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# Nonmarriage

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## NONMARRIAGE

JUNE CARBONE &amp; NAOMI CAHN\*

*Now that the Supreme Court has reshaped the laws of marriage, attention is shifting to nonmarriage. The law no longer treats intimate couples who do not marry as either deviant or deprived. Yet, rather than regulate nonmarriage in a systematic way, the law applies two inconsistent doctrines to govern these relationships. This Article is the first to explore the fundamental contradiction in the legal approach to unmarried partners. While the laws governing financial obligations between unmarried couples are moving toward a deregulatory model that radically differs from the status-based regulation of marriage, the laws of custody and support insist on imposing normative obligations identical to those involved in marriage, whatever the actual arrangement between the parties. This Article provides a new theory for the current legal regulation of nonmarriage.*

*This Article examines the different trajectories of the two bodies of law—financial and custodial obligations—that underlie the legal treatment of nonmarriage. It shows how the financial law of nonmarriage reflects women’s growing economic independence and the deregulation of adult relationships. By contrast, custody and support law are rooted in an older view of parental obligations that is contrary to emerging community norms about unmarried parenting. Consequently, as this Article shows, the laws of marriage, which envision a single coherent institution, are an inappropriate model for the laws of nonmarriage. Finally, this Article articulates a framework to provide a coherent legal approach to nonmarriage. As marriage—and nonmarriage—become true choices, it will be increasingly important to address what full legal respect for these choices entails.*

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## INTRODUCTION

With the Supreme Court's embrace of marriage equality in cases from *Loving v. Virginia*<sup>1</sup> to *Obergefell v. Hodges*,<sup>2</sup> the looming issue for contemporary families is nonmarriage: how should the law respond to the increasing numbers of couples who could marry, but choose not to? Existing legal regulation of nonmarriage combines two contradictory approaches. It accepts the autonomy of such couples with respect to financial matters and imposes almost no obligations without either an express agreement or evidence of combined assets. Yet, with respect to childrearing, the law ignores the parties' arrangements and instead imposes obligations comparable to those ap-

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1. 388 U.S. 1 (1967).

2. 135 S. Ct. 2584 (2015).

plicable to married couples. These opposing approaches, which reflect entirely different conceptions of what nonmarriage means, block the emergence of a more coherent system for regulating unmarried relationships.<sup>3</sup>

The first approach embraces couples' autonomy in electing terms suitable to their individual relationships. It allows cohabitants to enter into contracts, manage their estates, and adopt each other's children.<sup>4</sup> Courts that apply this approach stop short of implying any broader commitments from the existence of an unmarried intimate relationship itself. Indeed, relatively few states are willing to imply an agreement, impose a duty to share property, or provide continued support from the fact of cohabitation alone.<sup>5</sup> Instead, the courts take their lead from the parties' formal agreements and their actions in commingling their assets. As though they were dealing with business partnerships, the courts unwind the parties' financial entanglements in accordance with express contract terms and the law of unjust enrichment.<sup>6</sup> In the process, the law withholds judgment about the relationship itself. It no longer condemns, but it also does not guide the status of nonmarriage, leaving the parties room to craft relationships of their choice.<sup>7</sup>

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3. See, e.g., Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CAL. L. REV. 87 (2014) (showing how marriage shaped advocacy for recognizing LGBT relational rights). While there are many discussions of cohabitation, most emphasize the ways the law fails to extend marriage-like provisions to the unmarried and propose that the law extend similar treatment to both. See, e.g., CYNTHIA GRANT BOWMAN, *UNMARRIED COUPLES, LAW, AND PUBLIC POLICY* (2010). Alternatively, those opposing equal treatment of married and unmarried couples tend to emphasize the continuing importance (and superiority) of marriage. See, e.g., Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309, 315–22 (2008) [hereinafter Garrison, *Nonmarital Cohabitation*]. For other articles addressing some of the differences between marriage and nonmarriage, see Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815 (2005) [hereinafter Garrison, *Consent*] (discussing the importance of consent); Candace Saari Kovacic-Fleischer, *Cohabitation and the Restatement (Third) of Restitution & Unjust Enrichment*, 68 WASH. & LEE L. REV. 1407, 1419–24 (2011); Melissa Murray, *Accommodating Nonmarriage*, 88 S. CAL. L. REV. 661 (2015) (exploring how to conceptualize alternatives to traditional intimate couple relationships).

4. See, e.g., William N. Eskridge Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1929 (2012). Illinois, for example, does not recognize rights between cohabitants “to enforce mutual property rights where those rights are rooted in a marriage-like relationship.” *Blumenthal v. Brewer*, No. 118781, slip op. at 4 (Ill. filed Aug. 18, 2016); see also Gregg Strauss, *Why the State Cannot “Abolish Marriage”: A Partial Defense of Legal Marriage*, 90 IND. L.J. 1261, 1278 (2015).

5. The Illinois Supreme Court, for example, which had been expected to expand the remedies available to unmarried couples, chose not to do so. See *Blumenthal*, slip op at 29.

6. See, e.g., *Cates v. Swain*, No. 2010–CT–01939–SCT, 2013 WL 1831783, at \*2 (Miss. May 2, 2013) (en banc).

7. See DOUGLAS ABRAMS ET AL., *CONTEMPORARY FAMILY LAW* 249–94 (4th ed. 2015) (tracing the history of legal approaches to nonmarital relationships). The American Law Institute's *Principles of Family Dissolution* (“ALI Principles”) and the state of Washington set out guidance for when economic rights accrue in nonmarital relationships. *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* § 6.03 (AM. LAW INST. 2002) [hereinafter ALI PRINCIPLES]; see also *Olver v. Fowler*, 168 P.3d 348, 355 (Wash. 2007). This provision of the ALI Principles however, has been soundly criticized, and the provision has not been widely adopted.

The second approach to nonmarriage is typically applied to parenting issues. It rejects the couples' autonomy by ignoring their own parenting agreements and understandings. Instead, the law imposes custody and support terms indistinguishable from those it applies to married parents at divorce, terms that impose equal rights and responsibilities on both parents. Yet, many parents do not marry precisely because they do not want such terms, or they feel, often with good reason, that the other parent is not willing or capable of equally sharing responsibilities. Consequently, courts increasingly impose such shared parenting arrangements on couples who barely know each other, disagree fundamentally on how to parent, and often cannot stand to be in the same room together; or, even if they cooperate perfectly well, they have simply elected that their co-parenting relationship consist of different terms from those the law would ordinarily impose. These custodial and support terms, which reflect the norms that married couples are expected to internalize, are at odds with the circumstances more typical of unmarried relationships.

This Article is the first to examine the contradictions between these two bodies of law and consider their implications for the meaning of nonmarriage as a distinct status. It documents how the laws governing financial obligations are moving toward a deregulatory model that differs radically from the status-based regulation of marriage at the same time that custody and support standards impose normative obligations identical to those involved in marriage. It explains that the law that governs financial matters has evolved to reflect women's increasing economic independence, and refuses to insist on protection for those made vulnerable by cohabitation. It contrasts these developments with the law that governs custody and support. The law that governs nonmarital children, however, remains rooted in an older view of parental relationships, and does not reflect emerging community norms about unmarried parenting. To the extent it recognizes the parties' individual understandings at all, it is often disdainful of them. And, unlike the financial treatment of nonmarriage, it does not create space for the couples' varying expectations about what it means to raise a child together without marrying.

While the law that governs property and the law that governs children are often distinct, we argue that the failure to consider these two approaches together prevents the emergence of a more unified approach to nonmarriage. Both groups of cases have one thing in common: the couples have very intentionally said "no" to marriage because they did not want the commitments marriage entails. We conclude that these decisions should be taken seriously, and that the time has come to consider "nonmarriage" as a distinct body of law on its own terms. Doing so requires acknowledging the full continuum

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See Garrison, *Consent*, *supra* note 3 (criticizing ALI *Principles* because of the failure to require consent to assumption of nonmarital obligations).

of nonmarital relationships and bringing coherence to the two bodies of non-marriage law. In Part I, the Article traces the different trajectories of the two bodies of law—financial and parental obligations—that underlie the legal treatment of nonmarriage and argues that these two distinct regulatory approaches are on a collision course, defeating a coherent legal approach to nonmarriage.

In Part II, the Article analyzes changes in the law of marriage. Over the past half-century, marriage has been transformed from an institution premised on inequality to one that enshrines equality. This commitment to formal equality has made financial interdependence, with a presumptive fifty/fifty division of marital assets, and shared parenting, with many states seeking to maximize the time the children spend with both parents, the hallmarks of the remade institution of marriage. As a result, marriage today requires high degrees of commitment, maturity, and trust. It is, accordingly, not for everyone.

In Part III, the Article sets out three critical differences that frame the choice not to marry, exploring legal distinctions as well as providing a sociological and demographic context. The rate of cohabitation is almost nine times higher today than it was in the 1960s, and most new marriages begin as cohabitations.<sup>8</sup> Approximately one out of every five children are born to cohabiting, nonmarried couples. Some of these relationships involve profound commitments equivalent in every respect to the strongest marriages—except state sanction. Others involve no more than a casual affair or a cohabitation of convenience. Most do not involve either financial interdependence or, if there are children at all, equally shared parenting. Unlike marriage, these nonmarriages do not involve any single set of shared meanings. Instead, emerging community norms reflect varying expectations about what such relationships entail.

The Article concludes that for the law to fully embrace nonmarriage, it must find ways to protect autonomy and to allow recognition of the continuum of relationships of the unmarried. The imposition of formal equality in these circumstances disrupts the terms the parties have chosen for themselves, alters the nature of their relationships, and threatens to create instability for children. Paradoxically, therefore, imposing equality fosters inequality. To that end, default principles should attempt not to mimic marital relationships, but to reflect the terms couples might, and do, choose on their own.

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8. Arielle Kuperberg, *Does Premarital Cohabitation Raise Your Risk of Divorce?*, COUNCIL ON CONTEMPORARY FAMILIES (Mar. 10, 2014), <https://contemporaryfamilies.org/cohabitation-divorce-brief-report/>.

## I. THE IRONIES OF NONMARRIAGE

Marriage law has long served to institutionalize expectations about appropriate conduct<sup>9</sup> by reinforcing broadly shared community norms and “channeling” intimate relationships into marriage.<sup>10</sup> The purpose of the contemporary law of nonmarriage, on the other hand, is a subject of intense dispute.

Many scholars advocate greater recognition of nonmarital relationships in order to increase individual autonomy and pluralism; these scholars argue that individuals should be free to enter into relationships of their choice,<sup>11</sup> at least so long as the relationships do not involve the imposition of harm on others.<sup>12</sup> Other scholars advocate greater recognition of unmarried relationships because they are concerned about the potential for exploitation in the absence of regulation; some cohabitants, for example, commingle their lives over time in ways that may leave one partner more vulnerable than the other at the time of a break-up.<sup>13</sup> As many scholars have observed, however, there is a difference between justifying legal intervention on the basis of the parties’ presumed agreements (partners who have lived together for a certain period of time can be presumed to have agreed to take care each other, unless they specify otherwise), versus doing so on the basis of a societally imposed moral obligation (partners who have lived together for a certain period of

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9. See, e.g., Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293, 313 (2015) (“[M]arriage is embedded in informal social norms that prescribe expectations for spousal behavior and underscore its nature as a family relationship defined by long-term commitment. These norms are internalized, thereby reinforcing trust, and are also enforced externally through informal sanctions.”).

10. See Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992).

11. See Eskridge, *supra* note 4, at 1890 (arguing for a broad menu of options that simultaneously increases and guides choices in the creation of family relationships); Shahar Lifshitz, *Married Against Their Will? Toward a Pluralist Regulation of Spousal Relationships*, 66 WASH. & LEE L. REV. 1565, 1589–1601 (2009) (arguing for family pluralism as valuable in itself and challenging the imposition of mandatory obligations on cohabitants).

12. The clearest examples of harm involve predatory or exploitative relationships such as underage marriages. The more controversial examples involve the continuing prohibitions on polygamous relationships. See, e.g., Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 2018 (2010) (suggesting a regulation based on the partnership model to police the potential for abuse in polygamous relationships).

13. The highest profile cases, such as *Marvin v. Marvin*, often involve such disparities. 557 P.2d 106 (Cal. 1976) (Michelle Marvin was a lounge singer, while Lee Marvin was a movie star). And, a few scholars still oppose all recognition. See Lynn D. Wardle, *The “Constitution” of Marriage, and the “Constitutions” of Nations*, 45 U.S.F. L. REV. 437, 464 (2010) (explaining that increasing rates of nonmarital cohabitation “create serious challenges to the integrity of many marriages and families and threaten heartache and deprivation”).

time have assumed an obligation to take care of each other, whether or not they would prefer otherwise).<sup>14</sup>

In addition, legal decisions, whether they impose or reject such obligations, influence community expectations. They make cohabitation—and the practices associated with it—more visible. This increased visibility encourages couples to make more conscious choices about their relationships in light of the court decisions, further contributing to the development of community norms. In some cases, the community norms lead to shared expectations, such as the expectation that cohabitation without marriage involves no obligation to share an inheritance, while at other times, it leads to more carefully framed choices, such as the need for unmarried couples to consider whether to title their shared residence as a joint tenancy or a tenancy in common. And the evolving community standards may in turn influence the law.<sup>15</sup>

Full legal recognition of nonmarriage accordingly requires engaging in the process of norm creation. Those scholars who advocate for treating marriage and nonmarriage on equal terms typically favor developing substantive expectations about the content of nonmarriage.<sup>16</sup> Yet, it is difficult to do justice to the variety of nonmarital cohabitations; one size does not fit all.<sup>17</sup> This Part will explore these contradictions through two Sections that compare the law that addresses financial obligations with the law that governs custody. It concludes that these two bodies of law reflect conflicting approaches to nonmarital status, and block the emergence of a more coherent and unified body of law.

#### A. *Nonmarriage and Financial Independence*

The cases most associated with recognizing nonmarriage as a distinct status involve financial obligations, and the early cases involved women who,

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14. See Ira Mark Ellman, “Contract Thinking” Was Marvin’s *Fatal Flaw*, 76 NOTRE DAME L. REV. 1365, 1367–69 (2001); see also Garrison, *Consent*, *supra* note 3 (noting similar problems).

15. See Scott & Scott, *supra* note 9, at 340–42 (calling this an “iterative process”); see also Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367, 406 (2012) (noting the interactive effect of law and behavior); Katherine M. Franke, Commentary, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1419 (2004) (questioning the privileging of behavior through legal recognition); Clare Huntington, *Familial Norms and Normality*, 59 EMORY L.J. 1103, 1156–59 (2010); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997) (defining norms as informal social and cultural expectations with which people feel they must comply).

16. Ellman, *supra* note 14, at 1367 (favoring support obligations); Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 240 (2015) (favoring greater emphasis on shared custody for unmarried couples).

17. Indeed, the reported cases are systematically different from typical cohabitation cases in ways that skew any process of norm development, and raise concerns about the use of such norms to define the legal obligations of nonmarriage more generally. They do not conform to “ordinary cohabitation.” See J. Herbie DiFonzo, *How Marriage Became Optional: Cohabitation, Gender, and the Emerging Functional Norms*, 8 RUTGERS J.L. & PUB. POL’Y 521 (2011); Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1401–08 (2001).



over the course of the cohabitation, became dependent on the financial support of their wealthy male partners.<sup>18</sup> The case that thrust legal recognition of cohabitation into public consciousness was *Marvin v. Marvin*,<sup>19</sup> a case involving a famous actor at the height of his career and a Hollywood starlet. Before *Marvin*, courts typically rejected claims for support between cohabitants; a woman who lived with a man without a ring on her finger was both stigmatized and pitied as a fool, who should have known better than to rely on a man's promises.<sup>20</sup> Moreover, before *Marvin*, the enforceability of such agreements, even if explicit, was questionable to the extent that a contract for a woman's domestic services in exchange for a man's support was presumed to be premised on sex as consideration for the agreement.<sup>21</sup>

In *Marvin*, the California Supreme Court held that unmarried couples could contract between themselves and those contracts would be enforceable.<sup>22</sup> The Court rejected only those contracts where sex was the express purpose of the contract.<sup>23</sup> *Marvin* and its progeny<sup>24</sup> helped ratify recognition of nonmarriage as a distinct relationship and remove some of the stigma associated with nonmarital sexuality.<sup>25</sup>

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18. See, e.g., *In re Estate of Roccamonte*, 808 A.2d 838, 845 (N.J. 2002), *superseded by statute on other grounds*, Act of Jan. 18, 2010, ch. 311, 2009 N.J. Laws 2322 (codified at N.J. STAT. § 25:1-5(h) (2015)).

19. 557 P.2d 106 (Cal. 1976).

20. See, e.g., *Beckman v. Mayhew*, 122 Cal. Rptr. 604, 608 (Cal. Ct. App. 1975) (pre-*Marvin* case rejecting claim for support on the basis of domestic services provided in the context of a nonmarital cohabitation). Not all courts, however, accepted the *Marvin* reasoning. E.g., *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979) (post-*Marvin*).

21. See *Marvin*, 557 P.2d at 112. The *Marvin* court also observed that earlier decisions “rested upon a policy of punishing persons guilty of cohabitation without marriage.” *Id.* at 119.

22. *Id.* at 122.

23. The court stated that this type of agreement, “even if expressly made in contemplation of a common living arrangement, is invalid only if sexual acts form an inseparable part of the consideration for the agreement.” *Id.* at 114. Instead, “any severable portion of the contract supported by independent consideration will still be enforced.” *Id.*; cf. *Pizzo v. Goor*, 857 N.Y.S.2d 526, 526 (N.Y. App. Div. 2008) (adjudicating a constructive trust claim dismissed even in face of an express “promise to pay . . . at the end of their cohabitation” because the main consideration was the provision of companionship, both sexual and platonic).

24. E.g., *Kozlowski v. Kozlowski*, 403 A.2d 902, 906 (N.J. 1979); Garrison, *Nonmarital Cohabitation*, *supra* note 3, at 315 (pointing out that *Marvin* has been cited approximately 200 times by other courts, and it represents “the dominant approach to cohabitant claims”).

25. The *Marvin* Court concluded that:

[W]e base our opinion on the principle that adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights. . . . [T]hey may agree to pool their earnings and to hold all property acquired during the relationship in accord with the law governing community property; conversely they may agree that each partner's earnings and the property acquired from those earnings remains the separate property of the earning partner. So long as the agreement does not rest upon illicit meretricious consideration, the parties may order their economic affairs as they choose, and no policy precludes the courts from enforcing such agreements.

*Marvin*, 557 P.2d at 116.

But *Marvin*, and the cases that followed, also raised a potentially more radical claim; one that if fully implemented would have changed the norms as well as the power balance that attended unmarried relationships. This second claim suggested not only that parties could enter into contractual relationships if they so chose, but also that such voluntary agreements should be presumed from the circumstances of the parties' arrangements.<sup>26</sup> That is, if a couple entered into an arrangement in which the party with the higher income provided support while the other party attended to the couple's household needs, the higher earning party would be presumed to have agreed to support the other party for a period beyond the end of the relationship.<sup>27</sup> This latter allegation, couched in the language of implied contract, assumes a moral obligation. It suggests that where, as in the *Marvin* case, the higher earner accepts the contributions of the other party, he can be presumed to have agreed to provide compensation, either because the other party acted in reliance on such an implied promise (by, for example, quitting her own job or failing to develop other sources of income), or because the higher earner received the benefits of services from the other party without providing full compensation for them.

*Marvin*, however, while clearly upholding the principle that the parties could reach any agreement they wanted, did not ultimately conclude that Lee Marvin had made any such promise or entered into any such agreement. Nor did the court find that the mere fact of a traditional relationship between a higher earning partner and one who gave up other opportunities to contribute to household management gave rise to an agreement implied in either fact or law to provide compensation.<sup>28</sup> Instead, the case and later developments in the law of nonmarriage have extended greater recognition of such relationships and increased the autonomy of nonmarital cohabitants to enter into terms of their choosing, without addressing the balance between them that typically gives more power to the person with the greater income.<sup>29</sup> In short,

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26. *Id.* at 122 (allowing the courts to “inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract or implied agreement of partnership or joint venture, or some other tacit understanding between the parties”). The court also allowed a nonmarital partner to “recover in quantum meruit for the reasonable value of household services rendered less the reasonable value of support received if he can show that he rendered services with the expectation of monetary reward.” *Id.* at 122–23.

27. Or, according to the ALI *Principles*, the higher earning party would be subject to such an obligation even without an agreement. This provision, however, has been the subject of considerable objection. See Garrison, *Consent*, *supra* note 3, at 819–21 (criticizing ALI *Principles* because of the failure to require consent to assumption of nonmarital obligations).

28. Michelle Marvin never received any compensation after her relationship with Lee Marvin. See ABRAMS ET AL., *supra* note 7, at 258.

29. Ellman, *supra* note 14.

the law increased recognition of such relationships without regulating, monitoring, or encouraging them.<sup>30</sup>

Where courts have imposed obligations on nonmarital partners, it has done so by extending unjust enrichment claims to property ownership.<sup>31</sup> These cases typically involve relatively sophisticated parties, who, in the context of longer-term relationships, commingle their financial assets. Courts have recognized the need to oversee the division of assets at the termination of the relationship, without becoming involved in the relationship terms themselves.

In *Cates v. Swain*,<sup>32</sup> for example, the Mississippi Supreme Court, in a 2013 *en banc* decision, acknowledged the right of a same-sex cohabitant to seek unjust enrichment for her contributions to property held in her partner's name. The court distinguished earlier rulings rejecting such claims between different-sex intimate partnerships, emphasizing that the earlier cases based their claims on the nature of the *relationships*.<sup>33</sup> In *Cates*, the court characterized the claim as one based on a right of recovery of "readily identifiable assets (or tangible benefits)," acquired through an understanding of shared ownership and possession.<sup>34</sup> The court observed that it was quite consciously not using the legal claim of unjust enrichment as "a roving mandate [for a court] to sort through terminated personal relationships in an attempt to nicely judge and balance the respective contributions of the parties."<sup>35</sup> Instead, the court distinguished the need to provide recompense for one party's monetary contributions (the acquisition of a house titled only in the other party's name), from what it termed the "momentous task" of parsing the terms of the relationship itself.<sup>36</sup>

Illinois, which seemed similarly poised to overturn its long-standing refusal to grant relief to unmarried couples, decided not to do so.<sup>37</sup> In *Blumenthal v. Brewer*,<sup>38</sup> the Illinois Court of Appeals addressed a relationship between two women, a doctor and a lawyer, who had lived together for twenty-six years and raised three children together.<sup>39</sup> Throughout most of the period,

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30. See Scott & Scott, *supra* note 9 (discussing the law's role in monitoring unconventional relationships).

31. Kovacic-Fleischer, *supra* note 3.

32. No. 2010-CT-01939-SCT, 2013 WL 1831783, at \*5 (Miss. May 2, 2013) (*en banc*).

33. *E.g.*, *id.* at \*3 (noting that in earlier cases, "the aggrieved party's claim for recovery was based upon a relationship").

34. *Id.* at \*4.

35. *Id.* (quoting *Slocum v. Hammond*, 346 N.W.2d 485, 491-92 (Iowa 1984)).

36. *Id.*

37. See *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979) (discussing *Marvin* but denying judicial recognition of "mutually enforceable property rights to knowingly unmarried cohabitants").

38. 24 N.E.3d 168 (Ill. App. Ct. 2014), *appeal granted*, 31 N.E.3d 767 (Ill. 2015).

39. *Id.* at 170.

the couple could not marry; yet, they had a relationship essentially indistinguishable from a fully committed, financially interdependent marriage.

The court of appeals overturned the trial court's dismissal of the case, observing that "the public policy to treat unmarried partnerships as illicit no longer exists,"<sup>40</sup> but the Illinois Supreme Court reversed, upholding its earlier precedents.<sup>41</sup> As in *Cates v. Swain*, the Illinois Supreme Court distinguished between claims that arose from the basis of the relationship, that is, the parties' living in a marriage-like relationship<sup>42</sup> versus claims arising from distinct contributions by each to property acquisition.<sup>43</sup> The court emphasized that the state's continuing interest in distinguishing between marital and non-marital relationships, and the importance of preventing "marriage from becoming in effect a private contract terminable at will, by disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants."<sup>44</sup> While the decision's refusal to recognize claims arising from the fact of the intimate relationship itself is consistent with cases from other jurisdictions,<sup>45</sup> the strength of the policy echoes the California Supreme Court's statement in *Marvin*: that a court's decision on claims brought by unmarried cohabitants did not in any way undercut the strong state policy supporting marriage.

A few states initially took a broader approach toward nonmarital obligations, in which they seemed to recognize grounds for support on the basis of a gendered assumption of responsibilities during cohabitation, but most of these states have subsequently narrowed these doctrines,<sup>46</sup> typically distinguishing between property claims and claims for support. The New Jersey Supreme Court, for example, had awarded permanent support based on an

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40. *Id.* at 174.

41. *See* *Blumenthal v. Brewer*, No. 118781, slip op. at 29 (Ill. filed Aug. 18, 2016). The court found that:

[T]he current legislative and judicial trend is to uphold the institution of marriage. Most notably, within the past year, the United States Supreme Court in *Obergefell v. Hodges*, held that same-sex couples cannot be denied the right to marry. In doing so, the Court found that "new insights [from the developments in the institution of marriage over the past centuries] have strengthened, not weakened, the institution of marriage."

*Id.* at 26 (citation omitted) (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015)).

42. No. 2010-CT-01939-SCT, 2013 WL 1831783 (Miss. May 2, 2013), at \*3 (en banc). *See*, for example, the court's point that "[t]he decision between *Blumenthal* and *Brewer* to commingle their finances and use those joint funds to make property and financial investments demonstrates that the funds were economically dependent on the parties' marriage-like relationship." *Blumenthal*, slip op. at 22.

43. *See, e.g., id.* at 23 (referring to the requirement of "an independent economic basis apart from the parties' relationship" as prerequisite for a claim of restitution).

44. *Id.* at 27.

45. *See, e.g., Cates*, 2013 WL 1831783, at \*3-5.

46. *See, e.g., Watts v. Watts*, 405 N.W.2d 303, 313-14 (Wis. 1987); *cf. Waage v. Borer*, 525 N.W.2d 96, 98 (Wis. Ct. App. 1994) (holding that Wisconsin "does not recognize recompense for housekeeping or other services unless the services are linked to an accumulation of wealth or assets during the relationship").

oral promise between partners who did not even cohabit, but the legislature then limited such claims to those based on written agreements.<sup>47</sup> The highest court of West Virginia also recognized broad equity jurisdiction to untangle the financial affairs of long-term cohabitants, but later limited the precedent to property matters rather than support.<sup>48</sup>

The state of Washington similarly extended its community property regime to unmarried partners engaged in what it initially termed a “meretricious” relationship, and now deems a “committed intimate relationship.”<sup>49</sup> It defined meretricious relationships as “stable relationships evidenced by such factors as continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for mutual benefit, and the intent of the parties.”<sup>50</sup> Despite this relatively expansive definition, Washington courts have nevertheless refused to extend this doctrine to couples engaged in less “marriage-like” cohabitations, looking not only for evidence of exclusivity in the intimate character of the relationship, but also a pooling of resources giving rise to the need for an equitable division of property.<sup>51</sup>

The most ambitious effort to recognize broad obligations among cohabitants came from the American Law Institute’s *Principles of Family Dissolution* (ALI *Principles*).<sup>52</sup> The ALI *Principles* effectively make the same remedies available following the dissolution of a cohabitation as a marriage, but the provision subjecting domestic partners and married couples to the same equitable division and alimony rules have not been fully adopted by any state.<sup>53</sup> And some states remain reluctant to recognize actions by unmarried couples against each other at all, not because of a refusal to recognize the

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47. See *In re Estate of Roccamonte*, 808 A.2d 838, 845 (N.J. 2002), *superseded by statute*, N.J. STAT. ANN. § 25:1-5h (2016).

48. West Virginia permits property division between unmarried cohabitants “who have considered themselves and held themselves out to be husband and wife,” looking at factors such as “the purpose, duration, and stability of the relationship and the expectations of the parties.” *Goode v. Goode*, 396 S.E.2d 430, 438 (W. Va. 1990). But see *Thomas v. LaRosa*, 400 S.E.2d 809 (W. Va. 1990) (rejecting claim of support).

49. *Connell v. Francisco*, 898 P.2d 831 (Wash. 1995) (en banc) (using “meretricious relationship” terminology); see also *In re Kelly & Moesslang*, 287 P.3d 12, 16–19 (Wash. Ct. App. 2012) (applying a three-year statute of limitations to claims based on a “committed intimate relationship” by analogizing such claims to those arising out of contracts or other liabilities not established by writing).

50. *In re Marriage of Pennington*, 14 P.3d 764, 770 (2000) (en banc) (citing *Connell v. Francisco*, 898 P.2d 831, 834 (Wash. 1995) (en banc)).

51. *Id.* at 773.

52. ALI PRINCIPLES, *supra* note 7, § 6.

53. Strauss, *supra* note 4, at 1280 (noting that the ALI *Principles* have created controversy and that the provisions addressing the property distribution between unmarried partners have not been adopted by any state); see also Garrison, *Consent*, *supra* note 3 (criticizing ALI *Principles* because of the failure to require consent to assumption of nonmarital obligations).

relationship, but due to a wariness of becoming entangled in the substance of the claims.<sup>54</sup>

While the states continue to vary in their willingness to address claims arising from nonmarital cohabitation, the majority of jurisdictions appear to be influenced by two factors. First, consistent with the greater willingness to recognize nonmarital relationships, courts are willing to untangle ownership of assets. This is likely because the process involves familiar and determinate concepts, and courts apply these concepts in the context of other types of relationships.<sup>55</sup> Second, as a general rule, courts have not engaged the normative question of what partners owe each other. Therefore, they most emphatically have not treated unmarried cohabitants equally with married couples who are seen as promising each other a duty of support and who stand in a fiduciary obligation with respect to each other.<sup>56</sup>

A 2013 Hawaii case illustrates these principles. In *Simmons v. Samulewicz*,<sup>57</sup> a man and a woman were engaged to be married. Samulewicz, the woman, “was concerned about Simmons’s business and financial situation and the potential financial liability legal marriage could entail.”<sup>58</sup> She accordingly broke off the engagement, but the couple continued to live together and, arguably, made a number of joint investments.<sup>59</sup> After the relationship ended, Simmons sued to recover property from his ex-fiancée. The court dismissed the contract and implied contract claims, emphasizing that “[c]ohabitation, no matter for how long, does not by itself prove the existence of a contract implied-in-fact.”<sup>60</sup> The court nonetheless allowed an unjust enrichment claim to move forward that provided Simmons an opportunity to recover the \$46,000 in mortgage payments and the tens of thousands of dollars

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54. See, e.g., *Morone v. Morone*, 413 N.E.2d 1154, 1155 (N.Y. 1980) (permitting enforcement of express contracts, but rejecting palimony claims as conceptually so amorphous as practically to defy equitable enforcement); see also *Toth v. Spellman*, 2011 N.Y. Misc. LEXIS 3417 (N.Y. Sup. Ct. July 7, 2011), *aff’d*, 945 N.Y.S.2d 557 (N.Y. App. Div. 2012) (rejecting application of constructive trust to unmarried couple where one alleged that he had agreed to be “equal economic partners”).

55. See, e.g., *Cates v. Swain*, No. 2010-CT-01939-SCT, 2013 WL 1831783, at \*5 (Miss. May 2, 2013) (en banc); cf. *Richards v. Brown*, 222 P.3d 69, 80 (Utah Ct. App. 2009), *aff’d on other grounds*, 274 P.3d 911 (Utah 2012) (rejecting unjust enrichment claim where cohabitant’s contributions to mortgage payments were equivalent to what he would have had to pay for a rental).

56. See, e.g., *Christian v. Christian*, 365 N.E.2d 849, 855 (N.Y. 1977) (holding that agreements between spouses, unlike ordinary business contracts, involve a fiduciary relationship requiring the utmost of good faith); cf. *Cates*, 2013 WL 1831783, at \*3 (expressly rejecting claims based on the nature of the relationship); *Blumenthal v. Brewer*, No. 118781, slip op. at 28 (Ill. filed Aug. 18, 2016) (observing that “individuals can enter into an intimate relationship, but the relationship itself cannot form the basis to bring common-law claims”).

57. 304 P.3d 648 (Haw. Ct. App. 2013).

58. *Id.* at 651.

59. The parties had somewhat different descriptions of their financial arrangements.

60. *Id.* at 656 (quoting *Aehagma v. Aehagma*, 797 P.2d 74, 79 (Haw. Ct. App. 1990)).

in other sums he had invested in properties held solely in Samulewicz's name.<sup>61</sup>

The early cases, like *Marvin*, and the scenarios that inspired the ALI *Principles* involved dependent partners who claim betrayal in the face of their partners' decisions to end the relationship. Scholars have protested that without judicial intervention, the law "creates an incentive for the more financially savvy partner to opt out of marriage."<sup>62</sup> As women have gained greater economic independence, however, fewer partners are completely dependent on the relationship, and the law no longer recognizes either a moral imperative to marry, or a requirement that either partner look out for the other. And the decisions not to marry have become more complex, as both men and women increasingly seek greater equality as well as romance in marriage.<sup>63</sup>

Samulewicz did not marry Simmons because she feared making a financial commitment to him.<sup>64</sup> Marriage would have meant equitable distribution of property acquired during the marriage. By not marrying, she owed him nothing for his services when her career took off and his did not during the period they lived together. The court limited his potential claims to restitution, that is, return of the direct contributions he made to properties held in her name alone, but not to services he performed in managing her business investments.<sup>65</sup> The court was willing to unwind their commingled financial affairs, but not willing to pass judgment on their conduct toward each other.<sup>66</sup>

These court rulings reflect studies of the couples' own attitudes toward nonmarriage.<sup>67</sup> Unmarried couples are less likely than married couples to embrace financial interdependence. They recognize the difference between marriage and nonmarriage, and the unmarried are less likely to have joint bank accounts, jointly titled property, or long-term commitments to care for

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61. *Id.* at 658–59.

62. Kovacic-Fleischer, *supra* note 3, at 1424.

63. See David M. Buss et al., *A Half Century of Mate Preferences: The Cultural Evolution of Values*, 63 J. MARRIAGE & FAM. 491 (2001) (finding that both men and women have increased their emphasis on a potential spouse's earning capacity); Christine R. Schwartz, *Earnings Inequality and the Changing Association Between Spouses' Earnings*, 115 AM. J. SOC. 1524 (2010) (observing that both men and women seek to marry someone with comparable earning power).

64. *Simmons*, 304 P.3d at 651 ("Samulewicz was concerned about Simmons's business and financial situation and the potential financial liability legal marriage could entail.").

65. *Id.* at 658 (allowing unjust enrichment claim to go forward).

66. Even then, there is no guarantee of recovery. See, e.g., *Richards v. Brown*, 222 P.3d 69, 80 (Utah Ct. App. 2009), *aff'd on other grounds*, 274 P.3d 911 (Utah 2012) (rejecting unjust enrichment claim where cohabitant's contributions to mortgage payments for his unmarried partner's home were equivalent to what he would have had to pay for a rental).

67. E.g., Daniel T. Lichter, Sharon Sassler, & Richard N. Turner, *Cohabitation, Post-Conception Unions, and the Rise in Nonmarital Fertility*, 47 SOC. SCI. RES. 134 (2014); Sharon Sassler & Amanda J. Miller, *Class Differences in Cohabitation Processes*, 60 FAM. REL. 163 (2011).

each other.<sup>68</sup> Indeed, a major reason for parties' unwillingness to marry is often an unwillingness to make a financial commitment to a partner who is seen, as in the *Simmons* case, as more of a liability than an asset.<sup>69</sup> The parties who bring high profile cases are outliers; they have more committed relationships—and often more money—than typical cohabitants.<sup>70</sup>

In addition, as same-sex couples have won greater recognition, couples who could not marry during most of their relationship, such as the Illinois doctor and lawyer in *Blumenthal v. Brewer*, have tried to use these doctrines to address the termination of marriage-like relationships. Now that same-sex couples can marry, the frequency of this newer type of case is likely to diminish, and same-sex cohabitants will become comparable to different-sex cohabitants who make deliberate choices not to marry.<sup>71</sup>

Courts often sympathize with the parties who feel betrayed. And, as with the ALI *Principles*, there are some who, in the name of dismantling the distinctions between marriage and nonmarriage, would in fact apply marital principles to these parties. But, neither the courts nor general public opinion have applied the normative commitments of marriage to other intimate partners solely by virtue of cohabitation—at least when it comes to financial interdependence. Greater recognition has not meant equal results.

### B. Nonmarriage and Shared Parenting

The status of nonmarriage is more complex when it comes, first, to establishing parentage, and second, to obtaining child custody. The process of acquiring legal parenthood differs for marital and nonmarital parents. For married parents, a marital presumption assumes that both spouses are the parents of any child born into the marriage; it accordingly functions as an “opt-out” system. In contrast, a nonmarital partner who does not give birth to the child must take affirmative steps to establish parenthood; which is an “opt-in” system for the second parent.<sup>72</sup> All states recognize the woman who gives

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68. Fenaba R. Addo & Sharon Sassler, *Financial Arrangements and Relationship Quality in Low-Income Couples*, 59 FAM. REL. 408, 411 (2010) (finding that married couples are more likely to pool income).

69. See *infra* notes 214–227 and accompanying text.

70. See, e.g., Garrison, *Nonmarital Cohabitation*, *supra* note 3 (summarizing the studies and cases). Women with less education are more likely to cohabit, and their relationships are less likely to transition to marriage. See Casey E. Copen et al., *First Premarital Cohabitation in the United States: 2006–2010 National Survey of Family Growth*, NAT'L HEALTH STATISTICS REPORT 4–6, figs. 1–3 (2013), <http://www.cdc.gov/nchs/data/nhsr/nhsr064.pdf>.

71. See *Blumenthal v. Brewer*, No. 118781, slip op. at 28 (Ill. filed Aug. 18, 2016) (“Since marriage is a legal relationship that all individuals may or may not enter into, Illinois does not act irrationally or discriminatorily in refusing to grant benefits and protections under the Marriage and Dissolution Act to those who do not participate in the institution of marriage.”).

72. See Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185 (2016).



birth as a legal parent on the basis of her biological tie to the child.<sup>73</sup> The states then permit the addition of a second adult as a legal parent on the basis of some combination of biology, function, or intent,<sup>74</sup> though they vary in their requirements and the degree to which they give greater weight to biology or function.<sup>75</sup>

Custodial rights, in contrast, depend on a best interest of the child standard. This standard applies regardless of whether the parties are married or unmarried parents. But differences in application of the standard typically arise from the dissimilar circumstances of unmarried couples.<sup>76</sup> As a practical matter, outside of surrogacy, almost all women who give birth leave the hospital with the child and, in more than a quarter of the states, the nonmarital birth mother enjoys a presumption in favor of her custody—any other custodial arrangement typically requires court action.<sup>77</sup> Consequently, a second parent who wants legal custody has to establish rights as a parent, and may be required to go to court to obtain a custody order.<sup>78</sup> If the parties split, there is no automatic event, such as divorce, that will produce such an order, and unmarried parents, who tend to be poorer than married ones, are less likely to have the resources or the will to engage in litigation.<sup>79</sup> Moreover, even if unmarried parents get to court, they may not have a sufficiently functional relationship with each other to make shared parenting of the child realistic.<sup>80</sup>

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73. See, e.g., UNIF. PARENTAGE ACT § 201(a)(1) (amended 2002), 9B U.L.A. 15 (Supp. 2008). This Article does not address the circumstances in which an unmarried partner with no biological relationship to the child should be recognized as a legal parent. The states vary considerably in whether they allow such recognition at all, and if they do, whether they require adoption or merely the assumption of the functional role. In addition, they differ considerably on whether the result is a legal parental status equal to that of the partner with the initial legal tie to the child or a secondary status, such as that of step-parent or parent by estoppel in accordance with the ALI *Principles*. While this Article does not address these issues, it proposes tying recognition of full and equal parental status to those circumstances in which there is both assumption of an equal role, and explicit consent to that role by the partner. See June Carbone & Naomi Cahn, *Parents, Babies, and More Parents*, 92 CHI.-KENT L. REV. (forthcoming 2017) (on file with authors).

74. Some states, like California, allow recognition of partners with no biological connection to the child as parents based on the assumption of a parental role, while other states recognize such partners as parents only through adoption. See June Carbone & Naomi Cahn, *Marriage, Parentage, and Child Support*, 45 FAM. L. Q. 219, 220–21 (2011).

75. See *infra* note 114 and accompanying text (discussing voluntary paternity establishment).

76. See LESLIE JOAN HARRIS ET AL., FAMILY LAW 865 (5th ed. 2013); Huntington, *supra* note 16, at 203–05.

77. See Huntington, *supra* note 16, at 204, 227.

78. While many unmarried fathers establish paternity through voluntary acknowledgments of paternity at the time of the child's birth, relatively few seek custodial orders after the breakup. See BROWN & COOK, *supra* note 141, at 18–21 (establishing that relatively few unmarried fathers have custodial orders); Harris, *infra* note 102, at 1308–13 (observing that most unmarried fathers who are present with the mother at birth sign voluntary acknowledgments).

79. See JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY (2014).

80. See *infra* Part III.B.

This Section begins by showing how legal developments provide increasing recognition of unmarried legal parenthood and, for unmarried parents who choose to litigate, a custody presumption identical to that available to married parents. In addition, the courts do not shy away from normative judgments—many insist on the continued involvement of both parents following a break-up, and punish custodial parents who obstruct the other parent's access to the child.<sup>81</sup> In this arena, the courts have been norm entrepreneurs, contributing to the development of principles to govern nonmarriage—and these principles impose equality between the married and unmarried even where such equality does not reflect the parents' own understanding of the terms of their relationships.

### 1. Parentage

The legal recognition of nonmarital parenting, like the legal recognition of cohabitation, began in the 1970s. Until then, a man who expected to play a parental role in a child's life was expected to marry the mother; if he did not, he might not receive legal recognition as a parent at all.<sup>82</sup> The United States Supreme Court changed that in 1972, deciding in *Stanley v. Illinois*<sup>83</sup> that the failure to provide unmarried fathers with any opportunity to play a parental role violated equal protection.<sup>84</sup> The Court thus opened the door to greater rights for unmarried fathers, requiring the states to revisit the level of recognition they would provide.<sup>85</sup> It stopped short, however, of prescribing what such recognition entailed.<sup>86</sup>

Over the next seventeen years, the Supreme Court repeatedly struggled with the question of how far unmarried fathers' constitutional rights extended.<sup>87</sup> None of the Justices saw the issue solely as a question of biology or of formal equality between men and women, or married and unmarried

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81. See *infra* notes 93–96.

82. *Stanley v. Illinois*, 405 U.S. 645, 663–64 (1972) (describing an Illinois statute that refused to recognize a man as a legal father of his children at the mother's death, even though he had lived with the mother and the children on and off for eighteen years).

83. 405 U.S. 645 (1972).

84. *Id.* at 663–64.

85. See June Carbone, *The Missing Piece of the Custody Puzzle: Creating a New Model of Parental Partnership*, 39 SANTA CLARA L. REV. 1091, 1104–07 (1999) (reviewing the state responses in the context of fathers' rights in adoption proceedings).

86. Indeed, rather than finding an automatic right as the surviving parent, the Court held only that Peter Stanley had a right to a hearing as to whether he should receive custody of his children. *Stanley*, 405 U.S. at 649. The state could not treat him as a stranger to the children he had helped to raise. See also Josh Gupta-Kagan, *In re Sanders and the Resurrection of Stanley v. Illinois*, 5 CAL. L. REV. 383 (2014).

87. See Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 647 (1993) (reviewing post-*Stanley* decisions).

men.<sup>88</sup> Instead, the Justices focused on the normative question: what contribution does a man have to make to a child to be entitled to constitutional protection as a father?<sup>89</sup> Chief Justice Burger, in his dissenting opinion, answered “marriage,”<sup>90</sup> because he believed that fathers should acquire equal rights to mothers only if they made the commitment marriage entails.<sup>91</sup> He referred to the often “casual” nature of the encounter that produced the child, and explained: “Centuries of human experience buttress this view of the realities of human conditions and suggest that unwed mothers of illegitimate children are generally more dependable protectors of their children than are unwed fathers.”<sup>92</sup> Justice White, who, of all the Justices of that era, gave the greatest weight to biology, nonetheless wrote for the Court that a father must “accept[] some measure of responsibility for the child’s future” before the Constitution could “compel a [s]tate to listen to his opinion of where the child’s best interests lie.”<sup>93</sup> Over the course of subsequent cases, the statement that commanded the greatest support, however, has been described as “biology plus.”<sup>94</sup> Under this theory, in order for a nonmarital father to receive Due Process protection, he must demonstrate his “full commitment to the responsibilities of parenthood by ‘com[ing] forward to participate in the rearing of his child’ . . . [and] [a]t that point it may be said that he ‘act[s] as a father toward his children.’”<sup>95</sup>

While the Supreme Court has thus articulated a standard for unmarried fathers who wished to acquire constitutional protection, it has never resolved the issue of what obligations mothers owe unmarried men who wish to acknowledge their relationship with a child.<sup>96</sup> For an unmarried father “to participate in the rearing of his child,”<sup>97</sup> after all, the mother must cooperate—and not all mothers welcome the participation of the father.<sup>98</sup> In 1989, the Court, rather than address the issue head on, narrowly upheld the constitutionality of the marital presumption against a challenge by the putative nonmarital father in *Michael H. v. Gerald D.*<sup>99</sup> In *Michael H.*, four Justices

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88. *Id.* at 661.

89. *Id.* at 662.

90. 405 U.S. 645, 659–68 (1972) (Burger, C.J., dissenting).

91. *Id.* at 665–66.

92. *Id.* at 666.

93. *Lehr v. Robertson*, 463 U.S. 248, 262 (1983).

94. *E.g.*, Deborah L. Forman, *Unwed Fathers and Adoption: A Theoretical Analysis in Context*, 72 TEX. L. REV. 967, 975 (1994).

95. *Lehr*, 463 U.S. at 261 (quoting *Caban v. Mohammed*, 441 U.S. 380, 389 n.7, 392 (1979)).

96. Carbone, *supra* note 85, at 1102 (concluding that “[w]hat the Court did not directly address was the father’s obligation to establish a parental relationship and the mother’s duty to let him”); *see also infra* Part IV.A.

97. *Lehr*, 463 U.S. at 262.

98. *See, e.g.*, Huntington, *supra* note 16, at 194 (observing that a father’s continued involvement with the child depends on his relationship with the mother).

99. 491 U.S. 110 (1989).

joined Justice Scalia's plurality opinion, which recognized the mother's husband as the child's legal father, even where the biological father had established a relationship with the child and lived with the mother and child for several months after the child's birth.<sup>100</sup> Since this notably fractured vote, the Court has not addressed the issue.<sup>101</sup>

At the time of *Michael H.*, relatively few unmarried fathers opted into formal parental status; only thirty-one percent of children with unmarried parents had a father whose paternity had been established.<sup>102</sup> In the years after *Michael H.*, Congress and the states made it easier for unmarried fathers to receive recognition as parents, but these legislative efforts focused heavily on securing child support; custodial rights were an afterthought.<sup>103</sup> Over the course of the 1980s and 1990s, Congress repeatedly created incentives for the states to streamline paternity establishment and improve child support collection efforts.<sup>104</sup> Between 1992 and 2010, the number of paternity establishments tripled.<sup>105</sup>

These efforts addressed another issue left open by the Supreme Court: what obligation did unmarried men owe their children?<sup>106</sup> Congress became interested in paternity establishment and child support enforcement as a result of its concern over the increase in the federal welfare rolls,<sup>107</sup> which, it concluded, was "to a considerable extent, a problem of the non-support of children by their absent parents."<sup>108</sup> This congressional approach viewed women as incapable of supporting a child on their own and assumed that the only reason that mothers were single and in need was because fathers had deserted them.<sup>109</sup> In implementing the Family Support Act of 1988, which required every state to devise mandatory child support guidelines,<sup>110</sup> states

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100. The Justices disagreed in part over Justice Scalia's invocation of originalism to find no historical support for recognition of rights for an "adulterous natural father," with Justices Kennedy and O'Connor refusing to join in that part of the opinion. *Michael H.*, 491 U.S. at 127–28 n.6.

101. The Court did rule against an unmarried father seeking to prevent adoption of his child in *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013), but did so on statutory grounds without reaching the father's constitutional rights.

102. Leslie Joan Harris, *Reforming Paternity Law to Eliminate Gender, Status, and Class Inequality*, 2013 MICH. ST. L. REV. 1295, 1300, 1304 n.51 (2013).

103. See Huntington, *supra* note 16, at 183–84 (discussing a state-initiated child support system independent of custodial rights).

104. See Harris, *supra* note 102 at 1304 & n.52.

105. *Id.* at 1304 n.53.

106. Carbone, *supra* note 85, at 1102.

107. Ann Laquer Estin, *Federalism and Child Support*, 5 VA. J. SOC. POL'Y & L. 541, 549 (1998).

108. *Id.* (citing H.R. REP. NO. 93-1490 (1974), reprinted in 1974 U.S.C.C.A.N. 8133, 8145).

109. See David L. Chambers, *Fathers, the Welfare System, and the Virtues and Perils of Child-Support Enforcement*, 81 VA. L. REV. 2575, 2588 (1995) (noting that "it is men who walk away from their children, and women left in poverty who bear the burden").

110. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (1988) (amending 42 U.S.C. §§ 666, 667 (2012) (making use of child support guidelines mandatory)).

drew no distinctions between divorced fathers and unmarried men who had never been in a relationship with the mothers of their children.<sup>111</sup> All fathers owed support, and marriage or nonmarriage did not change that obligation. While divorced women were more likely to seek and obtain child support orders than women who had never been married,<sup>112</sup> the child support system assumed that all men had duties to support their children.<sup>113</sup>

The expansion of the child support system established a foundation for a later revision of custody rights. In the years after *Stanley*, the law changed to make it easier for unmarried fathers to “opt in” to parental recognition. Indeed, federal law has encouraged the states to streamline paternity determinations through voluntary acknowledgments of paternity that can be signed in the hospital when the child is born, and most unmarried parents sign such acknowledgements.<sup>114</sup> Once parentage is established, all legal parents not only are subject to the same support obligations, they also acquire equal standing to seek custody in accordance with the best interests of the child.<sup>115</sup>

## 2. Child Custody

Custody determinations for nonmarital parents parallel those for marital parents upon divorce. From the early nineteenth through the late twentieth century, custody laws adopted a “tender years presumption” that favored granting custody of young children to their mothers.<sup>116</sup> And, during the initial

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111. *Id.* (referring to “persons”); *see also, e.g.*, MD. CODE ANN., FAM. LAW § 12-204 (2016) (referring to “parent”).

112. Chambers, *supra* note 109, at 2588–89 (observing that while two-thirds of divorced mothers had child support orders, only one-third of children born to unmarried mothers had a legal father who could be held liable for support).

113. *Id.* at 2589 (noting the widely shared belief that absent parents should support their children).

114. 42 U.S.C. § 666(a)(5)(D)(i)(I) (2012) (father’s name will be placed on the birth certificate if “the father and mother have signed a voluntary acknowledgment of paternity”); *see Harris, supra* note 102, at 1308–13.

115. *See* Stacy Brustin & Lisa Vollendorf Martin, *Paved with Good Intentions: Unintended Consequences of Federal Proposals to Integrate Child Support and Parenting Time*, 48 IND. L. REV. 803, 810 (2015) (observing that in the majority of states, legally recognized parents have co-extensive parental rights and responsibilities by operation of law, regardless of their marital status and how they choose to structure their households).

116. *See* MARY ANN MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS 61–62 (1994); Deborah Dinner, *The Divorce Bargain: The Fathers’ Rights Movement and Family Inequalities*, 102 VA. L. REV. 79, 114–15 (2016) (discussing challenges to the “tender years” presumption).

period streamlining paternity establishment, custody laws favored mothers.<sup>117</sup> Since then, however, the law has shifted to a model of shared parenting that places far more weight on the continued involvement of both parents in the child's life.<sup>118</sup>

Most custody statutes give equal rights to men and women and do not distinguish explicitly between married and unmarried parents.<sup>119</sup> Instead, in every state, the courts apply a best interest of the child standard, which favors case-specific determinations.<sup>120</sup> While these determinations typically give some weight to the parent who has been the child's primary caretaker, most states presume that the child's interests lie in continuing contact with both parents.<sup>121</sup> In addition, many states favor a custody award to the parent most likely to facilitate the continued involvement of the other parent.<sup>122</sup> These "friendly parent" provisions give courts the ability to threaten parents who obstruct the other parent's involvement with loss of custody,<sup>123</sup> and the number of reported opinions transferring custody from mothers to fathers on this basis has increased.<sup>124</sup> These statutes reflect the changing custody standards

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117. See, e.g., William Weston, *Putative Fathers' Rights to Custody—A Rocky Road at Best*, 10 WHITTIER L. REV. 683, 685 (1989) ("Irrespective of the living arrangement at the time custody is determined, the putative father faces a more difficult task in proving that the best interests of the child are served by a placement with him.")

118. See J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 FAM. CT. REV. 213, 216 (2014) (observing that "[t]he most significant trend in contemporary child custody law is toward greater active involvement by both parents in continued child rearing after separation" (quoting Pruett & DiFonzo, *infra* note 211, at 152)).

119. One state, Massachusetts, explicitly applies different custody standards to married and unmarried parents. MASS. GEN. LAWS ch. 209C, § 10 (2016) (nonmarital); ch. 208 § 31 (marital); see also, e.g., *Smith v. McDonald*, 941 N.E.2d 1, 5 (Mass. 2010) (holding that a nonmarital father had no legal rights prior to paternity establishment, but that once established, visitation was appropriate). Indeed, Martha Fineman has proposed that the parenting framework shift to recognize that the mother/child dyad is the primary caretaking unit. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 9 (1995).

120. Elizabeth S. Scott & Robert E. Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard*, 77 L. & CONTEMP. PROBS. 69, 83–88 (2014) (discussing the difficulty of validating domestic violence allegations).

121. See N.H. REV. STAT. § 461-A:6(f)–(g) (2015); *Schwieterman v. Schwieterman*, 114 So. 3d 984, 986–87 (Fla. Dist. Ct. App. 2012) ("It is the public policy of this state that each minor child has frequent and continuing contact with both parents after the parents separate . . . to share the rights and responsibilities, and joys, of childrearing." (quoting 2009 Fla. Laws Ch. 2009-180 § 3, at 1853)); DiFonzo, *supra* note 118, at 217, 225; *Charts*, 48 FAM. L.Q. 654, 656 (2015) (depicting custody criteria in Chart 2). Continuing contact can take the form of joint physical and/or legal custody, parenting plans, or other orders that allocate shares of the child's time and parental decisionmaking authority. See, e.g., HARRIS ET AL., *supra* note 76, at 570–89.

122. See DiFonzo, *supra* note 118, at 217, 225.

123. See, e.g., ARK. CODE. § 9-13-101(b)(1)(A)(iii) (2015) (providing that when a "parent demonstrates a pattern of willfully creating conflict in an attempt to disrupt a current or pending joint-custody arrangement," the court can modify a shared custody award "to an order of primary custody to the nondisruptive parent").

124. See, e.g., *In re Mannion*, 917 A.2d 1272, 1275–76 (N.H. 2007).

applied to married couples.<sup>125</sup> When applied to the unmarried, however, they produce results at odds with the principles in the financial cases and often with the parties' own understandings of their relationships.

Consider the case of *In re Myers and Smith*.<sup>126</sup> A four-year-old, who was the subject of a custody fight between his parents, was born in 2011 after what the court describes as "a brief relationship" between two "young and immature" people. Amber, the mother, had custody after the child's birth in Iowa, while Nick, the child's father, joined the Navy and was stationed in Virginia. He married another woman, Jennifer, in 2012. When the child was three-and-a-half years old, the court transferred custody from the mother to the father, solely because of the mother's lack of cooperation with the father. She did not provide him with her new address when she moved, cooperate with his efforts to provide military benefits for the child, facilitate visitation, or support the father's relationship with the child. The trial court also found that the child, understandably, had a closer relationship with the mother and that the father also had anger management issues, and difficulty controlling his disdain for the mother. The trial court called the issue a "close call,"<sup>127</sup> but transferred custody to the father after finding the father to be more mature, based on the success of his military career, the stability of his marriage, and his record of paying child support. The court of appeals affirmed, emphasizing the mother's failure to support the father's involvement with the child.<sup>128</sup>

An increasing number of cases reach similar results.<sup>129</sup> The New Hampshire Supreme Court observed in 2011: "Across the country, the great weight of authority holds that conduct by one parent that tends to alienate the child's affections from the other is so inimical to the child's welfare as to be grounds for a denial of custody . . ." <sup>130</sup> In articulating these standards, the New Hampshire Supreme Court cited a case involving married parents<sup>131</sup> and then uncritically applied the same standard to an on again, off again relationship between unmarried parents.<sup>132</sup> The court, in effect, held that interference with

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125. See discussion *infra* Part II.C.

126. *In re Myers and Smith*, No. 15-0842, 2016 BL 11287 (Iowa Ct. App. Jan. 13, 2016).

127. *Id.* at \*2.

128. *Id.* at \*3.

129. See James N. Bow, Jonathon W. Gould & James R. Flens, *Examining Parental Alienation in Child Custody Cases: A Survey of Mental Health and Legal Professionals*, 37 AM. J. FAM. THERAPY 127, 136 (2009) (estimating that thirty percent of cases involve parental-alienation claims).

130. *In re Matter of Miller*, 20 A.3d 854 (N.H. 2011) (quoting *Renaud v. Renaud*, 721 A.2d 463, 465–66 (Vt. 1998)).

131. *Id.* (citing *Renaud v. Renaud*, 721 A.2d 463, 465–66 (Vt. 1998) (case involving married parents where the mother, who alleged that the father abused the child, was threatened with loss of custody if she did not cooperate in restoring the father's relationship with the child)).

132. *Id.*

a second parent's visitation—regardless of marital status—is so serious as “to raise a strong possibility that the child will be harmed.”<sup>133</sup>

Courts applying these precepts tend to assume such harm, even where the child has a strong relationship with one parent and little relationship with the other. At divorce, parents have typically lived together and with the child for some period of time; in nonmarital custody cases the patterns are more varied. In *K.T.D. v. K.W.P.*,<sup>134</sup> for example, the mother was sixteen and the father twenty-one at the time of the child's birth. The father established paternity and received visitation when the child was nine months old. By the time the child was four, the parents, who did not communicate well and agreed on little, both moved to change the visitation arrangements, with the father seeking sole physical and legal custody and the mother seeking to restrict the father's visitation rights. The court transferred custody from mother to father because of the mother's “poor judgment” in failing to support the father's relationship with the child.<sup>135</sup> In an additional case, an Arkansas court transferred custody of a three-year-old with cancer from the mother to the father, with whom the child had never had an overnight visit, because of the mother's inability to maintain a civil relationship with the father.<sup>136</sup> The trial court judge called the mother “evil” from the bench because of her failure to tell the father of the child's ear tube surgery, after the mother called the father's house twice to inform him, but both times the father's mother hung up on her, presumably because of the lack of civility in their relationship.<sup>137</sup> The court of appeals affirmed the transfer of custody, even though the mother established a similar pattern of noncooperation on the father's part after the transfer occurred.<sup>138</sup>

At one time, courts opposed sharing (also termed “joint”) custody because they presumed that parents who could not manage to stay together for the children's benefit could also not manage to cooperate well enough to parent constructively after they parted.<sup>139</sup> Today, in contrast, the law in many states imposes a duty of cooperation, whether or not the parties are capable of implementing it.<sup>140</sup> While unmarried fathers remain less likely to seek

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133. *Id.* at 862 (quoting *Webb v. Knudsen*, 582 A.2d 282, 286 (N.H. 1990)).

134. 119 So. 3d 418 (Ala. Civ. App. 2012).

135. *Id.* at 421.

136. *Sharp v. Keeler*, 256 S.W.3d 528 (Ark. Ct. App. 2007).

137. *Id.* at 541–42.

138. *Id.*

139. *See DiFonzo*, *supra* note 118, at 215 (observing that the dominant view was that a child needed the stability of a single home run by only one parent, and that shifting the child from parent to parent would result in “a permanent injury to the child”).

140. Shared parenting has become more common both globally and in the United States, but jurisdictions continue to vary widely in the strength of their support for such an award. *See Santo v. Santo*, No. 0061, 2015 WL 5921468, at \*5 (Md. Ct. Spec. App. Oct. 9, 2015), *aff'd*, 448 Md. 620, 141 A.3d 74 (2016) (upholding shared custody award where parents lacked ability to cooperate despite strong Maryland precedent counseling against shared custody awards in such cases); Linda



custodial orders,<sup>141</sup> they have become more likely to prevail when they do.<sup>142</sup> The result imposes a one-size-fits-all model of parenting relationships: all parents are deemed subject to duties of formal financial support and all parents are expected to share parenting responsibilities. In both cases, courts impose these standards and police them in punitive ways. Parents who fail to pay support, even if they are incarcerated or unemployed, are subject to mounting arrears that may subject them to contempt proceedings, loss of driver's licenses, or imprisonment.<sup>143</sup> Custodial parents who fail to facilitate contact with the other parent also face punitive measures that include loss of the custody of the child.

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As a comment on the status of nonmarriage, these cases present contrasting models of judicial intervention. In both financial claims and child custody cases, the law began with a presumption that all women were financially dependent and unable to raise children on their own without a man's support; marriage, therefore, supplied an important and necessary structure that justified the refusal to recognize nonmarriage at all. Today, courts acknowledge striking changes in the relationship between marriage and nonmarriage, have legitimized nonmarital relationships, and presume that men and women are equally capable of supporting themselves and raising children on their own. In the financial context, this conclusion leads to hands-off doctrines.<sup>144</sup> The courts will intervene in accordance with the parties' express agreements or, if none exist, in accordance with restitution standards that untangle the parties' respective contributions to asset acquisition.<sup>145</sup> The result respects the parties' autonomy. In the child support and custody contexts, by contrast, the law imposes obligations irrespective of the parties' agreements and circumstances.<sup>146</sup> In the name of equality, the law treats unmarried parents identically to married ones.<sup>147</sup> It refuses to acknowledge agreements that

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Nielsen, *Shared Physical Custody: Does It Benefit Most Children?*, 28 J. AM. ACAD. MATRIM. L. 79, 81 (2015).

141. See PATRICIA BROWN & STEVEN T. COOK, CHILDREN'S PLACEMENT ARRANGEMENTS IN DIVORCE AND PATERNITY CASES IN WISCONSIN 2, 9–12, 18–19 (2012), [http://www.irp.wisc.edu/research/childsup/cspolicy/pdfs/2009-11/Task4A\\_CS\\_09-11\\_Final\\_revi2012.pdf](http://www.irp.wisc.edu/research/childsup/cspolicy/pdfs/2009-11/Task4A_CS_09-11_Final_revi2012.pdf).

142. See DiFonzo, *supra* note 118, at 215.

143. Moreover, courts often impose such punitive consequences even when the parties' behavior corresponds with community norms or their own agreements. See, e.g., Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991, 995–96 (2006) (observing that fathers in poor communities often provide informal support and play active roles in their children's lives that may not necessarily conform to mainstream emphasis on fathers as providers).

144. See *supra* Part I.B.1.

145. See *supra* Part I.B.1.

146. See *supra* Part I.B.2.

147. A minority of states, however, does distinguish on the basis of marital status. See Bernardo Cuadra, Note, *Family Law—Maternal and Joint Custody Presumptions for Unmarried Parents:*

terminate support obligations, community norms that allocate greater responsibility to one parent over another, or the variety of circumstances that make nonmarital parents worse candidates for cooperative parenting than married ones.<sup>148</sup>

Moreover, while the courts often justify these determinations in terms of the best interests of the child, they are not necessarily individualized ones.<sup>149</sup> Instead, the courts apply a body of law that developed to meet the particular circumstances of married couples to unmarried couples. The contrasts between this body of law and the body of law concerning financial claims are striking. In the context of financial obligations, courts and scholars have recognized that the failure to intervene favors the financially better off party. Indeed, the ALI proposed extending the obligation of the married to the unmarried precisely in order to address such concerns. Yet, courts remain wary of such interventions. As women's economic opportunities increased, the courts have recognized the increasing variety of circumstances that underlie cohabitation and have refused to intervene, even if that refusal strengthens the position of the financially dominant partner.

The opposite is true in cases involving children. Scholars have documented the ways that the realities of nonmarital parenting are at odds with the courts' assumptions<sup>150</sup> and, in fact, exist on a continuum ranging from very involved to mostly absent fathers. In addition, studies show that those who do not marry tend to have different characteristics from those who do in ways that affect the likelihood of violence, the ability to cooperate, and the level of communication—all factors that affect children.<sup>151</sup> Yet, courts, rather than making the individualized determinations the law would seem to require, seem more inclined to impose a normative conclusion on the unmarried: all parenting requires acceptance of a shared custody and support model.<sup>152</sup> This result both reduces the autonomy of nonmarital couples and changes the balance of power between nonmarried partners rather than respecting the emerging role of nonmarriage as an alternative system.

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*Constitutional and Policy Considerations in Massachusetts and Beyond*, 32 W. NEW ENG. L. REV. 599, 618–22 (2010) (summarizing state laws).

148. See *supra* Part I.B.2.

149. This is particularly true in the cases of poor families facing overcrowded courts. See Daniel L. Hatcher, *Forgotten Fathers*, 93 B.U. L. REV. 897, 910 (2013) (“Courts that address child-support issues impacting poor fathers can often barely be characterized as courts. . . . Jaded fact finders are often not real judges. The rooms are overflowing and chaotic. Lawyers are usually not present . . . . Some fathers are in chains, brought in from prison. . . . In such circumstances, essentialism reigns.”).

150. See *id.*; Cahn, *supra* note 15.

151. See KATHRYN EDIN & TIMOTHY J. NELSON, *DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY* (2013); W. BRADFORD WILCOX & NICHOLAS H. WOLFINGER, *SOUL MATES: RELIGION, SEX, LOVE, AND MARRIAGE AMONG AFRICAN AMERICANS AND LATINOS* (2016); June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 1185 (2013).

152. See DiFonzo, *supra* note 118, at 215.

## II. MARRIAGE ESSENTIALS

Creating a distinct legal status for nonmarriage requires understanding the legal status of marriage. The laws that apply to marriage adopt a single coherent view of what the institution should be. Today, these laws reinforce marriage as a relationship between equals premised on unqualified commitment, interdependence, and shared parenting.

Spouses no longer vow to love, honor, and obey. Instead, they agree to trust, honor, and cooperate. This change in the nature of marriage accordingly frames both judicial divisions at divorce and couples' decisions to marry or to not marry. In addition, while the law permits individual marital contracting, it does not hesitate to address the normative core of marriage as an institution.<sup>153</sup> This normative vision enshrines the equal status of the spouses. In this Part, we explore the premises of equality that characterize marital status itself, then turn to the law's reinforcement of financial interdependence, and finally, look at the marital norm of shared parenting.

### A. *Equality and the Importance of Marital Choice*

In the era in which heterosexual intimacy inevitably involved the possibility of pregnancy, marriage was designed to channel sexuality and childrearing into an explicitly gendered two-parent union. With this system, the shotgun marriage served to shoehorn two people who might not know each other terribly well into an indissoluble institution.<sup>154</sup> Three revolutions in family law have transformed marriage: (1) marriage no longer serves as the exclusive or permanent location for sexuality, procreation, and childrearing; (2) spouses have equal roles; and (3) couples, regardless of their gender, have access to partners of their choice. In turn, these revolutions make marriage a deliberate choice built on a foundation of equality and interdependence.

A core revolution in family law has eliminated the compulsion that once made marriage the sole legitimate institution for sex and raising children. Marriage (and, it once went without saying, heterosexual marriage<sup>155</sup>) defined women's lives and constituted a critical part of full adult status for

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153. *But see* Barbara Stark, *Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law*, 89 CAL. L. REV. 1479 (2001).

154. George A. Akerlof, Janet L. Yellen & Michael L. Katz, *An Analysis of Out-of-Wedlock Childbearing in the United States*, 111 Q.J. ECON. 277 (1996).

155. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2614 (2015) (Roberts, C.J., dissenting) (referring to the traditional definition of marriage as "biologically rooted").

men.<sup>156</sup> Unmarried women—and men—faced suspicion, if not outright hostility and discrimination.<sup>157</sup> The restrictions of alternatives outside of marriage served to channel men and women into marriage and to keep them there.<sup>158</sup>

The law has dismantled these restrictions, providing greater recognition of nonmarital unions and easing the barriers to divorce. Along with the greater acknowledgment of nonmarital unions we described in the first section, the law extended access to contraception to the unmarried and abortion to all women, emphasizing that pregnancy should not be the punishment for sexual activity.<sup>159</sup> And in *Lawrence v. Texas*,<sup>160</sup> the Supreme Court struck down the criminalization of same-sex sodomy, effectively extending constitutional protection to private sexual activity.<sup>161</sup>

In adopting divorce reform, which swept state legislatures between the mid-sixties and mid-eighties, the law did not just make it easier for couples to divorce—it also eliminated fault grounds that required the courts to judge spousal conduct linked to adultery, desertion, and cruelty, which had once served as the exclusive basis for divorce.<sup>162</sup> After the reforms, approximately half of the states banned the consideration of traditional fault grounds as part of the financial award,<sup>163</sup> while the rest of the states allowed it to be consid-

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156. Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848 (2004).

157. And, some argue that the unmarried continue to face such suspicion today. See Courtney G. Joslin, *Marital Status Discrimination 2.0*, 95 B.U. L. Rev. 805, 806 (2015).

158. See SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* (1991) (commenting on the relationship between the lack of a power to exit a marriage and the inequality within the marriage).

159. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (contraception); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion).

160. 539 U.S. 558 (2003); see *id.* at 567 (“When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”).

161. *Id.* at 578–79.

162. E.g., HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* 64–65 (1988); see also Ira Mark Ellman, *The Place of Fault in A Modern Divorce Law*, 28 ARIZ. ST. L.J. 773, 776 (1996) (describing shift from the fault era, when all states allowed consideration of fault, to the no fault divorce era, in which approximately half the states ban consideration of fault altogether while the rest allow some limited consideration).

163. Ellman, *supra* note 162. Ellman observes further that about two-third of the states do not allow consideration of fault in the financial award, but a larger number permit consideration of fault in the spousal support award. *Id.* at 782.

ered to varying degrees, but rarely as the exclusive consideration in the financial award<sup>164</sup> and to a lesser degree in property distributions than support awards.<sup>165</sup>

With the courts no longer overseeing the regulation of sexual conduct to the same degree, a second revolution made equality and sharing principles the new foundation for the relationship between spouses, both within marriage and at divorce. Until the mid-twentieth century, state and federal law imposed clearly-delineated gender roles within marriage. The husband alone had a duty of support and, during the marriage, he unilaterally controlled not only his own income, upon which the family typically depended, but also the couples' jointly-held property.<sup>166</sup> These legally enforced roles made wives dependent on their husbands and, correspondingly, made it practically as well as legally difficult to leave a marriage.<sup>167</sup> Over the last half-century, Supreme Court and state law reforms have remade marriage in accordance with principles of equality, giving both spouses joint decisionmaking authority over assets and children and dividing both more equally at divorce.<sup>168</sup> The result

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164. See ALI PRINCIPLES, *supra* note 7, at § 2 (updated 2016) (listing how states consider fault in Topic 2, “Whether Marital Misconduct Should be Considered in Property Allocations and Awards of Compensatory Payments”). Louisiana law, for example, states, “[w]hen a spouse has not been at fault prior to the filing of a petition for divorce and is in need of support, based on the needs of that party and the ability of the other party to pay, that spouse may be awarded final periodic support.” LA. CIV. CODE ANN. art. 112A (2016).

165. See Strauss, *supra* note 4, at 1273 (“The states are split about whether marital misbehavior is relevant to property division or alimony.”). Ellman explains that almost all states allow consideration of misconduct that dissipates assets or results in a party’s greater need because of medical bills or other factors. Ellman, *supra* note 162, at 776–77. He observes further that determining the continuing role of fault is difficult because trial court practice often differs considerably from the formal law, with some judges restricting the role of fault in financial awards where the law would seem to allow it and other judges taking it into account, even where the statute does not direct them to do so. *Id.* at 777.

166. Indeed, a major reason that fault no longer influences property division to the same degree is that most states today view marital property as the product of both spouses’ efforts over the course of the marriage and therefore as jointly owned. Ellman, *supra* note 162, at 783 (observing that the fifteen states that allow consideration of fault in the allocation of property at divorce overlap to a considerable degree with “those common law states that have been most resistant generally to moving from the common law marital property system to the marital property idea of joint ownership”).

167. A finding of adultery, for example, could stigmatize a woman and justify denying her the support she needed to survive after a divorce along with any contact with her children. See Barbara Bennett Woodhouse & Katharine T. Bartlett, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO L.J. 2525, 2532–33 (1994) (briefly describing “old fashioned ‘fault-driven’ systems”).

168. *E.g.*, *Orr v. Orr*, 440 U.S. 268 (1979) (striking down an Alabama alimony statute that allowed for such awards only to women); *Reed v. Reed*, 404 U.S. 71, 74 (1971) (marking the first time that the Court applied the Equal Protection Clause to gender discrimination, finding unconstitutional an Idaho statute that favored men over women in estate administration). Dismantling the gendered assignment of marital roles has simultaneously made the relationship between spouses more equal, increased couples’ freedom to enter into binding premarital agreements with respect to their financial affairs, and enhanced women’s decisionmaking power (and thus autonomy) within marriage. These changes, however, do not represent complete freedom to determine the content of marriage, particularly with respect to children. See *supra* note 87 and accompanying text.

has changed marriage from a structure that fostered dependency based on rigidly-defined gender roles to an interdependent union that requires greater cooperation and coordination between the couple.<sup>169</sup>

These changes in the nature of marriage lay the foundation for the Supreme Court's decision in *Obergefell v. Hodges*. In *Obergefell*, the Court recognized that, in light of this new vision of marriage as a union of equals, the restriction of the institution to different-sex couples had become an anachronism.<sup>170</sup> The Court emphasized that the twin commands of equality grounded in the Equal Protection Clause of the Constitution and autonomy based on the Due Process Clause were "connected in a profound way," both individually and together compelling recognition of marriage equality.<sup>171</sup> The majority opinion identified these principles with dismantling the systems of inequality that made marriage an intrinsically gendered union, and coercion that made marriage the sole acceptable locus for sexuality and childrearing.<sup>172</sup>

Chief Justice Roberts's dissent, in contrast, opposed marriage equality because of what he saw as the continuing link between sexual relations, childrearing, and the marital bond.<sup>173</sup> In rejecting this view of marriage, the majority embraced an institution premised more on the ability to choose an equal partner than on the continued need for marriage as an exclusive—and universal—institution premised on the relationship to childrearing.<sup>174</sup>

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169. See, e.g., June Carbone & Naomi Cahn, *Whither/Wither Alimony?*, 93 TEX. L. REV. 925 (2015) (reviewing CYNTHIA LEE STARNES, *THE MARRIAGE BUYOUT: THE TROUBLED TRAJECTORY OF U.S. ALIMONY LAW* (2014)) (discussing the changing expectations of marriage); Douglas NeJaime, *Windsor's Right to Marry*, 123 YALE L.J. ONLINE 219, 244 (2013) (stating that marriage is now associated with "adult romantic affiliation, emotional and economic interdependence").

170. 135 S. Ct. 2584, 2595 (2015). But see Allison Anna Tait, *The Return of Coverture*, 114 MICH. L. REV. FIRST IMPRESSIONS 99, 100 (2016) (arguing that the decision reflects a "regressive" vision of marriage). It also sought to reinforce the centrality of marriage as an institution. See, e.g., Serena Mayeri, *Marriage (In)equality and the Historical Legacies of Feminism*, 6 CAL. L. REV. CIR. 126, 127 (2015).

171. *Obergefell*, 135 S. Ct. at 2602–03.

172. *Id.* at 2602 ("The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era.")

173. *Id.* at 2613 (Roberts, C.J., dissenting) ("Therefore, for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond."). Justice Alito's dissent similarly objected that the majority's understanding of marriage "focuses almost entirely on the happiness of persons who choose to marry." *Id.* at 2641 (Alito, J., dissenting).

174. In doing so, the Court did not ignore the relationship between marriage and children. Indeed, it saw marriage as important to the ability of same-sex couples to command community support for the families they had created. The Court nonetheless linked the stability and permanence that it associated with marriage to the spouses' ability to choose a suitable partner rather than to any association with biology or tradition, much less gender hierarchy and coercion. *Id.* at 2600 (majority opinion).

The movements towards marriage as a system of formal equality between two spouses, who to a much greater degree today can choose to enter and leave marriage on terms of their choosing, have fundamentally shifted the legal regulation of marriage. Marriage has come to mean the agreement of the spouses to assume joint and equal responsibility for their financial affairs and any resulting children—a meaning reinforced by property, parentage, and custody laws.

### B. *Financial Partnership Within Marriage*

Consistent with these changes, state family laws moved towards recognition of a new model of marriage with spouses having interdependent and equal roles during marriage and upon divorce.<sup>175</sup> In accordance with this model, a husband was no longer solely liable for expenses incurred by his wife (and could no longer rape his wife with impunity).<sup>176</sup> All states today accord both spouses equal management rights over jointly titled property. When one spouse dies, the other is entitled to a significant share of property in the decedent's estate, even when the will sets out contrary intent, in recognition of a partnership theory of marriage.<sup>177</sup>

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175. This change is often called the “partnership theory of marriage,” and it is associated with a change in property division in common law states from a title system to one of equitable distribution, premised on the joint contributions of the spouses. Mississippi was the last state in the country to make this shift. See Deborah H. Bell, *Equitable Distribution: Implementing the Marital Partnership Theory Through the Dual Classification System*, 67 MISS. L.J. 115, 124–25 (1997). Bell identifies marital partnership theory with three assumptions: first, that “when two persons marry they make a commitment to the marital unit” to contribute to the family welfare and to share the results of their joint efforts; second, that homemaking contributions enable the wage-earner to produce; and, third, that “because homemaking enables earning, its value is proportional to the income produced. Accordingly, the assets produced by the efforts of either spouse belong to the partnership, and each spouse has a right to a fair share of the partnership’s assets.” *Id.* at 125 (quoting and then citing Jean M. Krauskopf, *Classifying Marital and Separate Property – Combinations and Increase in Value of Separate Property*, 89 W. VA. L. REV. 997, 997–98 (1987)).

176. See, e.g., Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 844–48 (2004) (noting changes towards sex-neutral laws, even if the ultimate effect does not eliminate vestiges of coverture).

177. See UNIF. PROBATE CODE § 2 general cmt. (amended 2010). The partnership theory of marriage is based on mutual commitment and respect, with commitment based on emotional ties rather than social obligation. See, e.g., PAUL AMATO ET AL., *ALONE TOGETHER: HOW MARRIAGE IN AMERICA IS CHANGING* 14 (2007) (discussing the development of “companionate marriage”); STARNES, *supra* note 169, at 155–60 (discussing application of partnership principles to marriage); Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 2046 (2010) (discussing partnership theory of marriage); Ellman, *supra* note 162, at 820 (noting that equitable distribution of marital property is tied to a “premise of economic partnership and entitlement to fair share of accumulated property”); Alan Newman, *Incorporating the Partnership Theory of Marriage into Elective-Share Law: The Approximation System of the Uniform Probate Code and the Deferred-Community-Property Alternative*, 49 EMORY L.J. 487 (2000); Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 236–42 (1991) (discussing 1990 UPC reforms of elective share based on the concept of marriage as partnership).

For divorce, all states adopted some form of an equitable distribution system that gives both spouses a claim to all property acquired through the efforts of either spouse during the marriage.<sup>178</sup> In 1994, Mississippi became the last state to abandon a common law title system in which property ownership typically depended on which party's name was listed on the deed.<sup>179</sup> Some states explicitly presume that marital property should be equally divided, while other states reach a similar outcome based on principles of equitable distribution.<sup>180</sup> Even if, for example, the spouses live in different states and establish their own separate and successful businesses, courts may still order a fifty/fifty split upon divorce.<sup>181</sup>

At the same time, states have backed away from long-term alimony.<sup>182</sup> The law now treats marriage as a partnership premised on equal contributions, to be split when the relationship ends.<sup>183</sup> It also treats spouses, whatever their division of labor during the marriage, as capable of independence upon divorce. Long-term support, which never was all that common, has become increasingly rare.<sup>184</sup> It typically occurs only at the end of a long-term marriage, where one party was a full-time homemaker and there is a significant difference in income.<sup>185</sup> These changes make marriage an institution that reflects each spouse's choice to become a member of a shared community that "facilitates interdependent sharing, . . . intimacy and commitment."<sup>186</sup>

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178. See Bell, *supra* note 175, at 122.

179. Ferguson v. Ferguson, 639 So. 2d 921, 927 (Miss. 1994) (en banc).

180. See Gregory S. Alexander, *Governance Property*, 160 U. PA. L. REV. 1853, 1872 (2012); Marsha Garrison, *What's Fair in Divorce Property Distribution: Cross-National Perspectives from Survey Evidence*, 72 LA. L. REV. 57, 70 (2011).

181. Arneault v. Arneault, 639 S.E.2d 720, 728 (W.Va. 2006); see Hamm v. Hamm, 350 P.3d 124, 127 (Okla. 2015) (discussing wife's receipt of almost \$1 billion property settlement on divorce); David N. Hofstein et al., *Equitable Distribution Involving Large Marital Estates*, 26 J. AM. ACAD. MATRIMONIAL L. 311, 313 (2014) (concluding that even in states in which there is not a presumption of equal division, cases increasingly award equal division even where significant assets were created by one spouse).

182. Carbone & Cahn, *supra* note 169.

183. See, e.g., Berger v. Berger, 747 N.W.2d 336, 352–53 (Mich. Ct. App. 2008).

184. Empirical studies show: 1) the public is relatively hostile toward alimony awards to long-term homemakers whose children have grown up. See, e.g., Ira Mark Ellman & Sanford L. Braver, *Lay Intuitions About Family Obligations: The Case of Alimony*, 13 THEORETICAL INQUIRIES L. 209, 237 (2012); and 2) women who initiate divorce are reluctant to seek child support. See Judith G. McMullen, *Alimony: What Social Science and Popular Culture Tell Us About Women, Guilt, and Spousal Support After Divorce*, 19 DUKE J. GENDER L. & POL'Y 41, 47, 69 (2011).

185. See Katharine K. Baker, *The Stories of Marriage*, 12 J.L. & FAM. STUD. 1, 49–50 (2010).

186. Alicia Brokars Kelly, *Money Matters in Marriage: Unmasking Interdependence in Ongoing Spousal Economic Relations*, 47 U. LOUISVILLE L. REV. 113, 116 (2008).



### C. Parentage and Marriage

States have remade the relationship between parents and children to enforce more egalitarian principles of caretaking. Traditional marriage associated children's interests with a breadwinning father and a caretaking mother who performed complementary roles.<sup>187</sup> In the first half of the twentieth century, courts recognized a presumption in favor of maternal custody for children of "tender years."<sup>188</sup> They also presumed that if parents could not cooperate sufficiently to stay married, they were unlikely to be able to parent together after a divorce.<sup>189</sup> Accordingly, just as the law gave husbands unilateral decisionmaking authority over the family's assets, the law also insisted on recognition of a single custodial parent and accorded the other parent "visitation" if that parent enjoyed any right to see the child at all. Divided parental authority was thought to be inimical to children's interests.<sup>190</sup>

With the adoption of no-fault divorce and the dramatic increase in divorce rates, a continuation of the maternal presumption would have meant that a young woman would be able to leave her husband, with the children in tow, and demand that he provide financial support through the children's age of majority.<sup>191</sup> In the name of gender equality, men fought for and won increasing recognition of gender neutral custody rights and a presumption that it was in children's interests to retain contact with both parents.<sup>192</sup> Parenting

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187. Indeed, same-sex marriage opponents have often invoked the importance of complementary sex-based roles in children's development. See Suzanne B. Goldberg, *Risky Arguments in Social-Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 COLUM. L. REV. 2087, 2153 (2014) (discussing—and debunking—such claims).

188. See DiFonzo, *supra* note 118, at 228.

189. See, e.g., *McLemore v. McLemore*, 346 S.W.2d 722, 724 (Ky. Ct. App. 1961) (stating divided custody "would be greatly to the detriment of the children, because it would give them no fixed or permanent home, but rather keep them unsettled and on the move. Nothing can be more demoralizing to a home or destructive to good citizenship . . . ." (quoting *Towles v. Towles*, 195 S.W. 437, 438 (Ky. Ct. App. 1917))); *McCann v. McCann*, 167 Md. 167, 171–73, 173 A. 7, 9 (1934) (noting that the decree in question "divided the control of the child, which is to be avoided, whenever possible, as an evil fruitful in the destruction of discipline, in the creation of distrust, and in the production of mental distress in the child"); *Lapp v. Lapp*, 293 N.W.2d 121, 130 (N.D. 1980) (associating shared custody with lax discipline); *DeForest v. DeForest*, 228 N.W.2d 919, 925 (N.D. 1975) (discussing the need for stability); *Martin v. Martin*, 132 S.W.2d 426, 428 (Tex. Civ. App. 1939) ("It is readily apparent that such practices are calculated to arouse serious emotional conflicts in the mind of the child . . .").

190. JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 32, 34, 38 (1973) (stressing the importance of deferral to the custodial parent).

191. See McMullen, *supra* note 184 (discussing women's feelings of guilt about initiating divorce as a factor in lack of alimony awards); see also JUDITH S. WALLERSTEIN & JOAN B. KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* 23 (1996) (noting that the party initiating divorce is likely to ask for less financial support).

192. DiFonzo, *supra* note 118, at 216 (stating that almost all states have adopted policies favoring the child's continuing contact with both parents); Dinner, *supra* note 116.

is no longer thought to depend on unique male or female attributes;<sup>193</sup> rather, children's interests are thought to lie with the stability of their relationships with the two adults who assume responsibility for their care.<sup>194</sup>

### 1. *Determining Parentage*

The equal assumption of responsibility for children starts with the marital presumption. The marital presumption makes parentage an "opt-out" status. The presumption, both legally and practically, is that children born to a married woman are the children of the two spouses.<sup>195</sup> Neither spouse need take any action for both to receive recognition as parents, and their legal status continues unless someone takes action to challenge this status.<sup>196</sup> In many states, even proof that the husband is not the biological father does not solely rebut the presumption; instead, doing so may involve the consideration of the child's interests, the degree to which the husband assumed a paternal role, and/or the biological father's ability and willingness to provide support.<sup>197</sup>

Historically, the marital presumption served to confer fatherhood on a husband. It began as a presumption of biology that could only be rebutted through proof that the husband had not fathered his wife's child.<sup>198</sup> In fact, in the era that treated marriage as an institution designed to unite biology and parenthood, the marital presumption served as something of a fig leaf that, when necessary, could cover up inconvenient facts of reproduction in order to preserve the illusion of a biological family.<sup>199</sup> As a practical matter, it

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193. *But see* Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 *YALE J.L. & FEMINISM* 257, 343 (2009) (arguing that gender stereotypes survive, despite gender neutral custody presumptions, and have a disproportionate impact on gay fathers).

194. Within marriage, this still means two and only two adults. For discussion of the possibility of three adults, see Yehezkel Margalit et. al., *The New Frontier of Advanced Reproductive Technology: Reevaluating Modern Legal Parenthood*, 37 *HARV. J. L. & GENDER* 107 (2014); Nancy D. Polikoff, *Response: And Baby Makes . . . How Many? Using In re M.C. to Consider Parentage of a Child Conceived Through Sexual Intercourse and Born to a Lesbian Couple*, 100 *GEO. L.J.* 2015, 2026 (2012).

195. *See, e.g.*, NeJaime, *supra* note 72.

196. *See generally* Carbone & Cahn, *supra* note 74 (discussing operation of the marital presumption).

197. *See generally* Harris, *supra* note 102, at 1300 (noting the role of marital presumption in protecting the relationship between husband and child).

198. *E.g.*, Carbone & Cahn, *supra* note 74; June Carbone & Naomi Cahn, *Marriage and the Marital Presumption Post-Obergefell*, 84 *UMKC L. REV.* 663, 667 (2016).

199. It not only made parenthood for the married automatic, it also restricted those who could challenge the presumption (unmarried fathers typically did not have standing to establish paternity) and the testimony that could be used to rebut the husband's paternity (testimony about the wife's sexual behavior was not allowed). *See* Carbone & Cahn, *supra* note 74.

restricted the evidence that could be used to rebut the presumption<sup>200</sup> and thus preserved marital unity and protected the husband who assumed a paternal role, whatever the facts of his biological relationship to the child.<sup>201</sup>

Thus, if a married couple were to leave the hospital and get into an automobile accident on the way home, the husband would be a legal parent who could make medical decisions for the child even if his name did not appear on the birth certificate and he had taken no other action to affirm his paternity. Indeed, even if both parents knew that someone else had fathered the child, and even if the hospital had on record DNA tests that showed that the husband could not have fathered the child, his legal status as a parent would be unaffected unless someone challenged the presumption.<sup>202</sup> The marital presumption thus takes the form of an opt-out condition of marriage—presumed unless proven otherwise.

With the ability of same-sex couples to wed, the courts have had to decide whether the marital presumption applies to a couple who could not have jointly produced the child and, if so, what the presumption means theoretically and practically. Most of the cases decided to date have taken the position that the opt-out system applies to same-sex parents.<sup>203</sup> As a practical matter, this means that the opt-out system used for different-sex couples often

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200. Typically, marital presumption statutes have denied standing to the biological father to establish paternity, and precluded testimony about a wife's infidelity or sexual relations with a husband present in the household. See Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 573, 564 (2000).

201. Indeed, *Michael H.* upheld the continued constitutionality of the marital presumption in 1989, in part because of the importance of the marital family as a functional unit. See *Michael H. v. Gerald D.*, 491 U.S. 110, 119–20 (1989).

202. While all states continue to apply the marital presumption to couples in intact marriages (where there is no effort to rebut it), they differ in how they apply it at divorce. In Pennsylvania, for example, the marital presumption does not apply at all at divorce, allowing either parent to contest the parentage of a child born into the marriage. Pennsylvania then determines financial responsibility in accordance with estoppel principles. States also vary in their willingness to allow mothers to challenge the parental status of a husband who wishes to continue in a parental role. And, all states are more willing to entertain such challenges from either a husband or a wife, where the biological father is interested in assuming a parental role after the divorce. See, e.g., *In re Waites*, 152 So. 3d 306 (Miss. 2014).

203. See *Barse v. Pasternak*, No. HHBFA124030541S, 2015 WL 600973, at \*1 (Conn. Super. Ct. Jan. 16, 2015); *Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335 (Iowa 2013); *K.S. v. G.S.*, 440 A.2d 64 (N.J. 1981); *Wendy G-M. v. Erin G-M.*, 985 N.Y.S.2d 845, 861 (N.Y. 2014); *In re Baby Doe*, 353 S.E.2d 877 (S.C. 1987); *Roe v. Patton*, No. 2:15-CV-00253-DB, 2015 WL 4476734, at \*2 (D. Utah July 22, 2015). At least one jurisdiction has gone so far as to change its parentage statute to apply the presumption explicitly to same-sex couples. See, e.g., D.C. CODE § 16-909(a-1)(2) (2015) (“There shall be a presumption that a woman is the mother of a child if she and the child’s mother are or have been married, or in a domestic partnership, at the time of either conception or birth, or between conception or birth, and the child is born during the marriage or domestic partnership . . . .”); see also Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201, 247 (2009) (noting consideration or enactment of similar statutes elsewhere).

applies to same-sex couples; consequently, two same-sex partners would automatically be treated as parents of a child, without having to adopt or take some other action to establish legal parenthood.

This result reinforces marriage as an institution that presumes the spouses undertake shared and equal commitments to the children they produce as part of the union—even without a biological tie. If the presumption were not applicable to same-sex spouses, the parent without a biological or adoptive tie would become a step-parent, a legal role that is distinctly secondary to that of the other spouse. Instead, application of the marital presumption assumes that by marrying, each spouse consents to the assumption of joint and equal parental roles.

## 2. *Determining Custody*

Custody for all children turns on a best interest of the child standard that appears to require that courts tailor custodial arrangements based on the specific circumstances of each case. In fact, courts decide custody in accordance with general presumptions about children's interests, and today these presumptions identify the child's interests with the continuing involvement of both parents.<sup>204</sup> As a practical matter, courts will not enter a divorce decree without listing the children born into the marriage and entering a custodial order, and these orders increasingly provide for time with both parents.<sup>205</sup> Continuing contact can take the form of joint physical and/or legal custody, parenting plans, or other orders that allocate shares of the child's time and parental decisionmaking authority.<sup>206</sup>

Shared custody, rather than selection of a sole custodian, has become the norm.<sup>207</sup> Although it was once dismissed as unworkable, it is now available in some form in all states, and has become the preferred outcome in some jurisdictions, absent a showing of "detriment" to the child.<sup>208</sup> Even when a

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204. See DiFonzo, *supra* note 118, at 217, 225; see also N.H. REV. STAT. § 461-A:6(f)–(g) (2015); Schwieterman v. Schwieterman, 114 So. 3d 984, 986–87 (Fla. Dist. Ct. App. 2012) ("It is the public policy of this state that each minor child has frequent and continuing contact with both parents after the parents separate . . . to share the rights and responsibilities, and joys, of childrearing." (quoting 2009 Fla. Laws Ch. 2009-180 § 3, at 1853)); *Charts*, 48 FAM. L.Q. 654, 656 (2015) (depicting custody criteria in Chart 2).

205. See BROWN & COOK, *supra* note 141, at 2, 9–12, 18–19; Maria Cancian et al., *Who Gets Custody Now? Dramatic Changes in Children's Living Arrangements After Divorce*, 51 DEMOGRAPHY 1381 (2014).

206. See, e.g., HARRIS ET AL., *supra* note 76, at 570–89.

207. See Theresa Glennon, *Still Partners? Examining the Consequences of Post-Dissolution Parenting*, 41 FAM. L.Q. 105, 114 (2007). Indeed, "[d]ivorced fathers were among the chief supporters of the California joint custody statute that became effective in 1980, ten years after the no-fault divorce law . . ." Herma Hill Kay, *No-Fault Divorce and Child Custody: Chilling Out the Gender Wars*, 36 FAM. L.Q. 27, 36 (2002).

208. See, e.g., ARK. CODE § 9-13-101(a)(1)(A)(iii) (2015) ("an award of shared custody is favored in Arkansas"); N.H. REV. STAT. § 461-A:5 (2015) (establishing a presumption in favor of joint decisionmaking responsibility); Cuadra, *supra* note 147, at 641 (listing joint custody statutes);

court awards one parent primary custody, it may still be required to grant a minimum number of visitation days to the other parent.<sup>209</sup>

National custody statistics are not available, but studies of child custody suggest a growing trend towards shared custody.<sup>210</sup> As a national task force declared in 2014, “[t]he most significant trend in contemporary child custody law is toward greater active involvement by both parents in postseparation childrearing.”<sup>211</sup> Fathers’ rights groups continue to press further for a presumption in favor of an equal division of the child’s time in all divorces, and, even without such a presumption, some courts try to equalize the time spent with each parent when it is practicable.<sup>212</sup>

Moreover, many states that may not have an explicit preference for shared custody favor a custody award to the parent most likely to facilitate the continued involvement of the other parent.<sup>213</sup> These “friendly parent” provisions give courts the ability to threaten parents who obstruct the other parent’s involvement with loss of custody,<sup>214</sup> and the number of reported opinions transferring custody from mothers to fathers on this basis has increased.<sup>215</sup>

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DiFonzo, *supra* note 118, at 217 (“Forty-seven states and the District of Columbia have statutory provisions authorizing courts to award joint custody in one form or another (legal or physical),” and the other three do so by case law). States differ, however, about whether the preference extends just to joint legal custody, which refers to joint decisionmaking, or to both joint legal and physical custody. In addition, some states have moved away from the joint custody, sole custody, and visitation vocabulary in favor of parenting plans or other forms of cooperative custody. DiFonzo, *supra* note 118, at 216–18.

209. *E.g.*, UTAH CODE § 30-3-35 (2015) (establishing a “[m]inimum schedule for parent-time for children 5 to 18 years of age”).

210. WOMEN’S LAW CTR. OF MD., FAMILIES IN TRANSITION: A FOLLOW-UP STUDY EXPLORING FAMILY LAW ISSUES IN MARYLAND 35–36 (2006), <http://www.wlcmd.org/wp-content/uploads/2013/06/Families-in-Transition.pdf> (showing that between 1999 and 2003, “Maryland parents [were] sharing decisionmaking in more than half the cases—55 percent—and with greater frequency”).

211. Marsha Kline Pruett & J. Herbie DiFonzo, *Closing the Gap: Research, Policy, Practice and Shared Parenting*, 52 FAM. CT. REV. 152, 156 (2014).

212. For a discussion of these movements and the objections to them, see Margaret F. Brinig, *Penalty Defaults in Family Law: The Case of Child Custody*, 33 FLA. ST. U. L. REV. 779, 781–82 (2006); Dinner, *supra* note 192; Arnett Dugan, *In Mass. and Elsewhere, a Push for Custody Reform*, BOS. GLOBE (Aug. 1, 2015), <https://www.bostonglobe.com/metro/2015/07/31/massachusetts-and-elsewhere-push-for-child-custody-reform/Xh4NOwx2qWyZ12VMuYPf9J/story.html>. See also *Schwieterman v. Schwieterman*, 114 So. 3d 984, 986–87 (Fla. Dist. Ct. App. 2012) (upholding an award of equal time to each parent without a statutory mandate).

213. See DiFonzo, *supra* note 118, at 217, 225.

214. See, *e.g.*, ARK. CODE. § 9-13-101(b)(1)(A)(iii) (2015) (providing that when a “parent demonstrates a pattern of willfully creating conflict in an attempt to disrupt a current or pending joint-custody arrangement,” the court can modify a joint custody award “to an order of primary custody to the nondisruptive parent”).

215. See, *e.g.*, *In re Mannion*, 917 A.2d 1272, 1275–76 (N.H. 2007).

Sharing custody has won widespread public and judicial support.<sup>216</sup> For example, a survey of Indiana family court judges found that, while only four percent preferred joint custody in 1998, only twenty percent or less *did not* prefer it in 2011.<sup>217</sup> This acceptance goes beyond the legal system. When participants in an innovative study were asked to allocate parenting time upon divorce, they strongly preferred equal awards of the child's time to each parent, irrespective of each parent's involvement with the child during the marriage or the existence of conflict between the parents during the divorce. Study participants expressed significant reservations only when one of the parents had instigated the conflict.<sup>218</sup>

### 3. Conclusion

These changes have reshaped marriage. Today, it has become a union for the financially stable and mature.<sup>219</sup> The husband no longer solely generates the family income with the legal authority to determine how it will be spent; instead, both spouses have the obligation to support each other and the need to cooperate in managing the family's assets.<sup>220</sup> Similarly, wives are no longer expected to take responsibility for children with little input from their husbands. Today's marital ideal requires coordinating homework supervision, doctor's visits, daycare pickup, and after school activities. And if a split

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216. L. Braver et al., *Lay Judgments About Child Custody After Divorce*, 17 PSYCHOL. PUB. POL'Y & L. 212 (2011); see also Glennon, *supra* note 207, at 113–14; Linda Nielsen, *Shared Parenting After Divorce: A Review of Shared Residential Parenting Research*, 52 J. DIVORCE & REMARRIAGE 586 (2011); *Results of Local, Regional Ballot Questions*, BOS. GLOBE (2004), [http://www.boston.com/news/special/politics/2004\\_results/general\\_election/questions\\_all\\_by\\_town.htm](http://www.boston.com/news/special/politics/2004_results/general_election/questions_all_by_town.htm) (discussing a proposition in favor of shared parenting which passed with overwhelming support).

217. Julie E. Artis & Andrew V. Krebs, *Family Law and Social Change: Judicial Views of Joint Custody, 1998–2011*, 40 LAW & SOC. INQUIRY 723, 734 (2015) (finding that in 1998, only 4% favored shared custody, regardless of the age of the child; in 2011, 92% favored shared custody for children ages five to twelve, and 80% favored shared custody for children from birth to age four and ages thirteen to eighteen).

218. Braver et al., *supra* note 216, at 236. Follow-up studies reaffirmed the basic intuitions about a strong preference for shared custody, but also found less of an inclination to award equal time to both parents where one had caused the breakup because of an affair or an unjustified decision to leave the marriage. Ashley M. Votruba et al., *Moral Intuitions About Fault, Parenting, and Child Custody After Divorce*, 20 PSYCHOL. PUB. POL'Y & L. 251, 256 (2014). Even then, most participants continued to favor awarding each parent substantial time with the child.

219. Shelly Lundberg & Robert A. Pollak, *Cohabitation and the Uneven Retreat from Marriage in the U.S., 1950–2010* (Nat'l Bureau of Econ. Research, NBER Working Paper No. 19413, 2013), <http://www.nber.org/papers/w19413> (discussing that a two parent investment is necessary for today's children to reach middle class status).

220. Public attitudes show declining support for the traditional hierarchical family and increasing support for equal roles of caretaking and breadwinning in marriage, although women still believe that a man is not ready for marriage until he can provide economic support to his family. *The Decline of Marriage and Rise of New Families*, PEW RESEARCH CTR. (Nov. 16, 2010), <http://www.pewsocialtrends.org/2010/11/18/the-decline-of-marriage-and-rise-of-new-families/6/>.

does occur, both parents are expected to support the other's continuing participation as an equal in the child's life.<sup>221</sup>

The costs of attachment to an unreliable partner have accordingly increased.<sup>222</sup> Equality within marriage involves the re-creation of the institution as an interdependent economic union and one of shared and co-equal assumption of parental responsibilities.<sup>223</sup> Both spouses, therefore, have reason to be wary of unreliable partners who do not carry their own weight in a relationship.<sup>224</sup> This remaking of marriage along principles of equality does not allow spouses complete freedom to tailor the terms of marriage to their preferences. While they have greater ability to enter into premarital agreements that alter the financial terms of the union, the enforceability of provisions altering parental rights and obligations is limited.<sup>225</sup> Accordingly, the championing of marriage equality as equality between spouses involves some restriction on autonomy.<sup>226</sup> Marriage remains an institution whose content comes from strong social and legal norms, not just from the agreement of the spouses.<sup>227</sup>

Ultimately, the dismantling of traditional marriage, which rested on the twin foundations of inequality and coercion,<sup>228</sup> has both redefined marriage in accordance with principles of equality and given adults more freedom to choose marital or nonmarital relationships.<sup>229</sup> The newest challenges to marriage equality center on the treatment of the differences between marriage

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221. See, e.g., HARRIS ET AL., *supra* note 76, at 626.

222. See ROBERT D. PUTNAM ET AL., GROWING CLASS GAPS IN SOCIAL CONNECTEDNESS AMONG AMERICAN YOUTH, 1975–2009 10 (2012), [http://www.hks.harvard.edu/saguaro/pdfs/SaguaroReport\\_DivergingSocialConnectedness.pdf](http://www.hks.harvard.edu/saguaro/pdfs/SaguaroReport_DivergingSocialConnectedness.pdf). See generally ROBERT D. PUTNAM, OUR KIDS: THE AMERICAN DREAM IN CRISIS (2015) (documenting disparity in child outcomes based on family income).

223. See Cynthia Lee Starnes, *Lovers, Parents, and Partners: Disentangling Spousal and Co-Parenting Commitments*, 54 ARIZ. L. REV. 197, 199, 230–31 (2012) (arguing that family law should treat marriage as both a spousal and a co-parenting commitment).

224. See CARBONE & CAHN, *supra* note 79.

225. See, e.g., HARRIS ET AL., *supra* note 76, at 675.

226. Although spouses do have greater ability to enter into premarital agreements addressing their financial obligations, they cannot alter custody and child support obligations. See *id.*

227. Cherlin, *supra* note 156 (explaining that institutionalization comes from the establishment and reinforcement of institutions such as marriage that create shared expectations about acceptable behavior).

228. See *supra* Part II.A.

229. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (noting the egalitarian nature of marriage); MARTHA M. ERTMAN, LOVE'S PROMISES: HOW FORMAL AND INFORMAL CONTRACTS SHAPE ALL KINDS OF FAMILIES 109 (2015) (addressing marital and nonmarital relationships).

and nonmarriage.<sup>230</sup> The privileged role of marriage in the law—a privileging celebrated by Justice Kennedy throughout *Obergefell*<sup>231</sup>—makes efforts to respect nonmarriage, on its own terms, even more significant and potentially more difficult.<sup>232</sup>

### III. MARRYING AND NOT MARRYING

Given the changes in the nature of marriage, and the decisions of large numbers of intimate partners to cohabit or bear children together without marrying, the time has come to address the question of whether nonmarriage should be recognized as a separate status and, if so, what that status entails. The Supreme Court, culminating in *Obergefell*, has opened up marriage to those previously excluded from the institution. As a result, not being married becomes a choice rather than, as was true for same-sex couples before *Obergefell*, the only option. *Lawrence v. Texas* and earlier decisions, for example, decriminalized nonmarital relationships, helping to make nonmarriage increasingly accepted. As a result, not marrying becomes a choice. Moreover, as the nature of marriage has changed, so too have the nature of the choices underlying such decisions. With the reform of marriage into an institution premised on formal equality, those who see their relationships as involving an unequal division of contributions and benefits have become more likely not to marry. As a result, more people are choosing not to get married, and the reasons they choose not to have changed. We should respect nonmarriage as a separate legal status in its own right.

In considering nonmarriage in these terms, it is important to contrast the two systems, acknowledging not just existing legal differences, but the reasons the parties choose between them in the first place. In this Part, we explore three such considerations that should be central in shaping the law of nonmarriage.

The first difference is that married couples know what is customary when they legalize their relationship while unmarried couples are often making it up as they go along. Marriage is an *institution* that reinforces shared

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230. Indeed, the issue that has received the greatest attention from the Supreme Court involves consent to adoption. The claims of fathers to equal rights with mothers have received considerable attention in the context of adoption decisions, where either one party's inclination (for example, the mother's desire to place the child for adoption) or the other's (for example, the father's preference for raising the child himself) can prevail. See, e.g., *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013); *In re Adoption of J.S.*, 358 P.3d 1009 (Utah 2014), cert. denied sub nom., *Bolden v. Doe*, 136 S. Ct. 31 (2015).

231. E.g., Mayeri, *supra* note 170, at 134 (*Obergefell* does not reflect feminist campaigns "against discrimination based on nonmarital status"); Tait, *supra* note 170 (critiquing the majority's vision of marriage).

232. See KATHERINE FRANKE, *WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY* (2015); R.A. Lenhardt, *Marriage as Black Citizenship?*, 66 HASTINGS L.J. 1317, 1358 (2015) ("[M]arriage need not be the only, or even the primary, frame for supporting black loving relationships.").



expectations about what it means to marry, even if the spouses do not know each of the 1,000-plus state-provided benefits accorded to marriage or all of the laws on dissolution and death. Nonmarriage is not one single institution, but instead is a continuum of relationships.<sup>233</sup> It simultaneously allows couples greater room to work out arrangements of their choice and involves fewer societal mechanisms that help unmarried couples reach agreement about what their relationship means. Unmarried couples are therefore less likely than married couples to agree on the terms of their individual unions.

The second difference is that married couples make an unqualified commitment to each other—for better or worse, in sickness and in health—while unmarried couples typically make a more contingent one. When couples search for a marital partner, they are looking for a true life partner, one who complements their vision of what a good life entails.<sup>234</sup> Cohabitants, in contrast, often lack similar confidence in their partners or in the existence of circumstances that will allow the relationship to flourish. While marriage therefore rests on a system that assumes a high degree of integration of the couples' lives, nonmarriage involves a series of choices about whether to jointly title property, maintain separate bank accounts, put both parties' names on a lease, or otherwise assume responsibility for the other person's affairs.

The third difference is that marriage involves institutionalized expectations of equality. The law assumes equal contributions to marriage, typically divides property equally, and assumes that the child's interests lie with the relatively equal involvement of both parents following a break-up. Couples who do not see themselves as equal, who do not want an equal division of assets or responsibilities, or who do not trust the other partner to deliver on promises of equality, often do not marry for these reasons. Nonmarriage allows them to define their relationships on something closer to their own terms, even if that means unequal terms.

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233. Because nonmarriage describes a continuum of relationships, its definition is somewhat imprecise. Nonetheless, for purposes of this Article, we use the term to mean the minimum relationship between intimate partners necessary to trigger a claim of legal obligations from one to the other. The term thus does not include roommates, co-workers, or business partners who do not have an intimate relationship with each other, but it does include intimate partners who undertake joint business ventures or who commingle their finances whether or not they cohabit. It also includes those unmarried partners who raise a child together (with or without a biological relationship) or who have had a child together, even if their only tie is the sexual act that produced the child. And, it includes those who enter into formal legal "nonmarriage" statuses. See, e.g., Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 *FORDHAM L. REV.* 1509, 1515 (2016).

234. Maura Kelly, *How We Meet Our Spouses*, *WALL ST. J.* (Mar. 27, 2014), <http://www.wsj.com/articles/SB10001424052702303325204579463272000371990> (asserting that most Americans want to find soul mates); see also Wendy Wang & Kim Parker, *Record Share of Americans Have Never Married*, *PEW RESEARCH CTR.* (2014), <http://www.pewsocial-trends.org/2014/09/24/record-share-of-americans-have-never-married/> (finding that a majority of those looking for a partner want someone with similar ideas about children—although having the same moral beliefs is less important).

A. *Formality and Shared Expectations*

Marriage and divorce require deliberate decisions to enter into and out of a state-sanctioned status. Unmarried partners, on the other hand, may enter and leave relationships without formalities and often without explicit markers commemorating the changing status of a relationship. These differences influence the relationship between norms, the couple's own understandings about their relationships, and the law.

Outside of the small number of common law marriage states,<sup>235</sup> marriage requires obtaining a license and conducting a ceremony.<sup>236</sup> Divorce in all states for any marriage (including a common law marriage) requires a judicial proceeding that produces a court order effecting the change in status. These formalities, which can be expensive and time consuming, provide an opportunity for the parties to ponder and plan for their change in marital status.

In contrast, unmarried couples often drift into cohabitation without either a clear plan or distinct understandings about their relationships.<sup>237</sup> The lack of formalities correlates not just with a lack of planning for the relationship, but with a greater likelihood that the couple may not share expectations about their future together.<sup>238</sup> For example, cohabiting males are significantly less likely than cohabiting females to report that they “love . . . [their] partner a lot” or to view the relationship as a committed one.<sup>239</sup> On the other hand, there are no significant differences between male and female spouses on these measures.<sup>240</sup> In some cases, the decision to move in together is jus-

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235. Nine states and the District of Columbia still recognize common law marriage. Common law marriage states require an intent to be married, cohabitation, and a holding out to the community that the couple is married. See HARRIS ET AL., *supra* note 76, at 235; ABRAMS ET AL., *supra* note 7, at 146–57.

236. ABRAMS ET AL., *supra* note 7, at 130 (noting that all but the common law marriage states typically require a license and a ceremony).

237. Kathryn Edin, Paula England, & Kathryn Linnenberg, *Love and Distrust Among Unmarried Parents*, Presentation at the National Poverty Center Conference 6–7 (2003) (unpublished manuscript), [https://www.researchgate.net/profile/Kathryn\\_Edin/publication/246728505\\_Love\\_and\\_Distrust\\_Among\\_Unmarried\\_Parents/links/558aed4808ae31beb1003ab0.pdf](https://www.researchgate.net/profile/Kathryn_Edin/publication/246728505_Love_and_Distrust_Among_Unmarried_Parents/links/558aed4808ae31beb1003ab0.pdf) (indicating that unmarried couples who cohabit before the birth of a child often did so though drift, while couples who cohabit after the birth of a child may do so because they believe they should live as a family); accord, ISABEL V. SAWHILL, *GENERATION UNBOUND: DRIFTING INTO SEX AND PARENTHOOD WITHOUT MARRIAGE* (2013).

238. Sharon Sassler & Amanda J. Miller, *Waiting to Be Asked: Gender, Power, and Relationship Progression Among Cohabiting Couples*, 32 J. FAM. ISSUES 482, 499 (2011) (“Cohabitation is an ‘incomplete institution’ . . . with few clear guidelines regarding whether and how it should progress.”).

239. Michael S. Pollard & Kathleen Mullan Harris, *Cohabitation and Marriage Intensity: Consolidation, Intimacy, and Commitment* 13 (RAND Labor & Population, Working Paper No. WR-1001, 2013), <http://ssrn.com/abstract=2284457>.

240. *Id.* at 12–13.

tified by convenience; it is cheaper to maintain one household than to maintain two.<sup>241</sup> The dissolution of cohabiting relationships is even more basic: one of the parties moves out. Indeed, one of the reasons cohabiting couples give for not marrying is the ease of ending the relationship.<sup>242</sup>

The lack of formal legal process may contribute to the persistence of varying expectations among cohabitants. If a married couple wishes to end their relationship, they must go to court. The process will involve hiring a lawyer or filling out judicial forms that will shape the process. The parties will have to list their children and their assets, and the divorce decree will specify the property division, the children's custodial arrangements, and the provision for support. The professionals involved in the process will communicate information about what to expect and will assist the parties in reaching their own agreements, partly by influencing their expectations about what is reasonable, and partly by providing counseling, mediation, custodial evaluations and financial advice, if needed.<sup>243</sup> Marriage law and community norms inform the process, while alternative dispute resolution procedures allow space for couples to craft individualized resolutions.<sup>244</sup> Unmarried couples need not go to court at all to begin or to end their relationships, and therefore, they are much less likely to encounter professionals who will shape either their expectations about appropriate norms or assist with the unwinding of their relationships. Instead, they are unlikely to end up in court unless one party feels that the other was unjustly enriched. For example, parties who commingled their finances without express documentation of their respective interests in the property would receive equitable property division if they were married, but neither the law nor community norms mandates a clear result when the parties are not married.<sup>245</sup>

These diverging expectations correspond to different reservations about marriage. Low income women report concern about a commitment to a financially unreliable man; these women fear that such commitments may

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241. Sassler & Miller, *supra* note 238, at 491 (concluding that “[t]he greater convenience of shared living was most often mentioned as a reason that men proposed living together”).

242. Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 J.L. & FAM. STUD. 1, 12 (2007) (finding that low income women report reluctance to marry men they may have to “evict”).

243. Jana B. Singer, *Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift*, 47 FAM. CT. REV. 363, 364 (2009) (emphasizing the changing role of family courts as conflict managers). *But see* Hatcher, *supra* note 149, at 909–10 (emphasizing the different level of resources available to those who cannot afford private attorneys or other professionals).

244. *See generally* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

245. For example, in *Cates v. Swain*, the parties gave differing accounts of their financial history, their intent, and their characterizations of various money transfers. No. 2010–CT–01939–SCT, 2013 WL 1831783, at \*1 (Miss. May 2, 2013) (en banc). In contrast, had they been married, they would have been more likely to put the property in their joint names and the court would have equitably divided the investments, which included their principal residence, however they characterized their intent.

threaten the resources on which they depend to take care of themselves and their children.<sup>246</sup> And among cohabitants between the ages of eighteen and twenty-nine who have not graduated from high school, women are much less likely than men to indicate that they expect to marry their current partner (forty-seven percent compared to sixty-seven percent of the men).<sup>247</sup> In contrast, young, better-educated men are more likely to report concerns about relationships holding them back,<sup>248</sup> and among cohabitants with at least some college completion, the gender differences reverse with sixty-eight percent of women and forty-six percent of the men expecting to marry their current partner.<sup>249</sup>

Unmarried relationships with children may be even more complex. “Shotgun cohabitation” has replaced shotgun marriage, with differences that correspond to racial, ethnic, and socioeconomic factors.<sup>250</sup> The poorer and less educated the mother, the more likely the pregnancy was unplanned.<sup>251</sup> While couples have become less likely to marry solely because of the birth of their child, they have become more likely to live together and to try to create a family, even when the parents did not know each other all that well at the time of conception.<sup>252</sup> They may have neither clear role expectations nor confidence in each other as they do.<sup>253</sup> Again, if the parties do nothing at the time of their break-up, the result ratifies the status quo, which would typically mean a custodial parent who controls access to the child,<sup>254</sup> and a non-custodial parent, who is not subject to a formal order of support. While

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246. Bowman, *supra* note 242, at 11.

247. KAY HYMOWITZ ET AL., KNOT YET: THE BENEFITS AND COSTS OF DELAYED MARRIAGE IN AMERICA 28 (2013), <http://nationalmarriageproject.org/wp-content/uploads/2013/03/KnotYet-FinalForWeb.pdf>; *see also* Amanda J. Miller et al., *The Specter of Divorce: Views From Working- and Middle-Class Cohabitators*, 60 FAM. REL. 602, 613 (2011) (observing that “[w]orking-class cohabitators—particularly the women—were more than twice as likely to express concerns regarding how hard marriage was to exit than were middle-class respondents, emphasizing the legal and financial challenges of unraveling a marriage”).

248. *See, e.g.*, MARK REGNERUS & JEREMY UECKER, *PREMARITAL SEX IN AMERICA: HOW YOUNG AMERICANS MEET, MATE, AND THINK ABOUT MARRIAGE* 192 (2011) (reporting that ambitious men want sex as recreation but are wary about the limitations of more committed relationships).

249. HYMOWITZ ET AL., *supra* note 247, at 28.

250. Lichter et al., *supra* note 67, at 135 (referring to shotgun cohabitation as a new form of “legitimation”).

251. *See* NAOMI CAHN ET AL., *TWO PERSPECTIVES ON DEMOGRAPHIC CHANGE AND THE FUTURE OF THE FAMILY* 11 (2016).

252. Heather Rackin & Christina M. Gibson-Davis, *The Role of Pre- and Postconception Relationships for First-Time Parents*, 74 J. MARRIAGE & FAM. 526, 527 (2012) (documenting cohabitation as response to, rather than a cause of, pregnancy); *see also* EDIN & NELSON, *supra* note 151, at 89 (explaining that parents often do not know each other very well at the time a woman becomes pregnant).

253. Edin et al., *supra* note 237, at 6–7 (describing pregnancy as triggering efforts to create a family attributing some of the distrust to suspicions of infidelity).

254. *See* BROWN & COOK, *supra* note 141, at 18–23 (documenting greater tendency of married than unmarried fathers to have custodial order giving them time with the child).

the majority of non-custodial parents maintain contact with their children following a break-up, the relationship is less likely to be formalized than in the case of divorce.<sup>255</sup> In these cases, however, the state may intervene to compel issuance of a child support order if the custodial parent is receiving state benefits.<sup>256</sup> In state-initiated actions, unlike private divorce proceedings, the parents have little ability to resolve the matter on their own, and the terms the courts impose are more likely to reflect state-mandated guidelines than community norms.<sup>257</sup>

Unmarried couples are thus both less likely to enter into their relationships with shared expectations about the relationships' terms and less likely to interact with the legal system in a way that effectively gives voice to the understandings they do have. Nonmarital couples are less likely to go to court, less likely to be able to control the outcomes if they do go to court, and less likely to be subject to rules that reflect either their personal or their community expectations about the terms of their relationship. The law accordingly fails to serve either an iterative process that helps reinforce shared understandings<sup>258</sup> or a proactive dispute resolution process that diffuses conflict in accordance with customized resolutions.<sup>259</sup>

While this first difference between marriage and nonmarriage is that the partners are less likely to agree between themselves on the terms of their relationships, the second difference involves something on which they have agreed: the definition of marriage.

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255. See Leslie Joan Harris, *Questioning Child Support Enforcement Policy for Poor Families*, 45 FAM. L.Q. 157, 164–66 (2011) (observing that more custodial parents in the Fragile Families studies, who are overwhelmingly unmarried, received informal than formal support from noncustodial parents, and that the amount of informal support tended to be greater than that provided through formal child support orders).

256. Brustin & Martin, *supra* note 115, at 804–05.

257. For example, in private actions, the noncustodial parent may seek more time with the child as a way of decreasing the support owed, or the custodial parent may decide not to seek support at all from a parent with whom she does not wish the child to have a relationship. In a state-initiated action, on the other hand, the state controls the action, and the noncustodial parent would have to file an independent action to seek a custodial order. See *id.* at 824.

258. See Scott & Scott, *supra* note 9, at 339–40.

259. See Singer, *supra* note 243.

*B. Contingent Relationships and the Decision Not to Marry*

Both those who marry and those who do not see marriage as an institution based on a permanent and unqualified commitment to the other partner.<sup>260</sup> And, in fact, married relationships are more likely to last.<sup>261</sup>

Nonmarriage, in contrast, occurs on a continuum. Some nonmarital unions involve partners who might like to marry and cannot, such as same-sex couples in the pre-*Obergefell* era, or couples who face financial penalties if they do.<sup>262</sup> Others who can marry choose not to do so because they do not believe in the institution.<sup>263</sup> These couples often think of themselves as fully committed to each other and may have commingled their lives in ways that are indistinguishable from married couples. And, the majority of people who live together increasingly commingle their affairs as time passes. Although, the number who report that they are “completely committed” to each other neither changes over time nor resembles the substantially greater reported commitment levels of married couples.<sup>264</sup>

Instead, many unmarried couples see their relationships as contingent, that is, as an agreement to stay together so long as they both wish to do so. While some couples treat cohabitation as a form of “trial marriage,” to see whether or not they are compatible, for others, a decision to move in together may have simply been a matter of convenience—a way to save money or to find a place to stay in a new city.<sup>265</sup> Cohabitation per se does not necessarily signal mutual understandings about either a relationship change or agreement to particular terms, such as a shared bank account.<sup>266</sup> As a general matter,

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260. Pollard & Harris, *supra* note 239, at 14 (observing that “cohabitators are . . . substantially less certain about the permanence of their relationships than respondents in married relationships, and they report substantially lower levels of ‘complete’ commitment to their partner, especially for males” while “married relationships of any duration consistently ranked higher on all of the intensity measures than cohabitations at even the longer durations”); *see also* Miller et al., *supra* note 247, at 607.

261. *See* DONALD BRAMAN, *DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICAN* 95 (2007) (reporting that “many wives of prisoners said that they would have left their partners had they not been married to them”); Sara McLanahan & Audrey N. Beck, *Parental Relationships in Fragile Families*, 20 *FUTURE CHILD* 17, 21 (2010) (for black families in the study, the dissolution rate five years after birth was 73% for cohabitants and 46% for marriage; for whites, it was 65% for cohabitants, and 17% for marriages).

262. *See, e.g.*, Brustin & Martin, *supra* note 115; Lenhardt, *supra* note 232.

263. *See, e.g.*, NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE* 3, 19 (2008); NeJaime, *supra* note 3, at 105. A sizeable minority of the LGBT community believes same-sex marriage advocacy has assumed too high a priority. Jens Manuel Krogstad, *What LGBT Americans Think of Same-Sex Marriage*, PEW RESEARCH CTR. 2 (Jan. 27, 2015), <http://www.pewresearch.org/fact-tank/2015/01/27/what-lgbt-americans-think-of-same-sex-marriage/>.

264. Pollard & Harris, *supra* note 240, at 12. Married couples, in contrast, show more commitment from the beginning of the relationship and less variation over time. *Id.*

265. Sassler & Miller, *supra* note 238, at 491, 493.

266. *Id.* at 494–95 (indicating that to the extent the couples in the study had discussed marriage, it had been after they moved in together, in some cases because the decision to move in happened quickly).

these partners may wish to marry someday,<sup>267</sup> but they clearly distinguish between married and unmarried relationships and are generally not ready to make an unqualified commitment to their current partner.<sup>268</sup>

Unmarried couples are less likely than married couples to commingle their assets.<sup>269</sup> In some cases, that may be because the couple has not yet made a commitment to each other, but in other cases the couple may be unwilling to make that commitment because of a lack of trust. Some unmarried couples report directly that they do not trust the other partner, or do not believe that they can manage interdependent finances.<sup>270</sup> Many women report that they will not marry a man who cannot hold a steady job.<sup>271</sup> For many, the issue is practical. Women see themselves as assuming primary responsibility for children, and if a man is not pulling his own weight in the relationship, he may detract from the woman's ability to provide for herself and the children. As one woman in a national study explained, she worries that marriage might lead to "a financially ruinous divorce," particularly because she earns more than her partner.<sup>272</sup> She observed that if a break-up occurs while they are nonmarital partners, "we don't have to divide anything up. What's yours is yours, and what's mine is mine, and that's it."<sup>273</sup> Other women similarly note that they did not want to be part of "the financial 'drama'" they identify with marriage, especially given the high divorce rates in their communities.<sup>274</sup> And men similarly identify marriage with the willingness to make a greater financial commitment to their partners.<sup>275</sup> Yet, couples who

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267. In the United States, most people continue to express positive views about marriage and express a desire to marry. Those who are not married are likely to say that it is because they have not met the right person. Wang & Parker, *supra* note 234 (explaining the reasoning of those who are not yet married but would like to do so). Nonetheless, working class couples express greater skepticism about making marriage work than middle class couples. See Miller et al., *supra* note 247, at 613 (reporting class differences in attitudes toward divorce); see also Amanda Jayne Miller & Sharon Sassler, *The Construction of Gender Among Working-Class Cohabiting Couples*, 35 QUALITATIVE SOC. 427, 443 (2012) (indicating that women who were the primary wage-earners were more reluctant to marry).

268. Pollard & Harris, *supra* note 239, at 14 (observing that "married relationships of any duration consistently ranked higher on all of the intensity measures than cohabitations at even the longer durations" and reporting differences in commitment levels).

269. Addo & Sassler, *supra* note 68, at 411 (concluding that married couples are more likely to pool income).

270. As discussed earlier, in *Arneault v. Arneault*, for example, the court concluded that a fifty/fifty division of assets was appropriate even where the married couple lived in different states, the wife did not substantially contribute to the business the husband ran in West Virginia, and the wife ran her own, much less profitable, business in Michigan. 639 S.E.2d 720 (W. Va. 2006). In contrast, in *Simmons v. Samulewicz*, the woman chose not to accept a marriage proposal precisely because of her wariness of her partner's finances. She believed that he could not be a true financial partner, and for this reason, she chose not to marry him. 304 P.3d 648 (Haw. Ct. App. 2013).

271. Wang & Parker, *supra* note 234.

272. WILCOX & WOLFINGER, *supra* note 151, at 75.

273. *Id.*

274. *Id.* at 105.

275. Miller et al., *supra* note 247, at 613.

keep their finances entirely separate report lower satisfaction levels with the relationship generally.<sup>276</sup>

The commitment to pooled resources has become a defining element of marriage, and it also characterizes the more committed nonmarital relationships.<sup>277</sup> Yet, for many couples, it has become a principal reason not to marry; these couples identify marriage with a commitment to share what they see as their resources with a partner, and a major part of what they find distasteful about divorce are the disputes over the enforcement of that commitment.<sup>278</sup> Nonmarriage has become more attractive for many precisely because it involves no such agreement.

For unmarried couples with children, the issue of trust is even more critical. These couples often report that they are trying to create a family.<sup>279</sup> Yet, the reasons cohabiting couples give for wariness about marriage and for the end of their relationships go to the heart of what should make for a parental partnership: conflict, violence, emotional and economic instability, and mistrust.<sup>280</sup> When poor mothers explain why their relationships with the fathers of their children ended, domestic violence is the most significant factor, with half of unmarried mothers indicating that it was a factor.<sup>281</sup> Moreover, unmarried relationships, in part because they do not involve the same commitment as marriage, are more likely than marriages to end because of sexual jealousy or other forms of mistrust.<sup>282</sup> Both men and women report suspicions about their partner's activities. One woman, for example, complained that:

When we got back together [after his infidelity during pregnancy] . . . I always checked his pockets because I don't trust him *at all*. I did it maybe for a month, then I gave him my trust

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276. Addo & Sassler, *supra* note 68, at 408 (indicating that joint accounts correlate with higher relationship quality).

277. *Id.*

278. WILCOX & WOLFINGER, *supra* note 151, at 75–76.

279. Rackin & Gibson-Davis, *supra* note 252, at 526.

280. Two-hundred and thirty-seven sociologists report, for example, that “certain conditions—such as extreme economic marginality, frequent conflict, involvement in crime, incarceration, or even infidelity . . .—can be dealt with in a nonmarital union but would virtually mandate a divorce if they were married.” Laura Tach & Kathryn Edin, *The Compositional and Institutional Sources of Union Dissolution for Married and Unmarried Parents in the United States*, 50 *DEMOGRAPHY* 1789, 1815 (2013). “More than one-third of unmarried fathers have been incarcerated, compared with less than 10% of married fathers.” *Id.* at 1799.

281. KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 81, 98 (2005) (asserting that domestic violence is the “chief culprit” of ruined relationships).

282. *Id.* at 81 (covering infidelity and domestic violence); Heather D. Hill, *Steppin' Out: Infidelity and Sexual Jealousy Among Unmarried Parents*, in *UNMARRIED COUPLES WITH CHILDREN* 104 (Paula England & Kathryn Edin eds., 2007); Joanna Reed, *Anatomy of the Break-up: How and Why Do Unmarried Couples with Children Break-Up?*, in *UNMARRIED COUPLES WITH CHILDREN*, *supra*, at 133.



back . . . . Then he came . . . to the house . . . in a car with two girls in it. Ever since . . . , I just don't trust him. Maybe it's just in my head, or maybe it's not.<sup>283</sup>

Men, in turn, report wariness not only about the fidelity of their partners but about their partners' distrust of them.<sup>284</sup> The lack of trust contributes to an unwillingness to commit completely to a relationship. While the public generally has become more tolerant of nonmarital sexuality, it draws the line at adultery.<sup>285</sup> Couples unwilling to commit to sexual exclusivity, and those who do not trust their partners' willingness to do so, do not marry.

These differences in trust and commitment systematically underlie the difference between marriage and nonmarriage. They also frame the differences between the exceptions and the rules, between what should be default rules and custom-crafted exceptions. In the context of marriage, it makes sense for courts to treat the parties as an interdependent unit; after all, spouses promise to share their lives together. In the context of nonmarriage, it similarly makes sense for courts to treat the parties as two independent units who have not assumed responsibility for each other after a break-up. In this setting, parties who wish to make alternative arrangements can contract around the default rules or show that one has contributed to the other in ways that create an injustice when the relationship ends.

The anomalies in this system of chosen terms for the nonmarried then become the laws of child custody and support. Even in the context of marriage, the behavior that causes many people not to marry also constitutes a reason not to award shared custody. Every state, for example, mandates consideration of domestic violence in custody awards.<sup>286</sup> Moreover, jealousy, mistrust, and inability to communicate may be grounds to deny a request for joint legal or physical custody.<sup>287</sup> And couples who cannot cooperate well enough to live together for any period of time<sup>288</sup> may not be able to cooperate sufficiently to share custody decisionmaking.<sup>289</sup>

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283. Edin et al., *supra* note 237, at 8.

284. *Id.*

285. CNN|ORC POLL 4 (2014), <http://i2.cdn.turner.com/cnn/2014/images/01/06/cnn.orc.poll.marijuana.pdf> (reporting ninety-three percent of the public is opposed to adultery).

286. *Id.*; see also HARRIS ET AL., *supra* note 76, at 614–15 (noting that domestic violence directed at caretakers has been found to be harmful to children, and all states mandate consideration of such violence as a factor in custody awards).

287. See, e.g., *In re Hansen*, 733 N.W. 2d 683 (Iowa 2007).

288. As one prominent study found, although fifty-one percent of unmarried parents were living together at the time of the child's birth, only sixteen percent were married one year later. SARA MCLANAHAN ET AL., THE FRAGILE FAMILIES AND CHILD WELLBEING STUDY: BASELINE NATIONAL REPORT (2003), [http://www.fragilefamilies.princeton.edu/research\\_associates.asp](http://www.fragilefamilies.princeton.edu/research_associates.asp). Of the couples that were romantically involved at the time of the child's birth, only twelve percent remained so one year later. *Id.*

289. EDIN & NELSON, *supra* note 151, at 89 (explaining that parents often do not know each other very well at the time a woman becomes pregnant, and the low attachment of the father to the

Even where disqualifying behavior such as domestic violence is not an issue, unmarried couples report that the instability in their lives that comes from insecure employment, unstable income, substance abuse, and involvement with the criminal justice system make them wary of the type of commitment marriage entails.<sup>290</sup> These same factors make truly shared parenting much less likely to work.<sup>291</sup>

The question then becomes why apply exactly the same custody laws to nonmarriage as those applicable to marriage? Why not take the same approach that applies to finances? The answer may be because of the all or nothing nature of parenthood. Parentage law imposes an all or nothing view of parental rights and obligations; it thus confers equal standing on all those who can claim the label “parent.” Yet, nonmarriage is a system that may not confer equal status on unmarried partners, either with respect to bank accounts or with respect to children.

### C. *Inequality and Decisions Not to Marry*

This Section turns to the third distinguishing feature of nonmarriage—inequality—and argues that nonmarriage should be seen as a continuum of relationships including many in which the parties do not assume equal positions with respect to each other. Indeed, as marriage becomes a system premised, at least rhetorically, on equality, inequality in assumption of responsibilities becomes a reason not to marry. In the *Mad Men* era, executives married their secretaries, and executive wives and blue collar wives both took care of home and children without much input from their husbands. Today, executives marry fellow executives,<sup>292</sup> and many working class women feel that they have no choice but to stay in the labor market. In the present-day, marriage is seen, legally and practically, as an exchange among equals. This

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child is often attributed to low attachment to the mother in these cases). As one study reported, “it goes without saying that shared parenting couples must have enough money to provide two households suitable for children. Both parents must also have flexible enough work schedules that their children can live with them more than a couple of weekends a month.” Linda Nielsen, *Shared Residential Custody: Review of the Research (Part I of II)*, 27 AM. J. FAM. L. 61, 66 (2013).

290. See, e.g., HANNA ROSIN, *THE END OF MEN AND THE RISE OF WOMEN* 92–93 (2012); WILLIAM J. WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 99 (1996). In their 2005 book, sociologists Kathy Edin and Maria Kefalas, for example, quote one young woman, a white high school dropout who had a child in her teens with a man who was awaiting trial: “That’s when I really started [to get better], because I didn’t have to worry about what *he* was doing, didn’t have to worry about him *cheating* on me, all this stuff. [It was] then I realized that I had to do what I had to do to take care of my son.” EDIN & KEFELAS, *supra* note 281, at 194.

291. For the women, already struggling economically, “single parenthood reduces the emotional burden and shields them from the type of exploitation that often accompanies the sharing of both living arrangements and limited resources.” WILSON, *supra* note 290, at 105. Even studies that show strong support for joint custody indicate hesitation where a divorce occurs because of one party’s misbehavior. See Ellman & Braver, *supra* note 184.

292. See Christine R. Schwartz & Robert D. Mare, *Trends in Educational Assortative Marriage from 1940 to 2003*, 42 DEMOGRAPHY 621–46 (2011) (documenting rise in assortative mating).

exchange may involve two-career couples who hire others to do the housework, or it may involve relatively traditional couples with a primary wage earner and a primary caretaker. In either case, both the men and the women see marriage as involving an agreement to share equally, and they want partners who will carry their own weight in a relationship.<sup>293</sup>

Moreover, studies of marital quality indicate that these relatively equal marriages do better than others for reasons that shed light on decisions not to marry.<sup>294</sup> They tend to involve two types of marital exchanges consonant with the sharing principles applicable at divorce. The first involve two-career couples, where both the man and woman work and share domestic responsibilities.<sup>295</sup> In these families, fathers have become much more involved in childcare, while the mothers do substantially less housework than their mothers did.<sup>296</sup> It helps that with two incomes, the couples can also afford to hire more outside help.<sup>297</sup> The second group is comprised of traditional couples in which the husband earns enough to support the family, and the wife works outside the home either part-time or not at all. These families are also doing well, and the law sees these arrangements as ones in which the two spouses make different types of contributions that should be equally valued at divorce.<sup>298</sup>

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293. As part of this process, both men and women have increased the weight they place on a potential spouse's earnings. See David M. Buss et al., *A Half Century of Mate Preferences: The Cultural Evolution of Values*, 63 J. MARRIAGE & FAM. 491, 501 (2001) (indicating that men's interest in women's earnings has increased dramatically since the middle of the twentieth century). And male college graduates are more likely to marry fellow graduates, while women are somewhat more likely than the men to marry a spouse with less education than they have. Philip Cohen, *College Graduates Marry Other College Graduates Most of the Time*, ATLANTIC (April 4, 2013), <http://www.theatlantic.com/sexes/archive/2013/04/college-graduates-marry-other-college-graduates-most-of-the-time/274654/>. About half of the women who marry non-grads, however, marry men who earn more than they do. *Id.*

294. Christine R. Schwartz & Hongyun Han, *The Reversal of the Gender Gap in Education and Trends in Marital Dissolution*, 79 AM. SOC. REV. 605, 623 (2014).

295. AMATO ET AL., *supra* note 177.

296. See ALISON WOLF, *THE XX FACTOR: HOW THE RISE OF WORKING WOMEN HAS CREATED A FAR LESS EQUAL WORLD* (2013).

297. AMATO ET AL., *supra* note 177, at 123–24, 141 (describing advantages of being able “to afford services, such as high quality child care, take-out meals, and home cleaning, that help to ease the family burdens associated with dual employment”); see also Steven L. Nock & Margaret F. Brinig, *Weak Men and Disorderly Women: Divorce and the Division of Labor*, in *THE LAW AND ECONOMICS OF MARRIAGE & DIVORCE* 185, 186–87 (Antony W. Dnes & Robert Rowthorn eds., 2002) (explaining that greater involvement in traditionally-female housework by either partner is associated with higher chances of divorce or separation, though relationships are more stable if the husband acknowledges that the wife does more housework and he views the result as unfair).

298. See discussion *supra* at notes 180–181 and accompanying text. Of course, the law does not always treat these couples in accord with such expectations of valuation. See Starnes, *supra* note 223, at 203, 210–11. Cohabiting couples may also view a traditional exchange of male breadwinning for female homemaking as “equal” and “fair.” See Miller & Sassler, *supra* note 267, at 429.

The marriages that have become much less happy—and more divorce prone—are those where the husband cannot afford to support the family on his own, and the wife, who still assumes the majority of the responsibility for the family’s domestic responsibilities, also feels she must work.<sup>299</sup> These women, who tend to be working class, derive less satisfaction from their jobs than true “career women,”<sup>300</sup> receive less assistance with either childcare or housekeeping from their husbands, and enjoy less decisionmaking authority than middle class women who work outside the home.<sup>301</sup> Yet, while men still tend to earn more than women overall, the gap between spouses is lower (or reversed) in these families. Among families with dual earners, the wife earns more than the husband in 70% of marriages in the bottom quintile of families in comparison with 34% of wives in families with incomes in the top 20%.<sup>302</sup>

Financial realities influence attitudes toward marriage. Both men and women want egalitarian relationships and express reluctance to commit to a partner that they believe they will have to support.<sup>303</sup> Where one cohabitant earns substantially more than the other, or assumes a disproportionate share of the responsibilities in the relationship, the sharing principles embedded in marriage may be a bad deal.<sup>304</sup> And, indeed, many couples do not marry because they are hoping to do better. Unmarried mothers who do not marry the fathers of their children, for example, but later form a relationship with a different man, typically do so with someone financially better off than the father.<sup>305</sup>

Decisions not to marry allow couples the ability to order their relationships in accordance with these preferences, though the law permits such results in different ways for financial and custody matters. In the context of financial arrangements, it accepts as a default that unmarried couples have no obligation to each other. If Lee Marvin wanted to live with Michelle Triola, without an obligation to share the results of his movies or provide support, he was free to do so absent an express promise to the contrary.<sup>306</sup> Yet, in the

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299. AMATO ET AL., *supra* note 177, at 124 (describing tensions related to gender roles).

300. *Id.* at 173.

301. *Id.* at 174.

302. Sarah Jane Glynn, *The New Breadwinners, 2010 Update*, CTR. FOR AM. PROGRESS (Apr. 16, 2012), <https://www.americanprogress.org/issues/labor/report/2012/04/16/11377/the-new-breadwinners-2010-update/>.

303. KATHLEEN GERSON, *THE UNFINISHED REVOLUTION: COMING OF AGE IN A NEW ERA OF GENDER, WORK, AND FAMILY* 11 (2010) (indicating that four-fifths of women and two-thirds of men surveyed indicate that they want egalitarian relationships); *id.* at 172 (noting that even self-reliant women are reluctant to shoulder the entire economic burden on their own).

304. While the majority of all women say that they want egalitarian relationships, middle class women are more likely to choose a traditional relationship as an alternative while working women pick self-reliance as an alternative. *Id.* at 127.

305. Sharon H. Bzostek, Sara McLanahan & Marcia J. Carlson, *Mothers’ Repartnering After a Nonmarital Birth*, 90 SOC. FORCES 817 (2012).

306. *See supra* notes 13, 19–30 and accompanying text.

context of custodial arrangements, the parent who invests more in the children has the ability to end the relationship and keep sole custody largely to the degree she stays out of court.<sup>307</sup>

Although in most states the law does not draw a distinction between the custodial rights of married and unmarried parents, married fathers are much more likely to have a custodial order after dissolution of their marriage than unmarried fathers.<sup>308</sup> The reasons are practical. For married parents, paternity establishment is automatic; for the unmarried, a second parent must opt into parenthood.<sup>309</sup> For married parents who divorce, child support and custodial orders are routine; for unmarried parents, there is no dissolution proceeding in which to seek an order, so they must file a separate action.<sup>310</sup> Even for married parents, the likelihood that a father has a custodial order correlates with his income.<sup>311</sup> Unmarried parents tend to be poorer, and the reported contested custody cases, which are not necessarily typical of unmarried cases overall, tend to involve men who have more resources than average for unmarried fathers and more resources than the mothers involved in the litigation.<sup>312</sup> Most unmarried couples prefer not to go to court or are unable to do so—instead, they work things out informally.<sup>313</sup>

Staying out of court, whether for Lee and Michelle, or working class couples who have had a child together, leaves the stronger party in a position to call the shots. In palimony cases, that has historically meant that wealthier men paired with women without comparable resources have greater bargaining power when ending the relationship. In the case of children, it ratifies the practices in poorer communities where women tend to take primary responsibility for children.<sup>314</sup> In both cases, however, it reinforces norms that identify nonmarriage as having greater inequality than the law allows in marriage.<sup>315</sup>

Marriage and nonmarriage are thus fundamentally different systems. For centuries, the law has been comprehensively involved in establishing marriage as an institution and guiding changes in the nature of the institution

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307. Carbone & Cahn, *supra* note 151, at 1211–12.

308. See BROWN & COOK, *supra* note 141, at 30 (finding that married fathers are much more likely to have custodial orders).

309. See *supra* notes 113–115 and accompanying text.

310. See Brustin & Martin, *supra* note 115, at 813–14 (describing process).

311. See BROWN & COOK, *supra* note 141, at 19.

312. See, e.g., *supra*, cases discussed in Part I in which the father has married someone else, but mother has not.

313. See Harris, *supra* note 255, at 166 (describing informal arrangements).

314. See EDIN & NELSON, *supra* note 151, at 214 (describing mothers in poor communities as gatekeepers).

315. See, e.g., Lane v. Lane, 202 S.W.3d 577 (Ky. 2006) (disapproving provision of premarital agreement between a wealthy stockbroker and a hotel clerk on unconscionability grounds); Barbara A. Atwood & Brian H. Bix, *A New Uniform Law for Premarital and Marital Agreements*, 46 FAM. L.Q. 313, 318 (2012) (“marriage gives rise to fiduciary duties between spouses”).

as society changes. Nonmarriage, in contrast, has developed largely outside the law, reinforcing the differences between the two systems. First, with married couples, the law typically insists on upholding the core normative commitments involved in the formal system of marriage while encouraging alternative dispute resolution that creates space for private agreements.<sup>316</sup> With nonmarriage, the parties in less formal relationships may find it easier to avoid contact with the legal system altogether,<sup>317</sup> but they may have greater difficulty enforcing individualized understandings when they end up in court.<sup>318</sup>

Second, the emerging law of nonmarriage recognizes the contingent nature of nonmarital relationships when it comes to financial matters but ignores it with respect to children. As a result, while the formal law that governs financial matters corresponds to informal nonmarital practices, the law that governs children does not.

Third, the legal treatment of parental rights and responsibilities continues to follow the all-or-nothing approach typical of marital relationships. Marriage, both historically and today, is a system designed to unite two parents in the creation of a unitary family.<sup>319</sup> Nonmarriage, by contrast, involves a continuum of relationships that may not necessarily involve the equal assumption of parental obligations. Yet, where the law recognizes two legal parents, it tends to confer equal standing on them irrespective of the realities of the families they have created.

Taken together, therefore, existing nonmarriage law<sup>320</sup> does not systematically reflect or do justice to the reasons underlying partners' decisions not to marry each other and community norms about such relationships.

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316. See Singer, *supra* note 243.

317. Carbone & Cahn, *supra* note 151, at 1189.

318. This may be true both because of the lack of systematic access to alternative dispute resolution and because of the legal system's lack of recognition of or sympathy for the circumstances of the unmarried. See Hatcher, *supra* note 149, at 908–09.

319. See Dolgin, *supra* note 87, at 667 n.118 (1993) (discussing the idea of the “unitary family” in the Supreme Court’s treatment of parentage).

320. The Uniform Premarital Agreement Act, which establishes procedures for binding prenuptial agreements concerning issues such as the accumulation of property during marriage, has been adopted in almost half of American jurisdictions. UNIFORM LAW COMMISSION, LEGISLATIVE FACT SHEET—PREMARITAL AGREEMENT ACT (2016), <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Premarital%20Agreement%20Act>. A successor act, the Uniform Premarital and Marital Agreements Act, which was completed in 2012, has been adopted in two jurisdictions. UNIFORM LAW COMMISSION, LEGISLATIVE FACT SHEET—PREMARITAL AND MARITAL AGREEMENTS ACT (2016), <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Premarital%20and%20Marital%20Agreements%20Act>.

## IV. NONMARRIAGE AND AUTONOMY

Moving forward, nonmarriage should be seen as a legal category in its own right. Rather than dividing the law of nonmarriage into separate categories that deal with financial matters, child support, and child custody, the legal system should make greater efforts to treat these relationships as part of an integrated whole and to equip couples with greater ability to reach resolutions on their own.<sup>321</sup> At the same time, this also requires recognition that nonmarital relationships do not rest on a single set of culturally assumed (and often imposed) assumptions. Instead, they occupy a continuum that includes couples who have made an express decision not to marry, couples who thought that they were in a committed relationship and feel betrayed by the break-up, and others who formed contingent relationships that intentionally left open the future of the relationship. Doing justice to these relationships accordingly requires, first, embracing couples' autonomy in creating nonmarital relationships and giving them more tools for crafting express agreements, particularly with respect to financial matters. Second, it requires recasting parenting relationships. Unmarried parenting does not necessarily involve an impoverished mother and a father who has abandoned his children, but it sometimes involves a betrayal of trust.<sup>322</sup> Parents should have greater ability to craft agreements that reflect the realities of individual relationships, and the default norms that apply should not necessarily be the same as the ones that govern married relationships. This Article proposes that any legal regime should ensure enforcement of the parties' own understandings of their relationship and responsibilities, and more fully integrate alternative dispute resolution techniques into the treatment of unmarried relationships. These principles of autonomy can resolve the fundamental contradiction in the contemporary approaches to nonmarriage.

A. *Autonomy and Nonmarriage*

Nonmarriage has long had a bad name, if it is given a printable name at all. It has historically been associated with women's lack of virtue and men's refusal to take responsibility for their partners and their children; it has also stood for the law's refusal to permit the creation of intimate nonmarital relationships.<sup>323</sup> Today, however, nonmarriage has emerged as a choice; one that

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321. For arguments on how the state can better support families, see, for example, MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS* (2010); LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* (2006); Lenhardt, *supra* note 232, at 1348–52.

322. On the role of infidelity as a cause of the dissolution of nonmarital relationships, see, for example, EDIN & KEFALAS, *supra* note 281, at 81 (covering infidelity and domestic violence); Hill, *supra* note 282, at 104; Reed, *supra* note 282, at 133.

323. See, e.g., *Marvin v. Marvin*, 557 P.2d 106, 119 (1976) (observing that earlier decisions “rested upon a policy of punishing persons guilty of cohabitation without marriage”).

exists for couples who want to create their own relationships on their own terms. While unmarried partners differ on what they want in their relationships, with, for example, one partner sometimes preferring more commitment than the other, they both realize that the decision not to marry means that their relationship will not be the same as a marital one. These choices should receive legal respect.

To do so requires starting with the idea of obligation. Men have historically been seen as responsible for women for two reasons, both of which are no longer true. The first was legal restrictions on women's labor market participation and capacity for self-support, making women—women with children, in particular—dependent on male support. Today, in contrast, the legal restrictions no longer exist.<sup>324</sup> The second was the practical inability to engage in sexual activity without the risk of pregnancy. Therefore, sex had to be confined within a relationship that could deal with the consequences. As both of these conditions have changed, so has the meaning of decisions not to marry. The cases that address finances reflect these changes in the vulnerability of women and the corresponding understanding that attends sexual partnerships,<sup>325</sup> but the child support cases do not. What both require is a different model of nonmarital decisionmaking, within a different normative framework.

In the case of financial decisions, the law has embraced the parties' agreements—or lack thereof. In *Marvin*, Lee and Michelle's relationship was a traditional one. They both treated Michelle as dependent on Lee during the relationship.<sup>326</sup> While they differed in their descriptions of their agreement, they seemed clear in describing a relationship in which Michelle wanted a marriage-like set of arrangements and Lee refused to commit to her. Their relationship ended, after all, when Lee left her to marry his high school sweetheart.<sup>327</sup> In more recent cases, by contrast, it may be a woman who refuses to make a permanent financial commitment to a less well-off partner—a partner who might prefer to marry.<sup>328</sup> As both men and women make choices to

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324. The wage gap has narrowed, particularly for those with less education, and women's workforce participation is close to men's, even though women still earn less than men. See, e.g., Fancine D. Blau & Lawrence M. Kahn, *The Gender Wage Gap: Extent, Trends, and Explanations* 3 (IZA Inst. for the Study of Labor, Discussion Paper No. 9656, 2016), <http://ftp.iza.org/dp9656.pdf>; Ben Casselman, *Why Women Are No Longer Catching up to Men on Pay*, FIVETHIRTYEIGHT (Aug. 19, 2016, 7:00 AM), <http://fivethirtyeight.com/features/why-women-are-no-longer-catching-up-to-men-on-pay/>.

325. See Akerlof et al., *supra* note 154, at 298.

326. See *Marvin*, 557 P.2d at 110.

327. See Elaine Woo, *Michelle Triola Marvin Dies at 75; Her Legal Fight with Ex-lover Lee Marvin Added "Palimony" to the Language*, L.A. TIMES (October 31, 2009), <http://www.latimes.com/local/obituaries/la-me-michelle-triola-marvin31-2009oct31-story.html> (noting that Lee Marvin married his high school sweetheart after leaving Michelle).

328. See, e.g., *Simmons v. Samulewicz*, 304 P.3d 648 (Haw. Ct. App. 2013); see also *supra* notes 56–59 and accompanying text (discussing a modern case in which the female partner broke off an engagement with a male partner because of his shaky finances); CARBONE & CAHN, *supra*



live together without marrying, the law no longer passes judgment on them, even when the result reflects unequal bargaining power and different preferences. These couples are treated as independent actors capable of making their own choices and dealing the consequences.

In contrast, child support law is paradoxically based on an image of deadbeat dads deserting their children<sup>329</sup> and who need to be coerced into assuming marriage-like responsibilities. The assumptions underlying child support provisions have been that, first, all parents should support their children, second, mothers would not need government assistance if the fathers provided adequate support, and third, fathers either married the mothers of their children or abandoned them.<sup>330</sup> Recent research, however, has remade these notions. It establishes that many of fathers who fail to provide enough support to keep the mothers off government assistance are “dead broke”<sup>331</sup> rather than deadbeats; that is, they are the kind of father from whom you cannot get cash because they do not have any.<sup>332</sup> In addition, there has been growing recognition that unmarried fathers do contribute; the majority are living with the mothers at the time of the child’s birth<sup>333</sup> and most remain involved with their children after their relationship with the mother ends.<sup>334</sup>

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note 79, at 2–3; ROSIN, *supra* note 290, at 1–5 (story of Bethenny who did not want a partner who could not contribute financially); Jacquelyn J. Benson & Marilyn Coleman, *Older Adults Developing a Preference for Living Apart Together*, 78 J. MARR. & FAM. 797, 803 (2016). In *Living Apart Together*, one study participant explained her reason not to get married: “if Eli and I got married now, what happens if he goes into a nursing home and if suddenly my assets are his assets because we’re married and it sucks it all away, and the money that I intended for my nursing home is now gone? Or if I managed to have assets still intact at the time of my death, it would go to my son. What if I’m married? No, then it goes to the partner.” *Id.*

329. See, e.g., Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 353 (2005) (noting that the idea of a “[d]eadbeat Dad” “evokes an image of a noncustodial father who has impoverished his children while improving his own standard of living after separation from the family”).

330. See, e.g., Kerry Abrams & Brandon L. Garrett, *DNA and Distrust*, 91 NOTRE DAME L. REV. 757, 793 (2015) (the logic of child support enforcement efforts was that “an available father” rather than the government should support the child); Brenda Cossman, *Contesting Conservatism, Family Feuds and the Privatization of Dependency*, 13 AM. U. J. GENDER SOC. POL’Y & L. 415, 443 (2005) (explaining that both liberals and conservatives saw “‘deadbeat dads’ as culpable for their children’s poverty and welfare dependency, and . . . [sought] to promote personal responsibility by enforcing the private support obligations of fathers”).

331. See, e.g., Maldonado, *supra* note 143, at 1001, 1004 (2006) (describing poor fathers as too broke to be able to pay the amounts specified in child support orders).

332. See Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER, RACE & JUST. 617, 633 (2012).

333. See Harris, *supra* note 255, at 166 (“The *Fragile Families* research found that the great majority of unmarried parents are strongly connected to each other and to their children at birth. At the time of birth, 51% of unmarried couples in the study were living together, and another 31% were dating.”).

334. Among nonresident fathers in the Fragile Families Study who were interviewed one year after the birth of their children, 87% had seen their child since birth and 63% had seen their child more than once in the past month. By the interview three years after birth, 71% had seen their child since the first-year interview, and 47% had seen their child more than once in the past month. At

The parents, left to their own devices, trade off support and access to the child, often without the intervention of the legal system. More than fifty-seven percent of custodial parents, for example, received noncash support from noncustodial parents, a type of support court orders do not address.<sup>335</sup> And, while custodial parents are portrayed as “gatekeepers”<sup>336</sup> who block the noncustodial parents’ access to children, the majority of fathers, in fact, have access to their children following a break-up.<sup>337</sup> In many of these cases, the parents simply see no reason to formalize their relationship. For example, among custodial parents without child support orders involving the other parent, the custodial parent did not seek such an order in two-thirds of cases either because the other parent was already contributing or because of the lack of a desire to have court involvement.<sup>338</sup>

Some of these cases certainly involved absent parents who could contribute and refused to do so after the break-up, or custodial parents eager to move on to new relationships who excluded a parent willing to pay support, but these parents were a distinct minority.<sup>339</sup> In the majority of cases, unmarried parents, like other unmarried partners, negotiate an arrangement without resorting to the legal system.<sup>340</sup> In these negotiations, custodial parents seek to secure their own and their children’s safety from violent or abusive partners, their ability to form new relationships without interference, resources

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the interview five years after birth, 63% had seen their child since the third-year interview, and 43% had seen their child more than once in the past month. Black non-Hispanic men were more likely to have maintained contact with their children, to have seen them in the past month, and to have seen them frequently. Marcia J. Carlson et al., *Coparenting and Nonresident Fathers’ Involvement with Young Children After a Nonmarital Birth*, 45 *DEMOGRAPHY* 461, 473 (2008).

335. Harris, *supra* note 255, at 169–70 (stating that “[w]hen parents in the *Fragile Families* study split up after the birth of a child, most of the men who were not living with the mothers still stayed in contact with their children, at least in the first few years”).

336. See EDIN & NELSON, *supra* note 151, at 157, 169, 208, 214; see Huntington, *supra* note 16, at 240.

337. Harris, *supra* note 255.

338. TIMOTHY S. GRALL, *CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT*: 2009, U.S. CENSUS BUREAU (2011), <http://www.census.gov/prod/2011pubs/p60-240.pdf>. In other cases, however, the custodial parent did not want contact with the other parent, with 16.7% reporting that they did not seek a child support order because they did not want the child to have contact with the other parent, in 21.2% of the cases because they did not want the other parent to pay for unspecified reasons, and in 16.7% of the cases because the other parent could not be located. *Id.* at 7. On the issue of court involvement, see Carbone & Cahn, *supra* note 151, at 1224–25.

339. Huntington, *supra* note 16, at 195 (observing that “[t]o maintain the new relationship, it was easiest for the mother to keep the father away from the family”).

340. Indeed, those who object to “gatekeeping” define it as the ability of custodial parents to set terms for noncustodial access to children, contrasting it with court orders that give the noncustodial parents access as a matter of legal right. *Id.* Such court orders, however, give the custodial parents little ability to insist on terms that protect either the custodial parent’s or the children’s interests.

with which to provide for the family, and cooperation in establishing parenting norms.<sup>341</sup>

The legal regulation of these relationships ought to be more like that of cohabitants in financial disputes; it should respect independent actors who manage their own relationship terms. At divorce, parents do in fact often manage to agree on parenting terms that involve trades of support for more or less time with the child. Unmarried parents effect similar exchanges without going to court.<sup>342</sup> The fact that both the process and content of such agreements between unmarried parents may differ from those of married parents is not itself cause for concern. Instead, the issue ought to be how the law can interact with these couples to strengthen their ability to reach resolutions consistent with the varied understandings that underlie their relationships.

### *B. Nonmarriage, Finances, and Private Ordering*

Recognition of nonmarriage as its own legal status should give unmarried couples far more control of their financial relationships, both in the context of bank accounts and child support. That additional control could happen, for example, in a series of different situations. First, true recognition of nonmarriage should make it easier for parties to select and enforce the terms of the relationship of their choice. This means courts should enforce formal contracts, when they exist, as well as when partners opt into other forms of legal recognition of their relationships.<sup>343</sup> In the absence of such formalities, the law should apply presumptions that recognize how the partners live through their relationships. In accordance with this principle, the courts should presume that the parties expect to remain financially independent, they expect to receive credit for contributions to the acquisition of major financial assets such as a house, and they do not anticipate tallying up contributions for routine day-to-day expenses such as groceries in the absence of an express agreement and record keeping that would make such an accounting fair and practical. Financial professionals should assist. The purchase of a home or a car or the opening of a bank account is a formal event, with opportunities to think about how to take title, and to establish a record that reflects the parties' respective contributions. In contrast, there should be no expectation of financial obligations arising from informal day-to-day exchanges.

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341. For poor unmarried women, domestic violence is a factor in the majority of break-ups, and distrust between the parents often means a lack of confidence in the other parent's parenting skills. See *supra* notes 281–282 and accompanying text.

342. See Huntington, *supra* note 16, at 195.

343. Twenty-six percent of lawyers in the American Association of Matrimonial Law report increased interest in cohabitation agreements. Joslin Davis, *Avoiding a Costly Cohabitation Divorce*, HUFF. POST (June 2, 2016), [http://www.huffingtonpost.com/joslin-davis/avoiding-a-costly-cohabit\\_b\\_10261306.html](http://www.huffingtonpost.com/joslin-davis/avoiding-a-costly-cohabit_b_10261306.html).

Second, child support could similarly be treated to allow parents to implement child support agreements to a greater degree. While the state has a strong—and legally enforceable—interest in the welfare of the child, the presumption is that parents are best able to effectuate those interests.<sup>344</sup> Consequently, *mandatory* child support actions might be limited to a narrower range of cases where the noncustodial parent has proven ability to pay and the custodial parent is otherwise destitute.<sup>345</sup> Extending mandatory actions, that is, a requirement to facilitate state-initiated actions as a condition of the receipt of benefits such as health insurance, is a major violation of parental autonomy.<sup>346</sup>

Moreover, where the state initiates an action, the parent should retain control of it, including the ability to reach a settlement.<sup>347</sup> Instead of being forced into court, parents could receive access to community-based mediation services in resolving their disputes.<sup>348</sup> The goal becomes assisting parents in reaching their own resolutions based on their assessments of their own capabilities and their children's interests rather than imposing conditions from outside based on a simplistic notion of equality.

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344. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 68–69 (2000).

345. See Stacy Brustin, *Child Support: Shifting the Financial Burden in Low-Income Families*, 20 GEO. J. ON POVERTY L. & POL'Y 1, 4–5 (2012) (summarizing proposed reforms).

346. Consider, for example, a hypothetical unmarried couple that separated before the birth of their child. In one version of the hypothetical, the noncustodial parent sees the child regularly and contributes often. In a second version, the parents agree that the noncustodial parent will not be part of the child's life in any way. In neither case is there a child support order, and all of the parents want it that way. When the child is four, each custodial parent's employer decides to discontinue health insurance for its employees, and the custodial parent obtains an insurance policy through the expanded Medicaid system. If the custodial parent's income is low enough to qualify for subsidies under the Act, that parent becomes obligated to cooperate in state efforts to obtain child support from the noncustodial parent to offset the cost of the government provided insurance subsidy. In contrast, if the custodial parent's employer provides health care, subsidized through the tax system, there is no such obligation even if the size of the government subsidy for the employer-provided insurance is larger than the subsidy through the Medicaid system. See CARMEN SOLOMON-FEARS, CONGRESSIONAL RESEARCH SERVICE, *MEDICAL CHILD SUPPORT: BACKGROUND AND CURRENT POLICY* 13 (2013), <https://www.fas.org/sgp/crs/misc/R43020.pdf>.

347. In many states, child support guidelines take into account the amount of time the child spends with the other parent, so that if the parents were to reach a settlement that included custodial time with both parents, it would be automatically reflected in the child support award. In state-initiated actions, however, the noncustodial parents cannot seek a custody order—that can only be done in a separate action. Some have suggested changing the law to combine the two actions, but doing so would simply combine an inflexible child support system with an inflexible custody system that mandates two parent involvement. See Brustin & Martin, *supra* note 115 (critiquing such proposals).

348. See *id.* at 844–45 (arguing that mediation or other forms of alternative dispute resolution may offer promising methods for addressing interrelated issues of visitation and custody in parentage and child support cases).

*C. Nonmarriage, Parenthood, and Private Ordering*

Principles of autonomy allow those who reject the implicit and explicit terms of marriage to fashion relationships on other terms.<sup>349</sup> At one time, when the law told gay and lesbian couples that they could not marry, they fought for and often obtained recognition as parents outside of marriage. They won recognition of second-parent adoption, stepparent adoption within civil unions and domestic partnerships, de facto parentage, and other forms of functional parenthood.<sup>350</sup> Today, with access to marriage, the question becomes whether these doctrines will retain their vitality—for different-sex and same-sex couples alike.

This Section maintains that recognition of the parental status and custodial rights of those who do not marry should respect the parents' autonomy in choosing to enter into any number of different parenting arrangements and acknowledge the relationship between the practicalities of children's interests and the nature of the adult arrangements. Only those adults who have assumed an equal commitment to the child should be presumed to be capable of vindicating an equal assignment of custodial responsibilities.

While equal assumption of parental responsibilities has become the norm associated with marriage and child rearing in middle class communities that bear children within marriage, it is not the norm in the communities moving away from marriage. Women may not marry precisely because they find the men unstable as partners and potential parents.<sup>351</sup> Instead, in these communities, unmarried fathers' relationships with their children occur in the context of the contingent relationships they negotiate with the mothers, and studies indicate that a father's continuing relationship with his children depends on how he manages the relationship with the mother.<sup>352</sup> The access to the child that the mother allows often depends in turn on the father's willingness to cooperate with the mother and assist financially and socially when she needs help.<sup>353</sup> And women encourage the greater involvement of the men

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349. See *supra* at Part III.A.

350. See, e.g., NeJaime, *supra* note 72, at 1197, 1199.

351. See, e.g., Amber Lapp, *How Class Influences Pregnancy Ambivalence*, INSTITUTE FOR FAMILY STUDIES (Apr. 27, 2015), <http://family-studies.org/how-class-influences-pregnancy-ambivalence/>; David Lapp, *Could Pregnancy be a Reason NOT to Get Married?*, <http://twentysomethingmarriage.org/could-pregnancy-be-a-reason-not-to-get-married/>.

352. The mother's entry into new relationships also has an impact. See Tach & Edin, *supra* note 280, at 1794. There are racial variations in the rate of positive co-parenting, with black mothers reporting higher rates of effective co-parenting and more involvement from black fathers than other races. See Calvina Z. Ellerbe et al., *Nonresident Fathers' Involvement After a Nonmarital Birth: Exploring Differences by Race/Ethnicity* 9–10, 20, 22 (Bendheim-Thoman Ctr. for Research on Child Wellbeing, Working Paper WP14-07-FF, 2014), <http://crcw.princeton.edu/publications/publications.asp>.

353. See NANCY E. DOWD, *REDEFINING FATHERHOOD* 3 (2000); Harris, *supra* note 313. Sociologists have found that the mothers valued fathers' contributions not by the amount of financial support, but by non-economic factors, such as role modeling. See, e.g., Maureen R. Waller, *Viewing*

who contribute to their children, either financially or otherwise, and often form new relationships when the father does not remain involved.<sup>354</sup> Given the factors that undermine relationship stability in poorer communities, a norm that counsels hesitation about marriage and about truly shared parenting makes sense.<sup>355</sup> Children's interests are best served through family stability, regardless of family structure,<sup>356</sup> and mandating two-parent involvement in the face of violence, conflict, or unpredictability undermines that stability.

Therefore, it makes no sense to insist on formal equality between the married and the unmarried in custody proceedings. Existing law, of course, permits consideration of factors such as domestic violence,<sup>357</sup> and substance abuse, criminality, and incarceration are grounds to limit parental contact even among married couples. Yet, in the face of clear statutory mandates to take parental misbehavior into account, courts have difficulty determining when factors such as domestic violence and substance abuse are serious enough to justify limitations on custodial rights, and they appear reluctant to limit a parent's contact with a child in the face of a strong presumption for the continuation of such contact.<sup>358</sup>

Instead, the courts should recognize that the reasons parents do not marry are often good reasons not to award shared custody. Recognition of these reasons should give rise to presumptions that track the behavior that leads some into marriage and some into nonmarriage, with recognition that

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*Low-Income Fathers' Ties to Families Through a Cultural Lens: Insights for Research and Policy*, 629 ANNALS AM. ACAD. POL. & SOC. SCI. 102, 109 (2010).

354. Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J. L. & PUB. POL'Y 1, 37 (2004); Laurie S. Kohn, *Engaging Men as Fathers: The Courts, the Law, and Father Absence in Low-Income Families*, 35 CARDOZO L. REV. 511, 512 (2013). Men are also more likely to establish paternity if they have a close relationship with the mother. See Ronald Mincy et al., *In-Hospital Paternity Establishment and Father Involvement in Fragile Families*, 67 J. MARRIAGE & FAM. 611, 615 (2005). A smaller Wisconsin study found that almost half of the unmarried parents in the state filed voluntary paternity acknowledgements ("VPAs") within a few months of birth for children born in 2005. The parents were more likely to use VPAs if they were older or college educated, and less likely to do so if the mother was on receiving public support. See BROWN & COOK, *supra* note 141.

355. What produces this distrust is not just economic marginality, but the mismatch between men and women. See CARBONE & CAHN, *supra* note 79.

356. See, e.g., SEAN FREMSTAD & MELISSA BOTEACH, CTR. FOR AM. PROGRESS, VALUING ALL OUR FAMILIES 16 (2015), <https://cdn.americanprogress.org/wp-content/uploads/2015/01/FamilyStructure-report.pdf>; Ariel Kalil et al., *Time Investments in Children Across Family Structures*, 654 ANNALS AM. ACAD. POL. & SOC. SCI. 150 (2014).

357. See Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law 2011–2012: "DOMA" Challenges Hit Federal Courts and Abduction Cases Increase*, 46 FAM. L.Q. 471, 524 (2013) (custody criteria).

358. Scott & Emery, *supra* note 120, at 70–71.

the presumptions should be rebuttable in appropriate cases.<sup>359</sup> Such an alternative system would not disturb existing law applicable to married parents who otherwise meet the jurisdiction's criteria for shared custody.<sup>360</sup> For unmarried parents, however, the law should assume that the children's interests lie in the security and stability of their attachment to the person who has acted as their primary caretaker, unless there are two adults who:

a) are both legal parents in accordance with the opt-in system described above<sup>361</sup>;

b) can demonstrate the capacity to parent together without violence, abuse, or excessive conflict; and,

c) have lived together for a period of at least two years during which they shared parenting; or,

d) have shared parenting in an approximately equal way for a period of at least two years without living together.

If the presumption in favor of a single primary custodial parent is not rebutted, the other parent would still be able to seek visitation in accordance with a best interest standard. While the presumption would be that the child's interests lie with visitation, the presumption should include the consideration that the child's interests lie with the strength of the relationship to the primary caretaker.<sup>362</sup>

The resulting new framework<sup>363</sup> articulates distinct standards for custody based on whether the parents have explicitly or implicitly assumed joint

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359. As Scott and Scott recognize, "cohabiting couples are a heterogeneous category with diverse goals and expectations for their relationships. This heterogeneity, together with the defining decision not to marry, . . . sends a confusing signal about the nature of cohabiting unions." Scott & Scott, *supra* note 9, at 299–300.

360. A full examination of the propriety of shared custody at divorce is beyond the scope of this Article. Yet, as discussed in Part II.A.2, *supra*, the same factors that counsel hesitation in the case of unmarried couples, such as the failure to live together, to assume co-equal responsibility for the child at birth, or to engage in violence, criminal behavior, or high levels of conflict, should also rebut any presumption in favor of joint or shared custody at divorce.

361. Today, most different-sex cohabitants sign voluntary acknowledgments of paternity. Harris, *supra* note 102, at 1308–13. Same-sex couples would similarly have to take action, such as adoption, for the partner who is not biologically related to the child to receive recognition as a parent. Many states, however, also consider functional parenthood either as a basis for full parental status or as a basis for visitation in accordance with a best interest test.

362. This means, as a practical matter, that where two parents cannot cooperate, the burden should not be on the custodial parent to insure the inclusion of the other parent in the child's life. For disturbing examples of the opposite rule, see *K.T.D. v. K.W.P.*, 119 So. 3d 418, 430–31 (Ala. Civ. App. 2012) (transferring custody of a five-year-old child from sole maternal custody to joint legal and physical custody because of the mother's failure to support the father's involvement); *Sharp v. Keeler*, 256 S.W.3d 528, 539 (Ark. App. 2007) (transferring custody of seriously ill child to father who had had only limited visitation with the child because of acrimony between the parents). In both cases, the courts valued contact with the non-custodial parent more than the child's interest in the relationship with the custodial parent who had provided care from birth.

363. Since 1986, Massachusetts has used two different standards for determining custody. First, for nonmarital parents, "the court shall, to the extent possible, preserve the relationship between the child and the primary caretaker parent," considering where the child has resided "and whether one

responsibility for caretaking in the context of a stable, long-term relationship. Such a system is consistent with emerging norms that draw sharp (and evolving) distinctions between marital and nonmarital parenting partnerships, and which focus on the child's interests in the stability of a relationship with the parent or parents who have consistently provided caretaking and who have taken care of the child emotionally and financially—irrespective of marriage.<sup>364</sup> By ratifying the arrangements that families are developing themselves, it reflects *Obergefell*'s joint emphasis on equality *and* autonomy, allowing couples to make the choice between an opt-in or an opt-out system.

#### D. Objections

To be sure, such a system, which draws a bright-line rule based on marriage and gives custodial parents (who tend to be women) greater rights than non-custodial parents, is likely to be controversial for several reasons. First, it may appear to promote marriage at the expense of other institutions. That is, it may be viewed as providing rights that are contingent upon marriage, thus continuing the privileging of marital status.

The system, however, does not valorize marriage to the exclusion of nonmarriage. Instead, it tries to honor the reasons that couples might choose one arrangement over the other.<sup>365</sup> The argument for this new system of regulating nonmarriage rests on the recognition that marriage has become a distinct—rather than universal—bargain, and that nonmarriage is becoming a separate and robust family structure on its own. Marriage encourages a joint assumption of responsibility for finances and for children. In return, it protects the investment both partners make in the relationship itself and that they make in the children. The result makes marriage riskier in some ways for parents who fear losing custody, but it also encourages greater care in the

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or both of the parents has established a personal and parental relationship with the child or has exercised parental responsibility in the best interests of the child.” MASS. GEN. LAWS 209C § 10 (2015); *see, e.g.*, *Smith v. McDonald*, 941 N.E.2d 1, 10 (Mass. 2010) (holding that a nonmarital father had no legal rights prior to paternity establishment, but that once established, visitation was appropriate). Second, for married parents, their rights “shall, in the absence of misconduct, be held to be equal . . . until a judgment on the merits is rendered, absent emergency conditions, abuse or neglect, the parents shall have temporary shared legal custody of any minor child of the marriage.” MASS. GEN. LAWS. 208 § 31 (2015). Other states do not distinguish in their custody statutes between marital and nonmarital parents. *E.g.*, MINN. STAT. § 518.17 (2015).

364. The ALI's system of proportional custody could be justified in similar terms. *See* Scott & Emery, *supra* note 120, at 75. The system proposed in this Article is different in that it distinguishes between marital and nonmarital children, and it assumes there should be a single primary caretaker who receives sole custody except where the parents demonstrate that they have jointly assumed caretaking responsibility in a manner similar to long-term, committed cohabitants. To be sure, most nonmarital children are born to cohabitants, but the cohabitation is less likely to be stable, co-equal, or long-lasting. *See* MCLANAHAN ET AL., *supra* note 288.

365. *See, e.g.*, Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276, 1285 (discussing “the potential financial benefits of nonrecognition”); Matsumura, *supra* note 233, at 1515 (explaining that people may not marry because of “legal consequence and personal beliefs”).



selection of a partner. Recognizing nonmarriage as a legitimate system on its own terms requires acknowledging the different patterns of commitment between adults and to children. This Article attempts to identify the traits that link marriage and shared parenting, and it extends them to unmarried couples who demonstrate the same traits, but only to those couples.<sup>366</sup>

Second, the system may, in the guise of acknowledging existing bargains, mischaracterize nonmarital relationships as more contingent and riskier than they are in practice.<sup>367</sup> The *Fragile Families* studies, for example, demonstrate that the majority of nonmarital fathers cohabit with the mothers of their children at birth, and contribute substantially to them materially and emotionally.<sup>368</sup> Failing to grant these fathers equal standing with married fathers may thus be perceived as further entrenching the class-based differences between families; deepening the differences between low-income families (which are more likely to be nonmarital) and everyone else; and discouraging low-income fathers from further involvement. The state should, indeed, be wary of reifying this situation. Moreover, the existing system already discourages paternal investment in children. State-initiated child support enforcement results in high incarceration rates that, by themselves, have counterproductive effects on fathers' involvement with their children's lives.<sup>369</sup> The increased emphasis on paternal custodial rights has encouraged some women to forego child support, so that they will not be subject to fathers' efforts to control their lives through their children.<sup>370</sup>

Nonetheless, while government regulation should encourage the involvement of parents with their children, the means for doing so should not disrupt a child's stable environment and the ability of the primary caretaker to continue providing care.<sup>371</sup> Rather than removing family decisionmaking

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366. This Article also accepts the possibility of alternative family patterns with one or more parents. To date, the interests of third parties, such as biological fathers, have been seen as at odds with recognition of same-sex partners, but accepting the notion that not all parents have the same rights makes it easier to conceive of more than two parents. See, e.g., ERTMAN, *supra* note 229; NeJaime, *supra* note 72.

367. See CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* 100 (2014).

368. See *supra* notes 333–335.

369. See, e.g., Noah D. Zatz, *A New Peonage?: Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond*, 39 SEATTLE U.L. REV. 927 (reporting that fifteen percent of African American fathers in large cities have been imprisoned at some point for not paying child support).

370. Carbone & Cahn, *supra* note 151 (describing the motives of custodial parents who do not seek child support orders); Harris, *supra* note 313.

371. Moreover, the legal default rules that operate in the background often affect the terms of parental bargains. In the cases that have given rise to changes in custody because of the failure of one parent to cooperate with the other, the courts assume that shared custody should be the norm and that the child's interests lie with the involvement of both parents. In these cases, the reason for the custodial parent's refusal to cooperate with the noncustodial may be irrelevant; the courts appear determined to produce two party involvement, effectively punishing the custodial parents for what may be a mutual unwillingness of the two parents to cooperate with each other. See, e.g., *supra*

from the parents to the state, the state should defer to the parties' own arrangements.<sup>372</sup> Left to their own devices, non-custodial parents contribute more when the state does not intervene, particularly when that intervention comes over the objections of both parents.<sup>373</sup> Given what we know about the reasons poor couples do not marry, creating a system of greater automatic custody rights would confer significant advantages on the parties least likely to cooperate.<sup>374</sup>

In contrast, measures to address the class gap directly, rather than through family law, offer more promise.<sup>375</sup> Fathers in nonmarital families who cannot play the role they desire are typically unable to do so because of their unstable living situations, ranging from periodic unemployment to incarceration.<sup>376</sup> If society invested more in the fathers, rather than in efforts to promote marriage or shared custody, greater family stability would follow. In the meantime, this proposal provides stability for children, according to their expectations and needs. It does not exclude non-custodial parents from the children's lives, and should not stand in the way of proposals that focus on parenting skills and the ability to cooperate.<sup>377</sup>

Relatedly, even for married couples, the equal parenting presumptions may not in fact reflect the couples' preferred arrangement or the actual assumption of responsibilities during the marriage. Nonetheless, the meaning

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notes 134–138 (describing cases in which the courts transferred custody from the mother to the father because of the parents' inability to cooperate). If, on the other hand, the noncustodial parent's access to the child depends on the custodial partner's consent, the noncustodial parent would have a greater incentive to provide support or to engage in more cooperative behavior as the understood price of access to the child. *See, e.g.*, EDIN & NELSON, *supra* note 151, at 214 (describing mothers in poor communities as "gatekeepers" and describing fathers' corresponding conviction that they had to keep the mothers happy to be able to see the children). Both the courts and the fathers in the Edin and Nelson study express expectations that the men should want to be involved; the policy question we address is, on what terms?

372. Proposals to extend non-custodial parents' custody rights often accompany insistence on state-mandated child support enforcement, and seek to add greater custody rights as an offset to greater state insistence on child support enforcement. *See, e.g.*, Brustin & Martin, *supra* note 115, at 830; Huntington, *supra* note 16, at 208–09.

373. *See* Harris, *supra* note 313.

374. *See, e.g.*, Amy Levin & Linda Mills, *Fighting for Child Custody When Domestic Violence Is at Issue: Survey of State Laws*, 48 SOC. WORK 463, 467 (2003) (arguing that abusers seek shared custody to gain access to women they abuse and those women must be free to oppose this arrangement); *see also* Joan S. Meier, *Johnson's Differentiation Theory: Is It Really Empirically Supported?*, 12 J. CHILD CUSTODY 4 (2015), <http://dx.doi.org/10.1080/15379418.2015.1037054> (showing that domestic violence is a more serious issue than previously believed).

375. *See, e.g.*, CARBONE & CAHN, *supra* note 79; FREMSTAD & BOTEACH, *supra* note 356, at 41.

376. *See, e.g.*, EDIN & NELSON, *supra* note 151; EDIN & KEFALAS, *supra* note 281; ALICE GOFFMAN, *ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY* (2014).

377. *See* Huntington, *supra* note 16.

of marriage has come to reflect the legal assignment of equal caretaking responsibilities. By contrast, nonmarriage presumes more varied allocations of caretaking responsibilities,<sup>378</sup> and each choice deserves recognition.

Third, making family law decisions by presumptions raises serious due process concerns.<sup>379</sup> The possibility of false negatives (denying custody where it is warranted) and false positives (granting shared custody where it is unwarranted) are salient whenever the law uses presumptions. Yet, the proposed unified system for financial and custodial decisionmaking does not impose irrebuttable presumptions. Consequently, given the ability to rebut the presumption, nonmarital relationships that look like marriage should be treated similarly in the end.<sup>380</sup>

Finally, on the equal protection challenge, discrimination occurs when “like” are treated “unlike.” Here, the particular lens being used to classify becomes critical. On the one hand, fathers with the same biological links to their children will be treated differently based on the fact of marriage. On the other hand, fathers (and others who have functioned as parents) will be treated similarly if they have served as caretakers.

While these objections suggest legitimate reasons to move cautiously towards further regulation of nonmarriage, they also provide insight into the cost-benefit analysis of legal regulation. We cannot assume that creating a legal structure will simply help those who want to develop ties and allow those who do not to remain outside the system. It will affect everyone.

## V. CONCLUSION

With the old system of marriage based on inequality now dismantled, the new legal regime underlying marriage involves a commitment to a joint assumption of responsibility for children. Consequently, there are still major restraints on the ability to customize marriage; its strength as an institution comes from the fact it has strong norms associated with it, the most critical of which is childrearing.

These new meanings for marriage create an extraordinary opportunity to develop a family law regime where one does not exist. In so many other areas of the law, we are burdened by the encumbrances of anachronistic laws, but here there is the chance to create something new.

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378. *But see* Nancy D. Polikoff, *The New “Illegitimacy”: Winning Backward in the Protection of the Children of Lesbian Couples*, 20 AM. U. J. GENDER SOC. POL’Y & L. 721, 722 (2012) (arguing that using marriage to recognize parental rights will decrease support for finding parentage relationships in other contexts).

379. *See, e.g.*, *Orr v. Orr*, 440 U.S. 268 (1979) (striking down an Alabama statute which irrefutably denied alimony to husbands); *Stanley v. Illinois*, 405 U.S. 645 (1972) (discussing presumptions regarding nonmarital fathers).

380. As noted earlier, this Article does not address the circumstances in which an unmarried partner with no biological relationship to the child should be recognized as a legal parent through doctrines such as *de facto* parenthood. *See supra* note 73.

Nonmarriage, as a new legal status, could be conceptualized as the ability to craft custom arrangements, even if they are seemingly unequal. That is, marriage is a fixed institution premised on equality with a set of clear rules, while nonmarriage implies the freedom to contract on a continuum of terms. Because the law does not impose those terms, greater autonomy is possible, but formal equality between parents is not mandated and may not be appropriate. The law can only routinize these relationships if it acknowledges the reasons parents choose non-marriage over marriage, and incorporates these differences into both financial and custody decisionmaking.<sup>381</sup>

The legal reality is that the nonmarital relationships discussed here—and the nature of children’s interests that follow from the content of the adult relationships—are on a continuum. Insistence on formal equality between the two parents and between married and unmarried parents coerces heterogeneous couples into homogenous relationships. The commitment to marriage presumes equal caretaking; that same presumption should only apply in nonmarital relationships where there is an actual assumption of equal parental responsibilities during the relationship, while the rejection of equal parental status should produce wariness about the imposition of shared custodial presumptions.

Ultimately, the achievement of multiple forms of marital equality has created opportunities for the flourishing of nonmarital families. This growing acceptance, however, leads to questions about how the law can respect these newly developing familial norms without imposing marital terms on the unmarried. True respect for autonomy neither privileges marriage over nonmarriage nor imposes the same terms on those who have not chosen them voluntarily.

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381. For unmarried biological parents, pressure is building to institutionalize equality in parents’ ongoing contact with children following dissolution of the adult relationships. *See, e.g.*, Huntington, *supra* note 16, at 225–31.