Familial Norms and Normality Colloquium Celebrating 25th Anniversary of Feminism and Legal Theory Project

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FAMILIAL NORMS AND NORMALITY

Clare Huntington*

ABSTRACT

Social norms exert a powerful influence on families. They shape major life decisions, such as whether to marry and how many children to have, as well as everyday decisions, such as how to discipline children and divide household labor. Emotion is a defining feature of these familial social norms, giving force and content to norms in contexts as varied as reproductive choice, parenting, and same-sex relationships. These emotion-laden norms do not stand apart from the law. Falling along a continuum of involvement that ranges from direct regulation to choice architecture, state sway over social norms through their emotional valence is an under-recognized aspect of the family-state relationship.

Although scholars have explored aspects of familial social norms, current accounts offer an incomplete picture of both families and family law because they insufficiently account for the elemental relationship between social norms, emotion, and the state. By exploring the confluence of these forces, this Article makes two contributions to the literature. Descriptively, this Article identifies the centrality of emotion in creating and defining familial social norms. First, emotion is often the content of a familial social norm; therefore it is impossible to understand the norm without understanding emotion. Second, emotions can trigger social norms, with particular emotions leading to changes in behavior. Third, familial social norms carry tremendous emotional weight, which explains why the cost of noncompliance can be particularly high in the family context. Finally, the emotion-laden nature of familial social norms complicates any predictive enterprise for law and policy.

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Normatively, a more complete understanding of the operation of familial social norms allows for more effective regulation of families. The state should recognize that emotion is a powerful point of entry when it seeks to influence norms and shape behavior. There are risks to this influence, but exposing the uncomfortable reality that the law often tries to manipulate our affective lives creates an opportunity to use this dynamic for more appealing ends, such as cultivating greater tolerance for parental conduct that falls outside dominant norms.

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INTRODUCTION

A young boy hits his brother in a crowded subway, and his father’s mind races while deciding how to discipline the child. A young woman and man anxiously discuss the future of their relationship, trying to decide whether to marry, move in together, or remain in separate homes. A thirty-nine-year-old single woman considers using donated sperm to become pregnant and raise a child on her own. A gay couple puzzles through who should attend the Mother’s Day celebration at their children’s school. A mother contemplates breastfeeding her baby in a crowded public park. A teenager considers having sex with his girlfriend. A lesbian, not out in her workplace, ponders bringing her partner to the annual holiday party. A visibly pregnant woman decides whether to order a glass of wine in a restaurant. Another woman considers terminating her pregnancy. A couple thinks seriously about homeschooling their young children.

These kinds of decisions, momentous and prosaic, form the core of family life. Yet no one makes them independently. Instead, individuals make these decisions within a tight web of social norms. Social norms are generally understood to be the rules of behavior that individuals follow independent of legal obligation or formal penalty for noncompliance. The power of social norms comes from the understanding that individuals are attentive to the views of others, seeking their approval and avoiding disapproval.

While social norms affect behavior in nearly every realm of human life, norms particularly shape the relationships and intimate decisions that fall within the ambit of family law. These powerful influences often eclipse the

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3. Although there are several accounts of the role of social norms in shaping familial behavior, these explorations have paid insufficient attention to the importance of emotion. See, e.g., Margaret F. Brinig & Steven L. Nock, “I Only Want Trust”: Norms, Trust and Autonomy, 32 J. Socio.-Econ. 471, 478–85 (2003) (arguing that custody rules contribute to a loss of trust by society toward a noncustodial parent, which in turn undermines parenting norms); Elizabeth S. Scott, Social Norms and the Legal Regulation of Marriage, 86 Va. L. Rev. 903 (2000).
significance of direct legal regulation of families. For example, although the state does not require parents to raise children in a certain manner, community-specific social norms influence nearly all aspects of parenting, such as where a child sleeps at night, whether and for how long to breastfeed, and how much screen time to allow a child. It is hard to imagine a family that operates independent of at least some social norms, even if the family is merely rebelling against the norms.

If social norms are integral to familial behavior, emotion is integral to these norms. The father in the subway is conscious that, based on the disciplinary measure he chooses, others will pass judgment on how much he loves his child. The lesbian knows that some in her community will embrace her relationship out of loving acceptance while others will react with disgust. The woman pondering artificial insemination understands that many people vilify single mothers. The breastfeeding mother may face everything from revulsion to sexual desire from passersby. The pregnant woman considering an abortion knows that her decision will be met with judgments about her maternal instincts and that some will see her as selfish and unfeeling or worse.

The emotional component of social norms is unsurprising because emotion is interwoven into all aspects of human life, particularly family life. Critical turning points as well as daily familial interactions can generate multiple emotions, including love, joy, concern, sympathy, and forgiveness, as well as anger, guilt, fear, and resentment—often in complex and conflicting patterns. Further, although the family is often conceptualized as a private institution, it has a public, decidedly performative, aspect to it. Accordingly, in addition to strong and varied emotions in families, there can be a tumult of emotions about families.

L. REV. 1901, 1902–03 (2000) (describing the complicated relationship between the law and social norms surrounding marriage). For further discussion of the existing literature on familial social norms, see infra Part I.C.  

Emphasizing the importance of familial social norms is not intended to understate the centrality of direct regulation, particularly in determining entry and exit from families. For example, when the state refuses to recognize the relationship between the partners in a same-sex couple, the state fundamentally affects that couple's ability to function as a family. The point is that familial social norms often start where direct regulation ends, and that a tremendous amount of family life takes place outside the direct reach of formal law.

As discussed below, familial social norms vary greatly by community, and therefore it is not possible to say that any one social norm predominates. See infra text accompanying notes 91–102. The power of familial social norms, however, remains constant.

The powerful emotions that attend intimate relationships and personal choices give exceptional strength to familial social norms. As this Article elaborates, emotion plays several key roles in familial social norms. First, because emotion often provides the content of a familial social norm, it is impossible to understand the norm without understanding emotion. For example, a prevailing norm is that parents love their children, but without understanding parental love, it is difficult to understand what the norm encompasses. Second, emotion can instigate norms. Thus, although views on corporal punishment have changed over the years, parents are often urged to spank or refrain from spanking out of love for the child. Third, familial social norms carry tremendous emotional weight, which explains why the cost of noncompliance can be particularly high in the family context. If the father in the subway smacks his child across the face, he will be seen as a brute who does not love his child. Finally, the emotion-laden nature of familial social norms complicates any predictive enterprise. To complete the example, dominant theories of norm generation do not account for the complex emotional enterprise of parenting and therefore are less reliable in predicting how a father contemplating discipline will react to a change in norms or how different norms might emerge.

Emotion-laden social norms in the familial context do not stand apart from the law. Instead, the state helps shape these norms by changing the emotional context of intimate and personal decision making. When the state enacts a law requiring that women seeking an abortion be offered the opportunity to view a sonogram of the fetus, the state contributes to the social norm that seeks to cloak reproductive decisions in guilt. When the state passes legislation allowing workers to meet family responsibilities, the state helps shape norms regarding working parents by sending the message that loving parents can also engage in paid labor. And when a local official interprets a law as

7 See infra note 170.
8 Compare William Sears et al., The Baby Book 349 (2d ed. 2003) (noting that “spanking keeps a parent from learning the real cause of a child’s misbehavior and finding a more appropriate method”), with John Rosemond, The Well-Behaved Child: Discipline That Really Works! 15 (2009) (advocating the well-timed spank because “your love for him is why you simply will not let him get away with misbehavior”).
9 See Carol Sanger, Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice, 56 UCLA L. Rev. 351, 351 (2008). For further discussion of this example, see infra Part II.A.1.
10 For an example of such a law, see Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 (2006) (stating it is the purpose of the Act “to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity”). Of course, this message is complex and varies by economic class. When the federal government refashioned welfare into “Temporary Assistance to Needy Families,” requiring recipients to work, it helped
sanctioning same-sex marriage, that action sends a strong signal about the
dignity of same-sex couples in that community.\textsuperscript{11}

The aims of this Article are first to illuminate the state’s role in shaping
familial social norms, focusing in particular on the role of emotion, and then to
integrate that understanding into more effective state regulation.\textsuperscript{12} To begin
this examination, this Article draws upon the methodology of the growing field
of law and emotion. Scholars in this field are interested in the relationship
between emotion and the law, seeking to identify and understand the emotional
aspects of a legal issue and then use that knowledge for normative ends.\textsuperscript{13}
Scholars have begun to engage in a law-and-emotion analysis of family law,
although to date that analysis has focused largely on direct state regulation, not
on social norms and other forms of indirect regulation.\textsuperscript{14} Accordingly, this
Article develops an understanding of family law centered on insights into the
operation of—and the elemental relationship among—emotion, social norms,
and the state. This novel approach yields a more nuanced family law, with the

\textsuperscript{11} See infra text accompanying notes 187–198.
\textsuperscript{12} See Kathryn Abrams & Hila Keren, Who’s Afraid of Law and the Emotions?, 94 MINN. L. REV. (forthcoming May 2010) (manuscript at 28–57, on file with Emory Law Journal) (identifying three aspects of law-and-emotion scholarship: illumination, investigation, and integration). For further discussion, see infra Part I.C.
\textsuperscript{13} See Abrams & Keren, supra note 12.
\textsuperscript{14} See Clare Huntington, Repairing Family Law, 57 DUKE L.J. 1245, 1245–46 (2008) [hereinafter Huntington, Repairing Family Law] (analyzing laws governing the family through a law-and-emotion lens); see also Clare Huntington, Embracing the Affective Family, 33 HARY. J. L. & GENDER 321, 324–26 (2010) [hereinafter Huntington, Embracing the Affective Family] (arguing that family law scholars should explore the complexity of emotion in family law and not reject this line of inquiry merely because the family has been caricatured as altruistic); Clare Huntington, Happy Families? Translating Positive Psychology into Family Law, 16 VA. J. SOC. POL’Y & L. 385, 385 (2009) (arguing that family law should draw upon the field of positive psychology to determine the what, why, and how of state regulation). Other treatments of emotion and family law also focus on direct regulation. See Solangel Maldonado, Cultivating Forgiveness: Reducing Hostility and Conflict After Divorce, 43 WAKE FOREST L. REV. 441, 482–94 (2008); Katharine B. Silbaugh, Money as Emotion in the Distribution of Wealth at Divorce, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE’S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 234, 234 (Robin Fretwell Wilson ed., 2006) (contending that the ALI Principles wrongly distinguish financial from nonfinancial matters, ignoring the emotional component of financial bargains in a marriage: “Finances are not distinct from emotions in relationships, but are an avenue through which spouses express emotions.”). The interest in emotion and family law is growing, as evidenced by a conference held at the University of Virginia in 2008. See Center for Children, Families, and the Law, University of Virginia, Law and Emotion: Re-Envisioning Family Law (Sept. 18–19, 2008), http://www.virginia.edu/ccfl/conference.php. The papers for this conference can be found at 16 VA. J. SOC. POL’Y & L. 301, 301–513 (2009).
relationship between families and the state understood to encompass not simply the direct regulation of families, but other forms of state influence as well, particularly the state’s power to affect social norms through their emotional valence.\textsuperscript{15}

To understand this phenomenon more fully, this Article uses three examples: reproductive rights, parenting, and same-sex marriage. Revealing the many layers and aspects of family law enriches the conversation about how the state should approach these and other critical issues at the center of family law. The current understanding of family law results in a truncated debate, at least in some areas, because of a failure to recognize that these issues are subject to state influence at the confluence of emotion and social norms.\textsuperscript{16}

This Article makes both a descriptive and a normative contribution to the literature. As a descriptive matter, existing accounts of social norms in the family are incomplete because they do not address the role of emotion in both creating and perpetuating social norms, nor do existing accounts incorporate the state’s use of emotion as a tool for shaping social norms. Once we add emotion to the current accounts, we can develop a more robust understanding of familial social norms and the state’s role in shaping these norms. Foregrounding the distinctive role of emotion explains both the particular strength of familial social norms and why social norms can be such an effective, if also potentially pernicious, means of regulating behavior in the family law context.

As a normative matter, a better understanding of the operation of these norms forms the basis for more effective regulation of families. Emotion provides the point of entry for the state to influence familial social norms.

\textsuperscript{15} As discussed infra Part I.A.1, although direct state regulation of families is both foundational and widespread, it is only one manifestation of state influence. The state shapes family life in numerous ways, such as offering incentives, constructing choice architecture, and, importantly, influencing social norms. See Richard H. Thaler & Cass R. Sunstein, Nudge: Improving Decisions About Health, Wealth, and Happiness 3 (2008) (defining choice architecture as the ability of the choice architect, often the state, to describe, frame, or present choices in a manner that predictably affects decisions). Understanding the state’s role in shaping familial social norms requires an appreciation of the role of emotion in these norms because when the state seeks to shape social norms, it often uses emotion as a tool to exert influence.

\textsuperscript{16} As explored more fully below, the dynamic by which social norms are shaped by emotional responses is not completely hidden. See infra text accompanying notes 207–216. In some contexts, the emotional resonance is on the surface, such as the role of disgust in the same-sex marriage debate. See infra text accompanying notes 187–199. By contrast, in other contexts, such as the child welfare system, many individuals may be less attuned to this dynamic, perhaps because it is hard to imagine being subject to its constraints.
There are real risks to this influence, but exposing the uncomfortable reality that the law often tries to manipulate our affective lives creates the possibility that we might use this dynamic for more appealing ends, such as cultivating greater tolerance for family choices and parental conduct falling outside the dominant norms.

More generally, this Article's insights are important to scholarship about social norms. A few scholars have recognized the role of emotion in social norms in other areas, such as criminal law and corporate culture. There has not, however, been a systematic attempt to incorporate the role of emotion into existing accounts of social norms. This Article demonstrates the value of doing so and creates a template for such an examination. It also provides a working middle ground between current accounts of social norms, which are dominated by rational-choice and law-and-society theories. The former discounts factors such as emotion, rendering the accounts of social norms unrecognizable as a descriptive matter, and the latter over-contextualizes social norms, robbing the accounts of any predictive value. This Article demonstrates the necessity of considering emotion as a particularly salient aspect of social norms.

Finally, this Article continues the scholarly project of mapping the affective family. As described elsewhere, the goal is to disentangle—by identifying, questioning, and understanding—the emotions at play in familial relationships. With a more nuanced understanding of the role of emotion in families, we can begin to examine how the law exploits and cultivates emotion and how the law might better account for the complexity and variety of emotions. Building upon the exploration of the role of emotion in the direct regulation of

17 See Peter H. Huang & Ho-Mou Wu, More Order Without More Law: A Theory of Social Norms and Organizational Cultures, 10 J.L. ECON. & ORG. 390, 391 (1994) (discussing the role of remorse in corporate culture); Dan M. Kahan, The Anatomy of Disgust in Criminal Law, 96 MICH. L. REV. 1621, 1656 (1999) (dissecting the role of disgust in criminal law and, in particular, noting the relationship between disgust and social norms). Similarly, the economist Robert Frank has contended that rational-choice theories provide considerable room for "noble motives" in addition to self-interest. ROBERT H. FRANK, PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS, at xi (1988); see also id. at 4 ("My claim . . . is that passions often serve our interests very well indeed. The apparent contradiction arises not because of any hidden gains from the impassioned actions themselves, but because we face important problems that simply cannot be solved by rational action.").

18 See infra Part II.C (discussing this debate).

families, this Article addresses the subject of social norms, an enormously important factor in familial decision making.

This Article proceeds in three parts. Part I describes the intersection of social norms, emotion, and the state in family law. To make these observations concrete, Part II excavates three sites of contention in contemporary family law: reproductive choice, parenting, and same-sex relationships. This Part demonstrates how, in each case, adding emotion to current theories of social norms lays the foundation for both a sound understanding of the operation and power of familial social norms and a sufficient formalization of the norms necessary for the formulation of policy and laws. Part III turns to the normative implications of this analysis, beginning with the potentially pernicious side of familial social norms and state influence. Using child abuse and neglect as a case study for illustrating the potential value of harnessing the emotional valence of social norms, this Part argues that the state role need not be so troubling.

I. THE INTERSECTION OF SOCIAL NORMS, EMOTION, AND THE STATE IN FAMILY LAW

The state influences families in numerous, often overlapping ways. Direct regulation—such as rules determining who may get married and establishing the terms of divorce—is a visible and important part of how the state shapes families. But these mandatory rules are only one aspect of the family-state relationship; the state shapes family life in many other, less visible ways. State sway over social norms is a particularly underappreciated form of state influence. When the state influences social norms in the family, it often does so through emotion. Before examining that dynamic, however, it is important to describe more fully the place of familial social norms in state regulation and the place of emotion in family life.

Accordingly, this Part begins by placing social norms along a continuum of state influence over families and providing a brief overview of the current understanding of social norms. It then develops the role of emotion in families, identifying emotions in the family and emotions about the family. This Part concludes with an overview of the current literature, arguing that

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20 See Huntington, Repairing Family Law, supra note 14, at 1245–46 (using a law-and-emotion lens to analyze laws governing the family).
scholars have overlooked the important confluence of social norms, emotion, and family law.

A. Social Norms and the State

1. The Spectrum of State Roles in Familial Decision Making

Beginning with direct regulation, the state controls families through mandatory rules that determine both who is eligible for the legal moniker “family” and what legal obligations and rights flow from that denomination. For example, family law determines who may marry or enter into a domestic partnership or civil union and when a parental relationship between an adult and a child will be legally recognized. Family law also determines when legal relationships terminate, establishing standards for voluntary ends to a relationship, such as a marital dissolution or the relinquishment of a child for adoption, and an involuntary end, such as a state action terminating parental rights.

Although the state typically does not intervene directly during the course of a relationship, family law still dictates the obligations family members owe to one another, such as the duty of a parent to support and educate a child, and certain spousal duties. To be sure, some of these obligations can be altered by agreement between the parties; the recognition of premarital agreements is

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21 See, e.g., CAL. FAM. CODE § 297 (West 2009) (listing the requirements for a domestic partnership); 750 ILL. COMP. STAT. 5/201 (2009) (limiting marriage to a union between a man and woman); N.Y. DOM. REL. LAW § 5 (McKinney 2009) (declaring void all marriages between certain relatives).

22 See, e.g., FLA. STAT. § 742.091 (2009) (creating a legal fiction that the child was born in wedlock where the parents marry after birth of the child); 750 ILL. COMP. STAT. 45/5 (2009) (requiring, inter alia, marriage or a signed acknowledgement of parentage to establish legal presumption of paternity for fathers).

23 See, e.g., CAL. FAM. CODE § 299 (West 2009) (listing requirements for the termination of a domestic partnership); N.Y. DOM. REL. LAW § 170 (McKinney 2009) (listing grounds upon which the state will grant a divorce).

24 See CAL. FAM. CODE § 8604 (West 2009) (listing legal requirements for a parent or parents to consent to the adoption of their child); 750 ILL. COMP. STAT. 50/8 (2009) (requiring consent to adoption or surrender of parental rights by biological parents as a prerequisite to adoption of a child unless the state deems it appropriate to intervene, such as by finding the parents unfit by clear and convincing evidence).


26 See, e.g., CAL. FAM. CODE § 3900 (West 2009) (requiring parents of a minor child to “support their child in the manner suitable to the child’s circumstances”); N.Y. EDUC. LAW § 3212 (McKinney 2009) (listing parental duties regarding children’s education).

one example of the state accommodating individual preferences.\textsuperscript{28} Overall, however, the state is the gatekeeper for entry to, and exit from, families and determines most obligations that run between family members.\textsuperscript{29}

Moving away from direct regulation, the state also influences families by enacting legal rules that provide incentives or subsidies that shape familial behavior. For example, voluntary programs—such as Head Start, which provides early childhood education to children in low-income families,\textsuperscript{30} and the Nurse-Family Partnership, which funds visits by nurses to first-time mothers at risk of committing child abuse or neglect\textsuperscript{31}—are ways in which the state attempts to influence families on an opt-in basis. Further, through affordable housing tax credits and public transportation subsidies, the state enables people to live and work near schools and day care centers.\textsuperscript{32} Finally, when the state regulates the workplace—for example, by enacting equal opportunity legislation that promotes the entry of women into the paid labor market or enacting other employment laws—the state affects a parent’s ability to provide financially for her children.\textsuperscript{33} The effect of this type of regulation can also be less tangible, playing a role in defining family ideals. For example, equal opportunity legislation and subsidized child care help send a message

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{28} See D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 118–30 (4th ed. 2010) (discussing the varying legal treatment of premarital contracts, their increasing popularity, and the recent trend by courts to find such contracts enforceable absent unconscionability).
\item\textsuperscript{29} See Jill Elaine Hasday, The Canon of Family Law, 57 STAN. L. REV. 825, 834–41 (2004) (describing how the purported change in family law—from a system that assigns rights and responsibilities to individuals based on their status (e.g., married, single) to a system that allows individuals to contract for the rights and responsibilities they prefer—is overstated). Regulation involving the family does not always run directly from the state to a family member. It can also run to third parties, such as an employer. The Family and Medical Leave Act (FMLA), for example, requires qualifying employers to provide employees an unpaid leave of absence to care for newly-born or adopted children or seriously ill parents. See 29 U.S.C. § 2612(a) (2006).
\item\textsuperscript{30} See 42 U.S.C. § 9833 (2006) (providing discretionary financial assistance for five years to qualifying agencies seeking to establish a Head Start program).
\item\textsuperscript{32} See Katharine B. Silbaugh, Women’s Place: Urban Planning, Housing Design, and Work–Family Balance, 76 FORDHAM L. REV. 1797, 1798, 1818–50 (2007) (describing “the role of urban planning and housing design in frustrating the effective balance of work and family responsibilities”).
\end{enumerate}
\end{footnotesize}
that women can, and at least for individuals receiving public subsidies, \textit{should} work.\textsuperscript{34}

Moving even further away from direct regulation, the state influences families by describing, framing, or presenting choices in a manner that affects decisions.\textsuperscript{35} Through this “choice architecture,”\textsuperscript{36} the state can profoundly sway families, although the architecture is often unseen. The default rules on distribution of property at the dissolution of a marriage are an example of choice architecture at work in family law. In most states, the default rule is one of equitable property distribution. Under this regime, each spouse typically has a claim to marital property, regardless of who purchased the property.\textsuperscript{37} To be sure, individuals can contract around these rules through pre- and post-nuptial agreements,\textsuperscript{38} but given the optimism most individuals express about the longevity of their own marriage,\textsuperscript{39} the default rule is applied more often than not.\textsuperscript{40}

Through this default rule, the state influences familial outcomes. For example, in the common scenario where one person in the couple invests in the family while the other invests in a career,\textsuperscript{41} the default rule ensures that the individual with less earning potential still has a claim to marital assets, even though that person may not have provided the money that purchased the assets. The state is thus sending a signal that marriage is a partnership, and it is backing up this signal with an asset-division rule that reflects this view of marriage.

\textsuperscript{35} See Thaler & Sunstein, supra note 15, at 3.
\textsuperscript{36} See id.
\textsuperscript{38} See id.
\textsuperscript{40} This rule is particularly important in light of the uneven investments many couples make in career versus family. See John Monahan & Jeffrey Swanson, Lawyers at Mid-Career: A 20-Year Longitudinal Study of Job and Life Satisfaction, 6 J. EMPIRICAL LEGAL STUD. 451, 465–66 (2009) (documenting this phenomenon for 1990 graduates of the University of Virginia Law School and finding a direct correlation between the number of children and the amount of full-time participation in the workforce for women and almost no correlation for men).
\textsuperscript{41} See id.
State sway over social norms is yet another type of unseen state regulation. The principle of family autonomy—that families operate largely without state interference—means that the state leaves many decisions, both momentous and banal, to individual choice. As a result, social norms often play a far more important, and certainly more pervasive, role in shaping familial behavior than direct legal regulation. These social norms affect many of the most important aspects of family life, from reproductive decisions, to parenting, to the family form itself. As Part II describes, the state plays an active part in creating and perpetuating these social norms. For now, it is sufficient to note that social norms are one aspect of state regulation and that the state’s influence in this arena is often not perceived.

To set forth this taxonomy is not to suggest that these categories are watertight; many forms of regulation bleed into one another. For example, when the state enacts a law requiring the use of child-restraint systems for young children traveling in cars, the state is both directly regulating families and influencing social norms. Most parents would not dream of putting a toddler in the car without strapping her into a car seat—not because the parent fears a ticket, but rather because of the widespread norm of using seat belts and car seats. The precise interaction of laws and social norms, a topic of great debate, is developed in the following section. The point here is simply that forms of state regulation are often overlapping.

2. Understanding Social Norms

Before turning to social norms in the family, it is helpful to develop a basic understanding of social norms more generally. As noted above, social norms are typically understood to be the rules of behavior that individuals follow independent of any legal obligation or formal penalty for noncompliance. Although no standard definition of social norms is used consistently in the literature, scholars emphasize the internal processes that make people feel

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42 But see infra text accompanying note 171 (noting the descriptive inaccuracies of family autonomy).
43 See, e.g., COLO. REV. STAT § 42-4-236(2) (2009) (requiring child-restraint systems in private, noncommercial passenger cars for children under a certain age and weight).
44 The seat belt example is a familiar one in social norms literature. The intention here is not to explore it exhaustively, but rather to show the overlap in forms of state regulation. For further discussion of the interplay of laws governing child restraints and parental behavior, see, for example, McAdams, supra note 1, at 407–08.
45 See id. at 340; see also ELSTER, supra note 1, at 101 (stating that social norms rely “on informal sanctions and the voice of conscience” whereas the law provides formal punishment).
obliged to follow such norms, the broad social consensus around such norms that is sustained by attitudes of approval and disapproval, and the particularly public nature of norm communication and reinforcement.

When legal scholars first began to study social norms, many considered them to be an extralegal influence on behavior. For example, Robert Ellickson’s case study on conflict resolution among cattle ranchers in Shasta County, California, details how the ranchers regulated themselves wholly outside the law, instead relying on informal social norms. Similarly, Lisa Bernstein’s study of diamond merchants demonstrates how the merchants engaged in commercial self-regulation without resort to the legal system. Stewart Macaulay’s study of business dealings concludes that individuals try to find informal, nonlegal solutions to business problems. This “first generation” of social norm theorists, then, understands social norms as independent from formal laws.

A “second generation” of social norms scholars has focused on the interplay between law and social norms, arguing that the two regulate behavior

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46 See McAdams, supra note 1, at 340 (“Roughly speaking, by norms this literature refers to informal social regularities that individuals feel obligated to follow . . . .”).
47 See Elster, supra note 1, at 99 (“For norms to be social, they must be (a) shared by other people and (b) partly sustained by their approval and disapproval.”). Robert Cooter, Expressive Law and Economics, 27 J. LEGAL STUD. 585, 587 (1998) (defining a social norm as “an effective consensus obligation,” where “almost everyone in a community agrees that they ought to behave in a particular way in specific circumstances, and this agreement affects what people actually do”), Cass R. Sunstein, Social Norms and Social Roles, 96 COLUM. L. REV. 903, 914 (1996) (“[W]e might, very roughly, understand ‘norms’ to be social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done.”).
48 As Elster notes, “to violate a norm in public shows a disdain for public opinion that is often more severely disapproved of than the norm violation itself. Conversely, by hiding the violation, one respects and upholds the norm.” Elster, supra note 1, at 109. Thus social norms differ from conventions in that the failure to follow a social norm typically results in a social sanction, whereas the failure to follow a convention does not. See Robert D. Cooter, Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant, 144 U. PA. L. REV. 1643, 1656 (1996) (describing the difference with the following example: removing one’s hat in church is a social norm, and failure to comply will likely result in a social sanction, while removing one’s hat to escape the heat in a boiler room is a convention with no accompanying obligation and social sanction).
49 See Lisa Bernstein, Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, 21 J. LEGAL STUD. 115 (1992) (describing the benefits of extralegal regulation in the diamond industry and outlining the shortcomings of the American legal system with respect to this industry).
50 See Stewart Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 28 AM. SOC. REV. 55, 55 (1963) (“[B]usinessmen often fail to plan exchange relationships completely, and seldom use legal sanctions to adjust these relationships or to settle disputes.”).
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in tandem, along with other influences. Typical of this approach is the argument that four forces regulate behavior together: threats of legal sanctions (formal laws), social norms, markets, and architecture. Each of the three non-legal forces is subject, at least in part, to the law; therefore the law has both direct and indirect effects on human behavior. Thus, second-generation norms scholars have demonstrated that law and social norms supplement, rather than replace, one another. Sociologist Steven Nock has distinguished social norms from enacted laws by contending that, by definition, social norms are followed by most people, and therefore most people view a social norm as legitimate, in contrast to laws, which are sometimes perceived as illegitimate.

The precise interplay between the law and social norms has been the subject of considerable debate. The central scholarly task has been to determine how the law influences human behavior apart from the relatively straightforward deterrent effect of legal sanctions. In one account, even without enforcement, the law can support a desirable norm by “expressing” it. The law both conveys signals to the public about what people support and reject (their preferences) and concretizes and externalizes what might

54 Id.
55 Id. at 662–63. Put slightly differently, Cass R. Sunstein has argued that the state can regulate behavior directly, or it can attempt to influence behavior by influencing social norms. See Sunstein, supra note 1, at 948–52. Thus, the state has a range of options: educational campaigns (which offer accurate information); persuasive campaigns (which attempt to alter attitudes and choices); economic incentives and disincentives (taxes and subsidies); time, place, and manner restrictions (e.g., banning smoking in public places); and straightforward coercion (e.g., seat belt laws). See id.
56 See Lessig, supra note 53, at 671–72 (“These alternative constraints beyond law do not exist independent of the law; they are in part the product of the law. Thus the question is never ‘law or something else.’ The question instead is always to what extent is a particular constraint a function of the law, and more importantly, to what extent can the law effectively change that constraint.”).
57 See Saul Levmore, Norms as Supplements, 86 Va. L. Rev. 1989, 1997–2008 (2000) (“Norms can supplement legal rules by coloring around the rules in a way that informs actors as to whether a rule is a serious signal, or ‘sanction,’ or is instead a mere price.”).
59 Richard McAdams summarizes the scholarly inquiry as follows: “Norms matter to legal analysis because (1) sometimes norms control individual behavior to the exclusion of law, (2) sometimes norms and law together influence behavior, and (3) sometimes norms and law influence each other.” McAdams, supra note 1, at 347.
otherwise be more abstract and internal. Although numerous theories explain why people comply with social norms, three stand out. In one account, individuals internalize expectations of behavior and feel guilty when they do not comply. Another account emphasizes that individuals experience a loss of esteem from others when they do not follow social norms, so they seek to avoid this cost by complying with norms. Yet another argues that social norms are the result of repeated prisoner dilemma games among individuals with ongoing ties to one another. In this last account, social norms are “signals” individuals send to each other about their willingness to cooperate with one another in the long run, thus establishing their desirability of becoming, for example, a long-term business or romantic partner.

B. The Salience of Emotion

Before demonstrating the central role that emotion plays in familial social norms, it is useful to explore emotion in families and family law more generally. Family law regulates the realm of intimate relationships, most notably relationships between romantic partners and parents and children. A

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61 McAdams, supra note 1, at 399–408.
62 See Lawrence Lessig, The Regulation of Social Meaning, 62 U. CHI. L. REV. 943, 968–73 (1996) (describing how the social meaning of dueling changed once the law prohibited a dueler from holding public office, thus altering the prior social signal that dueling was honorable).
63 See Robert Cooter, Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms, 86 VA. L. REV. 1577, 1584–91 (2000) (describing the effect of internalization of values on social norms; arguing that rational-choice theory is based on the idea of a rational “bad man” calculating his decision whether to obey a law by determining the costs and benefits of compliance; and further arguing that rational-choice theory fails to account for people who are internally motivated because they have internalized civic values); id. at 1593–96 (developing an economic analysis of internalization).
64 McAdams, supra note 1, at 355.
65 For a description of the classic prisoner dilemma game, its variations, and the consequences of repeat play, see ERIC A. POSNER, LAW AND SOCIAL NORMS 14–18 (2000).
66 See id. at 19; ELICKSON, supra note 50, at 167–73. Posner’s book has been the subject of considerable criticism for its overly reductionist and all-encompassing approach to social norms. See Richard H. McAdams, Signaling Discount Rates: Laws, Norms, and Economic Methodology, 110 YALE L.J. 625, 678–87 (2001) (reviewing ERIC A. POSNER, LAW AND SOCIAL NORMS (2000)). Posner’s book also has been criticized more sweepingly for its behaviorally unrealistic, politically naive, and morally undesirable account of human behavior. See Dan M. Kahan, Signaling or Reciprocating? A Response to Eric Posner’s Law and Social Norms, 36 U. RICH. L. REV. 367, 367–68 (2002) (arguing that the behavior Posner identifies as the result of signaling is better understood as the result of reciprocity).
67 The exact boundary of family law has generated considerable interest of late. See, e.g., Melissa Murray, The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers, 94 VA. L.
defining characteristic of these relationships is their emotional content, which takes two forms—emotions in the family and emotions about the family. 68 As a result, legal scholars cannot hope to understand decision making and conflict resolution in families without an appreciation of the emotional aspect of familial relationships. Similarly, legal scholars must account for the public’s strong emotional responses to families, responses that equally shape legal decisions and policy making.

To say that familial relationships have an emotional component is to state the obvious. To try to summarize the full range and complexity of these emotions in one article, however, would be challenging to say the least. This section simply outlines the types of emotions often associated with familial relationships. This description does not assume that every person in every familial relationship experiences the same emotions. Still, it is important to identify, even if briefly, some of the central and well-recognized emotions at play within families and in society’s reaction to familial issues. 69

1. Emotions in the Family

Intuitively, it is easy to recognize the deeply emotional context of intimate and familial relationships. In light of the relative dearth of scholarship addressing the role of emotion in family law, however, it is useful to discuss at least some specific emotions and to illustrate how each might surface in matters relevant to family law.

To begin, emotion is interwoven into every aspect of our lives—the trading floor, the classroom, the playing field, the street, and the courthouse. Each of these areas of human activity is marbled with emotion. The emerging

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68 By focusing on emotion, this Article does not adhere to the now fairly disregarded split between reason and emotion. See Antonio Damasio, Descartes’ Error: Emotion, Reason, and the Human Brain 53 (1994) (arguing that the “biological machinery of reason” includes emotion). Instead, this Article assumes that multiple factors, working together and in tension, affect decisions.

69 For a taxonomy of emotions in general, see id. at 149 (describing the five central emotions as “Happiness, Sadness, Anger, Fear, and Disgust” and noting that each of these five categories has variations, such as panic and shyness, which are variations of fear).
neuroscience of brain functioning demonstrates that without emotion, we cannot function in society, make decisions well, or live a recognizable life. The intention is not to exceptionalize the familial context by contending that individuals feel emotion only in the familial context, but rather to argue that emotion, relevant everywhere, is particularly salient in the family context.

Thus, even set against a backdrop of omnipresent emotion, family law highlights particularly intense moments of emotion. Divorce, for example, is generally understood to be one of the greatest emotional upheavals in a lifetime. The emotional process typically is not linear but rather cyclical, with emotions moving back and forth between love, anger, and sadness. Complex and often conflicting emotions play out at various points. Although some studies show that immediate reactions to transgressions in intimate relationships can lead to resentment and retaliation, individuals are capable of forgiveness over time.

Divorce litigants often bring their emotions into the legal process. For example, in a study of the methods divorce attorneys use to help clients settle cases, scholars observe that even though settlement rather than a full-blown trial is the typical outcome—and compromise and cooperation does occur—

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70 For an excellent primer on this topic, as well as a review of the relevant literature, see id. at 165–201 (arguing that emotion is a key component of reason and that it aids, rather than hinders, decision making). See JONAH LEHRER, HOW WE DECIDE 34–42 (2009) (providing a layperson’s account of the interplay between emotion and decision making); see also David J. Arkush, Situating Emotion: A Critical Realist View of Emotion and Nonconscious Cognitive Processes for Law and Legal Theory, 2008 BYU L. REV. 1275, 1328–53 (arguing that rational-choice theory, behavioral economics, and cultural-cognition theory all fail to understand that emotion is part of the decision-making process and not a compromising force). Interestingly, individuals who, as a result of brain damage or illness, have lost the ability to feel emotions also lose the ability to follow social norms. See DAMASIO, supra note 68, at 3–14, 32–33 (discussing the famous case of Phineas Gage, a railroad supervisor who, in 1848, survived the accidental blasting of an iron rod through his head, damaging what we now know to be the prefrontal cortices, and noting that although he lived and retained most of his capacities, including speech, the accident fundamentally altered Gage’s personality, including his ability to follow social norms).

71 Susan M. Johnson, Couple and Family Therapy: An Attachment Perspective, in HANDBOOK OF ATTACHMENT: THEORY, RESEARCH, AND CLINICAL APPLICATIONS 811, 814 (Jude Cassidy & Phillip R. Shaver eds., 2008) (“Attachment relationships are where our strongest emotions arise and where they seem to have the most impact.”).

72 See ROBERT E. EMERY, RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY, AND MEDIATION 215 (1994) (stating that only a spouse’s death is ranked higher than divorce with respect to stress and noting that divorce involves numerous negative emotions, such as anger, regret, and sadness).

73 See id. at 26–28 (discussing a cyclical theory of grief in divorce).

74 Eli J. Finkel et al., Vengefully Ever After: Destiny Beliefs, State Attachment Anxiety, and Forgiveness, 92 J. PERSONALITY & SOC. PSYCHOL. 871, 871 (2007) (listing these studies).

settlement negotiations are still contentious, and clients use numerous tactics to maintain the possibility of a contested trial or hearing. This client attitude shapes attorney responses, and scholars have found that attorneys, under pressure to identify with the client's world view, cast settlement "as a different kind of combat, but as combat nonetheless."  

Emotions also run high in the context of child abuse and neglect. For child victims, the emotions accompanying abuse and neglect are complex and include fear, anger, anxiety, guilt, sadness, and bewilderment. The emotional response is necessarily complex, and even though a child will almost certainly experience relief when away from the abuse or neglect, the experience of being removed from the home, even temporarily, can be deeply traumatizing. For parents who abuse or neglect their children, the emotions are similarly complex. Parents often experience guilt over the abuse, as well as anger, denial, and fear of losing a child permanently.

Likewise, adoption can evoke complex and conflicting emotions—joy, guilt, loss, fear, anxiety, and denial—for birth parents, adoptive parents, and adopted children both at the time of adoption and later. This is not to subscribe to the narrative that parents who relinquish their children are bad
parents, inflicting a primal wound on their children, but rather to note that the emotions surrounding adoption are complex and, of course, will vary with the individual.

In all these contexts—divorce, child welfare, and adoption—the loss itself is complicated because it is potentially revocable, thus making it an “ambiguous loss.” Psychologist Pauline Boss categorizes ambiguous losses as situations (often in divorced and adoptive families) where an individual is physically absent but still psychologically present. Boss contends that the uncertainty of ambiguous losses can freeze the grieving process, leading to cycles of hope and hopelessness.

To highlight these more negative emotions is not to obscure the positive emotions that also abound, at least in some families. For example, in the United States, people typically enter into romantic and sexual relationships out of love and desire. Although romanticized and oversimplified, individuals often find parenting a deep source of joy and pride, at least in the long run. Even when relationships hit inevitable bumps, individuals are capable of tremendous forgiveness and often seek to right the wrongs they have inflicted.

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83 See ANN FESSLER, THE GIRLS WHO WENT AWAY: THE HIDDEN HISTORY OF WOMEN WHO SURRENDERED CHILDREN FOR ADOPTION IN THE DECADES BEFORE ROE V. WADE (2006) (describing the pre-Roe years when large percentages of young, unmarried women were sexually active but had little access to birth control and further describing the secrecy of the adoption system where young women who “went away” to have babies were typically pressured into surrendering their children for adoption, experiencing grief and guilt for years afterward).
84 See PAULINE BOSS, AMBIGUOUS LOSS: LEARNING TO LIVE WITH UNRESOLVED GRIEF 8–12, 61–76 (1999).
85 Id. at 8. Boss also defines ambiguous loss to include situations where a person is physically present but psychologically absent. See id. at 9.
86 Id. at 10–11, 61–76.
87 Historically, economic, political, and social considerations have also influenced these decisions. See STEPHANIE COONTZ, MARRIAGE, A HISTORY: HOW LOVE CONQUERED MARRIAGE 26–27 (2005) (identifying the wide variety of reasons couples have entered into marriage in different cultures and during different time periods); NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION (2000) (providing a historical overview of the ways government has shaped the institution of marriage).
88 This may be true for the experience of being a parent writ large, but it is not necessarily true for day-to-day parenting. See Daniel Kahneman et al., A Survey Method for Characterizing Daily Life Experience: The Day Reconstruction Method, 306 SCIENCE 1776, 1777 (2004) (finding that women enjoy child care slightly more than housework but considerably less than watching television).
89 See Huntington, Repairing Family Law, supra note 14, at 1260–73.
Finally, family members often feel doubt about their own emotions, questioning the mismatch between what they feel and expectations of what they ought to feel. Post-partum depression, for example, can be particularly painful for women because of the expectation that having a baby is a joyous event, thus making it more difficult for a woman to admit she is not, in fact, overjoyed. Similarly, although deciding whether to have an abortion can be a wrenching decision emotionally, this is not true for all women, leading some women to question their lack of guilt or regret because it does not accord with the dominant emotional narrative about abortions. Ambivalence and doubt are thus important emotions and familial experiences.

2. Emotions About the Family

Referring to families as “private” is a common trope, but it does not account for the tremendous possessiveness some individuals and groups seem to feel about other people’s families. This interest is highly emotional. Small-scale examples of this are ubiquitous: fathers and mothers at the playground watch and judge the parenting decisions of other parents; close friends react to the behavior of each others’ partners and spouses; the simple act of a same-sex couple holding hands in public can spark reactions. Each of these social interactions involves powerful emotions about the family.

A similar but much broader dynamic plays out at the societal level. The individuals and groups driving the political process are often motivated by emotion. Thus, individuals who are not directly affected by a familial issue often feel that they are affected, or at least have an emotional response to what goes on in other people’s families. For example, many opposite-sex couples hold strong views about same-sex marriage, and many parents who send their children to school maintain firm views on homeschooling. Indeed, when people discuss the so-called “culture wars,” they rarely, if ever, mean raging debates over high versus low art or plays versus musicals; what people generally invoke are the deep political and social conflicts over matters involving the most intimate realms of familial and individual choice. The intense public focus on everything from same-sex marriage, to single-parenthood, to abortion, to the daily aspects of child rearing is driven by intense emotions about other people’s families and personal choices.

90 See Aspen Baker, Overcoming Stigma: Talking Freely About Abortion, CTR. FOR AM. PROGRESS, Aug. 3, 2005, http://www.americanprogress.org/issues/2005/08/6939545.html/print.html (describing the responses of women on a post-abortion talk line and noting that “[m]any are surprised by their lack of guilt or regret, and fear that their response makes them cruel or callous”).
The intense concern with other people’s families is another way to deconstruct the public–private divide. Frances Olsen has usefully demonstrated how the public–private line is incoherent, but there is another way in which families are not private. People feel affected by what goes on in other people’s families. And in some ways, they are. Children, of course, influence each other, thus moderating the lessons parents try to instill in their own children. The broader community also influences families, making it easier or harder for a family to maintain values that run counter to those of the majority. Think of a conservative, “traditional values” Christian family in Berkeley, or a same-sex couple in Provo. The Berkeley family knows it will be harder to pass their values on to their children if most other families in the community embrace same-sex marriage, and vice-versa.

Although some advocates of same-sex marriage deride opponents with such slogans as “Focus on Your Own Damn Family,” this simplification fails to account for the reality that we are affected by other people’s families. To be sure, the harm experienced by a same-sex couple who cannot enjoy the same legal protections as an opposite-sex couple is qualitatively different from the harm experienced by the family seeking to pass on its traditional values. The point is simply that what goes on in other people’s families is more broadly relevant than is often credited.

As this example demonstrates, the debate over same-sex marriage is a compelling illustration of emotions about other people’s families. Emotion is at the center of the debate. Advocates in favor of legal recognition of same-sex couples seek tangible benefits, such as health care, survivor benefits, and parental rights to commonly raised children. But the route to these tangible benefits is through an emotional claim that families headed by same-sex parents are no different from families headed by opposite-sex parents and

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92 The public aspect of family life is reflected in family law doctrine as well. For example, one of the components of a common law marriage is that the couple hold themselves out to the community as husband and wife. See CLARK, supra note 37, at 50–51.


94 I intend to explore these themes more fully in a separate article, tentatively entitled “Other People’s Families.”
therefore deserve the same recognition and protection. This is typically framed as a question of “dignity” and is, at heart, a claim that individuals in same-sex relationships love each other and their children in the same way that individuals in opposite-sex relationships love each other and their children. The claim seeks to cultivate an emotional response in the listener by playing on the emotions associated with families.

Opponents of legal recognition of same-sex marriage likewise frame arguments in emotional terms. These advocates contend that the recognition of same-sex marriage (which they sometimes refer to as “counterfeit marriage”) threatens the sanctity of opposite-sex marriage. Advocates subtly

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95 See, e.g., Opening Brief on the Merits for Petitioners at 42, Clinton v. California decided sub nom. In re Marriage Cases, 183 P.3d 384 (2008), superseded by CAL. CONST. art. 1, § 7.5 (No. S147999), 2007 WL 1335195 at *42 (“Like heterosexual marriages, same-gender marriages are based on commitment, love and support. Same-gender homes provide children with safe, supportive and loving environments. Thus, same-gender marriage would benefit the state by offering more stable homes in which children can be raised by two committed parents.”).  
96 See, e.g., In re Marriage Cases, 183 P.3d 384, 399 (Cal. 2008), superseded by CAL. CONST. art. 1, § 7.5 (“These core substantive rights include, most fundamentally, the opportunity of an individual to establish—with the person with whom the individual has chosen to share his or her life—an officially recognized and protected family possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage.”). Moreover, even when a state grants access to these benefits, such as the far-reaching domestic partnership laws in California, see CAL. FAM. CODE §§ 297–299.6 (West 2009), there is still an emotional battle to be waged. In the case challenging the exclusion of same-sex couples from marriage, the California Supreme Court found that even though virtually no tangible benefits were at stake, the state’s decision not to allow same-sex couples access to the same legal status as opposite-sex couples violated state equal protection rights and the right to marry. See In re Marriage Cases, 183 P.3d 384, 401–02 (Cal. 2008), superseded by CAL. CONST. art. 1, § 7.5 (“Only marriage between a man and a woman is valid or recognized in California.”).  
97 As Maxine Eichner argues, dignity is an all-encompassing term, meaning more than simply equal rights under the law. See MAXINE EICHNER, THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA’S POLITICAL IDEALS (forthcoming July 2010) (manuscript at ch. 6, p. 25, on file with the Emory Law Journal) (observing that “liberalism’s promise of equality is one of equal dignity in society—a dignity that extends beyond simply equal rights in the law and noting that racial minorities should not just be recognized as “politically equal, but . . . also socially equal”).  
98 Here, an “emotional argument,” means one that appeals to emotion. See D. Don Welch, Ruling with the Heart: Emotion-Based Public Policy, 6 S. CAL. INTERDISC. L.J. 55, 59–63, 75–87 (1997) (describing such arguments and contending that they have a place in public discourse). For example, by displaying disgust, opponents of same-sex marriage convey the message that such a marriage should not be recognized because the underlying relationship (or at least the sex) is disgusting. The argument thus taps into the emotions of the listener. Similarly, an emotional argument can help create emotions. For example, same-sex advocates in Ireland intended to evoke sympathy and trust by showing a likeable boy-next-door knocking on four million doors to ask for “Sinead’s hand in marriage” and ending with the tag line, “How would you feel if you had to ask 4 million people for permission to get married?” See Marriage Equality: Civil Marriage for Gay and Lesbian People, Sinead’s Hand, http://www.marriagequality.ie/ (last visited Mar. 15, 2010).  
deploy the emotion of disgust to undermine the claim to same-sex marriage.\textsuperscript{100} The title of the federal law, the Defense of Marriage Act,\textsuperscript{101} tellingly suggests that traditional marriage must be “defended,” evoking fear among opposite-sex couples that they stand to lose something if same-sex couples are recognized—that same-sex marriage is not just a social or political choice, but some kind of an assault on traditional marriage.

Similarly, in the child welfare context, individuals not directly involved in the system have strong feelings about those who are. In addition to concern and sympathy for children, individuals often feel revulsion and hatred for parents who abuse or neglect their children, casting them as misfits who are somehow inhuman. As Martin Guggenheim has stated,

There is a shocking presumption generated by fear, by otherness, by a lot of things—that the parents of children in foster care are bad for their children. They don’t love them enough or they don’t have the ability enough to raise them well. And I’m here to say that in my 30 years of work in this field, that is the most despicable slander of all, and the most difficult falsity to refute.\textsuperscript{102}

In sum, emotions about the family can deeply affect public responses to familial issues. Policy makers and advocates evoke and deploy emotion on a regular basis, driving decision making and affecting public opinion.\textsuperscript{103} As

\textsuperscript{100} Cf. Marc R. Poirier, \textit{The Cultural Property Claim Within the Same-Sex Marriage Controversy}, 17 COLUM. J. GENDER & L. 343, 374–77 (2008) (arguing that opponents of same-sex marriage can be said to be making a cultural property claim to marriage rites and are arguing that broadening access to these rites undermines group identity); see also Martha Nussbaum, \textit{A Right to Marry? Same-Sex Marriage and Constitutional Law}, DISSERT, Summer 2009, at 43, 51 (describing the role of disgust in defining opposition to same-sex marriage). For a more general discussion of disgust and sexual orientation, see MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW (2010).


\textsuperscript{103} Adoption is another area of family law that evokes strong emotional responses from the public. For example, the debate over trans-racial adoptions—whether children should be matched with adoptive parents of the same race—has led to rancorous public and academic debates, with emotions running high on all sides. See, e.g., ELIZABETH BARTHOLET, NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE 7 (1999) (arguing that a pervasive “blood bias” in the child welfare system sacrifices children’s futures); Solangel Maldonado, \textit{Discouraging Racial Preferences in Adoption}, 39 U.C. DAVIS L. REV. 1415, 1467–68 (2006) (describing white potential adoptive parents’ cognitive biases for non-African
discussed in Part III, these emotions affect familial social norms and are critical to the generation and transmission of social norms.

C. Social Norms and Emotion in Family Law Scholarship

Despite the significance of social norms and emotion in family life, scholars generally have not studied the confluence of these two forces. Some family law scholars have addressed social norms but without sufficient appreciation of the role of emotion. And some family law scholars have addressed emotion without a full appreciation of the importance of social norms. This section identifies that precise point of intersection.

To begin, a few legal scholars have explored the role of social norms in the familial context. Elizabeth Scott, for example, has made important contributions to the study of social norms in the context of family law. Examining the complicated relationship between the law and social norms surrounding marriage, Scott has described fundamental changes in the legal framework governing marriage. As Scott describes it, marriage moved from a framework of clear gender roles—with marriage privileged over other intimate relationships and exit difficult because fault-based divorce grounds were required—to a framework of gender equality, with easier exit through no-fault divorce, and less privileged status over other relationships. To Scott, these legal changes contributed to the weakening of marital commitment norms, although marriage is still understood as a relationship of commitment. Scott is skeptical of the argument that this weakening can be reversed through further legal change because commitment norms are closely connected to gender norms. This “bundling” of commitment norms and

104 Although not speaking directly about social norms, Carl Schneider was perhaps the first scholar to recognize that one purpose of family law is to shape family life through ways other than direct regulation. See Carl E. Schneider, The Channelling Function in Family Law, 20 HOFSTRA L. REV. 495, 496–98 (1992) (contending that family law has five functions including the expressive function, which is the power of the law through words and symbols to alter the behavior of individuals regulated by the law).

105 See Scott, supra note 3, at 1904–06.

106 See id.

107 See id.

108 See id. at 1905–06. According to Scott, legal change may generate a one-way (downward) ratchet for commitment norms because of the influence of gender norms. Any attempt to encourage greater commitment in marriage provokes a reaction from those who do not want to return to the days of gender inequality. See id.
gender norms makes it difficult for the law to reinforce marriage because any attempt to do so is perceived as a return to traditional gender roles.\textsuperscript{109}

Steven Nock has argued that when laws are perceived as illegitimate, they are unlikely to influence social norms and that this is why legal reforms that attempt to remove gender from marriage—to equalize marital roles between men and women—have had so little influence, and instead these roles persist.\textsuperscript{110} He posits that most people, especially men, do not want marriage to be “genderless,” but rather view marriage as a way to realize fully their gender identity.\textsuperscript{111} He contends that social norms are context-specific, so although people reject gender distinctions in public institutions, such as the workplace, they want to retain them in marriage.\textsuperscript{112}

Focusing on post-divorce parenting, Solangel Maldonado has argued that although many fathers in intact relationships are engaged with their children, post-divorce fathers typically become far less involved with their children over time.\textsuperscript{113} Maldonado contends that for these fathers the social norm is one of “economic fatherhood” rather than a more robust relationship.\textsuperscript{114} Maldonado posits that the law has helped create this norm of economic fatherhood and that it can similarly help create a norm of “involved fatherhood.”\textsuperscript{115} In proposing various legal reforms that would encourage involved fatherhood,\textsuperscript{116} Maldonado

\textsuperscript{109} Scott contrasts this picture of marital social norms with the norms surrounding parental obligation. In that context, she argues, the law has had greater success in cultivating norms of engagement and commitment, in part because parental commitment norms are not “bundled” with other norms. \textit{Id.} at 1905–06, 1947–50; \textit{see also} Elizabeth S. Scott & Robert E. Scott, \textit{Parents as Fiduciaries}, 81 Va. L. Rev. 2401, 2436–37 (1995) (discussing “[t]he utility of parents’ affective bonds and informal social norms in promoting desirable behavior”).

\textsuperscript{110} \textit{See} Nock, \textit{supra} note 58, at 1974.

\textsuperscript{111} \textit{See id.} at 1975–80.

\textsuperscript{112} \textit{See id.} at 1975–80, 1986–87; \textit{see also id.} at 1974 (“Marriage is the primary locale in which gender is experienced because it is where our sexual lives are realized.”); \textit{see also} STEVEN L. NOCK, \textit{MARRIAGE IN MEN’S LIVES} 20–23 (1998).

\textsuperscript{113} \textit{See} Solangel Maldonado, \textit{Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent}, 153 U. Pa. L. Rev. 921, 923–25, 946–49 (2005) (describing this phenomenon and noting some peculiarities, such as the fact that the fathers that are most involved during marriage are among the most likely to be the least involved after a divorce).

\textsuperscript{114} \textit{See id.} at 938–46.

\textsuperscript{115} \textit{See id.} at 928.

\textsuperscript{116} \textit{See id.} at 983–84 (arguing in favor of a presumption of joint legal custody and requiring nonresidential parents to be involved in parenting to help create a social norm of parental involvement post-divorce).
argues that “[a]ll parents want to be perceived and want to perceive themselves as good parents. Most parents have internalized the role of ‘parent’ and experience guilt if they believe they have failed to be good parents,” and therefore if the expectation is one of involved fatherhood, fathers will internalize this and feel guilty for not following the social norm.

Although it is an important insight, Maldonado leaves the rich depths of this paternal motivation largely unexamined. These scholars typically assume a rational-actor perspective or, more generally, tend not to consider the role of emotion in familial social norms. Understanding the relationship between legal reform and social norms in the familial context is important, but insights into this dynamic would be even more trenchant if accompanied by an appreciation of the role of emotion in the creation, persistence, and modification of these social norms. For example, to understand better the bundling effect of gender norms and marital norms, it would be useful to develop an appreciation of emotional attachments and reactions to gender equality. In light of the strong emotions of family members surrounding gender roles, social norms of gender equality or inequality may be particularly sticky. And in light of the strong emotions of those outside a family about gender roles, there may be a particular kind of

Maldonado acknowledges that the cost of enforcing paternal involvement is too high, but she contends that the laws would have the effect of encouraging both community enforcement and self-sanctioning. Id. at 1000-08. Scott is interested in post-divorce parenting as well and has argued that recent custody reforms can be understood as an attempt to extend the parental autonomy enjoyed by intact families to post-divorce families, encouraging ongoing relationships and a social norm of involvement. See Elizabeth S. Scott, Parental Autonomy and Children’s Welfare, 11 WM. & MARY BILL RTS. J. 1071, 1071 n.2, 1072-74 (2003); see also Brinig & Nock, supra note 3, at 478-85 (describing the loss of societal trust toward a noncustodial parent, undermining parenting norms for those parents).

Maldonado identifies emotion as one of the reasons fathers choose not to engage with their children post-divorce. See id. at 978-79 (citing research that fathers find visits emotionally painful because they are so brief, intense, and insufficient and because fathers feel guilt over the divorce and therefore often choose to limit visitation to avoid these unpleasant feelings). Maldonado does not, however, explore these intriguing insights further.

In addition to the scholars described in this section, a few others have addressed social norms as well. See, e.g., Margaret F. Brinig & F.H. Buckley, Joint Custody: Bonding and Monitoring Theories, 73 IND. L.J. 393, 415 (1998) (arguing that the lessening of social stigma around divorce may affect divorce rates); Brinig & Nock, supra note 3, at 474-85 (exploring the role of trust in marriages (internal norms) and post-divorce parenting (external norms) and concluding that the loss of trust can lead to divorce and that divorce leads to a loss of societal trust for the noncustodial parent); David D. Meyer, Family Ties: Solving the Constitutional Dilemma of the Faultless Father, 41 ARIZ. L. REV. 753, 806-08 (1999) (arguing that legal recognition or non-recognition of the right to a relationship with a child affects social norms); Sarah E. Waldeck, Using Male Circumcision to Understand Social Norms as Multipliers, 72 U. CHI. L. REV. 455, 492-99 (2003) (contending that social norms play a role in parental decisions about whether to circumcise male infants).
norm enforcement in this context, one in which individuals are sanctioned more readily for deviating from norms.  

Just as the examination of familial social norms has taken insufficient account of emotion, scholars of emotion in family law have taken insufficient account of social norms. An overview of the field of law and emotion reveals this gap more fully.

The interplay between law and emotion is the subject of increasing scholarly attention. The field of law and emotion has progressed from tentative arguments that emotion has some value in legal reasoning to a promising and still-maturing exploration of the relationship between emotion and law. As Kathryn Abrams and Hila Keren have argued, law-and-emotion scholarship holds the promise of illumination, investigation, and integration. According to this characterization of the field, law-and-emotion scholarship can illuminate the affective aspect of a given legal problem, investigate this

120 For one popular account of the stickiness of gender norms in the division of labor in marriage and the social sanctions that accompany deviation from these norms, see Lisa Belkin, When Mom and Dad Share It All, N.Y. TIMES, June 15, 2008, § MM (Magazine), at 44 (describing primarily heterosexual couples who attempt to share parenting equally and the pushback many of these fathers have found in the workplace).

121 For an excellent review of the field, see Abrams & Keren, supra note 12, at 8–16. Law and emotion differs from the field of law and psychology in that it draws upon the study of human emotion in a variety of contexts, including feminism, anthropology, and philosophy. See Terry A. Maroney, Law and Emotion: A Proposed Taxonomy of an Emerging Field, 30 LAW & HUM. BEHAV. 119, 121 (2006) (“Not only has law in recent decades become far more receptive to insights from other disciplines, but those disciplines have begun to engage far more deliberately with issues of defining and understanding human emotion.”). The field of psychology, of course, also concerns emotions, but law and psychology arguably is more narrowly focused. See James R. P. Ogloff, Two Steps Forward and One Step Backward: The Law and Psychology Movement(s) in the 20th Century, in TAKING PSYCHOLOGY AND LAW INTO THE TWENTY-FIRST CENTURY 1, 13 (James R. P. Ogloff ed., 2006) (defining the law-and-psychology movement, under the label “legal psychology,” as “the scientific study of the effect of law on people; and the effect people have on the law” and noting that it “also includes the application of the study and practice of psychology to legal institutions and people who come into contact with the law”).

122 Abrams & Keren, supra note 12, at 7–8. The field does not view emotion and emotional responses as defective rationality, but rather as an acceptable mode of understanding and responding. See id. at 5.
aspect—typically through interdisciplinary work—and integrate this understanding into normative proposals for legal reform. A handful of legal scholars have recently begun to explore the role of emotion in family law. For example, I have argued that the substance, procedure, and practice of family law do not account for the cyclical nature of relationships, in which negative feelings are often followed by the desire to repair the relationship. Instead, in contexts as far ranging as divorce, child welfare, and adoption, family law is predicated on a binary model of love and hate, failing to account for guilt and the drive to reparation. This love–hate model actively thwarts the cycle of intimacy, greatly diminishing the opportunity for repair in familial relationships.

Similarly, Solangel Maldonado has examined the role of emotion in marital dissolution proceedings and has contended that the law could do more to cultivate forgiveness in divorcing spouses. Maldonado argues that scholars should examine the role of emotion in family law because of an elevated potential for harm. Rather than focusing only on negative emotions, she contends that the law can help cultivate forgiveness by eliminating all consideration of marital fault in divorce proceedings and requiring parents in high-conflict divorces to participate in a forgiveness education program. As is clear from these descriptions, these initial inquiries into the role of emotion in family law have not yet addressed the role of social norms.

Although not yet fully developed, some methodological commitments of the field are beginning to coalesce. For example, it is important for scholars to examine emotions from a variety of perspectives, exploring how emotion is understood by neuroscientists, psychologists, economists, sociologists, philosophers, political scientists, and anthropologists. See Peter H. Huang & Christopher J. Anderson, A Psychology of Emotional Legal Decision Making: Revulsion and Saving Face in Legal Theory and Practice, 90 MINN. L. REV. 1045, 1046–49 (2006) (reviewing MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME AND THE LAW (2004)) (describing the need to address all these perspectives and others to fully understand the role of emotion).

See Abrams & Keren, supra note 12, at 7–8.

See Laura E. Little, Negotiating the Tangle of Law and Emotion, 86 CORNELL L. REV. 974, 980–81, 994 (2001) (reviewing THE PASSIONS OF LAW (Susan A. Bandes ed., 1999)) (noting the “[s]urprising” absence of family law from law-and-emotion scholarship); Maroney, supra note 121, at 134 (“[L]ittle of the self-identified law and emotion literature has entered the arena of family law, nor has the family-law literature sought specifically to extract useful insights from the emotion-and-law field.”).

See Huntington, Repairing Family Law, supra note 14, at 1274–93.

See Maldonado, supra note 14, at 441.

See id. at 450.

See id. at 461–69.

Maldonado’s important exploration of the role of social norms in establishing economic fatherhood was not a law-and-emotion inquiry, but as discussed in the text, she did touch upon guilt as a motivating force for parents. See supra text accompanying notes 117–118.
Taken together, the literature on social norms and emotion in family law makes important inroads into our understanding of familial social norms, but because this literature does not address the confluence of social norms, emotion, and state influence, it presents an incomplete account of these norms. The next Part begins this project.

II. ILLUSTRATING FAMILIAL SOCIAL NORMS

Emotion plays a key role in shaping and reinforcing most, if not all, familial social norms. This Part explores this dynamic by examining three sites of contention involving familial social norms: reproductive choice, parenting, and same-sex relationships. In each of these contexts, emotion is deeply relevant to, and yet largely unrecognized in current accounts of, social norms. Exposing the role of emotion in familial social norms complicates, in a constructive way, current understandings of decision making in families. It also reveals the often unseen role the state plays in shaping familial social norms.

This Part discusses specific norms, but it is important to note that social norms regarding the family are both contested and changing. For example, although the gendered division of parental responsibility has undergone substantial changes in the last several decades, mothers still provide more child care than fathers.131 This trend is itself contested, with some communities embracing a more traditional division of responsibility.132 Despite this variation, within any given community a norm can be remarkably salient, as a non-breastfeeding mother in Park Slope, Brooklyn, or a gay couple holding hands in Colorado Springs could readily attest.133

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131 See BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, AMERICAN TIME USE SURVEY—2008, tbl.9 (2009), available at http://www.bls.gov/news.release/pdf/atus.pdf (finding that between 2004 and 2008, on average men spent .84 hours a day caring for children under age 18 while women spent 1.73 hours; even on weekends and holidays, women spent more time than men caring for children: an average of 1.31 hours to .88 hours).


133 Cf. Steven Kurutz, A Park Slope Novel Seems a Little Too Real, N.Y. TIMES, Sept. 10, 2009, at D1 (reviewing a new novel and referring to the setting, Park Slope, Brooklyn, where the stereotypical mother is “militantly organic” and the local Tea Lounge has been dubbed, at least in the novel, as the “Teat Lounge”).
Another important caveat to the discussion that follows is that emotion itself can be in part a social construction. For example, the idea that parents love their children is both widespread and foundational in American society (although perhaps a misplaced and misleading ideal, as addressed in Part III). But this sentimentalization of children and parenting has not always been so dominant. The following discussion explores these points and more.

A. Three Examples

1. Abortion

Abortion is, of course, one of the most contentious issues in contemporary American culture. In light of the roughly 846,000 abortions performed annually, as well as the ongoing political and social debate about the practice, it is not possible to say there is one social norm concerning abortion. It is possible, however, to discern the fault lines in the battle over abortion’s legality and its place in American life.

We have reached a legal equilibrium in which neither outer edge of the abortion debate is likely to prevail—the Supreme Court likely will not completely overturn Roe v. Wade, but neither will it limit in any serious way the swath of abortion-related regulation it now permits. As a result, abortion law and politics have moved to a second-order debate, with a series of proxy fights seeking to influence the decisions of women considering an abortion. To this end, the pro-life movement is attempting to erect indirect barriers to abortion. These indirect barriers include legal efforts, such as the requirement in some states that a woman view a sonogram of the fetus before

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134 See infra note 182.
137 This is not to say that the pro-life movement has abandoned its effort to create direct barriers, such as waiting periods and banning certain procedures. Indeed, the Partial Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (codified at 18 U.S.C. § 1531 (2006)), is one such example. Moreover, some in the pro-life movement oppose such incrementalism and seek an all-out ban. See Reva Siegel, The Right’s Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument, 57 DUKE L.J. 1641, 1687–89 (2008) (describing these efforts).
the abortion, as well as extra-legal efforts, such as the claim by pro-life advocates that women later regret abortions.

These indirect barriers can be understood as an attempt to shape an anti-abortion social norm by changing the individual and cultural dimensions of the emotions associated with abortion. The goal is to create a norm that stigmatizes abortion. This is achieved by seeking to impose, cultivate, or evoke the emotions of motherhood in all pregnant women. The desired norm is that women are mothers, and mothers love their children and would never harm them. A woman who violates this norm thus feels guilty for rejecting motherhood and, by extension, her womanhood.

In understanding the emotional effect of these indirect barriers, the work of Carol Sanger is particularly helpful. Sanger has argued that statutes seemingly unrelated to abortion, such as infant safe haven laws, play a particular role in the “culture of life.” Safe haven laws allow a mother to leave her newborn child anonymously in a designated spot such as a hospital or fire station without fear of prosecution, thereby making the child a ward of the state and effectively placing the child for adoption. The laws were passed in quick succession in numerous states with virtually no opposition, partially in

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142 See id. at 753, 756. The laws of a few states also allow other specified individuals to leave the child with the mother’s permission. See id. at 765.
response to high profile cases of young women killing or abandoning their newborns.\textsuperscript{143}

These laws may be facially unobjectionable, but their deeper meaning relates to pro-life social norm entrepreneurship because such laws seek to change the emotional resonance of the abortion decision. The thought of a newborn in a dumpster is horrific, and it is precisely this image that the safe haven laws seek to imprint on citizens and on individual women considering an abortion. The horror and revulsion at the thought of a woman who would throw out her child can be superimposed on a woman who would “throw out” her child a different way—by having an abortion.\textsuperscript{144}

Similarly, Sanger has discussed laws that require a woman who has chosen to have an abortion to first view an ultrasound of the fetus (or sign a waiver declining to view the ultrasound).\textsuperscript{145} As Sanger argues, ultrasounds have emotional content. In addition to requiring a woman to sign an informed consent waiver stating that she understands the procedure will end the existence of the fetus, the woman also is required to absorb this information pictorially. The state chooses this method because it effectively conveys the state’s preferred narrative.\textsuperscript{146} Mandatory sonogram laws thus seek not only to alter the emotional calculus of individuals facing abortion decisions, but also to reinforce larger social messages about reproductive choices.

Infant safe haven and mandatory sonogram laws may have little practical effect on a woman’s decision to have an abortion. The idea that a woman would not have an abortion because she knows she can keep her pregnancy secret, give birth in private, and then drop off the newborn at a designated spot is highly implausible.\textsuperscript{147} Similarly, the woman who is required to view a sonogram of her fetus has already decided to have the abortion.\textsuperscript{148}

To be sure, some women may choose not to abort a fetus as a result of these laws, but the more pervasive effect of these laws (and others that send similar signals)\textsuperscript{149} is subtle and far-reaching. The laws contribute to the

\textsuperscript{143} See id. at 753-54.
\textsuperscript{144} See id. at 760, 809.
\textsuperscript{145} See Sanger, supra note 9, at 351, 377.
\textsuperscript{146} See id. at 351.
\textsuperscript{147} See Sanger, supra note 141, at 753.
\textsuperscript{148} See supra note 9, at 362, 381.
\textsuperscript{149} Some states have enacted laws designed to inform women that fetuses of twenty or more weeks can experience pain. See, e.g., Ark. Code Ann. § 20-16-1103 (2005) (requiring the provider to inform a patient that information regarding the “unborn child[‘s]” pain is available in printed form and via a state-sponsored
creation of a social norm that a fetus is a human being, that pregnant women are mothers who must conform to maternal norms, and that having an abortion is a shameful act. Without this emotional component, these laws would not be nearly as effective in contributing to a social norm that stigmatizes the choice to have an abortion. This is not to say that the decision to have an abortion is without emotional resonance and that the state is somehow \textit{adding} emotion to the decision. Rather, the point is that the state is privileging and emphasizing one set of emotions over another. In this way, the state is manipulating the emotional context of decision making.

Turning to extra-legal efforts to create a social norm that views abortions in only one way—as a shameful act that no loving person would undertake—the pro-life movement is waging a campaign attempting to persuade women that they will feel regret if they abort a fetus.\footnote{Pro-life websites, for example, direct readers to testimonials by women who regret having had an abortion. \textit{See}, \textit{e.g.}, Lovematters.com, Women Who've Had Abortions, http://www.lovematters.com/women.htm (last visited Feb 5, 2010) ("Sonya had an abortion and advises other women, ‘Don’t do it. Regret of a permanent decision is like watching a sad movie over and over again and hoping the ending will change—but it never will.”). Perhaps most famous is the amicus brief submitted to the Supreme Court in \textit{Gonzales v. Carhart} making this claim. \textit{See infra} note 152.} Rather than directly demonize a pregnant woman considering an abortion, this strategy is more subtle. It sends a message of compassion for the pregnant woman: “We care about you so much that we want to stop you from doing something you will later regret.”

Justice Kennedy’s opinion in \textit{Gonzales v. Carhart}\footnote{\textit{Id.} at 159 (citing Brief for Sandra Cano et al. the Former “Mary Doe” of Doe v. Bolton, and 180 Women Injured by Abortion as Amici Curiae in Support of Petitioner, 550 U.S. 124 (May 22, 2006) (No. 05-380), 2006 WL 1436684).} provides some evidence that this particular anti-choice social norm is gaining ground. It also shows how the state, acting through the judiciary, can reinforce certain social messages. In that opinion, the majority stated that “[w]hether 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.”\footnote{\textit{Id.} § 20-16-1104 (providing that the physician must inform a patient whether an analgesic or anesthetic would lessen or eliminate the “unborn child[‘s]” pain caused by the abortion); GA. CODE ANN. § 31-9A-4 (Supp. 2005) (providing that information on pain potentially experienced by an “unborn child” shall be available via printed materials and via the state’s website).} That the Court could make this assertion
without support is some indication that the abortion-as-regret narrative has become a familiar one.\textsuperscript{153}

Teen pregnancy websites echo this message. For example, the home page of TeenBreaks.com does not at first glance appear to be a pro-life website. But the testimonials are one-sided, with girls and young women explaining in emotional terms why they chose not to seek an abortion.\textsuperscript{154} For those who did have an abortion, there are long narratives about the emotional aftermath.\textsuperscript{155}

Similar to the indirect legal barriers, these extra-legal efforts contribute to an anti-abortion social norm, which resonates because it is created by and builds upon powerful emotions—fetuses as humans and, thus, deserving of protection; women as mothers, regardless of their desire to be so; and abortion as a shameful and regret-inducing act. Although it is not yet clear whether women and girls are in fact influenced by an anti-abortion social norm,

\textsuperscript{153} Cf. Chris Guthrie, Carhart, Constitutional Rights, and the Psychology of Regret, 81 S. CAL. L. REV. 877, 881–82 (2008) (arguing that the majority opinion in \textit{Carhart} misunderstands regret as an emotion because the opinion assumes that women should be protected from regret because they are unable to anticipate it; in reality, individuals (1) are regret averse and factor the risk of regret into decision making, (2) overestimate anticipated regret, so when they actually experience it they find that it is less severe and more fleeting than expected, (3) are able to dampen any regret they do experience, and (4) learn from regret and thus tend to make better decisions in the future); Terry A. Maroney, Emotional Common Sense as Constitutional Law, 62 VAND. L. REV. 851, 891 (2009) ("The \textit{Carhart} majority, by thus eliding relevant categories, is subtly signaling endorsement of an account of the world in which abortion properly is regarded as the killing of a child by its mother, and the emotional consequences of the former therefore will match those of the latter. This half-submerged judgment is further discernable in the Court's discussion of post-abortion regret. \ldots [T]he invocation of such regret sends an important signal of the Court's evaluation of how post-abortive women \textit{should} feel, which colors how it presents what they \textit{do} feel—which then in turn influences the constitutional judgment.").

\textsuperscript{154} See, e.g., Teenbreaks.com, Teen Abortion Issues, Teen Stands Up and Walks Out on Her Abortion, http://teenabortionissues.com/?s=but+on+the+table+waiting+for+the+doctor+to+come+in%2C+I+told+him+I+was+not+able+to+do+this.&x=33&y=13 (last May 23, 2010) ("When I got to the clinic I was ready to have [the abortion], but on the table waiting for the doctor to come in, I told him I was not able to do this. I could not hurt an innocent life who had nothing to do with decisions I made. At that very moment I walked out, looked at my mom, and said she could hate me if she wanted but I was keeping my child. My parents were not supportive about the decision and for not doing what I was supposed to do. My now ex boyfriend was there for nine months and then left me after my son was born. I absolutely love my son Nathan, and I am very happy I made the decision I did.").

\textsuperscript{155} See, e.g., Teenbreaks.com, Teen Aborted Because It Was Too Soon, http://teenabortionissues.com/?s=I+feel+guilty+and+ashamed+of+the+thought+that+I+killed+&x=38&y=2 (last visited May 23, 2010) ("Now I feel guilty and ashamed of the thought that I killed an innocent life because my family believed the time was not right. Everyday I cry thinking about my baby. I just want to tell anyone who is thinking of an abortion, please, please make sure it is the right thing to do because there is no turning back after you wake up from surgery."). Even the page "about abortion" begins with a photograph of the feet of an aborted fetus held between an adult's fingers. See Teenbreaks.com, What Is Abortion?, http://www.teenbreaks.com/abortion/whatisabortion.cfm (last visited Feb. 21, 2010).
contributing to their choice not to abort a fetus, abortion does appear to be stigmatized. To give just one example, although numerous publically elected officials are openly gay (albeit mostly at lower levels of government or in the U.S. House of Representatives), it is difficult to identify a public official who is open about having had an abortion or paid for someone else to have one. Even accounting for the personal nature of the decision, we might expect at least some pro-choice public officials to use a personal narrative to support their stance if abortion were understood as a more neutral event.

The state’s favored narrative is not preordained, and other narratives are possible. For example, rather than focusing on regret, shame, and guilt, there could be a similar narrative about the relief and satisfaction experienced by a woman who has made a choice about her life and acted upon that choice. Recent abortion rate statistics for various demographic groups show that the proportion of women having an abortion who already have one child has been increasing, while abortion rates for other demographic groups, notably teenagers and women in their early twenties, have declined. Arguably, women who already have at least one child are the most informed about the

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156 Declining abortion rates—both among married and unmarried women and women of all races, but especially among white, African-American, and Latino women between the ages of fifteen and twenty four—may be some indication that the social norm is taking hold. Stephanie J. Ventura et al., Estimated Pregnancy Rates by Outcome for the United States, 1990–2004, NAT’L VITAL STAT. REP, April 14, 2008, at 6, 13–17, 22, available at http://www.cdc.gov/nchs/data/nvss/rvr56/nvss56_15.pdf. Without a systematic survey of those who choose abortions and those who do not, it is impossible to identify the precise motivations.

157 When abortion does surface, it can spell political trouble, especially for conservative candidates. For example, in a May 2008 congressional primary race in Oregon, support for the leading Republican candidate Mike Erickson dropped dramatically when his opponent alleged that Erickson had paid for a former girlfriend to have an abortion. Erickson, who had been leading in the polls by ten percentage points prior to the allegation, won the nomination by fewer than 1,300 votes, but he lost important endorsements from the Republican U.S. Senator Gordon Smith and an influential anti-abortion group, Oregon Right to Life. Erickson also was labeled unelectable and was encouraged to resign the nomination by a leading Oregon newspaper. See Editorial, The Oregon GOP’s 5th District Dilemma, OREGONIAN, May 25, 2008, at D4 (“More recent integrity issues also cloud Erickson’s candidacy. They make him appear almost unelectable at this point in his general election contest . . . .”); Steve Mayes, Erickson Beats Mannix in Contest Turned Nasty, OREGONIAN, May 21, 2008, at A6 (“Erickson defeated Mannix in a race that ended with allegations of dishonesty and hypocrisy over Erickson’s anti-abortion position that were disclosed just nine days before ballots were due.”).

158 Cf. Reva Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 STAN. L. REV. 261, 351–80 (1992) (arguing that we should locate the constitutional protection of abortions in equal protection as well as privacy because abortion regulations, analyzed in a social rather than physiological framework, can be understood as a form of sex discrimination based on traditional assumptions about proper gender roles).

decision because they know what it takes to bear and raise a child.\textsuperscript{160} It is not
difficult to imagine a counter narrative built around this trend, portraying a
woman who has chosen to have an abortion as feeling a sense of equanimity
because she has decided to save her emotional and financial resources for her
existing family. This is not to imply that women who have abortions for other
reasons are somehow less worthy and their decisions less deserving of
deference. Rather, the point is simply that within the pro-life framework of
emotions and abortion, it is possible to tell a positive story that also fits with
the iconic image of the loving, self-sacrificing mother.

There are other possible narratives as well, albeit more in line with pro-
choice values. In the words of a retired gynecologist who used to treat women
after botched illegal abortions in the pre-\textit{Roe} days:

\begin{quote}
It is important to remember that \textit{Roe v. Wade} did not mean that
abortions could be performed. They have always been done, dating
from ancient Greek days. What \textit{Roe} said was that ending a
pregnancy could be carried out by medical personnel, in a medically
accepted setting, thus conferring on women, finally, the full rights of
first-class citizens—and freeing their doctors to treat them as such.\textsuperscript{161}
\end{quote}

The powerful emotional appeal of this statement reinforces a different norm
around abortion, one that safeguards the well-being of women wholly apart
from their role as potential mothers.

\textbf{2. Parenting}

Emotion likewise plays a central role in creating and perpetuating social
norms in parenting.\textsuperscript{162} The legal principle of family autonomy largely shields
intact families from direct legal intervention disrupting parental choices. To be
sure, with compulsory education rules and the prohibition against child labor

\begin{footnotesize}
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\item \textsuperscript{160} See \textit{id.} at 14–15 ("Because they already have children, a majority of women having abortions are
aware of the implications of assuming responsibility for an additional child.").
\item \textsuperscript{162} Indeed, the decision to have children at all also involves social norms. Katherine Franke and Mary
Anne Case argue that feminists should challenge the connection between women, caretaking, and motherhood
and instead focus on other paths for women. See Mary Anne Case, \textit{How High the Apple Pie? A Few Troubling
Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted}, 76 \textit{Chi.-Kent L.
\end{itemize}
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(to name just two limitations on parenting decisions),

parental autonomy is not absolute. Moreover, with the advent of child protection laws, there are some minimum standards for parenting—parents who fail to provide adequate care for their children risk involvement with the child welfare system.

But as a basic proposition, at least for families in the dominant group, the state generally leaves parents alone unless they make gross parenting errors. This deference is based upon a number of principles: that parents generally will act in the best interests of their children, that this deference is a necessary quid pro quo to induce parents to undertake the hard work of parenting, and that parents enjoy a relative competency with respect to assessing and meeting the needs of their children. In short, parenting provides a classic example of an important social institution that the law regulates only on the margins.

Presenting a mirror image to this minimal legal regulation, an extensive set of social norms governs parenting behavior. As any parent can attest, norms of proper parenting abound. These norms vary with the community—defined along numerous axes, including socio-economic status, geography, and religion—and change over time. The social norms surrounding myriad

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164 For a discussion of why African-American families are more likely to be investigated for child abuse and neglect, see DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 47–48 (2002).

165 See Troxel v. Granville, 530 U.S. 57, 68–69 (2000) ("[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.").

166 See Scott & Scott, supra note 109, at 2440 ("[P]arental authority over the relationship with children is offered as the quid pro quo for satisfactory [parental] performance. It is unlikely that, in a hypothetical bargain over the terms of their performance, parents would agree to undertake the responsibilities desired by the state without assurance that their investment would receive legal protection.").

167 See Emily Buss, Allocating Developmental Control Among Parent, Child and the State, 2004 U. Chi. Legal F. 27, 33–34 (arguing that “relative competencies” should guide the allocation of developmental control between parent and state, giving parents greater control over matters with only private effects, and the state control over matters “in which the state has a direct stake,” such as education, which affects an individual’s ability to participate in and contribute to “a healthy democracy and economy”).

168 As discussed infra, the state does indirectly influence parenting by influencing social norms. See text accompanying note 186.

169 Corporal punishment, for example, was once widely understood as an effective means of disciplining a child. See BENJAMIN SPOCK, DR. SPOCK TALKS WITH MOTHERS: GROWTH AND GUIDANCE 102–04 (1961) (describing various forms of punishment, noting that “I think it’s of relatively minor importance whether you
specific parenting choices are far-reaching, creating expectations that parents will, depending on the community, baptize or circumcise a child (or follow a similar religious ritual for a young child), dress a child in gender-specific clothing, teach a child not to use swear words (at least in public), volunteer in a child’s school, value homework, or provide a religious education. Fellow family members, teachers, religious-community members, neighbors, and others enforce these expectations on a regular basis.\footnote{Although family autonomy runs deep as a legal matter, non-legal actors often feel no such compunction to withhold judgment. Indeed, ask any parent for a story of a complete stranger weighing in on some manner of parenting (for example, a stranger telling a pregnant woman in the check-out line that she should not be buying junk food, or telling a parent in the park that a child’s helmet is not on properly). Children can be norm enforcers too, such as when they tell a parent what is acceptable to wear at school or when they respond to advertising that targets them, thus enforcing certain consumerist norms. In this way, peer pressure can be understood as another means of norm transmission.}

The disapproval of an individual’s parenting choices is both conveyed and felt in emotional terms. The parent who does not comply with context-specific social norms is understood to feel something less than complete love and care for her child. Thus, the implicit message in a relative asking why a toddler is not in bed at 10 p.m. is that a “good parent” would have the child in bed.\footnote{In another community, requiring a child to go to bed and miss a family gathering might be seen as the violation of a social norm. “Why put Mary to bed at 10 p.m. and keep her from the family? A good parent would . . . .”} In this way, social norms operate as subtle shaming of parents, in the name of a child’s well-being.

Related decisions—such as the division of family responsibility along gender lines (for opposite-sex parents) and the amount of time dedicated to the family as opposed to the remunerative workplace—are also infused with emotional content. The battles over the proper balance for women between career and family arguably have become fraught precisely because these questions go to the heart of a person’s identity, at least in those socio-economic communities where working is a choice. One person’s choice is understood either to validate or invalidate another person’s choice. The judgmental aspect

of these competing norms (for example, to work outside the home or not) contributes to their salience.\footnote{173}

To say that emotion is the currency that enforces parenting social norms is only to start the analysis. The motivation to comply with parenting social norms is complex. To begin, most parents are intrinsically motivated to care for their children. Various theories for this motivation abound, particularly sociobiological,\footnote{174} biological,\footnote{175} and psychoanalytic\footnote{176} explanations.\footnote{177} These theories have generated controversy in some particulars, but it is not necessary to weigh the relative merits of each explanation to note the unifying theme of intrinsic motivation.

Even though intrinsic motivation to care for a child exists, there is no universal understanding of how a parent should care for a child. Instead, what it means to care for a child is supplied by social norms. For example, there is no law of nature that says a parent must put an infant in a separate bed at night

\footnote{173} Steven Nock has argued that there is no social norm concerning women in the workplace. He says that although it is "typical" now for women to work, this does not make it normative with an accompanying social sanction for women who do not work outside the home. See Nock, supra note 58, at 1975–76. By contrast, he contends that work is normative for men. See id. at 1975. Whether there is a social norm encouraging women to work or stay home is highly community-specific. Thus, data revealing the national average for workforce participation by mothers tells us little about a woman’s experience in various communities. For example, in some communities a woman may be regarded critically if she returns to work when her child is very young, while in other communities a woman staying home after her children start school may be regarded with similar disdain. At the very least, there is tremendous acrimony surrounding the "mommy wars." See, e.g., MIRIAM PESKOWITZ, THE TRUTH BEHIND THE MOMMY WARS: WHO DECIDES WHAT MAKES A GOOD MOTHER? (2005); MOMMY WARS: STAY-AT-HOME AND CAREER MOMS FACE OFF ON THEIR CHOICES, THEIR LIVES, THEIR FAMILIES (Leslie Morgan Stiver ed., 2006).

\footnote{174} See, e.g., SHELLY E. TAYLOR, THE TENDING INSTINCT: HOW NURTURING IS ESSENTIAL TO WHO WE ARE AND HOW WE LIVE 12 (2002) (describing the “tending instinct” as “a fundamental truth about human nature: The brain and body are crafted to tend . . . in order to attract, maintain, and nurture relationships with others across the life span”); see also ANTONIO DAMASIO, LOOKING FOR SPINOZA: JOY, SORROW, AND THE FEELING BRAIN 140–51 (2003) (describing the role of various regions of the brain in forming and sustaining attachments).


\footnote{176} See HANNA SEGAL, INTRODUCTION TO THE WORK OF MELANIE KLEIN 79 (1964) (“It is the wish and the capacity for the restoration of the good object, internal and external, that is the basis of the ego’s capacity to maintain love and relationships through conflicts and difficulties.”).

\footnote{177} The altruistic vision of parents’ love for their children is at least as old as Aristotle, who said that a mother’s love for her child is “defined as one who wishes and does what is good, or what seems to be good, to another for the other’s sake.” THE NICOMACHEAN ETHICS OF ARISTOTLE bk. IX, ch. iv (J. E. C. Welldon trans., 1892). The quoted material actually refers to friendship, but Aristotle then says “[t]his is the feeling of mothers toward their children.” Id.
or, conversely, must have the infant sleep next to the parent. But social norms send strong signals to a parent about the “right” thing to do. The parent complies with this social norm at least partly out of intrinsic motivation to care for her child. In this way, intrinsic motivation acts as an enforcement mechanism. In other words, parenting social norms give context-specific meaning to what it is to “care” for a child. In one community, that may be hovering over children at every moment to ensure their safety; in another community that may be giving children far greater latitude to make their own mistakes and learn from them.

Although the intrinsic motivation to care for a child may not vary over time, social norms do. For example, in the 1920s and 1930s, mothers were discouraged from picking up crying infants and from playing with and rocking them. Experts feared this would inculcate bad habits, breed self indulgence, and make the child dependent on attention. Today, attachment theories abound, and parents are encouraged to hold their children as much as possible. It is not that parents in the early part of the twentieth century were any less intrinsically motivated to care for their children. Rather, what it means to care for a child has changed over time.

For example, in many countries, including India, China, Kenya, Liberia, Mexico, Guatemala, and Japan, infants almost always sleep with their mothers. See Heidi Keller, Cultures of Infancy 173–74 (2007) (describing sleeping arrangements for children in Beijing, China; San José, Costa Rica; and Delhi, India); Meredith F. Small, Our Babies, Ourselves: How Biology and Culture Shape the Way We Parent 112–13 (1998) (comparing sleeping arrangements of American babies and Mayan babies in Guatemala); Beatrice Blyth Whiting & Carolyn Pope Edwards, Children of Different Worlds 19, 42 (1988) (observing sleeping arrangements for children in Kenya, India, Liberia, Mexico, and the Philippines and noting that “infants in our samples customarily sleep in the same bed with their mothers until they are weaned”). By contrast, even with the rise of the “co-sleeping” movement in the United States, see Sears et al., supra note 8, at 8–9 (recommending co-sleeping—“sharing sleep”—with infants), infants typically sleep apart from their mothers even if they are in the same room. See Judy DeLoache & Alma Gottlieb, A World of Babies: Imagined Childcare Guides for Seven Societies 16–17 (2000) (reporting that solitary sleeping is by far the most common practice among middle-class European-American families but that among some groups in the United States “identified by ethnic identity and/or class,” co-sleeping is common and may be the majority practice).
In addition to the intrinsic motivation to comply with social norms (because the norms tell parents what loving parents do), there is also extrinsic motivation for parents to comply with social norms. As discussed more fully below, rational-choice accounts of why people comply with social norms are relevant to this point: A parent follows the social norm in her community because she does not want to lose the esteem of others. It is the complex interaction between intrinsic—and deeply emotional—motivations and these extrinsic forces that shapes the power and resonance of parenting social norms.

Returning to the confluence of social norms, emotion, and the state: although the state may not directly regulate parenting, it does shape parenting norms in a variety of ways. To use the example of the gender norms surrounding paid work and parenting, by enacting and enforcing workplace discrimination laws, the state sends the message that women belong in the workplace as much as men. And by making family leave available to both parents, the state sends a message that men play an important role in caring for dependents. Political leaders often invoke emotion in supporting these laws. For example, in his signing statement accompanying the Family and Medical Leave Act, President Clinton said “American workers will no longer have to

Zelizer, *Pricing the Priceless Child: The Changing Social Value of Children* 1, 5–12 (1985) (describing “the social construction of the economically worthless but emotionally priceless child in the United States from 1870 to 1930,” arguing that this “has created an essential condition of contemporary childhood,” and further contending that the change is largely due to the end of child labor).

Falling in between intrinsic and extrinsic motivation is the parent who doubts her emotions. See supra text accompanying note 90. For such an individual, it can be comforting to follow social norms. For example, if a new mother suffers from post-partum depression and does not readily feel love for her child, she can comfort herself by following the community-specific breastfeeding norm. Thus, she reasons, “I must love my child because I am doing what other new mothers do.”

Illustrating another example of the contested norms around parenting, the Supreme Court has drawn a distinction between biological parents and foster parents on the ground that foster parents are paid for parenting and thus are not necessarily entitled to the same constitutional protections as biological parents. See *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1977) (“There are also important distinctions between the foster family and the natural family. First, unlike the earlier cases recognizing a right to family privacy, the State here seeks to interfere, not with a relationship having its origins entirely apart from the power of the State, but rather with a foster family which has its source in state law and contractual arrangements.”). If the social norm surrounding parenting hinges on intrinsic motivation (the idea that parents will, purely by dint of being parents, care for their children), a very different norm accompanies the status of foster parents. The norm for foster parents is one of induced care and an absence of intrinsic motivation. Payments distinguish foster parents from “real” parents. The Court thus sent an unintended signal about parenting as an endeavor disconnected from extrinsic, pecuniary motivation.
choose between the job they need and the family they love.” The message is that these are not lazy workers looking for “time off,” but rather dedicated family members seeking to care for their loved ones, a responsibility that falls on all of us.

3. Same-Sex Relationships

A third site of familial social norms—the norms attending family formation—equally illustrates the central role of emotion as well as state influence on family norms. Perhaps no area of family law is more contested than the status of same-sex couples. A generation ago, a lack of legal recognition was accompanied by strong social sanctions against such couples. Today, social norms have changed in some, but by no means all, communities. One way to understand the intense battles currently raging over legal recognition of alternative family forms is by understanding that one community’s social norms may be perceived as threatening to another. And the social norms themselves—whether a community is more or less accepting of same-sex couples—turn on the community’s emotional response to such couples.

As with abortion and parenting, emotion is a critical feature of the social norms surrounding same-sex couples. As discussed above, advocates on both sides of the debate over same-sex marriage employ emotion to reinforce existing social norms. Those opposed to same-sex marriage tap into feelings

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187 Although challenging to prove empirically, some evidence to support this claim is found in the various state and local laws, as well as court opinions, recognizing rights of same-sex couples. See, e.g., Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407 (Conn. 2008) (recognizing a right to same-sex marriage under the state constitution); Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (same); see also CAL. FAM. CODE § 297 (West 2004 & Supp. 2010) (listing requirements for establishing a domestic partnership); N.H. REV. STAT. ANN. § 457:1-a (2010) (“Any person who otherwise meets the eligibility requirements of this chapter may marry any other eligible person regardless of gender.”); N.J. STAT. ANN. § 26:8A (West 2009) (formally recognizing domestic partnerships); Vt. STAT. ANN. tit. 15, § 1202 (2007) (listing requirements for a valid civil union). By contrast, in other communities, there is still a strong social norm against same-sex couples. Again, although empirical evidence may be hard to come by, the state laws and recent constitutional amendments limiting marriage to opposite-sex couples and, in some states, prohibiting civil unions, are clear evidence that there is no consistent social norm recognizing same-sex couples across the United States. See, e.g., COLO. CONST. art. II, § 31 (“Only a union of one man and one woman shall be valid or recognized as a marriage in this state.”); MICH. CONST. art. 1, § 25 (similar); OR. CONST. art. XV, § 5a (similar); FLA. STAT. ANN. § 741.212 (West 2005) (similar).
188 Although the point is not elaborated here, religious views, which can have a strong emotional component, provide part of the fuel for opposition to same-sex marriage.
189 See supra Part I.B.2.
of disgust. Those in favor of same-sex marriage attempt to evoke more positive feelings by portraying same-sex couples as emotionally akin to opposite-sex couples—loving and caring.

Importantly, social norms of acceptance tend to precede legal recognition, and when this does not occur, the emotional resonance of legal change can backfire on advocates. For example, some states where courts have recognized legal rights for same-sex couples, such as Connecticut, Massachusetts, and Vermont, are commonly understood to be states where same-sex couples were welcome before the legal decisions. This can play out differently around the country depending in part on access to ballot initiatives. For example, although parts of California are famously liberal and the state supreme court found a right to marry someone of the same sex in the state’s constitution, a majority of voters chose to amend the state constitution to limit marriage to opposite-sex couples.

As with abortion and parenting social norms, the state can help cultivate a social norm of tolerance or intolerance through means other than judicial proceedings. For example, San Francisco has been known as a gay-friendly city for decades. In 2004, when Mayor Newsom proactively championed same-sex marriage (as opposed to domestic partnership, which was supported by California Governor Arnold Schwarzenegger) and framed his support as an emotional argument favoring dignity and equality, this contributed to San Francisco’s social norm of tolerance and provided further support for same-sex marriage (though it also provoked serious backlash). Of course, it is

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190 Kerrigan, 957 A.2d at 407.
191 Goodridge, 798 N.E.2d at 941.
193 Claims for legal recognition of same-sex couples do not always prevail in states generally considered liberal. For example, the high court in New York rejected a claim to same-sex marriage. See Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006). However, a lower court later found that same-sex marriages from other jurisdictions should be lawfully recognized in New York. See Martinez v. County of Monroec, 850 N.Y.S.2d 740 (App. Div. 2008). In response, Governor David Paterson issued a directive ordering state agencies to recognize same-sex marriages legally contracted outside the state. See Memorandum from David Nocenti to All Agency Counsel (May 14, 2008), available at http://www.ny.gov/governor/reports/pdf/Nocenti_memo.pdf. This compromise may reflect the divided political character of New York State, with a liberal south and more conservative north.
challenging to disentangle the precise interplay between norms and state action. The relationship between the social norm of tolerance and protective laws is complex, with one surely influencing the other. But to the extent laws gently reinforce what may be a growing norm of tolerance, the state will likely help expand and strengthen that norm. Conversely, laws that fail to recognize same-sex relationships as equal to opposite-sex relationships, such as the Defense of Marriage Act, contribute to a norm of intolerance by signaling the state’s view that same-sex relationships are less deserving of state protection and therefore somehow less acceptable.

B. Synthesizing the Many Roles of Emotion

To enunciate and systematize the relationship between emotion and familial social norms, this section draws out four main insights from the three examples discussed above. First, emotion is often the content of a familial social norm; thus it is impossible to understand norms without understanding emotion. Second, emotion can instigate a norm. By cultivating certain emotions, it is possible to shape behavior. Third, familial social norms carry tremendous emotional weight, which explains why the cost of noncompliance can be particularly high in the family context. Finally, the emotion-laden nature of familial social norms complicates any predictive enterprise.

Newsom as saying, “[i]t is wrong to deny tens of millions of Americans the same rights and privileges that people like myself . . . have been afforded just through happenstance because we married somebody of a different gender” (alteration in original)).

Lessons from the Cultural Cognition Project at Yale Law School are relevant to any understanding of norm formulation and modification and how these processes are affected by currently held values. According to the Project, “[c]ultural cognition refers to the tendency of individuals to conform their beliefs about disputed matters of fact (e.g., whether global warming is a serious threat; whether the death penalty deters murder; whether gun control makes society more safe or less) to values that define their cultural identities.” Cultural Cognition Project Home Page, http://www.culturalcognition.net (last visited Mar. 26, 2010). Stated more concretely, the Cultural Cognition Project tells us that social norms may be sticky because of the deeply held values underlying them. Telling someone opposed to same-sex marriage that children raised by same-sex parents have outcomes similar to children raised by opposite-sex parents will not necessarily lead to a change in values and hence a change in the corresponding social norm (the rejection of same-sex couples). Thus, any inquiry into social norms, especially social norms related to the contested issues surrounding families, must account for this stickiness. A full account of the role of cultural cognition, however, is beyond the scope of this Article.

See Dan M. Kahan, Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem, 67 U. Chi. L. Rev. 607, 625–32 (2000) (arguing that sudden changes to the law can be “hard shoves” to social norms that lead to backlash and resistance, such as the 1920s prohibition on alcohol, but incremental changes to the law, such as limited smoking bans, can serve as “gentle nudges” to social norms that lead to widespread compliance and a change in perceptions about acceptable behavior).

Emotion as the content of a norm. Emotion is often an embedded feature of a norm. For example, the norm that all parents love their children would not exist but for emotion. Thus, it is not possible to understand the norm without grasping the emotional aspect of the norm. If we better understand the relevant emotion, we better understand the norm.

Emotion as the instigator of a norm. Emotion also can trigger a norm when particular emotions induce a change in behavior. For example, when Colorado sought to reduce the incidence of shaken-baby syndrome, the state drew upon both fear and compassion to trigger a non-shaking norm. The state evoked fear by educating new parents about the real and devastating effects of shaking infants, thus sending a message that good parents do not shake their babies. The state also used compassion to induce the norm, letting parents know that taking care of an infant is stressful and that frustration is a normal part of parenting, but that shaking is never an appropriate response.

Trigger emotions raise certain concerns for state norm entrepreneurship. Arguably, there is greater unease when the state uses negative emotions to trigger a norm than when it uses positive emotions. The state may send a signal that people should be afraid to walk home alone at night, thus using fear to ensure people watch out for themselves. Although there are benefits to this awareness, it is not unproblematic. The state’s use of this fear could reinforce class and race stereotypes—implying that people should be particularly afraid of walking through non-white, poor neighborhoods. Similarly, the fear could reinforce ideas about gender differences—that only women should be afraid of walking home alone. Sometimes using negative emotions such as fear may be desirable—for example drawing upon the fear of new parents to prevent shaken-baby syndrome. There may be reason for concern, however, when the state vilifies parents who abuse or neglect their children, rather than drawing

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201 See id. (describing the dangers of shaken-baby syndrome); Calm a Crying Baby, www.calmacryingbaby.com (last visited Mar. 26, 2010).
202 See Andrew Sirotnak, Babies Cry... Be Prepared, COLO. PARENT, Apr. 2007, at 12 (“We all know that babies cry—but sometimes the reality of being in a room with a screaming baby frays the nerves of any caregiver, and sometimes, tragically, caregivers cross the line and take their frustration out on the child.”); see also id. (“By providing people with tips on how to calm a crying baby, we hope to provide ideas for caregivers who are feeling overwhelmed. And, just as importantly, to let people know they aren’t alone. Everyone gets overwhelmed, tired and frustrated . . . caring for a baby is hard work . . . . The most important thing to remember is to be patient and never, ever shake a baby.”).
upon more positive emotions, such as compassion, to trigger the same social norm. Part III examines this difference in greater detail, but it is worth noting that there are challenges in trying to cultivate a positive message and positive emotions. It may well be that it is easier to invoke negative emotions—such as scaring parents about the possibility of child abduction—than it is to instill a feeling of empathy for others. 203

**Emotion as a compliance enhancer.** The emotionally powerful nature of familial social norms means that the cost of noncompliance runs high. The dog walker who fails to scoop her dog’s poop may risk a loss of esteem from a passerby, thus increasing the likelihood that she will pick up after her dog. But the parent who fails to comply with community-specific norms about discipline, education, or work-family balance risks much more: the judgment that she is a bad parent. 204 As a norm-imprinting tool, emotion thus makes familial norms particularly salient. The esteem to be lost is so dear and so personal that individuals make great efforts to comply with the relevant norms. In this way, familial social norms are tremendously fraught because so much is perceived to be at stake.

**Emotion as a complicating factor.** Perhaps the most important insight from a study of emotion in familial social norms is that the predictive tools used by norm theorists are often inapposite. For example, rational-choice theory tells us that a person will comply with a social norm if it enhances her opportunity to cooperate with others, 205 but this account does not consider the intrinsic motivation to be a good parent. A parent may look to social norms to determine how a good parent acts, but the existence of norms is not what motivates her to be a good parent. Similarly, the internalization theory 206 predicts that a woman will choose not to have an abortion to avoid the stigma associated with abortions, but this theory does not help us understand the far

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203 For further discussion of how the law can cultivate emotion, particularly positive emotions, see Kathryn Abrams & Hila Keren, Law in the Cultivation of Hope, 95 CAL. L. REV. 319, 361–71 (2007) (exploring how the law can cultivate emotions and using “hope” as an animating example); and Cheshire Calhoun, Making Up Imaginary People, in The Passions of Law 217 (Susan A. Bandes ed., 1999) (discussing emotional scripting in the context of same-sex relationships and showing how the law can cultivate an idea of and belief in romantic love).

204 In certain socioeconomic circles, there is often so much pressure on women to be “good mothers” that no mother feels like she is parenting well. See Ayelet Waldman, Bad Mother: A Chronicle of Maternal Crimes, Minor Calamities, and Occasional Moments of Grace 3–4 (2009). Condemnation from a fellow parent stings even more because of the underlying fear of inadequate parenting. Id.

205 See supra text accompanying note 66.

206 See infra text accompanying notes 213–215 (discussing Cooter and the internalization theory).
more complex and pervasive ways in which guilt works to shape and perpetuate an anti-abortion norm.

Part III returns to these multiple roles of emotion in familial social norms, demonstrating that a sound understanding of these roles is essential to any norm entrepreneurship the state might undertake.

C. In Search of the Savannah

The analysis thus far reflects a long-running conflict in the discourse of social-norm theory—the challenge of identifying middle ground between rational-choice and law-and-society accounts of social norms. Rational-choice scholars craft relatively parsimonious theories of social norms, intentionally setting aside a complex range of factors (including emotion) that can motivate social norms and provide reasons for people to comply with them. By contrast, law-and-society scholars view norms as the result of numerous sociological factors, of which emotion is only one example.

The dichotomy between the two approaches to social norms reveals reciprocal shortcomings. If rational-choice accounts of social norms offer limited insight because of their failure to account for emotion, law-and-society accounts of social norms suffer from a different shortcoming. The law-and-society accounts may provide a richer understanding of human behavior, but the multiple variables considered by these sociological theories yield accounts of norm creation and transmission that are overly contextual and not

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207 See Scott, supra note 60, at 1607, 1622 n.39, 1637–39 (noting this long-standing challenge but also expressing pessimism about the ability to find a middle ground given the fundamentally complex nature of social norms and their context-specific nature).

208 But see Eric A. Posner, Law and the Emotions, 89 Geo. L.J. 1977, 1984–86, 1990 (2001) (proposing a framework for incorporating at least some emotions into the rational-choice model of decision making by “loosely drap[ing] the emotions over the rational choice framework,” assuming that emotional states can at least temporarily affect preferences). The economist Robert Frank is perhaps the best-known rational-choice scholar to incorporate emotion into rational-choice theories. His central contention is that rational-choice theories actually provide considerable room for “noble motives” in addition to self-interest. See Frank, supra note 17, at xi. For an extended discussion of reductionism in rational-choice theory as it relates to social norms and an explanation of when reductionism is too much, see McAdams, supra note 66, at 678–87. Finally, rational-choice theorists typically do not assert that sociological factors such as emotion are irrelevant, but rather that they are complex and unpredictable; therefore incorporating them does not yield a sufficiently parsimonious account of social norms. See Scott, supra note 60, at 1604–07.

209 One of the earliest and most important examples is Stewart Macaulay’s research of contracts in business relationships. See Macaulay, supra note 52. For work by a sociologist who studies law, see generally Donald Black, The Behavior of Law (1976) (discussing how sociological factors, not simply “the law,” constrain and affect legal actors).
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Determinative enough, thus jeopardizing any predictive value. As Arthur Leff aptly put it, rational-choice theories of social norms are a desert and law-and-society theories a swamp.

To begin with the analytic point, rational-choice theories do not reflect the reality of familial social norms because they fail to account for the salience of emotion. To be sure, some rational-choice accounts address the role of guilt, contending that when a social norm is internalized, a person feels guilty for not complying. But in the context of familial social norms, the emotion is not simply a prod for compliance, it is the essence of the norm itself. Take abortion, for example. Through the efforts described above, anti-abortion advocates seek to cultivate or impose feelings of motherhood and care. These campaigns anticipate that a woman will feel guilty for seeking to end her pregnancy, in contravention of what “good mothers” do.

Rational-choice theories of norm compliance—of esteem, internalization, and signaling—may partially account for the relevant dynamic in the decision whether to carry a pregnancy to term. Once abortion is understood as a mark of shame, women arguably will be less likely to choose to abort a fetus for fear of the loss of esteem from others. And to the extent she has internalized the social norm, a woman will sanction herself and choose not to have an abortion, anticipating the guilt she will feel both for violation of the norm and for engaging in the activity itself. Similarly, if abortion is shameful, a woman may choose not to seek an abortion because having one may signal a

\[210\] See Scott, supra note 60, at 1611.
\[211\] See Ellickson, supra note 50, at 147 (noting that Arthur Leff was believed to have “used these metaphors in casual conversation”).
\[212\] A few rational-choice scholars have looked at the role of emotion in particular contexts. For example, scholars have argued that remorse plays a key role in regulating corporate culture: individuals will refrain from engaging in fraud if they do not think others are engaging in fraud because they anticipate feeling remorseful if they act contrary to others. See Huang & Wu, supra note 17, at 392-401. But scholars of social norms have yet to mine the rich vein of emotion in any systematic fashion.
\[213\] For example, Robert Cooter has argued that rational-choice theory wrongly assumes a rational “bad man” calculating whether to obey a law by determining the costs and benefits of compliance and fails to account for people who are intrinsically motivated to obey the law because they have internalized civic values. See Cooter, supra note 63, at 1584-91. To account for this behavior within the rational-choice framework, Cooter theorizes that internalization is understood to occur when doing so increases an individual’s opportunity to cooperate with others. See id. at 1591-96. Similarly, rational-choice theorists have attempted to explain the role “other-regarding preferences”—behavior that takes into account the costs and benefits to others—play in social norms. See Lynn A. Stout, Social Norms and Other-Regarding Preferences, in NORMS AND THE LAW 14 (John N. Drobak ed., 2006).
\[214\] See supra Part I.A.2 (discussing these various theories, associated with Richard McAdams, Robert Cooter, and Eric Posner, respectively).
high discount rate and thus make the woman a less appealing long-term partner.

But putting the dynamic in such terms almost immediately shows the thinness of these accounts. Although esteem, internalization, and signaling theories can partly explain why people follow social norms, they provide little traction on the question of why a particular social norm emerges or the full range of considerations that might lead individuals to follow these norms. Women choose to have an abortion or carry a baby to term for deeply personal reasons that can be influenced by a desire for social esteem or future partners. But there are far more pressing considerations for women, including whether they are ready to become parents (socially, emotionally, and economically), whether they fear violence from a parent or partner, and whether they simply do not want to be pregnant. Each of these considerations has deep, personal emotional resonance shaped by social norms about the nature of parental responsibility and proper gender roles.

Extant rational-choice theories of social norms also fail to account for the distinction between intrinsic and extrinsic motivations. As rational-choice theorists might suggest, parents do appear to be extrinsically motivated to comply with social norms to avoid a loss of esteem from others and to signal something about themselves. And parents likely internalize expectations and values and thus seek to avoid guilty feelings by complying with norms.

All of this, however, misses the role of intrinsic motivation, which is critical to understanding every aspect of social norms in the familial context. Rational-choice theories are entirely focused on the external world, tying social norms to relationships between individuals while ignoring emotions within a particular individual. For example, the signaling theory of social norms posits that a parent will act like a “good” parent by complying with social norms because she wants to signal to others that she has a low discount rate. Similarly, the esteem theory of social norms is rooted in parents’ relationships with others. The internalization theory of social norms appears to come closest to describing parental motivation. But this theory, too, is about relationships with others because the internalization is understood to occur when doing so increases an individual’s opportunity to cooperate with others.²¹⁵

In the context of same-sex relationships, conceptions of esteem, internalization, and signaling operate to shape choices about family formation.

²¹⁵ See Cooter, supra note 63, at 1591–96.
As with abortion and parenting, however, the emotional resonance of internal motivations is just as determinative. For example, in a community that accepts same-sex couples, a person cognizant of this norm may not venture to make a homophobic remark for fear of losing the esteem of others or sending the wrong signal. Anticipation of guilt might even play a role if the person has internalized the community’s values. But beyond these dynamics, whether to accept or reject same-sex couples raises deep religious and cultural feelings that simply cannot be captured in the language of signaling and the like. Individuals on both sides feel that their very identities are at issue. Thus, it is not simply the loss of esteem that is at stake, but rather the loss of self.

Additionally, the particular emotions at issue in this context reveal the importance of paying attention to the source of norms. Although esteem theory suggests that a norm may arise if there is a known consensus about the worthiness of a particular behavior (here, accepting or rejecting same-sex couples), it does not account for why a particular social norm emerges. Understanding the emotional aspect of the social norms surrounding same-sex couples helps explain why some people expend considerable resources fighting the legal recognition of someone else’s relationship. The opponents of same-sex marriage understand that a social norm of acceptance is more likely to lead to legal recognition, and they further perceive this recognition as threatening their own sense of self. Thus, an account that a social norm emerges when there is sufficient consensus and knowledge does not begin to appreciate the emotional stakes in developing that consensus.

Rather than find an abstract theory of social norms that perfectly accounts for emotion—a savannah—it is more useful to first determine what is necessary for a sound understanding of familial social norms, and then determine what level of formalization is needed for the state to formulate effective policies and laws. In other words, there is no perfect answer: There are rich understandings of social norms, but they are so context-specific that it is nearly impossible to formalize these understandings. By contrast, there are usable formalizations, but these are not helpful understandings because they bear so little resemblance to reality. Adding emotion provides some middle ground for thinking about the role of the state in influencing families and also a framework for operationalizing these insights. As the next Part demonstrates,

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216 Indeed, this is one way to read Justice Scalia’s prediction in his dissent in *Lawrence v. Texas* that decriminalizing homosexual sex would inexorably lead to same-sex marriage. *See Lawrence v. Texas*, 539 U.S. 558, 590, 600-05 (2003) (Scalia, J., dissenting).
adding emotion advances the conversation sufficiently to develop effective policies in the family law context.

III. FAMILIAL SOCIAL NORMS IN CRITICAL PERSPECTIVE

Several normative implications flow from the intersection of emotion, social norms, and state influence. Although some readers may be persuaded that the state does influence social norms, there may be some resistance to the idea that the state should do so. This Part, then, unpacks state norm entrepreneurship, dissecting various concerns raised by the phenomenon. This Part also explores the pernicious side of familial social norms—their homogenizing potential. Despite these concerns, this Part argues that familial social norms can be harnessed to serve important interests, such as protecting children from abuse and neglect. This discussion demonstrates that state norm entrepreneurship has considerable advantages when addressing trenchant and controversial issues. Appreciating the confluence of social norms, emotion, and state influence opens the door to more creative and effective state interventions.

A. Emotion and State Norm Entrepreneurship

Intuitively, the idea of the state actively shaping ground-level social norms by changing the emotional context of decision making presents a potentially disturbing image, resonant of propaganda and manipulation. It is important, however, to tease out the unease this state role can generate. There are three independent questions: Is there a concern with what the state is doing (shaping norms)? Is there a concern with how the state is doing it (using emotion as a tool)? Or is there a concern with the underlying policies?217

1. What the State Does

Nearly every law or state-sponsored program embodies some value, even if the values conflict.218 Thus, the more precise question is whether the state can

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217 A slew of political process questions exceed the scope of this Article. For example, there may well be important differences between the state cultivating emotion and the state channeling emotion. This Article undertakes the descriptive project of exploring the role of emotion in state-influenced social norms and leaves for another day the analysis of the political process questions concerning the role of emotion in law making and governing more generally.

218 For example, although the state may disapprove of unauthorized migration, the state may still choose to translate public safety messages into Spanish.
and should choose to further a value by influencing social norms in addition to, or sometimes as an alternative to, direct legal regulation.

One objection is that the state must be transparent in its efforts to influence and impose values. In the reproductive choice context, for example, when the state enacts an infant safe haven law, it is purportedly addressing one concern (infanticide), but it is also, arguably, contributing to a pro-life message. When the state acts in this covert manner, the state potentially subverts the democratic process. A strong argument can be made that in a representative democracy, the state should not send hidden messages. To be sure, public hearings might be held on such laws, and part of the public discussion might uncover the message behind the law (that it equates women who seek abortions with women who kill their newborns). But, aside from the unlikelihood of this kind of transparency, the underlying message of the law would not necessarily be apparent to members of the community who are not part of the public discourse.

The state role in norm generation and direction raises a second, more fundamental concern. The prevailing principle of family autonomy reflects a larger cultural norm that seeks to preserve realms of individual and community decision making outside the reach of state influence. Where and how to situate the so-called public–private line is deeply contested, but most people still have an intuitive sense that at least as a default matter, the state should confine itself largely to the realm of public issues, whereas norms often reside in a somewhat more private, or at least personal, world.

This is an important concern, but at least in the familial context the state already plays a pervasive role in setting the conditions for, and terms of, many of the decisions and conflicts traditionally considered private. This is not to say that state intervention in norm dynamics is entirely unproblematic. The reality of pervasive state regulation does, however, bring attention to the proposition that what the state is trying to achieve through this kind of second-order regulatory strategy is more critical than the fact that the state is doing it through norms rather than direct regulation.

220 See id.
2. How the State Does It

This, then, shifts the inquiry to whether the concern is less with the fact of state intervention in norms and more with the means the state employs—the manipulation of the often fraught emotions that drive those ideas and behaviors. Although the state can help sway social norms using emotion as a tool, this tool may be most effective when used *sub rosa*. For example, a fetal sonogram law that explicitly stated that the purpose of the law was to instill feelings of guilt and regret in any woman considering abortion likely would provoke a backlash against such legislated emotion. The legislation may work precisely because the emotional evocation is hidden.

Concerns with transparency and respect for the private realm resonate with particular strength when the policy instrument has an emotional content. But again, unpacking these concerns suggests that the problem is less with emotion *per se* and more with the potentially troubling aspects of the specific emotional cues the state may be sending. Opposing abortion by generating community shame, or attempting to ban same-sex marriage by drawing on feelings of disgust, may be pernicious less because these are emotional issues and more because of a larger concern about undermining the equally important emotional values of respect and dignity.

3. The Underlying Policies

The real concern with state norm entrepreneurship would seem to turn on the “why”—the policies driving the state influence. In this way, how we assess the effectiveness and normative desirability of state intervention in driving and shaping norms turns largely on our evaluation of the underlying goals at issue and the particular emotional resonance the state chooses to pursue. Pro-life advocates are as likely to welcome the state’s attempt to contribute to a norm that stigmatizes abortion as pro-choice advocates are to abhor this intervention. There may well be something inherently troubling about the state trying to regulate abortion using emotion, but a person may find this more or less troubling depending on their views on this issue. In other words, although the abstract question is whether a state role in norm generation and manipulation is desirable, perhaps the role is only as good or bad as the goal to be achieved.

In short, although the state generally adheres to non-interventionist, autonomy-based principles when directly regulating families, it nonetheless plays a pervasive role in shaping social norms in areas where it does not
directly intervene. The state does this in obvious ways, such as circulating
public service messages urging parents to talk to their children about drugs,221
but the state also acts in myriad less obvious ways. Public rhetoric is a form of
norm entrepreneurship, but so too are laws that shape the work–family balance,
public funding decisions that feed or starve public schools, and even basic
land-use decisions about where to construct playgrounds or recreational
facilities. To ignore these ubiquitous dynamics will not eliminate the state
role, but rather push it further into the background.

The critical question, then, in evaluating the normative valence of any
individual instance of norm creation or manipulation turns less on whether the
strategy is legitimate and more on the underlying policy goals at issue. Social
norms are simply a means to an end, and it is more important to focus on the
ends than to pretend that the state never chooses these means.

To demonstrate that emotional-norm generation can be normatively
desirable in the right context (depending on the reader’s point of view), section
C will discuss the use of emotion to cultivate empathy for parents who abuse
or neglect their children. But before turning to that discussion, it is important
to address one additional concern about familial social norms: the potential
loss of pluralism.

B. Norms and Normality: On the Homogenizing Effect of Familial Social
Norms

There is something troubling about the ubiquity and homogenizing power
of social norms. In one sense, “social norm” is a neutral term for something
that is anything but neutral. Familial social norms both embody normative
views on appropriate behavior and have a potential to be homogenizing—
requiring all to comply or face social
to all comply or face social sanction.222 To the extent a norm has
force because it represents a community consensus about a given individual
choice or behavior, that very consensus has the potential to marginalize or
stigmatize outliers who do not adhere to it and the boundaries it defines.
Further, the law may embrace pluralism through the doctrine of family
autonomy, but that autonomy arguably is far more circumscribed through

221 See, e.g., St. Louis County Minnesota Sherriff’s Office, Talking with Your Kids About Drugs,
http://www.co.st-louis.mn.us/slcportal/SiteMap/HomePage/Departments/Sheriff/PoliceCrimePreventionTips/
222 See Kahan, supra note 66, at 373 (“Social norms notoriously underwrite all manner of intolerance and
persecution.”).
social norms. In other words, the law grants parents considerable discretion, but social norms may not because, although our society embraces pluralism across communities, any given community does not necessarily embrace pluralistic norms.

To write about familial social norms is, of course, to invoke issues of race and class, as these are two lines along which social norms may vary from one community to another. These differences can have considerable consequences, with the state using them to justify intervention in families. For example, differing social norms about parenting—especially those that deviate from norms in middle-class white families—have long been the basis for state intervention in families. Any state intervention in norm generation raises these types of concerns.

The homogenizing aspect of social norms is particularly troubling in the family context because families have long been understood as a site for cultivating pluralism. To be sure, social norms are context-specific, but within any given community, a norm can be oppressively homogenizing. The failure to comply with the norm may be a basis for social ostracism, ranging from a relatively trivial rejection by a playgroup to the complete rejection by a religious or social community.

This homogenizing aspect of norms raises the important question of whether the state, through the apparatus of public law, should seek to reinforce norms that are not consistent (as they so often are not) with principles of

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224 See Buss, supra note 168, at 27 (noting that leaving the upbringing of children to private actors “would comport with our commitment to pluralism by allowing one generation to perpetuate its own diversity, and even expand upon it, in the next generation”); Anne C. Dailey, Constitutional Privacy and the Just Family, 67 Tul. L. Rev. 955, 959 (1993) (“The family’s role in nourishing and sustaining diverse moral traditions is what in part distinguishes our liberal democracy from totalitarian political regimes . . . . As the locus of potential political resistance, the family acts as an important institutional check on the power of the state to mold citizens in its own image.”).

225 For a fictional account of this dynamic, see Tom Perrotta, Little Children (2004).

226 Circumcision is a good example because although it may be argued that this is a hidden preference not easily knowable by others, in a religious community that expects a ritual, the failure to conduct it would be telling. For example, the refusal to have a bris would inform others in a Jewish community that the parents are not following this tradition. Depending on the views of the community, this may lead to a social sanction. The more culturally homogenous the community, and the more insulated the community is from a wider social network, the more complete the sanctions—and thus the more complete the sanction—may be. See, e.g., Kirk Johnson, Estranged Father Testifies in Sect Case, N.Y. Times, May 21, 2008, at A18 (describing a father who was excommunicated from the Fundamentalist Church of Jesus Christ of Latter-Day Saints possibly due to religion, politics, or personality conflicts).
tolerance and equality. As with concerns about emotional manipulation discussed above, the normative question here requires attention to the specific kind of pluralism or homogeneity at issue. Where the state sanctions social norms that ostracize, stigmatize, or the like, this is more troubling than the state reinforcing norms of parental concern, stability, and empathy. As underscored by Elizabeth Scott’s analysis of the coupling of gender norms and marital commitment norms, the business of norm change through law is rarely linear or simple. Nonetheless, legitimate concerns about pluralism suggest that the state role in norm generation may be more acceptable where it is consistent with tolerance and equality.

There is a separate concern with state intervention in familial social norms where it relates to the content of those norms. Although social norms are, by definition, supposed to embody a consensus on appropriate behavior, there is a sense in which familial social norms may embody our hopes more than reality. This is a different way in which familial social norms can be homogenizing, and hence worthy of concern in considering the state role: the public discourse on many such norms simply does not allow a full flowering of the real complexity of emotion. This is particularly evident in norms around parenting and the emotions that are said to attach to parenting. Prevailing conceptions of parenting do not allow for parental ambivalence, creating friction where social norms do not recognize such ambivalence. Instead, parents are understood to love their children at all times and in all ways, and extant social norms reinforce this idea.

This expectation of parental love does not accord with lived experience. Intermittent ambivalence and, at times, antipathy are as much a part of parenting as love. Once we recognize the range of emotions at play in parenting, we can see that social norms are tremendously important in steering people in the right direction, but they are also potentially damaging when they

227 See supra notes 105-109 and accompanying text.
228 Cf. D. Don Welch, *Ruling with the Heart: Emotion-Based Public Policy*, 6 S. CAL. INTERDSC. L.J. 55, 75-87 (1997). Welch describes the danger of using emotional arguments to shape public policy, but he contends that such arguments have a place in the process when they relate to the subject matter and further discourse on the subject—and do not simply inflame one side of a debate. *Id.* Welch thus distinguishes a claim of sorrow over an aborted fetus from an angry accusation that a woman who aborts a fetus is a “baby killer.” *Id.* at 79.
229 One of the earliest chroniclers of this ambivalence was the psychoanalytic theorist Melanie Klein. For more on Klein and her theory of human intimacy, which posits that an individual first feels love for another, then inevitably comes to hate and transgresses against him or her, and finally feels guilt about the transgression and seeks to make amends, see Huntington, *Repairing Family Law*, supra note 14, at 1260–66.
fail to reflect the full array of human emotions. Without this reflection, the relevant social norm stigmatizes a parent who feels ambivalence toward her children (but who has not, at times?).

Failing to recognize these more negative emotions in the external world of social norms makes it all the more difficult for a parent to acknowledge these feelings internally and thus, ideally, to seek external support. As Anne Alstott has argued, there is “No Exit” for parents. Alstott makes a pragmatic, economic argument about the consequences of the tenacity of the parent–child bond. Her insight also fruitfully generates an understanding about the consequences of the lack of emotional exit for parents, leading to a different set of problems.

Where the state takes an overly simplistic approach to familial social norms—reinforcing the message that there is only one acceptable way to be in a relationship or to be a parent—this may reinforce the homogenizing effects of such norms. This is not inevitable, though. The state can, and ideally should, approach emotion with greater sensitivity, recognizing the full complexity of emotion and, where it chooses to intervene, reinforcing the best aspects of familial social norms. The next section explores one context in which that might be possible.

C. Harnessing Emotion in Reframing Social Norms

To demonstrate the value of drawing upon a nuanced understanding of the state role in shaping familial social norms, this section examines the state’s response to child abuse and neglect. In this context, values and attitudes around parenting—and the norms these values and attitudes help shape—a central role in understanding the problem and the response of the legal system. It is possible for the state both to prevent child abuse and neglect and to respond more productively to abuse and neglect after it occurs. Despite the possibility of a far more effective and efficient approach to child well-

231 To prevent child maltreatment, the state should offer a combination of general anti-poverty programs and targeted prevention programs, both of which are effective means for reducing rates of child abuse and neglect. See Huntington, supra note 219, at 1492–97, 1531–34 (describing a visiting nurse program and early childhood education programs, which are both proven to dramatically lower rates of child abuse and neglect). In cases where abuse and neglect have already occurred, the state should attempt to solve the underlying problems, rather than simply removing the child from the home and providing minimal and largely ineffective services to the parent. See Clare Huntington, Rights Myopia in Child Welfare, 53 UCLA L. REV. 637, 672–96 (2006).
being, the state largely fails to undertake the necessary investments. Indeed, attorneys, social workers, policy makers, and the general public have shown considerable resistance to a preventive and problem-solving approach.\(^{232}\)

There are many reasons for this resistance and lack of investment,\(^ {233}\) but one is based on the dominant understanding of child abuse and neglect: that only unloving and uncaring parents would hurt or endanger their children. This attitude or value of parental idealism—that parents love their children always and in all ways—informs the public’s perception of abusive and neglectful parents. This value, in turn, informs parental norms such as “good parents don’t hit their children.” The norm-shaping value of parental idealism shapes the legal system’s response to child abuse and neglect. By changing the underlying understanding of parental behavior, it may be possible to shift the child welfare system in a more preventive and problem-solving direction.

The following section first explores the emotional reaction to abusive or neglectful parents and then demonstrates how the state could use emotion to help shift the underlying values around parenting—from one of parental idealism to one of parental realism—thus reframing the problem and encouraging a different response.

1. Vilification as a Response to Child Abuse and Neglect

Child abuse and neglect are typically understood to be the product of parental pathology, committed only by “sick monsters.”\(^ {234}\) Little room is left in the public imagination for viewing maltreatment as the product of poverty and other systemic problems. Child welfare researcher Duncan Lindsey has described the residual nature of the child welfare system as one where the system intervenes in the lives of a subset of low-income families who experience, or are at great risk for, abuse and neglect, rather than intervening and offering services to all families who suffer from poverty.\(^ {235}\) In this way,

\(^{232}\) See Huntington, supra note 219, at 1489–97.

\(^{233}\) See id. at 1497.


the child welfare system views abused and neglected children apart from the society that helped create their circumstances.\(^{236}\)

The state helped create this frame. Once the War on Poverty became politically vulnerable in the late 1960s, liberal politicians tried to help families by channeling money through child abuse and neglect programs rather than general anti-poverty programs. But to garner support for proposed legislation,\(^{237}\) child abuse and neglect were packaged as a problem unrelated to poverty,\(^{238}\) which of course it is not.\(^{239}\) We are still experiencing the long-term consequences of this reformulation. The current child welfare system approaches child abuse and neglect as a phenomenon of individual dysfunction, treating each case as a matter of poor or pathological parenting, and thus it fails to respond to the systemic roots of the problem.\(^{240}\)

This state formulation encourages the vilification of abusive or neglectful parents and is underscored by the value that a parent is assumed to love her child completely and always.\(^{241}\) Put another way, the value of parental idealism masks the range of emotions many parents feel and makes it possible to demonize those parents the state identifies as having deviated from specific norms that flow from this value. This vilification does not distinguish among parents who abuse or neglect their children. Instead, the response lumps together all parents in the child welfare system, making no distinction between the low-income parent who struggles with substance abuse and chronic homelessness (with predictable results for the children) and a parent who beats a child nearly to death (and too often kills the child).\(^{242}\)

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\(^{236}\) See id. at 2 n.1.


\(^{238}\) See MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS 184–85 (2005).

\(^{239}\) See Marsha Garrison, Reforming Child Protection: A Public Health Perspective, 12 VA. J. SOC. POL’Y & L. 590, 612–19 (2005) (describing the strong correlation between poverty and neglect but arguing that the correlation is incomplete).

\(^{240}\) See Huntington, supra note 231, at 666–70.

\(^{241}\) Transgressions against this norm spark intense reactions. See, e.g., Erik Eckholm, Older Children Abandoned Under Law for Babies, N.Y. TIMES, Oct. 3, 2008, at A21 (describing the public outcry in Nebraska after several parents and custodians deposited older children at spots designated for infants); see also Gonzales v. Carhart, 550 U.S. 124, 159 (2007) (“Respect for human life finds an ultimate expression in the bond of love the mother has for her child.”).

\(^{242}\) See JANE WALDFOGL, THE FUTURE OF CHILD PROTECTION: HOW TO BREAK THE CYCLE OF ABUSE AND NEGLECT 124–25 (1998) (describing the widespread misconception that the child welfare system intervenes only where there is evidence of severe abuse and neglect; asserting that in reality such cases are not the norm, constituting approximately ten percent of all cases; and noting that by contrast approximately fifty
The vilification response also fails to acknowledge that about one-third of all parents who abuse or neglect children were themselves abused or neglected as children. Although there is often a strong emotional response of sympathy and concern for a child who is abused or neglected, this sympathy typically ends once the child becomes an adult.

2. Parental Realism

A greater focus on prevention and repair may be possible through a change in the dominant parenting value—from one of idealism to one of realism. The goal is to build a narrative that recognizes parental ambivalence such that it is harder to demonize parents who abuse or neglect their children. The values of parental idealism and realism are not norms themselves, but they shape the ground-level norms that influence behavior. These values also contribute to emotional scripting for family members. In the words of Kathryn Abrams and Hila Keren, emotional scripting is the “law’s capacity to . . . prescribe the emotions that should be felt in particular contexts, or the particular persons or groups who are entitled to feel them.” For those who fit within the prescribed emotion, there is a sense of belonging and correctness. But “emotional outlaws” experience the opposite.

Although scripting can constrain emotional responses, it can also create more space for a variety of emotional responses. A norm of parental ambivalence would better encompass the range of emotions most parents experience. Drawing upon this emotional breadth, the idea is to script a different emotional response with regard to parents who abuse or neglect their children, to change the emotional response from one of disgust to one of

percent of all cases are “lower-risk neglect cases,” many of which are poverty-related, with the remaining forty percent falling in between).


244 Indeed, some commentators have gone so far as to suggest that adults who were abused or neglected as children should be subject to additional state monitoring and have their parental rights terminated more expeditiously. See James G. Dwyer, The Child Protection Pretense: States’ Continued Consignment of Newborn Babies to Unfit Parents, 93 MINN. L. REV. 407, 409 (2008).

245 See Abrams & Keren, supra note 12, at 51–54.

246 Id. at 51.

247 Id. at 52.

empathy. This scripting would flow from a different value—that of parental realism.

The state could encourage parental realism in several ways: generating empathy for parents with minimal resources, acknowledging that all parents need support, and demonstrating trust in low-income parents.

a. Generating Empathy

If a negative emotional response to parents who abuse or neglect their children (or those at risk of doing so) is one of the obstacles to adopting a prevention-oriented and problem-solving model of child welfare, then responding to the emotional aspects of this resistance should be part of the solution. If the public were better educated about the forces that lead to child abuse and neglect—and the intergenerational nature of the problem—it might be possible to cultivate a different emotional response. Education could help reorient society's views of abuse and neglect away from the idea that abuse and neglect are products of parental pathology. A new understanding should be based upon social responsibility, in which a broader group—that includes both the immediate community and the state—claims responsibility for the larger circumstances that lead to abuse or neglect.

Through its laws and policies, then, the state should frame child abuse and neglect (or at least the fifty percent of cases falling into the poverty-related neglect category)\(^2\) as the result of a breakdown in support networks. Stress and frustration are common experiences in parenting, but most parents have resources, in all senses of the word, to help them through these periods. Some parents do not, and these parents neglect their children. If child neglect were understood as a breakdown of parental resources, vilification might give way to empathy.\(^2\)

One way the state might reinforce this understanding is by using nuanced narratives.\(^2\) Nightly news programs tend to focus on the horrific cases of

\(^2\) See supra note 242.


child abuse and neglect, but even in these cases, the underlying stories tend to be more complicated than the television reporter would have us believe. Rather than compounding this narrative with a simplistic prosecution of the parent, the state might choose a different punitive approach—one that sufficiently penalizes the parent for abusing, neglecting, or even killing a child, but that still conveys to the public the complexities in the case. This might be accomplished, for example, through a community service sentence that requires the mother to speak to parenting classes.

b. Reciprocity and Responsibility

To expand upon the idea of support for parents, the state could tap into a social norm that exists in many (though not all) communities—the expectation that parents and other community members help one another. In many communities, a norm of reciprocity governs parenting, with parents and other adults helping each other in numerous ways. This expectation of support, however, does not extend to the state. Instead, the cultural ideal in the United States is one of family autonomy, even though this is largely a myth. The question, then, is how to draw upon an existing social norm—the idea that families help one another—and extend that expectation such that it is politically palatable for the state to help families.

A first step in this direction would be to recognize the fallacy of family autonomy. As Frances Olsen has argued, state intervention in the lives of families is an inevitable by-product of organized government, and the myth of "non-intervention” lies in the misconception of the “ideal of the private

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252 See Oberman, supra note 252, at 340–59 (describing the news coverage of one filicidal mother and then recounting the author's impression of that mother's life and the circumstances surrounding her daughter’s death).

253 This norm may vary depending on socio-economic status. It has long been noted that at least some African-American communities rely upon extensive social networks for survival. See Jason DeParle, American Dream: Three Women, Ten Kids, and a Nation's Drive to End Welfare 79 (2004) (describing such support networks among African-American women in Milwaukee); Carol Stack, All Our Kin: Strategies for Survival in a Black Community 27–30 (1997) (describing her three-year study of the systems of reciprocity used by low-income African-American families in their urban community); see also Adrian Nicole LeBlanc, Random Family: Love, Drugs, Trouble and Coming of Age in the Bronx 148 (2003) (describing such networks among Dominican immigrants in the Bronx).

This myth distracts from the important debate over what kind of relationship we should seek between the state and families. Once the baseline of regulation is established and state action is understood as inevitable, it is far easier to contemplate what sort of regulation society prefers.

To this end, state officials should avoid rhetoric that reinforces a misunderstanding of family autonomy. Instead of hewing to the politically popular message “we leave families alone to make their own decisions,” it would be far better to send the message that the state regulates families based on “relative competencies.” Where the state is in a superior position to determine needs, the state makes the decision. But where parents are better positioned to understand what a family needs, the family makes the decision. Changing the rhetoric and acknowledging that all families need support, from one another and from the state, would make broader support programs more politically feasible.

c. Demonstrating Trust

A third way for the state to cultivate parental realism is to send a message of trust by not requiring parents to give up their decision-making authority in exchange for tangible benefits. As currently structured, when the state supports low-income families, it second-guesses them, attaching onerous and intrusive conditions to state support. The state need not take this approach. Instead, the state could provide the social and economic support needed to prevent child abuse and neglect, which would include a combination of general anti-poverty and more targeted programs. The state should not overly

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255 See Frances E. Olsen, The Myth of State Intervention in the Family, 18 U. Mich. J.L. Reform 835, 835–36 (1985). Frances Olsen has argued that the “private family,” often the basis for nonintervention, is a myth, or at least an incoherent ideal. Thus the terms “intervention” and “nonintervention” are largely meaningless. Harkening back to the legal realists’ deconstruction of a laissez-faire approach to government as a coherent legal framework, Olsen states that “as long as a state exists and enforces any laws at all, it makes political choices. The state cannot be neutral or remain uninvolv[ed], nor would anyone want the state to do so.”

256 See id. at 863.

257 See Buss, supra note 168, at 33.

258 To give one example from the child welfare context, if a parent needs substance abuse treatment, the state is typically in a better position to determine, based on extensive studies, which substance abuse treatment programs are effective and therefore should be subsidized by the state. By contrast, a family is far better able to determine for itself what supports are needed from the state—whether the family needs assistance with housing, childcare, educational needs, or domestic violence intervention.

259 See Huntington, supra note 219, at 1515 (describing how every family needs and receives state support).

260 See id. at 1505–10.
condition these supports on recipients engaging in any particular behavior, but rather on the understanding that parents will generally make good decisions for themselves and their children and that parents are in the best position to assess their family’s needs.261 Despite common visceral reactions, this principle should apply to parents who have abused or neglected their children in the past. In this way, enacted law—the statutory and administrative rules accompanying a benefit program—would send a powerful message of trust and cooperation, not distrust and stigma.

Regulating all families in a manner that promotes self-determination would help promote parental realism, mediating the emotions of disgust and revulsion and, ideally, fostering empathy and concern. Moreover, once the state begins to send the message that all parents are worthy of respect, it will be possible to create a positive feedback loop between laws and values.262 The law provides some indication of society’s values and, possibly, some means for changing those values. If the state were to send the message, for example, that parents suspected of abusing or neglecting their children deserve adequately paid counsel with access to resources, this would help convey that these parents are worthy of state investment.263 Although a seemingly small message, the ramifications could be enormous if it helped dismantle the current emotional response to such parents. The strengths-based practice that is beginning to take hold in the social-work field could then begin to permeate society as a whole,264 leading to even greater changes and more support. Ideally this support would come long before abuse or neglect occurs.

261 The two key aspects of the relationship between families and the state are, first, that some families need state support to help them care for their children and, second, that in providing this support, parental self-determination in decision making should be enhanced. For an extended discussion of how to strike this balance, see Huntington, supra note 219, at 1524–31.

262 As Katharine Bartlett argues, the law “produces and reproduces the dispositions and values of its citizens.” Katharine T. Bartlett, Re-Expressing Parenthood, 98 YALE L.J. 293, 293 (1988).

263 Court-appointed counsel for parents are typically paid very little. For example, in Colorado a court-appointed attorney can earn a maximum of $2,870 for the life of a case, which often stretches on for years. OFFICE OF THE CHIEF JUSTICE, SUPREME COURT OF COLO., CHIEF JUSTICE DIRECTIVE 04–05: APPOINTMENT AND PAYMENT PROCEDURES FOR COURT APPOINTED COUNSEL 5–6 (2009). Of course private attorneys can charge more, but in light of the connection between poverty and child abuse and neglect, most parents cannot afford their own attorneys.

In sum, cultivating empathy by scripting the emotional response to parents would lay the groundwork for a different approach to preventing and responding to child abuse and neglect. The idea is not to create norms that condone child abuse and neglect, but rather to help shape parenting norms that reflect the emotional reality of parenting and to help portray parenting as the enormously difficult job that it is.

When policy makers, commentators, and advocates appreciate the layers of family law, they develop a greater understanding of the operation of families and the impact of family law. This understanding, in turn, leads to more effective approaches to thorny issues involving regulation of families. Rather than assuming that any one solution—such as a change in divorce laws or the standards for removing children from their homes—will address the needs of all families, being attentive to the textures of families and family law lays the foundation for an appropriately complex response by the state. As this Part has demonstrated, subtle state efforts to shape social values and norms, particularly through their emotional valence, can be highly effective and may potentially engender less resistance.

CONCLUSION

From dating to marriage to parenthood, social norms deeply influence the behavior of individuals in the relationships that family law seeks to regulate. The powerful emotions that run both in families and about families give force and content to familial social norms. To be sure, some individuals revel in eschewing social norms—dressing a boy baby in pink, choosing unconventional names, or having fourteen children. But these rebellions only underscore the influence of social norms on behavior, and the rebellions are themselves often laden with emotion. In short, social norms are integral to family life, and emotion is integral to familial social norms.

These emotion-laden social norms do not stand apart from the law. Instead, the state plays an important, if often unseen, role in shaping familial social norms. Although there may be some unease with this state role, it is unlikely to disappear. The question, then, is how the state can use social norms for legitimate and important ends. An appreciation of the emotional component of familial norms, and the state’s role in creating and perpetuating them, offers a robust starting point both for debating sensitive issues and for developing more creative and effective state interventions.
Understanding the role of emotion in familial social norms also creates a roadmap for exploring emotion in other kinds of social norms, an important undertaking regardless of the context. Although it may not be possible to articulate a precise theory that finds a savannah between the desert of rational-choice accounts and the swamp of law-and-society accounts, it is essential to account for emotion in all its various roles. Indeed, to lose sight of emotion is to risk misunderstanding social norms altogether.