

## BOOKS

# The Law Should Protect Children, Not Sexual Expressionism

*Law professor Helen Alvaré's new book, 'Putting Children's Interests First in US Family Law and Policy,' details the alarming number of ways the law privileges 'consensual adult sexual expression,' regardless of the consequences.*

---

When I began writing on matters of sexuality, household structure, and children's outcomes—which yielded **unpleasant experiences** from which I'm still smarting—I had little sense or interest in family law. I realize some recalcitrant critics won't believe it, but I didn't really know until five years ago what exactly an amicus brief was, nor the difference between a U.S. circuit court and a district court.

But when I began writing what came to be the book **Cheap Sex**, I started probing distinctions in state family law—matters including divorce and age of consent—as well as familiarizing myself with the pathway by which artificial contraception came to be widely legalized and increasingly popular. Even now, though, I have to look up the names of the most consequential cases, and I couldn't tell you which ones settled what, nor how.

George Mason University law school professor Helen Alvaré, on the other hand, knows all about it. Her new volume, **Putting Children's Interests First in U.S. Family Law and Policy: With Power Comes Responsibility**, is a helpful tool for family law scholars, judges, attorneys, and people interested in understanding or fomenting legal and social change. It's priced by Cambridge University Press out of reach of most readers, but I hope that doesn't stop people from accessing it.

Alvaré takes readers on a tour of the history of family law. It's what I like most about this book, and it is her unique strength. Hence the first chapter is the longest and most engaging, and the most helpful for legal neophytes. Her key claim is about the rise of what she calls “sexual expressionism,” our cultural—and now legal—penchant for valorizing the sexual decisions of adults, putting their wishes squarely and unapologetically in front of children's needs.

She holds that the Supreme Court has been the primary source of sexually expressionist language. Alvaré notes that “the executive branch has not lagged far behind” the high court. She shares no shortage of examples of the latter, including the Obama-era Justice Department’s assertion that there is no rational reason for states to take unique interest in the relationships of procreative pairs. This position, she holds, is only defensible when your leadership presumes the merits of sexual expressionism. But commanders-in-chief come and go, executive orders can be undone, and Jeff Sessions is no Eric Holder. What the Supreme Court says, however, and how it says it, tends to stick.

## Sex Makes Babies

A second key assertion is that a child’s family structure—and with it, much of his or her future—is basically determined at the time of conception. Children conceived to unmarried parents find themselves on a trajectory from Day 1 of heading toward abortion or of greater average difficulty, or a life of comparative security and opportunity to flourish. Marriage, the science holds, makes a difference.

But when government promulgates the narrative that “unprotected sex makes babies,” complicating the more basic and accurate fact that “sex makes babies,” the cognitive connection between sex and parenthood weakens. (Weak it is, as I also document in *Cheap Sex*.) Much of the rest of *Putting Children’s Interests First* outlines who—which departments, agencies, and programs—gets what by way of funding and instruction to embed sexual expressionism and the decoupling of sex from fertility more deeply into the psyche of our everyday lives.

The federal government, Alvaré holds, supports the notion that “consensual adult sexual expression” is not merely legal or acceptable, but a profound human good, whereas the actual status of adults’ relationships is of no great concern. It’s about the sex, not about the relationship. This is the cornerstone of sexual expressionism. Here’s how it came to life.

In *Griswold v. Connecticut* (1965), the Supreme Court moves to treat the marital couple not as an independent entity but as the association of two individuals. But it was *Eisenstadt v. Baird* (1972) that was the first to display disregard for the marital status of the couple. Beginning with *Eisenstadt*, which granted single persons a constitutional right to access contraception, the court issued a series of decisions that gave legal life to sexual expressionism. *Roe v. Wade* (1973) reinforced it, disparaging pregnancy and

childbirth, as the court connected physical and psychological harm with the burdens of child care.

While bearing and raising children is no easy thing, Alvaré notes the court paints no other picture of parenting than the problems. *Planned Parenthood v. Casey* (1992) continues this, linking “sex—without childbirth and indifferent to the partners’ stability—with a woman’s ability to be free, equal to men, happy, and empowered to form her own identity.”

The court increasingly disregards marriage, while investing genital sexual activity with considerable power and unheard-of constitutional concern. The justices eventually return to an interest in marriage—just not the kind that (typically) yields children. In *Windsor* and *Obergefell*, Alvaré asserts the Supreme Court assigns “crucial importance to nonprocreative sexual conduct, and link it with foundational human values such as freedom, equality and dignity,” in so doing declaring that all sex acts are now created equal. Never mind that such a declaration is hardly self-evident. Three children remind me of this daily.

## Meaningful Bonds

Sexual expressionism, Alvaré maintains, is not neutral about our unions. Instead, it undermines relationship stability. *Obergefell*’s fans demur. The majority opinion in it, they hold, bolstered and ennobled stability by re-inserting children into the equation. Protecting the right to marry “safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.”

The irony here could not be more striking. After facilitating child-free, nonmarital heterosexual intercourse for 40 years, the Supreme Court seeks to protect children who cannot be the sexual product of their parents’ love. And its supporters are seemingly oblivious to this.

As evidence of this, Alvaré cites Justice Sonia Sotomayor’s defense of parenthood in *Adoptive Couple v. Baby Girl* (2013), where she asserted in her dissent that “the biological bond between parent and child is meaningful,” and that “children have a reciprocal interest in knowing their biological parents,” including their fathers. Severing that creates a loss that “cannot be measured.” (Actually, we can measure it, and have.)

Sotomayor continues, characterizing U.S. family law as reflecting the “understanding that the biological bond between a parent and a child is a strong foundation on which a stable and caring relationship may be built.” It does? Where? Only in the imagination: there remain no more legal “sticks” left to channel childbearing into marriage, Alvaré claims.

Meanwhile, babies are still “happening.” They’re just decreasingly guaranteed the right to life and the protection and love of the people who made them—intentionally or accidentally. The contraceptive revolution, underwritten by untold billions of dollars of investments, Alvaré claims, has just not worked. We didn’t get from 5 percent nonmarital births in 1961 to 41 percent today by failing to dole out the Pill. We got there in no small part because of it. It’s what you should expect when you combine an explosion in confidently infertile nonmarital sex with predictable contraceptive failure rates.

What’s the state’s answer? More of the same, this time with LARCs, or long-acting reversible contraceptives. The problem? Women aren’t big fans of them, despite plenty of encouragement and lots of research-and-development. Federal contraception programs haven’t even succeeded in reducing unintended pregnancy.

Why not? Because the government—as Alvaré describes in the book’s fourth chapter—operates with a deeply erroneously and ethically suspect “anthropology,” or understanding of what human beings are and how they work. In particular, they get women wrong, she claims. Sexual expressionism assimilates women to the male norm: sex without commitment. It won’t make them happy, at least not on average. “Why,” she asks, “would sex be the only domain in which justice for women is perfectly achieved by conforming women to men’s preferences and outcomes?” It’s an excellent question.

## Realism and Pessimism

Why problematize contraception now? Well, Alvaré wonders, “Why not?” Even many feminists express no great fondness for it, often supporting it out of allegiance to progressive goals. Moreover, the Pill is entrenched. It can be criticized without political paranoia. Instead, she wishes to confront the court system about its indifference to the notion that marriage is not just good for kids; it is, in no small part, for kids. Alvaré resents, as do I, suggestions that supporting marital parenting is “sexist,” a quest to “turn back the clock.”

Alvaré also wishes to reverse governmentally endorsed sexual expressionism. That is a long-term project with many obstacles, not the least of which is our collective amnesia about where babies come from, which represents a clear victory of sexual expressionism. Unplanned pregnancies have become the new “illegitimacy,” a designation once made by the state, now by the people. We can do better.

Hardly a knee-jerk social conservative, Alvaré is openly supportive of generous “back door” programs and benefits. Just don’t expect them to work miracles. That’s on us, or rather, that’s on our commitment to marriages and marital childbearing. But when subsidiarity fails, communities and states must step in. Yet they cannot love like a married mother and father—those biological parents America’s children no longer have a legal right to know.

Finally, Alvaré would also like to give people more information about relationships—think [Gottman Institute](#) kind of material—not just content tailored toward one or another political end. Women and men want more information “about one another, about sex, about healthy relationships and marriage, and about unhealthy relationships. Young Americans are ready for this,” she holds.

“Realism is desirable,” an assertion with which I certainly agree. Pessimism in this domain, however, is never far away. I can only imagine how politicized basic relationship information would be. In the end, even “do no harm” sounds good.

*Mark Regnerus is associate professor of sociology at the University of Texas at Austin, a senior fellow at the [Austin Institute for the Study of Family and Culture](#), the author of “[Cheap Sex](#),” and a contributor to [Unskewed](#).*

Copyright © 2019 The Federalist, a wholly independent division of FDRLST Media, All Rights Reserved.