often with children—that is, precisely the goal that family law’s channeling attempts have sought to achieve. This was so (and one might well question such conformity), despite several opportunities to challenge such aspirations, including for example, critical examinations of both traditional gender scripts and the conventional wisdom about the degradation inherent in sex work. Of course, almost everything that Stiritz teaches would violate the federal funding guidelines now in place for supported sex education.  

My admittedly limited observations in this course suggest that entrusting cultural cliteracy entirely to popular culture versus prescribing an official curriculum need not be viewed as mutually exclusive paths. Borrowing Brenda Cossman’s conceptual framework, we might imagine active intervention (or

327. *Id.* at 265-66 (footnotes omitted).
328. For this reason, I observed students deeply engaged by Peggy Orenstein’s book, *Flux,* supra note 208, and accompanying text, because it examines in detail the problems and challenges of the lives that the students envisioned leading. The preferences expressed by these students track those of their generation, as surveyed by others. See, e.g., Dorion Solot & Marshall Miller, *Taking Government Out of the Marriage Business: Families Would Benefit,* in *MARRIAGE PROPOSALS,* supra note 65, at 70, 92-93.
affirmative action) in the form of “state-sponsored self-help” — although she uses this terminology pejoratively to criticize coercive welfare measures, such as the HMI. Linda McClain’s understanding of a role for the state to foster personal self-governance suggests a more positive spin on this idea, and Stiritz’s work illustrates how the idea might be operationalized. Her course shows how, in the hands of a thoughtful, sensitive, and educated instructor, popular culture can be deployed in a valuable way, with full discussion of those social practices that empower women as well as critique of those that denigrate and objectify them. Students learn how to look behind the culture, how to become responsible for navigating within it, and how to shield themselves from harms often inflicted by it. Further, the basic ingredients of this approach could easily be adapted for a program aimed at parents.

The concept of state-sponsored self-help, considered in a positive light, usefully leaves ambiguous the precise role of the state versus that of private citizens. For now, I put aside questions such as: whether the government would directly operate cultural literacy programs, or simply provide funds for others to do so in compliance with officially imposed requirements; whether any particular inducements should be used to promote enrollment in such programs aimed at adults, whether they might operate in conjunction with the State’s gatekeeping role in licensing civil marriage (and hence in licensing sex); and whether parents can “opt out” of the school sex education curriculum for their children. Rather, I have tried to sketch in very preliminary form a context in which to think about both the problems and the promise that Stiritz’s work demonstrates, and to imagine a role for family law.

C. Other Family Law Applications and Implications

Although a more culturally cliterate family law should produce affirmative action designed to educate and challenge prevailing norms, additional modifications of the field might also follow. The sections below consider

330. COSSMAN, SEXUAL CITIZENS, supra note 10, at 128.
331. See generally McClain, THE PLACE OF FAMILIES, supra note 12.
332. The use of literature in the course permits students to express their thoughts and feelings by discussing characters in a book rather than their personal experiences, although personal experiences often emerge.
335. See supra notes 28-31 and accompanying text.
337. See Frug, supra note 74, at 1048-49 (noting how law, at least in part, constructs even the erotic aspects of women’s lives and thus how “law reform projects can re-construct or alter”).
338. I am indebted to Joanna Grossman for posing a question that prompted me to look beyond sex education programs to consider what more cultural cliteracy might mean for family law.
some other ways in which family law, understood to include family regulation and family policy, might acknowledge and respect women’s pleasure, without—at one extreme—“decree[ing] orgasm by law” or—at the other—perpetuating the notion of sexual activity as women’s “gift” to men. The primary purpose of what amounts to a series of thought experiments is not to formulate a law-reform agenda, but rather to emphasize that family law’s familiar principles and approaches reflect choices and value judgments, not inevitable “realities,” and to raise questions that family law might confront as a result.

1. Divorce Grounds

No-fault divorce, which became law in many states in the 1970s, shifts the focus from specific, formalistic marital transgressions, purportedly attributable to one spouse alone, and instead makes the critical variables the condition of the marriage and its future prospects. In practice, in many jurisdictions no-fault divorce operates as unilateral no-fault divorce because either spouse’s subjective feelings routinely satisfy the required “irreconcilable differences” or other test of marital breakdown.

Familiar feminist analyses of the advent of no-fault divorce attack the reportedly devastating financial consequences to women and children. Yet, women’s expanded ability to initiate divorce proceedings (even if men’s ability is also expanded) not only empowers them to exit oppressive marriages, it also “limit[s] the capability of the husband to impose his domination and thereby contribute[s] to the translation of coercive power into communication.” No-fault divorce, as the law has been applied, shifted the decision whether to end a

339. See supra notes 25-26 and accompanying text.
340. See supra notes 1-2 and accompanying text.
341. See generally Olsen, supra note 140.
342. See, e.g., Lynne Carol Halem, Divorce Reform: Changing Legal and Social Perspectives 233-83 (1980); Allen M. Parkman, Good Intentions Gone Awry: No-Fault Divorce and the American Family 71-90 (2000).
343. E.g., CAL. FAM. CODE § 2310(a) (West 2004) (“irreconcilable differences which have caused the irremediable breakdown of the marriage”; MO. REV. STAT. § 452.310(1) (LEXIS through 2007 legislation) (“marriage is irretrievably broken and that therefore there remains no reasonable likelihood that the marriage can be preserved.”); see Halem, supra note 342, at 158-93. As E.J. Graff puts it (albeit in placing the transition in the eighteenth century, some 200 years before the official “no-fault revolution”), the move from a fault-based to a no-fault regime amounts to a shift “from divorce only for marital crimes to divorce when love die[s].” Graff, supra note 28, at 233.
344. CAL. FAM. CODE § 2310 (West 2004).
346. Giddens, supra note 82, at 190-91.
marriage from the state to the spouses, in turn changing the way marriage is conceptualized. 347

More specifically, no-fault divorce does make room for the absence of sexual pleasure in marriage, including women’s, to produce important legal consequences. Like any other reason that might make a marriage unsatisfactory, a disappointing sexual relationship offers a reason to leave—and hence an incentive to address the problem, as part of the project of self-transformation and self-governance that marriage has become, according to Brenda Cossman. 348

Thus, for example, no-fault laws give to women who expect a sexually rewarding relationship but experience the orgasm gap the opportunity to exit or to demand more sexual attention from their spouses. Further, no-fault laws are sufficiently open-textured that none of these reasons need be publicly articulated. 349

Yet, some states still restrict no-fault divorce. In New York, for example, one cannot get a no-fault divorce unless both spouses agree; thus, either spouse can block a no-fault divorce and no divorce will ensue unless the petitioner can show adultery, extreme cruelty, or abandonment on the part of the respondent. 350

Recent efforts to relax New York’s law failed. 351 Missouri law differs only slightly, allowing a contested no-fault divorce only after a two-year wait. 352 Further, a return-to-fault movement has blossomed in several states, which have authorized “covenant marriage,” dissolvable only upon a showing of fault or a two-year separation. 353

In practice, some fault grounds operate in a gendered way, as illustrated by


348. COSSMAN, SEXUAL CITIZENS, supra note 10, at 69-73.

349. Indeed, California law explicitly precludes allegations and evidence of specific acts of misconduct, in order to reduce the acrimony of dissolution proceedings. CAL. FAM. CODE § 2335 (West 2004); see, e.g., HALLEM, supra note 342, at 251.


352. MO. REV. STAT. § 452.320 (LEXIS through 2007 legislation).

adultery, which remains a ground for divorce in twenty-nine states.\textsuperscript{354} Anecdotal data show that a wife’s infidelity triggers divorce more often than a husband’s, which is tolerated.\textsuperscript{355} One inference is that divorce remains more costly to women than to men, in part because of women’s unequal earning power in the marketplace.\textsuperscript{356} Another is that men (along with society) see their own desires and pleasures as fundamentally different from those of women—more meritorious and acceptable.

\textit{Cultural Cliteracy} provides a new lens through which to examine the evolution and scope of divorce law. If states either continue to flirt with a return to the fault system or decline to loosen existing fault-based restrictions, then they might consider making, say, a husband’s unresponsiveness to the gendered orgasm gap a specific ground for divorce. Of course, a statutory ground for divorce expressed in such terms is so improbable to be virtually unimaginable! Indeed, the more peculiar and implausible the possibility sounds, the wider the gulf between taking women’s sexual pleasure seriously and our understanding of family law. The traditional doctrine of privacy might help explain why we do not expect family law to consider such intimate and personal details of married life.\textsuperscript{357} Yet, as Fran Olsen has noted, the preference for keeping the State out of the family supports “the sexual status quo,” which favors men’s sexual satisfaction over women’s.\textsuperscript{358} Moreover, privacy cannot provide a complete explanation, for impotence has long played a role in divorce and annulment cases,\textsuperscript{359} adultery continues to be a divorce ground in many states,\textsuperscript{360} and “an unjustifiable persistent refusal of sexual intercourse” can be a divorce ground as

\begin{itemize}
  \item \textsuperscript{354} D. Kelly Weisberg & Susan Frelich Appleton, Modern Family Law: Cases and Materials 496 (3d ed. 2006).
  \item \textsuperscript{355} Weiss, supra note 191; see Frug, supra note 74, at 1066 (arguing “that the legal rules establishing the economic and physical circumstances in which women and men have sex encourage women to be more sexually monogamous than men” and give men “greater control over the terms of heterosexual intimacy”). \textit{But see} Amy L. Wax, \textit{Engines of Inequality: Class, Race, and Family Structure}, 41 \textit{FAM. L.Q.} 567, 592 (2007) (“Women across the board still expect monogamy within marriage, and cheating and its results—including multipartnered fertility—are still potent relationship killers.”). I am grateful to Karen Czapski for suggesting that, in this context, I might explore recent stories showing how wives stay with husbands despite adultery more often than husbands stay with adulterous wives.
  \item \textsuperscript{356} See supra notes 214-15 and accompanying text.
  \item \textsuperscript{357} Although adultery long served as a traditional fault-based ground for divorce, opportunity and disposition sufficed as proof of the sexual conduct. \textit{See}, e.g., Lickle v. Lickle, 52 A.2d 910 (Md. 1947).
  \item \textsuperscript{358} \textit{See supra} note 140 (quoting Olsen); \textit{see also} Cosman, \textit{Sexuality}, supra note 10, at 855 (explaining costs of analyzing sexuality without gender).
  \item \textsuperscript{359} \textit{E.g.,} S. v. S., 29 A.2d 325 (Del. Super. Ct. 1942); Cott v. Cott, 98 So. 2d 379 (Fla. Ct. App. 1957); J.G. v. H.G., 33 Md. 401, 405 (Md. 1870) (justifying divorce based on wife’s “impotence,” i.e., improper development of her sexual organs, resulting in “incapacity for \textit{vera copula}”); \textit{cf.} ROACH, supra note 117, at 149-52 (recounting process of proving male impotence in France in the sixteenth and seventeenth-century trials).
  \item \textsuperscript{360} \textit{See} WEISBERG & APPLETON, supra note 354 and accompanying text.
\end{itemize}
But if that’s so, is there any reason why “an unjustifiable persistent refusal” to attend to a wife’s interest in clitoral stimulation should not be accorded equal weight?

2. Sexual Harm

A more culturally cliterate family law might seek a foothold in connected tort claims. Although some tort claims raising the issue of sexual pleasure would present intractable problems, other more promising possibilities deserve consideration. This analysis unfolds against the background of other scholars’ examinations of the tendency of tort law to devalue and marginalize injuries experienced by women.

a. Consensual Relationships

With the demise of the traditional shield of interspousal immunity, family law now permits recovery for some sexual wrongs even in marriage—for example, the infection of a spouse with an undisclosed sexually transmitted disease, acquired in an extramarital liaison. In addition, several states still recognize what amounts to a tort of seduction, and some commentators have called for recognition of a more capacious tort of sexual fraud. These points of reference indicate that privacy has not been thought to absolutely block judicial review of consensual sexual conduct in civil claims for damages.

Further, although specific acts of marital misconduct have lost their special legal significance under many states’ divorce laws, some unhappy spouses—perhaps intent on official recognition or vindication—have brought suits to recover civil damages for alleged misbehavior. In one such case, Twyman v. Twyman, Sheila Twyman, a divorcing wife and a previous rape victim, sought to recover damages for the infliction of emotional distress from her husband, William Twyman. He found sexual enjoyment only in bondage and domination activities, he persuaded her to participate in such activities, and he then sought gratification of his desires with another woman when Sheila found that she could not continue to take part. At trial, Sheila testified that “she experienced utter


365. E.g., Feltmeyer v. Feltmeyer, 798 S.W.2d 651 (Tex. 1993).
despair, devastation, pain, humiliation and weight loss because of William’s affair and her feelings that the marriage could have survived if only she had engaged in bondage activities.368 A divided Texas supreme court reversed a decision below permitting Sheila’s recovery for the negligent infliction of emotional distress. However, the court recognized a cause of action for intentional infliction of emotional distress for which Sheila might recover on remand, if she could establish the requisite intent or recklessness of William and the “outrageousness” of his conduct.369

Both Janet Halley370 and Brenda Cossman371 have analyzed this case at length. Each offers and explores several possible readings of the case.372 For example, according to one of Halley’s readings, the Twymans might have been experiencing what “was for both of them a paroxysm of intimacy, a sustained crescendo of erotic interrelatedness.”373 Cossman’s response to Halley invokes both queer theory and several different schools of feminism, also spinning out a range of “takes” on the case, from an understanding of Sheila Twyman as the gendered victim of William, the “deviant fetishist,”374 to “a critique of heteronormativity.”375

Certainly, a family law more attentive to women’s sexual pleasure might attempt to grapple with issues presented by such emotional-distress claims as well as perhaps civil suits to recover for other unhappy or unsatisfactory sexual

368. Id. at 636. The “mostly undisputed” trial testimony is summarized in the concurring and dissenting opinion of Justice Hecht. Id.

369. A plurality opinion by Justice Comyn reached the outcome stated in text, distinguishing claims for intentional infliction of emotional distress from those based on negligence. Justice Gonzalez wrote separately to emphasize that the husband’s actions and statements were all “intentional in nature.” Id. at 626 (Gonzalez, J., concurring). Chief Justice Phillips would recognize the tort of intentional infliction of emotional distress but hold it not actionable in the marital context. Id. at 626-29 (Phillips, C.J., concurring and dissenting). Justice Hecht, joined by Justice Enoch, would not recognize actions for intentional infliction of emotional distress because of the indeterminacy of the governing standard, “outrageousness,” especially in matters of sex. Id. at 629-40 (Hecht, J., concurring and dissenting). Dissenting, Justice Spector, joined by Justice Doggett, would have affirmed the plaintiff’s verdict below, contending that the marginalization of emotional distress claims reflects gender bias in tort law, expressing concern that emotional harm often occurs unintentionally, and challenging the position of those who would impose a marital exemption on recovery for emotional harms. Id. at 640-44 (Spector, J., dissenting).


373. HALLEY, supra note 11, at 362-63.

374. Cossman, Sexuality, supra note 10, at 866; see also id. at 860.

375. Id. at 867.
experiences. Making the case that something as pervasive as the pleasure gap meets the "outrageousness" test, however, would clearly require a transformation of prevailing attitudes. Even more significantly, Halley’s and Cossman’s various readings of Twyman reveal the incoherence of expecting juries or judges to resolve such controversies by choosing one “correct” interpretation of the “facts”—especially if one values, “the multiplicity of erotic desires, practices, and identifications.” Despite the force of the feminist case for expanded recognition of claims for emotional harm, it is difficult to dispute one of the Twyman dissenters, when he asserts that “concepts of a beneficial sexual relationship vary widely, and spouses may expect that some accommodation of each other’s feelings will be necessary for their mutual good” and when he predicts that “[a]ny breach of such an intimate and essential part of marriage may be regarded as outrageous by the aggrieved spouse and will often be the cause of great distress.”

Indeed, the prospect hypothesized earlier that more explicit legal recognition of women’s sexual pleasure might regulate, depress, and limit it becomes especially worth considering here. Yet, perhaps Twyman ultimately draws a pragmatic and meaningful line when it rejects negligence as a basis for tort recovery, while allowing claims for intentional or reckless infliction of emotional distress. A Massachusetts court recently adopted a similar distinction in reviewing a man’s damages claim for physical injury to his penis, based on the defendant’s conduct during consensual sex. The court explained that it would allow recovery for wanton and reckless conduct, but declined “to hold consenting adults to a standard of reasonable care in the conduct of private consensual sexual behavior.” It based this decision on the invalidation in Lawrence v. Texas of criminal prohibitions for certain adult consensual conduct and on the absence of both “comprehensive legal rules to regulate consensual sexual behavior, and . . . commonly accepted customs or values that determine parameters for the intensely private and widely

376. Several scholars have raised questions of this sort. See, e.g., Deckha, supra note 143; Cheryl Hanna, Sex Is Not a Sport: Consent and Violence in Criminal Law, 42 B.C. L. REV. 239 (2001); Kennedy, supra note 143; Monica Pa. Beyond the Pleasure Principal: The Criminalization of Consensual Sadomasochistic Sex, 11 TEX. J. WOMEN & L. 51 (2001).


379. Twyman, 855 S.W.2d at 636 (Hecht, J., concurring and dissenting).

380. See supra text accompanying notes 306-08.


382. Id. at 245.


384. To the extent that criminal prohibitions of the sexual behavior that caused the allegedly tortious injury operated as a defense to a civil claim, Lawrence eliminates the defense. See Martin v. Ziherl, 607 S.E.2d 367 (Va. 2005) (holding criminal fornication law, unconstitutional after Lawrence, does not provide a defense for a civil claim for transmission of herpes).
diverse forms of such behavior."

Such distinctions provide a plausible place to start. Developing a standard of "reasonable sexual conduct" for tort purposes, even if it could provide an incentive to care for a woman’s interest in clitoral pleasure, goes too far. An objective standard would seem to leave little room for the individuality, multiplicity, passion, and spontaneity that the cultural cliteracy project necessarily values. On the other hand, in many states negligent inattention to a woman’s sexual pleasure or disregard that she subjectively perceives as unreasonable does have important legal consequences—not as a basis for monetary damages but as one of a limitless range of subjective experiences that can prompt a no-fault divorce. This approach to making family law more culturally cliterate in practice, however, requires women to have the knowledge, resources, independence, and ability to seek divorce in response to such experiences.

b. Medical Malpractice

American tort law has remained largely silent about medical injuries that impair women’s sexual pleasure. For example, lawsuits seeking to recover for malpractice in managing labor and delivery typically focus on injuries sustained by the child and almost never on childbirth-related injuries affecting women’s future sexual enjoyment. Yet, other recent developments perhaps pave the way for a new look at childbirth practices and related tort litigation that takes into account sexual impairment. For example, the ritualized practice of female genital mutilation has been receiving attention in cases and legislation in this country. In addition, a woman’s inability to engage in and enjoy sexual relations has been judicially recognized as an impairment that limits a major life activity, for purposes of the Rehabilitation Act of 1973.

Only recently has the use of episiotomies, still one of the most common


386. This question is difficult, and thus my conclusion is probably an example of what Halley, borrowing from Duncan Kennedy, calls “decisionism”—a decision based on “intuition” rather than “warrant.” HALLEY, supra note 11, at 185-86; Duncan Kennedy, A Semiotics of Critique, 22 CARDOZO L. REV. 1147, 1162-63 (2001). I suspect, however, that my intuition might reflect how steeped my own views of sex have been in an understanding of family law that has not achieved cultural cliteracy.

387. See supra notes 214-15.

388. I am indebted to Laura Kessler for suggesting this application of cultural cliteracy.

389. See supra note 14 and accompanying text.


391. An episiotomy is a “surgical incision of the vulva to prevent laceration at the time or to facilitate vaginal delivery.” STEDMAN’S MEDICAL DICTIONARY 658 (28th ed. 2005).
medical procedures in the United States, begun to decline. This is so even though medical authorities question the efficacy of this routine surgical incision said to aid delivery, and the procedure can impair sexual pleasure by irreversibly injuring clitoral muscles, replacing erectile tissue in the vulva with scar tissue, interfering with the capacity to produce natural lubrication, and making future intercourse painful. Further, alternative practices have achieved equally successful outcomes without causing sexual harm.

Even among the small number of reported cases from litigation about episiotomies, about half seek recovery for injury to the child (as in the usual childbirth-related lawsuit). Of the twelve that concern injury to the woman, only three discuss impairment of the woman’s sexual future. All three of these

393. Id.
395. Hanna Ejegård et al., Sexuality After Delivery with Episiotomy: A Long-Term Follow-Up, 66 GYN. & OB. INVESTIGATION 1 (2008). The investigators, however, did not find a negative impact on orgasm or arousal. Id.
396. MOORE, supra note 392, at 602. Some of the alternative procedures, such as perineal massage and slowed delivery of the baby’s head, see id., would no doubt lengthen the time necessary for childbirth. Yet, financial factors have produced a current trend of very brief maternal hospital stays that preclude more time-consuming procedures. See, e.g., George J. Annas, Women and Children First, 333 NEW ENG. J. MED. 1647, 1648 (1995).
397. A search (sy,di (episiotomy!)) of the Westlaw database “ALLCASES” in September 2008 returned twenty-eight cases. The data on reported cases, of course, leave out information about cases that might have settled before trial.
398. Jones v. Minick, 697 N.E.2d 496 (Ind. Ct. App. 1998) (reversing summary judgment for defendant in suit alleging, as a result of doctor’s stroke during delivery, he performed episiotomy without anesthesia; scraped patient’s uterus; lacerated her genitals, and caused pelvic pain, excessive bleeding, PTSD, and sexual dysfunction); Kummer v. Cruz, 752 S.W.2d 801 (Mo. Ct. App. 1988) (reversing summary judgment for defendants in suit for allegedly improperly performed episiotomy causing lacerated sphincter, rectal-vaginal fistula, and lasting pain during sexual intercourse); McFee v. Tulsa OB-GYN Ctr., 798 P.2d 614, 616 (Okla. 1990) (reversing summary judgment for defendants in suit alleging improperly performed episiotomy causing rectal leaking, infection, and infertility and making sexual relations painful or impossible).

malpractice cases mention sexual complications in a much larger context that includes other serious medical injuries. And to the extent that these cases provide detail about the sexual consequences of the alleged wrong, they assert pain during sexual intercourse.

Given the reputation of obstetrical practice as a highly litigious setting, the dearth of claims for sexual injuries stands out, especially in light of the controversial but extensive use of episiotomies. What insights about this picture might emerge from enhanced cultural cliteracy? One might venture several different speculations and conclusions. Perhaps the dearth of litigation suggests that such injuries rarely occur, that juries are unlikely to value them sufficiently to justify lawsuits, that women expect little enjoyment from sexual activities in any event, or that the baby’s condition—healthy or impaired—overshadows all else because of maternal norms of self-sacrifice. Further, when sexual harm makes a rare appearance in such suits, the asserted problem concerns pain during penile-vaginal penetration, with no mention of the effect on clitoral pleasure. Because the injury suffered therefore implicates a male partner’s interests, it should come as no surprise that the patient’s husband often (in two of the three relevant cases) joined his wife as a plaintiff. His claim, then, resembles a loss of consortium claim, seeking recovery for loss of companionship (including sexual companionship) as the result of physical injury to his spouse. Finally, enhanced cultural cliteracy could bring new scrutiny to other medical procedures that might produce sexual injuries. Medical evidence indicates that hysterectomies often affect sexual functioning and result in reduced sexual desire. What implications follow for informed consent by hysterectomy patients? What should be the value of the lost sexual feelings if the hysterectomy was performed unnecessarily? Also, now that plastic surgery offers to women the ability to seek genital cosmetic surgery, including


399. See supra note 398 (first paragraph).

400. Kummer, 752 S.W.2d at 804; McFee, 798 P.2d at 616.

401. Cf. Waldman & Herald, supra note 13, at 289 (exploring “how cognitive biases and distortions taint medical and legal understandings of women”).

402. See Jones, 697 N.E.2d 496; Kummer, 752 S.W.2d 801.

403. Cf. Erzernak v. Progressive Sec. Ins. Co., 899 So. 2d 870 (La. Ct. App. 2005) (reducing wife’s consortium damages because there was no evidence that husband’s sexual abilities were impaired); see generally, e.g., Conn. Ins. Guar. Ass’n v. Fontaine, 900 A.2d 18 (Conn. 2006).


405. See id.
labiaplasty, vaginoplasty, and hymenoplasty, the possibilities for sexual harms resulting from medical malpractice increase significantly. With these on-the-ground realities, the Western clitoridectomy invoked by Stiritz becomes much more than a metaphor.

3. Sexual Aids and Supports

Sexual activity is portrayed, in some of its most idealized descriptions, as an experience whose physicality and energy are self-sustaining and untethered, shutting out the rest of the material world. Even the channeling-story proponent David Blankenhorn writes of “sweaty, needy, flesh-and-blood, behind-closed-doors sex” in making explicit one of the essential, but often unarticulated, ingredients of marriage, as understood in family law. Yet, for all the talk and imagination of “pure sex” that takes place in its own time and space, individuals often rely on a variety of external supports and interventions to facilitate sexual experiences.

Perhaps the most visible of these today is Viagra and similar medications designed to overcome male erectile dysfunction. Advertisements for these products (sometimes featuring distinguished members of the public) appear pervasively on mainstream television, in mainstream newspapers and magazines, and in “family spaces” such as Major League Baseball stadiums. The ubiquity

406. See, e.g., Labiaplasty (large labia reduction) and Vaginoplasty (vaginal rejuvenation), http://labiaplastysurgeon.com/ (last visited Feb. 9, 2008); see also Natasha Singer, A Spa for Those Women Concerned about “Pelvic Fitness,” N.Y. TIMES, July 3, 2008, at G3.

407. The American College of Obstetrics and Gynecology (ACOG) advises against cosmetic vaginal procedures due to lack of safety and efficacy data, warning of the possible negative impact on sexual functioning. See AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, ACOG ADVISES AGAINST COSMETIC VAGINAL PROCEDURES DUE TO LACK OF SAFETY AND EFFICACY DATA (2007), available at http://www.acog.org/from_home/publications/press_releases/nr09-01-07-1-cfm. ACOG specifically warns of the possibility of complications arising from such surgeries, including “altered sensation, dyspareunia (pain during sexual intercourse), adhesions, and scarring.” Id. ACOG advises that “an honest discussion about the wide variation in the appearance of normal genitalia could reassure women who are insecure about the look of their own genitalia.” Id. ACOG further recommends that “Ob-gyns whose patients ask about these procedures should discuss the reason for the request and perform a physical evaluation for any signs of symptoms that may indicate a need for surgical intervention. Women who want to improve their sexual response should be evaluated for sexual dysfunction, and nonsurgical interventions, including counseling, should be considered.” Id.

408. Stiritz, supra note 3, at 249-54; see supra note 14 and accompanying text.

409. BLACKENHORN, supra note 35, at 15.

410. See supra note 232 (reporting loss of sense of time during orgasm).


412. Susan Frelich Appleton, Unraveling the “Seamless Garment”: Loose Threads in Pro-Life Progressivism, 2 U. ST. THOMAS L.J. 294, 297-98 (2005); see, e.g., Chris Conway, Recalling the Madness, N.Y. TIMES, Mar. 30, 2008, Week in Review Section, at 5 (retrospective on tenth anniversary of Viagra’s approval by the FDA); Harry Jackson, Jr., Viva Viagra, St. LOUIS POST-DISPATCH, Mar. 24, 2008, at H1 (same). Only recently have tests begun on a treatment for the post-menopausal decline in women’s libido. See Janet Cromley, A Boost for
of these advertisements signals that male participation in sexual activities is so expected and so utterly ordinary that such public promotions do not significantly differ from commercials for cars, financial planning services, or fast food.

Kim Buchanan finds a different example in First Amendment jurisprudence. She discerns solicitude for “straight men’s sexual pleasure” in the constitutional protection of a variety of practices and materials “designed to inspire and aid [men’s] masturbation,” including books, magazines, films, photographs, nude dancing, and phone sex.\textsuperscript{413}

However, in contrast to both the visible promotion of Viagra and the constitutional protection of the pleasure-facilitating items cited by Buchanan, some states limit access to products and interventions that support women’s sexual experiences. A more culturally cliterate family law requires a close look at the existing regime.

\textbf{a. Sex Toys}

Women often find that vibrators and similar sex toys facilitate orgasmic pleasure through clitoral stimulation. Originally employed in medical treatment to induce therapeutic “paroxysms” in “hysterical” women,\textsuperscript{414} such devices are commonly used for masturbation or soloing\textsuperscript{415} as well as in partnered sex,\textsuperscript{416} including in marriage.\textsuperscript{417}

Courts are divided on the constitutionality of legislation outlawing the distribution of vibrators and other sex toys.\textsuperscript{418} Recently, the United States Court of Appeals for the Fifth Circuit held that “the substantive due process right to sexual intimacy”\textsuperscript{419} recognized by the Supreme Court in \textit{Lawrence v. Texas}\textsuperscript{420} invalidates a Texas statute criminalizing “the selling, advertising, giving or lending of a device designed or marketed for sexual stimulation unless the defendant can prove . . . a statutorily-approved purpose.”\textsuperscript{421} Other theories


413. Buchanan, supra note 64, at 1246-47.
415. \textit{See supra} notes 270-71 and accompanying text.
417. \textit{See supra} notes 257-258 and accompanying text.
419. Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 744 (5th Cir. 2008).
421. Reliable Consultants, Inc., 517 F.3d at 741.
advanced that might support constitutional protection for access to sex toys, especially for women, include those based on privacy interests; a right to sexual expression under the First Amendment, with sexual activity understood as a form of gender expression; “equal sexual liberty” for women under the Equal Protection Clause; or simply a negative “right to sex” implied in various constitutional provisions.

Contrary to scholarly predictions, however, in some jurisdictions these distribution bans have survived constitutional challenges even after Lawrence rejected morality as sufficient justification to criminalize private, adult, consensual, sexual conduct. For example, in extended litigation against Alabama’s ban on commercial distribution of sex toys, the court acknowledged the argument that restrictions on access amount to restrictions on use, but nonetheless found Lawrence inapplicable to a statute prohibiting “public, commercial activity” and deemed the protection of public morals a sufficient justification under rational-basis review.

Clearly, a more culturally cliterate family law would eliminate restrictions on access to sex toys, whether through constitutional adjudication or legislative reform. Indeed, if family law elects to place its hopes for the channeling story in popular culture and the marketplace of ideas, with expectations that those seeking a more sexually satisfying marriage should take responsibility for

422. See Herald, supra note 13, at 6 (“constitutional liberty and privacy interests”). For an earlier analysis of a right to privacy that includes sexual autonomy, see David A.J. Richards, Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution, 30 Hastings L.J. 957 (1979). For cases invoking privacy to strike down bans on the distribution of sex toys, see, for example, People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc., 697 P.2d 348, 369 (Colo. 1985) (right to privacy); State v. Hughes, 792 P.2d 1023 (Kan. 1990) (right to privacy and overbreadth).


424. See Buchanan, supra note 64; see also Law, supra note 64.


429. Williams, 478 F.3d at 1322.

430. Id. at 1322-23.
achieving this goal, then access to supportive information and products becomes a pre-condition. In fact, we should expect to see advertisements for sex toys on a par with those for Viagra, including recommendations by prominent public figures. (Instead of a testimonial for Viagra by former Senator and presidential candidate Bob Dole, can we imagine one for a vibrator by a similarly situated woman, say, Senator Hillary Clinton or Governor Sarah Palin? Why not?)

Such enhanced access to vibrators might well extend to minor as well as adult females, perhaps under authority striking down prohibitions on minors’ access to contraceptives. Allowing women, young and old, to become more familiar with their bodies and their capacity for pleasure not only increases sexual self-efficacy, but also fosters empowerment in other aspects of life, as Stiritz’s preliminary empirical data show. The promotion of sex toys can “create models of sexual agency[, making] feminism relevant to women’s lives.” Such sexual agency can forestall some of the risks and inequities that make hooking up—as currently practiced—problematic, including the failure to protect against pregnancy and disease, and the prioritization of men’s pleasure, with women often seeking only to please others without experiencing pleasure themselves. Sexual agency can also provide valuable self-knowledge. Certainly, this is one reason why then-Surgeon General Jocelyn Elders offered her ill-fated suggestion for including discussion of masturbation in education designed to promote sexual health and why others continue to advocate this approach.

A problem with even some of the judicial opinions overturning restrictions on sex toys is that they emphasize the medical needs of otherwise anorgasmic women. In this way, these “liberating” cases return to the old views of vibrator use as a marker of sexual pathology—thus forging too close a conceptual link to modern therapies like Viagra. This approach simply reflects the assumption

431. See supra notes 261-273 and accompanying text.
432. See supra note 411.
433. Carey, 431 U.S. at 691-99 (1978) (plurality opinion); id. at 702-03 (White, J., concurring).
434. See supra note 327 and accompanying text.
436. See supra notes 201-205 and accompanying text.
437. See England et al., supra note 201, at 535-39 (demonstrating gendered pleasure gap in hooking up); Lindemann, supra note 418, at 342-43 (epidemiological argument for sex toys); see also U.S. Dep’t Health & Human Servs., supra note 203 (announcing study that finds one in four teenage girls has a sexually transmitted disease).
438. See, e.g., Levine, supra note 296, at 185; Fine & McClelland, supra note 89, at 324.
439. See supra note 318 and accompanying text.
440. See Lindemann, supra note 418, at 336-41; see also supra note 257 and accompanying text (conceding wisdom of emphasizing medical problems as a litigation strategy).
441. See supra note 414 and accompanying text.
442. See supra notes 411-12 and accompanying text.
that only penile-vaginal penetration is "normal" or "natural."\footnote{443}{See supra note 112 and accompanying text.}

Yet, as David Richards wrote some years ago in a slightly different context, "human sexuality . . . serves complex imaginative and symbolic purposes,"\footnote{444}{Richards, supra note 422, at 1001-02.} and "for humans to experience sex is never, even in solitary masturbation, a purely physical act, but is imbued with complex evaluational interpretations of its real or fantasied object, often rooted in the whole history of the person from early childhood on."\footnote{445}{Id. at 1002.} In fact, bringing "solo sex" out of masturbation's long historical shadows, by legitimizing sex toys without pathologizing their use, could contribute affirmatively to family law's channeling story in two different ways. First, solo sex offers alternatives to some of young women's sexual activities, in turn counteracting the message that penile-vaginal penetration is all that "counts"\footnote{446}{See supra note 299 and accompanying text.} and disrupting the stereotype that females should want only to be wanted (and thus should do anything that makes them wanted).\footnote{447}{GIDDENS, supra note 82, at 16 ("masturbation is widely recommended as a major source of sexual pleasure, and actively encouraged as a mode of improving sexual responsiveness on the part of both sexes").} Second, the self-knowledge gained from solo sex can provide a foundation on which to strengthen a present relationship or to build a future relationship\footnote{448}{See supra notes 219, 282 and accompanying text.}—thus helping to achieve the ""richly rewarding sex life" [that] is the central task of a good marriage."\footnote{449}{See supra note 259 and accompanying text: see also The Joy of Christian Sex Toys, supra note 251 (reporting business formed to promote "sin-free" sex toys "to add spark to [Christian couples'] romantic lives"). This understanding contrasts with a historical view that touted marriage as a cure for masturbation, both male and female. Robert H. MacDonald, The Frightful Consequences of Onanism: Notes on the History of a Delusion, 28 J. Hist. IDEAS 423, 425 (1967) (quoted in Williams v. Pryor, 220 F. Supp. 2d 1257, 1282 n.108 (N.D. Ala. 2002)).}

Read in this light, the Fifth Circuit's recent treatment of solo sex reflects at least implicitly a culturally cliterate approach.\footnote{450}{Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 744 (5th Cir. 2008).} In striking down the Texas ban on the distribution of sex toys, the majority, finding \textit{Lawrence} applicable, reasoned that "[a]n individual who wants to legally use a safe sexual device during private intimate moments alone or with another is unable to legally purchase a device in Texas, which heavily burdens a constitutional right."\footnote{451}{Id. at 745.} The court went on to deem inadequate, again under \textit{Lawrence}, Texas's asserted interest in "public morality," specifically its interest in "discouraging prurient interests in autonomous sex and the pursuit of sexual gratification unrelated to procreation and prohibiting the commercial sale of sex."\footnote{452}{Id. at 745.} In addition, although the court had no reason to resolve the extent to which minors can or should have access to sex toys, the court rejected the state's asserted interest in protecting
minors.\textsuperscript{453} The court acknowledged a compelling governmental interest “in protecting children from improper sexual expression,” but found no rational connection between the statute and this objective\textsuperscript{454}—thus leaving undefined for now the boundary between “improper” and “proper.”

\textbf{b. Reproductive Autonomy}

Over the years, many authorities have articulated the close relationship between reproductive freedom and gender equality, one of contemporary family law’s salient values. This relationship has several different facets. The ability of women to enjoy an equal opportunity to participate in the public sphere depends on their ability to limit pregnancy and maternity. Margaret Sanger recognized this truism when she spearheaded the movement to make birth control available in the early 1900s,\textsuperscript{455} and a majority of the Supreme Court recognized it as well in affirming a right to choose abortion in 1992 in \textit{Planned Parenthood v. Casey}.\textsuperscript{456}

An additional dimension of the relationship between reproductive control and gender equality concerns participation in “private” conduct. For women who want to avoid all risk of procreation, the ability to participate in sexual intimacy—and to feel free to enjoy fully the experience—requires access to contraception and, should that fail, abortion. Sylvia Law, for example, has argued for a reading of the Supreme Court’s protection of contraception and abortion that would include “an affirmative interest in sexual expression.” As I’ve written before, to the extent that “a woman’s confidence in controlling reproduction (despite the risk of contraceptive failure) unlocks for her the sexual enjoyment so prized among men, the mere availability of abortion becomes an important element of a full, free, and equal life.”\textsuperscript{457}

Today, protection for a woman’s right to engage in sex while avoiding reproductive consequences has become particularly vulnerable. Some

\begin{itemize}
\item \textsuperscript{453} Id. at 745-46.
\item \textsuperscript{454} Id.
\item \textsuperscript{455} \textit{LINDA GORDON, THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA} 145 (3d ed. 2002).
\item \textsuperscript{456} \textit{Planned Parenthood of Se. Pa. v. Casey}, 505 U.S. 833, 856 (1992):
\begin{quote}
[For two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.
\end{quote}
\item \textsuperscript{458} \textit{Law}, supra note 64, at 225-28. Margaret Sanger recognized this point too. See \textit{GORDON}, supra note 455, at 145 (noting influence of “sexual liberation theorists” on Sanger’s views); see also, e.g., Buchanan, supra note 64, at 1272 (asserting that in \textit{Lawrence v. Texas}, 539 U.S. 558 (2003), the Court “suggests that, like reproductive liberty and privacy, sexual liberty is a fundamental right”).
\item \textsuperscript{458} \textit{Appleton}, supra note 412, at 298; see also Karst, supra note 50, at 654.
\end{itemize}
pharmacists with personal objections to birth control, especially emergency contraception, and like-minded legislators have sought to limit women’s access. Activists supporting abstinence-only sex education and seeking to confine sexual activity exclusively within marriage condemn what they call “the contraceptive mentality” as a path to abortion and a license for “consequence-free sex.” Some courts still fail to recognize the discrimination against women resulting from an employer’s failure to cover contraceptives in its employee health care plan. In addition, opposition to immunizing young females against the human papillomavirus (HPV), which can cause cervical cancer, reveals a belief that unwanted consequences beyond procreation constitute appropriate tools for controlling women’s sexuality. All of these recent developments reflect an understanding of women in which sexual activity, marriage, and procreation should be inextricably linked.

Not surprisingly, this view has acquired special force in the ongoing siege against legalized abortion. Now, in addition to or in place of familiar anti-abortion efforts emphasizing the fetus, activists are pursuing a new strategy that purports to focus on women and their own interests. Proponents of what Reva Siegel calls “woman-protective abortion restrictions” assert that abortions harm women both physically (increasing cancer risks) and emotionally (triggering depression and suicide ideation)—claims contested by many medical experts. This approach, which has established a foothold in some state legislatures and state campaigns for ballot initiatives, received its most prominent endorsement when a majority of the Supreme Court in Gonzales v. Carhart upheld the federal “Partial Birth Abortion Ban Act” in part to protect

460. See supra notes 99-103 and accompanying text.
464. Reva Siegel has documented the development of this approach. Siegel, supra note 241.
465. Id.
466. See, e.g., Emily Bazelon, Is There a Post-Abortion Syndrome?, N.Y. TIMES MAG., Jan. 21, 2007, § 6, at 41.
467. See Siegel, supra note 241 (tracing use of this approach in enactment of a legislative ban on abortion in South Dakota, which voters ultimately overturned in a referendum).
TOWARD A “CULTURALLY CLITERATE” FAMILY LAW?

women from their own decisions and from subsequent regret for those choices.\footnote{469}

One element of the woman-protective rationale for abortion restrictions claims the that women do not freely choose abortion, but rather often experience direct coercion from abortion providers, family members, and sexual partners and indirect pressures from economic circumstances, educational demands, and other “situational” factors.\footnote{470} The paternalism\footnote{471} inherent in this approach is especially pernicious; it explicitly undermines women’s agency, while simultaneously caricaturing all women as both victims of abortion providers and guilt-ridden mothers.\footnote{472} This picture leaves no room for women’s sexual pleasure and enjoyment.

Yet, Siegel’s critique of the woman-protective rationale purports to find some “good news” here—in that “the antiabortion movement itself seems to be acknowledging that restrictions on abortion must respect women’s autonomy and welfare, even if Americans continue to argue about what this means.”\footnote{473} In essence, the shift of focus to women might permit a more nuanced inspection of a variety of constraints on women’s agency that prompt abortion decisions and other choices. For example, the anti-abortion organization Feminists for Life has pointed out that pregnant undergraduates have easy access to abortion services, but face obstacles in obtaining prenatal care and student housing that would allow them to room with their babies.\footnote{474} Further, demographic data reveal higher abortion rates among poor and minority women than other women,\footnote{475} although

\begin{quote}
Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. . . . While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.

In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails. . . .

. . . It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.
\end{quote}

\footnote{127 S. Ct. at 1634 (citations omitted).}


\footnote{474. See Appleton, supra note 412, at 295.}

\footnote{475. According to the Guttmacher Institute, “[t]hirty-seven percent of abortions occur to black
no one would contend that poor and minority women simply know better than other women how to exercise their reproductive autonomy! Once one starts to look behind women's choices, however, paternalism can easily swallow any meaningful sense of agency. An effort to neutralize "situational" factors can ultimately lead to the conclusion that abortions must be banned in the name of choice, as Sam Bagenstos has argued.

A culturally elitrate analysis of these family law issues promises no way out of the quicksand, but it does uncover a different perspective from which to theorize about contraception and abortion. These interventions—like all of family law—accept penile-vaginal penetration as the sexual paradigm. In other words, the argument that contraception and abortion enhance women's sexual freedom assumes that the sex that women want to have is penile-vaginal penetration.

How would we think about contraception and abortion if we challenged this paradigm, decentering penile-vaginal penetration? If family law developed an affirmative discourse of women's sexual pleasure, how might the understanding of reproductive rights change? What would legal respect for and validation of sexual practices focused on clitoral stimulation mean for the law of contraception and abortion? To what extent does the critical importance of access to contraception and abortion currently depend on an unstated assumption that women cannot or will not say "no" to penile-vaginal penetration, even if on some occasions some women would prefer some other activity?

When Justice Ginsburg, dissenting in *Gonzales v. Carhart*, writes that "not all pregnancies . . . are wanted, or even the product of consensual sexual activity," she cites authorities that establish the frequency of domestic violence and sexual assault. A culturally elitrate reading of Justice Ginsburg's opinion might go further to ask whether all apparently consensual intercourse is genuinely consensual (or "welcome," in Robin West's language), particularly if women's orgasmic pleasure need not require

women, 34% to non-Hispanic white women, 22% to Hispanic women and 8% to women of other races." GUTTMACHER INSTITUTE, IN BRIEF, FACTS ON INDUCED ABORTION IN THE UNITED STATES 1 (2008), http://www.guttmacher.org/pubs/fb_induced_abortion.pdf. Further, "[t]he abortion rate among women living below the federal poverty level ($9,570 for a single woman with no children) is more than four times that of women above 300% of the poverty level (44 vs. 10 abortions per 1,000 women)." *Id.* at 2.

476. *See supra* note 470 and accompanying text.
479. *Id.*
480. West, *supra* note 14, at 4-5 (making the point that consensual sex can also be unwelcome sex).
Of course, this reading veers close to the observations offered some twenty-five years ago by dominance feminist Catharine MacKinnon that “abortion facilitates women’s heterosexual availability” and “frees male sexual aggression.” 482 If anti-abortion activists wish to liberate women from social constraints on their agency, then they might gain some useful insights from Adrienne Rich’s work on “compulsory heterosexuality.”483 Thus, perhaps one can find room to consider women’s sexual pleasure within a “woman-protective” project, but only if cultural cliteracy displaces both the stereotyping and the assumptions of paternalism found in the present anti-abortion discourse.

Cultural cliteracy adds content to the asserted goal of “respect [for] women’s autonomy and welfare.”484 Cultural cliteracy not only emphasizes the positive dimensions of sexual pleasure in women’s lives, but also helps illuminate problems uncovered by other feminist analyses, including MacKinnon’s conflation of women’s consensual and nonconsensual sex,485 West’s notion of consensual but unwelcome sex,486 and Elizabeth Emens’s concept of adaptive desires.487

IV. CONCLUSION: BEYOND FAMILY LAW ON ITS OWN TERMS

Most of the specific applications of cultural cliteracy explored thus far challenge family law, but perhaps only by nibbling at its edges. The analysis prompted by woman-protective abortion regulations, however, revives a more profoundly challenging thought exercise embodied in these counterfactual

481. See supra note 117 and accompanying text; cf. Cossman, Sexuality, supra note 10, at 864 n.63 (noting the importance of “the problematization of consent” in feminist analyses of sexual activity). Whatever the prevalence of hooking up among young persons, see supra notes 201-05 and accompanying text, there is also evidence of considerable unwanted sexual contact within that population. See Elizabeth Redden, Unwanted Sexual Contact, in Context, INSIDE HIGHER ED, May 8, 2008, http://www.insidehighered.com/news/2008/05/08/sex (reporting study at University of New Hampshire).

482. Catharine A. MacKinnon, Privacy v. Equality: Beyond Roe v. Wade (1983), in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 93, 99 (1987); see also id. at 94 (“Liberals have supported the availability of the abortion choice as if the woman just happened upon the fetus. The political right, imagining that the intercourse preceding conception is usually voluntary, urges abstinence, as if sex were up to women, while defending male authority, specifically including a wife’s duty to submit to sex.”); id. at 97 (“Reproduction is sexual, men control sexuality, and the state supports the interest of men as a group.”).

483. See Rich, supra note 70.
484. See Siegel, supra note 473, at 1690.
485. See West, supra note 14, at 7, 12.
486. Id. at 28.
487. See supra notes 222-23 and accompanying text.
questions: What would women, unconstrained, really want? How would a more culturally cliterate family law change their choices?

In fact, although cultural cliteracy might save the channeling story from incoherence, given family law’s express teleology, cultural cliteracy also could pose threats to some of family law’s objectives. Cultural cliteracy raises questions about the choice to make or to avoid the commitment that many today see as the essential element of marriage. Further, like debates from past times summarized by marriage historian Stephanie Coontz, a culturally cliterate family law must ask whether “modern values of individualism, the ‘pleasure principle,’ sexual expressiveness, and women’s rights would destabilize marriage.” Put differently, if the clitoris is, as Stiritz asserts, “an obdurate reminder of women’s independence and power and supports women’s liberation,” would an affirmative discourse of sexual pleasure for women prove subversive of traditional marriage by making women more confident, sexually self-sufficient, interested in female partners, or disinterested in monogamy?

Perhaps—but only if family law assumes that women alone must shoulder responsibility for the “sexual regularity” entailed by the channeling story. Yet, certainly, the channeling story has persisted notwithstanding stereotypical understandings of male sexuality and the recognition of men’s interest in sexual pleasure both in culture and in family law. Thus, if the primary threat posed by cultural cliteracy emerges from its rejection of women’s traditional role as sexual “gatekeeper” or “police,” then family law’s recent embrace of gender equality requires exploration of how this responsibility—this burden—might be shared or

488. As Stiritz considers the question in the context of particular sexual activity: “What do women want?” This has been a hard question to answer because the clitoris has been erased from the lexicon. Therefore, words accurately describing female bodies and expressing women’s desires either do not exist or are not easy to use.” Stiritz, supra note 3, at 259. I pose the question in a larger sense, wondering about the meaning of voluntariness and choice in a system designed to influence preferences. See supra note 97 and accompanying text; cf. Halley, supra note 11, at 301-02 (examining notions of “wantedness” and “unwantedness” in sex).

489. See Karst, supra note 50, at 637 (“The full value of long-term commitment is also realizable only when there is freedom to remain uncommitted.”).

490. Coontz, supra note 50, at 225 (discussing views in the late 1940s).

491. Stiritz, supra note 3, at 244.

492. See Denaye-Elmi, supra note 120.

493. See, e.g., Cornell, supra note 164; Emens, supra note 29; Shanley, supra note 347, at 196-97; see also, e.g., Blankenhorn, supra note 35, at 149, 164. But cf. Graff, supra note 28, at 170 (asserting that the Church’s imposition of monogamy on marriage represented an advance for women because the insistence on monogamy was an acknowledgment that women’s “inner lives were as valuable as their husbands”); id. at 187 (arguing that marriage rules and monogamy are necessary to prevent exploitation of the weak and “to bring justice to human commitments”). Anthropologists have noted that monogamy is not a marital norm in all cultures, See, e.g., Lawrence Rosen, Anthropological Perspectives on the Abolition of Marriage, in MARRIAGE PROPOSALS, supra note 65, at 147, 152-53.

494. Carbone, supra note 40, at 812.

495. See, e.g., supra notes 89, 154 and accompanying text; see also, e.g., Blankenhorn, supra note 35, at 145-46 (women’s role in “domestication” of men); Wax, supra note 355, at 592, 595-96 (describing role of some women in enforcing expectations of monogamy).
rethought and replaced. Further, transforming the normative sexual landscape for
women might well have positive effects for men too—as challenges to gender
roles and stereotypes routinely do.\footnote{See, e.g., Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003) (noting how stereotypes about women’s domestic roles led employers to discourage men from taking family leave).}

Ultimately, determining whether family law can survive cultural cliteracy
requires deep engagement with questions about family law’s evolution and the
trajectory ahead. \textit{Goodridge}’s encomium to gender-neutral “commitment”\footnote{See supra note 174 and accompanying text.} offers one possible point of departure that merits exploration if a culturally
cliterate family law continues to emphasize marriage and monogamy. Alternatively, as June Carbone has suggested in a slightly different context, managing fertility rather than sexuality might take on predominant
significance.\footnote{Carbone, supra note 40, at 831 (describing “new middle-class morality”).} A focus on controlling fertility, in turn, would put new pressure on abortion and contraception law while also inviting a more critical look at the
penile-vaginal-penetration paradigm. And, of course, attempts to transform
family law more fundamentally—by taking the State out of the marriage
business, abolishing marriage, formulating new criteria for the distribution of
benefits and obligations now triggered by marriage, or shifting the focus from
the sexual dyad to the dependency exemplified by the mother-child
relationship—might gain more traction. In other words, an effort to bring
cultural cliteracy to family law might make the channeling story more coherent,
or it might accentuate the case for more far-reaching reforms and
reconceptualizations, in turn providing new support for the sorts of challenges
that I set aside earlier.

An attempt to make more sense of family law as it is ultimately reveals
new grounds to question its very foundations. This consequence might seem
contradictory, but the paradox simply highlights the critical turning point that the
field has reached.\footnote{For another example of a “paradox” in which an effort for incremental reform exposes more far-reaching challenges, see \textsc{Blankenhorn}, supra note 35, at 133-34 (describing Judith Stacey’s and Nan Hunter’s advocacy for same-sex marriage). David Meyer posits a somewhat different paradox when he wonders whether the impulse to respect the importance of family connections and to recognize diverse family forms could “ultimately sap family of its distinctive value and vitality.” See Meyer, supra note 56, at 475-77.} “A half-changed world” is the phrase that Peggy Orenstein
uses to describe the context in which contemporary women struggle to figure out
their place, in the face of publicly embraced promises of gender equality and
agency on the one hand, and the brute reality of privately experienced limitations
on the other.\footnote{ORENSTEIN, supra note 208.} Family law, likewise “half-changed,” also must figure out its role.