

# POSTMARITAL FAMILY LAW: A LEGAL STRUCTURE FOR NONMARITAL FAMILIES

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*Family law is based on marriage, but family life increasingly is not. The American family is undergoing a seismic shift, with marriage rates steadily declining and more than four in ten children now born to unmarried parents. Children of unmarried parents fall far behind children of married parents on a variety of metrics, contributing to stark inequality among children. Poverty and related factors explain much of this differential, but new sociological evidence highlights family structure—particularly friction and dislocation between unmarried parents after their relationship ends—as a crucial part of the problem. As the trend toward nonmarital childbearing continues to spread across class lines, the effect will be most pronounced among children.*

*This shift is the single most important issue facing family law today, yet scholars have been slow to engage with the structure and substance of the law in response. In family law, the marital family serves as a misleading synecdoche for all families, not only marginalizing nonmarital families but also actively undermining their already tenuous bonds.*

*It is essential for family law to address the needs of both marital and nonmarital families. This entails a new theory of state regulation as well as new doctrines, institutions, and norms in practice. Some feminists argue that the state should privilege caregiving between parents and children instead of marital relationships, while other commentators stubbornly advocate marriage primacy—the*

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*elevation of marriage above other family forms—despite the evidence that marriage promotion fails. These responses fundamentally misunderstand nonmarital family life, in which dynamics between parents deeply affect children yet parents are unlikely to marry. We must instead understand that it is possible to separate marriage from parenthood but not relationships from parenthood. Accordingly, the state should help unmarried parents become effective co-parents, especially after their relationship ends, so they can provide children with the healthy relationships crucial to child development. This theoretical insight, and the family law that flows from it, will inaugurate a larger debate about how to prepare for a world in which marriage is not the defining institution of family life.*

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## INTRODUCTION

There has been a sea change in family form in recent decades, with marriage no longer at the center of family life for increasingly large swaths of the American public. Nearly 41% of all children are born to unmarried parents,

with even higher levels in some demographic groups.<sup>1</sup> This shift away from marriage has come quickly, with nonmarital births increasing from 18% of all births in 1980 and 33% of all births in 2000.<sup>2</sup> Nonmarital families tend to differ from marital families in important respects. Unmarried parents generally are younger, are lower income, and have lower levels of educational attainment than married parents.<sup>3</sup> Most are romantically involved at the time of birth but typically end their relationship soon afterwards.<sup>4</sup> Unmarried parents then often find new partners and have additional children, forming what sociologists call “complex” families.<sup>5</sup>

This trend began among low-income families and is still concentrated there, but nonmarital childbearing is starting to spread across class lines, with the largest increase in nonmarital childbearing occurring among middle-income families.<sup>6</sup> Marriage, particularly long-term marriage that does not end in di-

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1. Brady E. Hamilton et al., *Births: Preliminary Data for 2013*, NAT'L VITAL STAT. REP., May 29, 2014, at 1, 4 (noting that of all births in 2013, 40.6% were to unmarried mothers); see also *id.* at 14 tbl.6 (reporting that 29.3% of all births to a white mother were nonmarital, 71.4% of all births to an African American mother were nonmarital, and 53.2% of all births to a Hispanic mother were nonmarital).

2. Joyce A. Martin et al., *Births: Final Data for 2000*, NAT'L VITAL STAT. REP., Feb. 12, 2002, at 1, 9; see also Stephanie J. Ventura, *Changing Patterns of Nonmarital Childbearing in the United States*, NCHS DATA BRIEF, no. 18, May 2009, at 1, 1 fig.1, 5.

3. See Sara S. McLanahan & Irwin Garfinkel, *Fragile Families: Debates, Facts, and Solutions*, in MARRIAGE AT THE CROSSROADS: LAW, POLICY, AND THE BRAVE NEW WORLD OF TWENTY-FIRST-CENTURY FAMILIES 142, 146-47 (Marsha Garrison & Elizabeth S. Scott eds., 2012); *infra* text accompanying notes 85-97.

4. McLanahan & Garfinkel, *supra* note 3, at 145-47 (noting that more than 80% of unmarried parents are romantically involved at the time of birth but that these relationships typically do not endure).

5. *Id.* at 152, 155.

6. Using educational attainment as a proxy for income, the trend in nonmarital childbearing is growing among women with higher levels of education. According to a population survey conducted by the U.S. Census Bureau in 1998, of the births in the twelve months preceding the survey, 60% of the births to women with less than a high school diploma were nonmarital, 38% of the births to women with only a high school diploma were nonmarital, 26% of the births to women with some college but no degree were nonmarital, and 3% of the births to women with at least a bachelor's degree were nonmarital. AMARA BACHU & MARTIN O'CONNELL, U.S. CENSUS BUREAU, NO. P20-526, FERTILITY OF AMERICAN WOMEN: JUNE 1998, at 3 fig.2 (2000), available at <http://www.census.gov/prod/2000pubs/p20-526.pdf>. The same survey in 2011 found that the percentages had changed: of the births in the twelve months preceding the survey, 57.0% of the births to women with less than a high school diploma were nonmarital, 49.0% of the births to women with only a high school diploma were nonmarital, 39.8% of the births to women with some college but no degree were nonmarital, and 8.8% of the births to women with at least a bachelor's degree were nonmarital. RACHEL M. SHATTUCK & ROSE M. KREIDER, U.S. CENSUS BUREAU, NO. ACS-21, SOCIAL AND ECONOMIC CHARACTERISTICS OF CURRENTLY UNMARRIED WOMEN WITH A RECENT BIRTH: 2011, at 4 tbl.2 (2013), available at <http://www.census.gov/prod/2013pubs/acs-21.pdf>.

voiced, is thus increasingly becoming an institution concentrated among the most privileged families.<sup>7</sup>

Children of unmarried parents fare much worse on a variety of metrics than children growing up with married parents.<sup>8</sup> Poverty and factors such as parental education explain much of this differential, but there is increasing evidence that family structure is an independent causal factor.<sup>9</sup> The connection between family structure and child outcomes is rooted in developmental psychology, particularly in a child's need for strong, stable, positive relationships.<sup>10</sup> The stress and distraction of managing complex families—particularly the jealousy of new partners and the challenge of sharing a biological father across families—means that many mothers, who are almost always the custodial parents, do not provide children with the attention critical to early childhood development and instead use harsh parenting strategies.<sup>11</sup> Complex family structures also lead fathers to disengage from their children. This dynamic is complicated, but it is driven at core by fractious relationships between mothers and fathers and the difficulty of maintaining ties with different households.<sup>12</sup> Children who grow up without supportive relationships are at a distinct disadvantage in a host of contexts, including education, the workplace, health, and future family formation.<sup>13</sup>

Family law is a critical but often unappreciated part of the problem, contributing to the differential outcomes for children born to unmarried parents. Family law places marriage at the very foundation of legal regulation. Indeed, the most fundamental divide in family law is between married and unmarried couples, and this schism carries over to how the law addresses nonmarital children. Legal institutions created to oversee the family, particularly upon divorce, are designed for married families that have been formally recognized by the state. And traditional gender norms, establishing economic support as the sine qua non of fatherhood and day-to-day caregiving as the hallmark of motherhood, still inform much of family law's approach to legal regulation, particularly in the conception of legal fatherhood. Together, this amounts to what this Article calls "marital family law."

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7. This Article focuses on the divide between married and unmarried parents, which largely tracks current income divides. As June Carbone and Naomi Cahn argue, however, there is a third group of families that consists of middle-income parents who are more likely to marry than low-income parents but also more likely to get divorced, remarry, and cohabit than their higher-income counterparts. See June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 1185, 1190, 1211.

8. See *infra* text accompanying notes 165-75.

9. See *infra* text accompanying notes 178-80.

10. See *infra* text accompanying notes 182-84.

11. See McLanahan & Garfinkel, *supra* note 3, at 152-53.

12. See *infra* text accompanying notes 150-64.

13. For an extended exploration of the relationship between parenting during early childhood and life outcomes, see CLARE HUNTINGTON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS 5-22, 145-53, 159-63 (2014).

Marital family law is hardly ideal for the married families it governs,<sup>14</sup> but it wreaks havoc on the nonmarital families it excludes.<sup>15</sup> Drawing on a growing body of sociological research, this Article argues that the fundamental mismatch between marital family law and nonmarital family life undermines relationships in nonmarital families. First, marital family law's doctrine fosters what sociologists term maternal "gatekeeping,"<sup>16</sup> where mothers control fathers' access to shared children. Unlike when a child is born to married parents, when a child is born to unmarried parents the mother automatically gains sole custody<sup>17</sup> of the child under many state laws. Without rights to custody, fathers see their children only if they are able to stay on good terms with the mothers of their children.<sup>18</sup> Marital family law also exacerbates existing acrimony between parents. Child support laws, which are relatively effective for divorcing families, impose unrealistic obligations on unmarried fathers, many of whom have dismal economic prospects.<sup>19</sup> The failure to satisfy child support requirements fuels animosity between unmarried parents, many of whom are already experiencing difficulty co-parenting.<sup>20</sup>

Second, because only the state can dissolve a marriage, marital family law presumes that couples will go to court at the end of relationships. The court system is designed to establish co-parenting structures for a couple's postdivorce family life. Although the court system is open to unmarried couples, they do not need the state to end their relationships, and most cannot afford to go to court to formalize issues such as custody.<sup>21</sup> This means that unmarried parents are left without an effective institution to help them transition from a family based on a romantic relationship to a family based on co-parenting. Thus, unmarried parents do not have the benefit of clearly estab-

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14. Marital family law is not particularly well suited to the needs of married families, *see id.* at 81-92, but it fails marital families in ways that are not the subject of this Article and that differ from the failings of marital family law as applied to nonmarital families.

15. This Article focuses primarily on separating or separated nonmarital families, rather than intact nonmarital families, largely because this is where marital family law imposes its highest cost. An additional problem facing nonmarital families is that family law does not offer a legal status that might be more appealing than marriage. *See* R.A. Lenhardt, *Marriage as Racial Subordination*, 66 HASTINGS L.J. (forthcoming 2015) (on file with author) (describing the legal and social history of marriage to explain why marriage is often unappealing to African Americans and other marginalized groups).

16. *See* KATHRYN EDIN & TIMOTHY J. NELSON, *DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY* 157, 169, 208, 214 (2013).

17. For ease of reference, this Article uses the term "custody" to refer to a parent's right to live with a child (physical custody) and make important decisions about the child (legal custody). The term "custody," however, is increasingly outdated, with states now using terms such as "parental authority," "parenting time," "parental decisionmaking authority," and so on. *See* J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 FAM. CT. REV. 213, 216-18 (2014).

18. *See infra* text accompanying notes 150-64.

19. *See infra* Part II.C.1.

20. *See id.*

21. *See infra* Part II.C.2.

lished expectations for their rights and responsibilities following a breakup. As a result, mothers generally continue as de facto gatekeepers to shared children, and parents fight about who should do what for the children.<sup>22</sup>

Finally, marital family law's reinforcement of traditional gender norms, while anachronistic for many married couples, is starkly at odds with the reality of nonmarital family life. Most unmarried fathers struggle to support their children economically, and most unmarried mothers are both full-time caregivers *and* breadwinners.<sup>23</sup> Marital norms thus deem unmarried fathers failures, undermining their place in the family by telling mothers and children that fathers are not acting as they should. In all these ways, marital family law weakens the already tenuous bonds that tie nonmarital families together.

It is essential to develop a more inclusive family law, better suited to the needs of both marital and nonmarital families. There are two dominant frameworks for responding to the decline of marriage, both unsatisfying. Some feminist legal theorists, such as Martha Fineman, have long criticized the hallowed place of marriage. In lieu of marriage as a legal category, these feminists argue that the state should focus regulation and support on parent-child relationships.<sup>24</sup> By contrast, other commentators argue that the state should restore the institution of marriage to promote social cohesion and ensure that children are cared for by their parents. To do so, these commentators argue, the state should provide incentives to marry, eliminate disincentives to marry, and make it harder to divorce.<sup>25</sup> Given the strong social norms that accompany marriage, this marriage primacy perspective favors marriage over other types of relationship recognition.<sup>26</sup>

Both approaches, however, fundamentally misunderstand the reality of nonmarital families. The feminist argument described above fails to recognize that the relationship between parents is central to the functioning of the family and the well-being of children. And the marriage primacy argument fails to appreciate that marriage alone cannot address the multiple structural challenges

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22. See *infra* text accompanying notes 150-64.

23. See *infra* text accompanying notes 92, 94, 96-97 (describing the economic limitations of unmarried fathers); *infra* text accompanying note 103 (describing custodial patterns among unmarried parents).

24. See *infra* Part III.A. Fineman, for example, argues that the state's regulation of the family is predicated on "[t]he legal story . . . that the family has a 'natural' form based on the sexual affiliation of a man and woman" and that this orientation leads to an emphasis on marriage rendering other adult relationships deviant and obscuring the important role families play in caring for dependents. MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 145-66 (1995). Fineman contends that the law should not recognize any relationship between adults and should instead focus on caretaking relationships. See *id.* at 228-36.

25. See *infra* Part III.B.

26. See Elizabeth S. Scott, *A World Without Marriage*, 41 *FAM. L.Q.* 537, 562-66 (2007) (exploring the argument that marriage should be abolished in favor of other forms of recognition and noting that cohabitation and other marriage-like institutions lack the social and institutional support for commitment that marriage enjoys).

nonmarital families face that also drive child outcomes. It is unsurprising, then, that marriage promotion programs are largely ineffective.<sup>27</sup>

Aligning family law with contemporary family life is more normatively attractive than decentering parental relationships or quixotically trying to recapture marriage. Accordingly, this Article proposes a new theoretical framework for the regulation of nonmarital families. This new understanding begins with the premise that although we are increasingly witnessing the separation of *marriage* from parenthood, we cannot separate *relationships* from parenthood. Whether unmarried parents get along deeply affects how they parent their children. If they do get along, both parents are better able to provide their children with the relationships necessary for healthy child development. Postmarital family law, then, recognizes that relationships between parents are critical to caregiving and child well-being even if parents are not romantically involved, let alone married. Thus, the state's goal should be to strengthen functional parental relationships in order to foster co-parenting. This, in turn, would help fathers remain engaged with their children and would enable mothers to better meet their children's needs.<sup>28</sup>

This approach reflects two principles. First, children benefit when they have a high-quality relationship with both parents.<sup>29</sup> Second, the law should not assume that unmarried parents, and especially unmarried fathers, are categorically different from married parents. In an age of declining marriage rates, the law should not use marriage to determine which fathers are committed to their children. Instead, the law should treat both marital and nonmarital families as a whole (two parents and a child), in contrast to its current approach to nonmarital families (mother and child with the father on the side).

To instantiate this theory of postmarital family law, this Article proposes critical reforms to family law's legal rules, institutions, and social norms. First, it is essential to have a new regulatory and doctrinal landscape that defuses maternal gatekeeping and decreases acrimony between parents after their romantic relationships end. This Article thus recommends several changes to family law, most importantly a new legal designation of "co-parent" that underscores the enduring nature of parents' connections to each other through parenting. It similarly argues for the decoupling of marriage and parental rights, with new default custody rules that give both parents an automatic right to legal and physical custody upon birth as well as reforms to child support to smooth fractious relationships between parents.<sup>30</sup>

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27. See Ron Haskins, *Marriage, Parenthood, and Public Policy*, NAT'L AFF., Spring 2014, at 55, 64-66; see also *infra* Part III.C.1 (discussing reasons why marriage promotion efforts miss the mark).

28. Ideally fathers and mothers would be equal caregivers, but given the current radically unequal starting point, the goal here is more modest: helping fathers maintain some relationship with their children and helping mothers reduce the stress in their lives so they can better meet the needs of their children. See *infra* Part III.C.2.

29. See *infra* text accompanying notes 181-84, 187.

30. See *infra* Part IV.A.

To address the problem that nonmarital families do not have effective institutions to help forestall conflict and transition from romantic relationships to co-parenting, this Article proposes the creation of alternative dispute resolution structures. A promising example is Australia's use of family relationship centers, which offer free, readily accessible mediation services in the community, not the courts, to help unmarried parents move into co-parenting relationships and get into the habit of cooperating.<sup>31</sup>

Finally, to develop new norms that do not paint unmarried fathers as failures, and instead broaden their roles to include both caregiving and breadwinning, this Article proposes changes to the child support system. Recognizing that many unmarried fathers want to play a larger role in their children's lives, and that they are unlikely to become meaningful breadwinners on their market earnings alone, postmarital family law would supplement the wages of unmarried fathers and also ensure that fathers have custody orders in place so that their ability to maintain relationships with their children is secure.<sup>32</sup>

The shift toward the nonmarital family is the most important challenge facing family law today, and it is essential to think critically about how to occupy the legal space left open by the retreat of marriage. Yet existing literature does not adequately address this phenomenon. Scholars recognize that marriage is at a crossroads and that marriage rates are declining,<sup>33</sup> and some scholars have focused on discrete questions such as the role of the child support system in driving fathers away from their families.<sup>34</sup> But legal scholars are only beginning to engage in a larger debate about how family law as a whole—on both a theoretical and a practical level—should respond to the decline of marriage and

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31. See *infra* Part IV.B.

32. See *infra* Part IV.C.

33. See, e.g., JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 1 (2014) (describing the class-based differences in family form and the link to the changing economy); Marsha Garrison & Elizabeth S. Scott, *Introduction* to MARRIAGE AT THE CROSSROADS: LAW, POLICY, AND THE BRAVE NEW WORLD OF TWENTY-FIRST-CENTURY FAMILIES, *supra* note 3, at 1, 1-2 (describing the place of marriage in modern society, the debates about whether to open marriage beyond its traditional borders, and the debates about whether the state should increase or decrease support for marriage); Linda C. McClain, *The Other Marriage Equality Problem*, 93 B.U. L. REV. 921, 927-29 (2013) (describing the trend in nonmarital childbearing).

34. See Laurie S. Kohn, *Engaging Men as Fathers: The Courts, the Law, and Father-Absence in Low-Income Families*, 35 CARDOZO L. REV. 511, 531-44 (2013). For other articles addressing the problematic role of child support in low-income families, see Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 IOWA J. GENDER RACE & JUST. 617 (2012); Ann Cammett, *Expanding Collateral Sanctions: The Hidden Costs of Aggressive Child Support Enforcement Against Incarcerated Parents*, 13 GEO. J. ON POVERTY L. & POL'Y 313 (2006); and Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991 (2006).



the rise of complex families.<sup>35</sup> This Article is thus a crucial step in preparing family law for a world in which marriage is in retreat.

To be clear, this Article is not proposing a complete dismantlement of marital family law. For those couples who do marry, the basic goals of marital family law—reinforcing relationships to prevent breakdown and helping parents transition to a co-parenting relationship if a marriage does end—are not inher-

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35. See, e.g., MERLE H. WEINER, *THE PARENT-PARTNER STATUS IN AMERICAN FAMILY LAW* (forthcoming 2015) (arguing that the birth of a shared child, within or without marriage, should lead to enforceable obligations between parents); Katharine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law when There Is No Standard Family*, 2012 U. ILL. L. REV. 319, 333, 361-66 (arguing that family law's rules do not reflect the wide variety of family forms but that family law should nonetheless adopt universal rules that are reliable and predictable because most people do not have the resources to litigate); Leslie Joan Harris, *Reforming Paternity Law to Eliminate Gender, Status, and Class Inequality*, 2013 MICH. ST. L. REV. 1295, 1335-40 (arguing that paternity laws inappropriately disadvantage nonmarital families); Cynthia Lee Starnes, *Lovers, Parents, and Partners: Disentangling Spousal and Co-Parenting Commitments*, 54 ARIZ. L. REV. 197, 199, 230 (2012) (arguing that family law must broaden its understanding of marriage by recognizing marriage as both a spousal and a co-parenting commitment); Merle H. Weiner, *Caregiver Payments and the Obligation to Give Care or Share*, 59 VILL. L. REV. 135 (2014) (arguing that regardless of marital relationship status, parents should be legally obligated to share responsibility for caring for their children or to compensate the other parent for disproportionate caregiving). Anne Alstott has written about the need to reform the tax code in response to the rise of nonmarital families. See Anne L. Alstott, *Updating the Welfare State: Marriage, the Income Tax, and Social Security in the Age of Individualism*, 66 TAX L. REV. 695 (2013).

In *Marriage Markets*, June Carbone and Naomi Cahn offer a helpful understanding of the economic forces that drive the creation of nonmarital families. See CARBONE & CAHN, *supra* note 33, at 13-20, 36-44. Their explication of links between the structure of the economy and the structure of the family is a valuable predicate for this Article's focus on the nature of family law, which Carbone and Cahn largely set aside.

In contrast to the nonmarital families described in this Article—those couples who never marry and end their romantic relationships shortly after childbirth, which describes the majority of nonmarital families—scholars have focused extensively on two other categories of unmarried couples: long-term cohabitants and same-sex couples who cannot marry. For two seminal books, see CYNTHIA GRANT BOWMAN, *UNMARRIED COUPLES, LAW, AND PUBLIC POLICY* (2010); and WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996). In the context of the marriage equality movement, the focus has been primarily on bringing more individuals within the traditional institutions of marital family law rather than changing marital family law into something that is capable of embracing a wider array of family structures. See *United States v. Windsor*, 133 S. Ct. 2675, 2689, 2692-95 (2013) (chronicling the expansion of same-sex marriage and explaining how the Defense of Marriage Act limited the benefits of marriage to opposite-sex couples); Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87, 104-54 (2014) (describing the history of the marriage equality movement and arguing that marriage has always been at the center of LGBT relationship recognition advocacy, including efforts to enact domestic partnership laws at a time when marriage was not an explicit goal).

ently problematic, although perhaps imperfectly realized.<sup>36</sup> The difficulty is the mismatch between marital family law's rules, institutions, and norms and the particular needs of nonmarital families.

Accordingly, this Article's proposals are not postmarital in the sense that they assume marriage will or should completely disappear. Rather, family law should be postmarital in the sense that marriage is no longer a major dividing line in the regulation of families and in the sense that family law responds to the needs of both marital and nonmarital families.

The Article proceeds in four Parts. Part I explains the genesis and continuing pull of the deeply entrenched marriage-based paradigm for family law. Part II explores the sea change in family form, the consequences of this shift, and the causal role of family form in contributing to unequal outcomes. It then illuminates the role that marital family law plays in this dynamic. Part III critiques the reigning theoretical approaches to legal regulation and proposes a new theory of postmarital family law that focuses on the relationship between the parents as a means of promoting child well-being. Part IV offers several illustrative reforms that embody this new theoretical framework, focusing on the relationship between mothers and fathers.<sup>37</sup>

## I. MARITAL FAMILY LAW

Marriage is so ubiquitous in family law that it is easy to overlook its presence.<sup>38</sup> Our legal system, however, has always used marriage as the focus for the regulation of families and continues to do so today. Since the creation of the United States, individual states have held a monopoly on the entrance to and exit from marriage, and the state largely organizes its approach to family through this binary of married and unmarried adults.<sup>39</sup> Rules about marriage,

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36. See HUNTINGTON, *supra* note 13, at 83-92 (describing the problems with family law).

37. This Article typically uses the terms "mother" and "father," rather than a more gender-neutral term, to refer to the two parents. The reason is twofold. First, the main focus of the Article is on low-income, unmarried parents, who typically have a child without an explicit plan to become pregnant. See *infra* Part II.A. By definition, this excludes same-sex couples. Second, the Article highlights the many ways marital family law reinforces traditional gender norms. By talking explicitly about mothers and fathers, it is easier to identify and analyze this dynamic.

38. Cf. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* ¶ 129, at 56<sup>c</sup> (P.M.S. Hacker & Joachim Schulte eds., G.E.M. Anscombe et al. trans., 4th ed. 2009) ("The aspects of things that are most important for us are hidden because of their simplicity and familiarity.").

39. See HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 12-15 (2000). This divide is another iteration of an idea first articulated by Jacobus tenBroek that family law treats families differently depending on their socioeconomic status. See Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pt. 1), 16 *STAN. L. REV.* 257 (1964) (discussing the distinction between "civil family law" and the "family law of the poor," and noting that for poor families, the state readily intervened

moreover, have always been more than simply a regulatory regime; they reflect prevailing views on both morality and theology.<sup>40</sup> And marriage laws have also been a means for social experimentation, with the state using regulation of the family form to change society.<sup>41</sup>

Family law today is still largely centered on marriage. With a few exceptions, the law no longer directly penalizes children born to unmarried parents<sup>42</sup>—formerly, “illegitimate” children—but the marital family remains the paradigm. The legal rules governing the family draw a sharp line between married and unmarried couples, and this distinction carries over to doctrines governing parental rights. Legal institutions governing family dissolution are designed for, and primarily used by, marital families. Further, family law reinforces gender roles associated with traditional married families, with fathers as breadwinners and mothers as caregivers. This Part describes this framework, arguing that family law as it exists today should be understood fundamentally as *marital* family law.<sup>43</sup>

### A. Legal Rules

Beginning with the legal rules governing the family, the central dividing line in family law is marriage. As the marriage equality movement highlights, legal marriage is a powerful institution that comes with a host of tangible benefits and deep emotional resonance.<sup>44</sup> Moreover, family law insists on legal mar-

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between parent and child, while for other families, the state intervened only in extreme circumstances, and then only when private parties initiated the action).

40. See HARTOG, *supra* note 39, at 13.

41. See *id.* at 13-15 (discussing the elimination of common law marriage and legal reforms that gave married women greater control over their property).

42. See JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 20 (2011). *But see* Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 356-64 (2011) (describing the continuing distinction between marital and nonmarital children in some areas of the law, including intestacy, citizenship, and financial support); *see also* Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387, 399-412 (2012) (arguing that although unmarried fathers can earn the same constitutional protections as married fathers, to do so they must replicate traditional family functions vis-à-vis both the child and the mother).

43. I am not the first to observe that family law has long privileged the marital family. *See, e.g.*, Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1252-60 (2010) (describing the privileging of the marital family in the constitutional doctrines protecting the family). Other areas of the law also use the marital family as a dividing line, including immigration, which grants immigration benefits only for marital families, *see* 8 U.S.C. § 1153(a)(2) (2013), and criminal law, which creates numerous benefits and burdens accompanying family ties, many of which turn on marriage, even a dissolved marriage, as with the spousal communication privilege, *see* DAN MARKEL ET AL., *PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES* 3-19, 63-73 (2009).

44. *See* Andrew Sullivan, *Why Gay Marriage Is Good for Straight America*, NEWSWEEK, July 25, 2011, at 12, 13 (“[A]most all [gay and lesbian people] grew up among

riage, not its functional equivalent. Thus, couples who live together but are unmarried—cohabitants—are not treated the same as married couples. Individual states have different rules, but the dominant approach draws a clear distinction between married and cohabiting couples, with the latter receiving far fewer of the rights and obligations associated with marriage.<sup>45</sup> If a marriage ends, for example, courts may grant spousal support to the less economically stable spouse and will divide property equitably, without regard to who paid for it, thus imposing a strong norm of economic sharing.<sup>46</sup> By contrast, courts treat unmarried cohabitants as separate economic units, with claims for spousal support possible but rarely granted and property typically retained by whoever paid for it.<sup>47</sup>

This privileging of marriage carries over to the parenting context. The doctrine of parental rights is skewed strongly in favor of marital families. Most states have some version of the marital presumption,<sup>48</sup> which provides that any child born to the wife of a married man is presumed to be the child of the husband as well as the wife; thus, the father does not need to take an additional step to establish parental rights over his child.<sup>49</sup> Additionally, family law assumes that parents live together—as most married couples do—and thus that there is no need to determine custody at birth. In most states, then, the law is silent as to the custody of newborns.<sup>50</sup>

In these ways, the legal rules tend to use marriage as a proxy for a meaningful family relationship. In the case of certain rights and privileges, legisla-

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and part of the majority, in families where the highest form of . . . love was between our parents in marriage. To feel you will never know that, never feel that, is to experience a deep psychic wound that takes years to recover from. It is to become psychologically homeless.”); *Facts at a Glance*, MARRIAGE EQUALITY USA, [http://www.marriageequality.org/facts\\_at\\_a\\_glance](http://www.marriageequality.org/facts_at_a_glance) (last visited Jan. 7, 2015) (listing the multiple tangible benefits of marriage).

45. See generally BOWMAN, *supra* note 35.

46. See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 14.8, at 449-52 (1968).

47. See Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1391-402 (2001). As Estin describes, in the few circumstances in which courts have awarded support payments or divided property, they have typically invoked an analogy to marriage or implied contract principles. These circumstances include an express written or oral contract; shared property, with attention paid to the original title owner as well as the cohabitants; intention with respect to the property; the loan of money for the purpose of investing in the partner’s business or property; and services provided beyond ordinary expectation under a quantum meruit theory. See *id.*

48. See Harris, *supra* note 35, at 1300, 1308-13 (describing the marital presumption). But see *In re J.W.T.*, 872 S.W.2d 189, 189-90 (Tex. 1994) (rejecting the marital presumption in Texas).

49. See, e.g., CAL. FAM. CODE § 7540 (West 2014); IOWA CODE § 252A.3 (2014); KAN. STAT. ANN. § 23-2208 (2014); NEB. REV. STAT. § 42-377 (2014); N.M. STAT. ANN. § 40-11A-204 (2014); VT. STAT. ANN. tit. 15, § 308 (2014). When a woman gives birth, she is presumed to be the mother. See UNIF. PARENTAGE ACT § 201(a)(1) (amended 2002), 9B U.L.A. 15 (Supp. 2008).

50. See *infra* Part II.C.1.

tures and courts believe marriage is a necessary condition for receipt of benefits. In the case of parenting and the marital presumption, legislatures and courts consider marriage a sufficient condition to presume commitment and closeness, regardless of actual family circumstances.

### B. *Legal Institutions*

Family law's institutional response to familial conflict flows from the marital framework. Married couples need the state to dissolve their legal relationships, and the state uses one formal mechanism for this process: the court system.<sup>51</sup> Through courts, the state helps divorcing couples restructure their lives, and one of the state's central goals is to ensure that those couples will continue in their roles as co-parents.

When a divorcing couple goes through the court system, they leave with custody and child support orders in place. Often the couple will have a detailed, legally binding parenting plan that specifies how they will address myriad co-parenting issues.<sup>52</sup> The significance of the custody order cannot be overstated. As a practical matter, it gives the nonresidential parent (overwhelmingly the father) the right to see the child at specified times, rather than leaving this to the discretion of the residential parent.<sup>53</sup> On a symbolic level, the custody order reinforces the importance of the child's continued relationship with both parents.<sup>54</sup> Additionally, the parenting plan is an important mechanism for forestalling conflict, helping a couple think through tricky issues before they arise.

There are also court-related resources to help parents adjust to their new roles as co-parents. Court-appointed parenting coordinators, for example, work

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51. The vast majority of divorces are not litigated in the traditional sense and instead are resolved through mediation or negotiated settlements, but the court still oversees this process and must issue the final decree, dissolving the marriage and entering orders regarding custody, support, and asset division. *See* HUNTINGTON, *supra* note 13, at 88, 106.

52. For an example of the level of detail in a parenting plan, see Supreme Court of the State of N.Y., Cnty. of N.Y., Parenting Plan (2013), *available at* <https://www.nycourts.gov/forms/matrimonial/ParentingPlanForm.pdf>. These plans are entered as court orders. *See, e.g.*, CAL. FAM. CODE § 3040(c) (West 2014) (“[T]he court and the family [have] the widest discretion to choose a parenting plan that is in the best interest of the child.”); CAL. R. CT. 5.210(c)(2) (2014) (“‘Parenting plan’ is a plan describing how parents or other appropriate parties will share and divide their decision making and caretaking responsibilities to protect the health, safety, welfare, and best interest of each child who is a subject of the proceedings.”).

53. All states have some variant on the “best interests” standard, but there is a preference for continued contact with both parents. *See* Theresa Glennon, *Still Partners? Examining the Consequences of Post-Dissolution Parenting*, 41 FAM. L.Q. 105, 114-17 (2007).

54. For a discussion of the expressive value of custody rules, see Elizabeth S. Scott, *Parental Autonomy and Children's Welfare*, 11 WM. & MARY BILL RTS. J. 1071, 1072 (2003) (arguing that trends in child custody rules that give divorcing parents increasing autonomy to decide matters of childrearing with limited court intervention are designed to mimic the autonomy of intact families and thus reinforce the position of both parents in a child's life).

with parents to develop concrete plans for parenting and then help parents resolve the disputes that often arise.<sup>55</sup> Similarly, some courts offer parenting programs to help parents learn how to work together after the divorce.<sup>56</sup> These programs have been effective at decreasing conflict between divorced parents.<sup>57</sup>

There are numerous problems with the court system,<sup>58</sup> and it can introduce or exacerbate acrimony,<sup>59</sup> but it does provide an institutional platform for families to adapt to new circumstances and establish clear and legally enforceable rights to custody and support.

### C. Gender Norms

Finally, family law draws upon and reinforces traditional gender norms based on the marital family, with mothers as caregivers and fathers as breadwinners.<sup>60</sup> Historically, one of the goals of marriage was to facilitate “specialization,” with wives caring for children and husbands earning a family wage.<sup>61</sup> Today, even though married couples increasingly share the breadwinning and

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55. See Christine A. Coates et al., *Parenting Coordination for High-Conflict Families*, 42 FAM. CT. REV. 246, 247 (2004); Nora Tooher, *Parent Coordinators Help Divorced Couples Who Won't Stop Fighting*, LAW. USA (Nov. 20, 2006), <http://lawyersusaonline.com/blog/2006/11/20/parent-coordinators-help-divorced-couples-who-wont-stop-fighting>.

56. In addition to voluntary classes, courts are sometimes authorized to mandate participation. Colorado, for example, authorizes courts to require a divorcing couple to attend a parenting class to teach them how to co-parent after the divorce. See COLO. REV. STAT. § 14-10-123.7 (2014).

57. See Jeffrey T. Cookston et al., *Effects of the Dads for Life Intervention on Interparental Conflict and Coparenting in the Two Years After Divorce*, 46 FAM. PROCESS 123, 132-35 (2007) (finding that a program designed for noncustodial fathers led to a significant increase in co-parenting with a corresponding decrease in parental conflict).

58. To give just one example, many litigants cannot afford some of the services available, such as parenting coordinators, which are paid for by the parties. See *infra* note 233.

59. See HUNTINGTON, *supra* note 13, at 83-92.

60. See NANCY E. DOWD, *REDEFINING FATHERHOOD* 132-54 (2000) (describing the law's role in helping create and reinforce “economic fatherhood”); Michael E. Lamb, *How Do Fathers Influence Children's Development? Let Me Count the Ways*, in *THE ROLE OF THE FATHER IN CHILD DEVELOPMENT* 1, 3-4 (Michael E. Lamb ed., 5th ed. 2010) (tracing the history of the paternal breadwinning role). For an exploration of the relationship between family law's rules and these gendered norms, see Clare Huntington, *Staging the Family*, 88 N.Y.U. L. REV. 589, 618-22 (2013).

61. GARY S. BECKER, *A TREATISE ON THE FAMILY* 14-37 (1981) (arguing that given certain assumptions, this specialization is economically efficient). Before the 1970s, this maternal investment in the family was encouraged and protected through divorce rules that made it hard to end the marriage and, if a marriage did end, granted considerable economic protection to wives. See GROSSMAN & FRIEDMAN, *supra* note 42, at 161-63, 195.

caregiving roles,<sup>62</sup> family law still reinforces, or at the very least reflects, these norms.

The implementation of child custody rules is an example of the continuing force of gender norms. Although these rules are facially gender neutral, in practice mothers are far more likely than fathers to have either sole physical custody or a disproportionate share of physical custody.<sup>63</sup> This does not necessarily mean that the system is biased. The discrepancy could be explained by an unequal division of labor before the divorce, with the custody order simply reflecting the predivorce division of labor.<sup>64</sup> Alternatively, it could be explained by fewer men seeking sole or primary physical custody.<sup>65</sup> It is notable, however,

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62. In marital families, the roles of men and women are converging, with most parents both engaged in the paid workforce and caring for children. See KIM PARKER & WENDY WANG, PEW RESEARCH CTR., MODERN PARENTHOOD: ROLES OF MOMS AND DADS CONVERGE AS THEY BALANCE WORK AND FAMILY (2013), available at [http://www.pewsocialtrends.org/files/2013/03/FINAL\\_modern\\_parenthood\\_03-2013.pdf](http://www.pewsocialtrends.org/files/2013/03/FINAL_modern_parenthood_03-2013.pdf) (describing this trend); WENDY WANG ET AL., PEW RESEARCH CTR., BREADWINNER MOMS: MOTHERS ARE THE SOLE OR PRIMARY PROVIDER IN FOUR-IN-TEN HOUSEHOLDS WITH CHILDREN; PUBLIC CONFLICTED ABOUT THE GROWING TREND 20 (2013), available at [http://www.pewsocialtrends.org/files/2013/05/Breadwinner\\_moms\\_final.pdf](http://www.pewsocialtrends.org/files/2013/05/Breadwinner_moms_final.pdf) (illustrating that fifty-nine percent of married couples with children have dual incomes). This convergence, however, goes only so far, with married men and women dividing their time between paid and unpaid work unequally. In dual-earner married couples, both parents tend to work the same total number of hours of paid and unpaid work. Married mothers work a total of 59 hours a week and married fathers a total of 58 hours a week. The difference is in the breakdown of these hours, with mothers spending 31 hours a week on paid work, 16 hours on housework, and 12 hours on child care, and fathers spending 42 hours a week on paid work, 9 hours on housework, and 7 hours on child care. PARKER & WANG, *supra*, at 4. Even though a differential between husbands and wives persists, men are doing more than in the past: married fathers perform three times as much child care today as they did in the 1960s. *Id.* at 6.

63. Looking at custody overall, and not limited to divorce cases, when children live with only one parent, it is overwhelmingly the mother. See TIMOTHY S. GRALL, U.S. CENSUS BUREAU, NO. P60-237, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2007, at 2 (2009), available at <http://www.census.gov/prod/2009pubs/p60-237.pdf> (indicating that in 2008, of all children living with one parent without the other parent in the home, 82.6% of the children lived with their mothers, as compared with only 17.4% living with their fathers). Looking specifically at divorce cases, there are no national statistics, but jurisdiction-specific studies show that divorced mothers receive a far greater proportion of time with their children than divorced fathers. See, e.g., Suzanne Reynolds et al., *Back to the Future: An Empirical Study of Child Custody Outcomes*, 85 N.C. L. REV. 1629, 1667 (2007) (“[T]he mother received primary physical custody in 71.9% of the cases . . . . The father received primary physical custody in 12.8% of the cases . . . . Joint physical custody, defined for the study as one involving at least 123 overnights, resulted in 15.3% of the cases . . . .” (footnote omitted)).

64. See *supra* note 62 (showing that for most married couples with children, both parents are in the paid workforce and also care for children, but that husbands and wives strike a different balance between paid and unpaid work, with wives spending fewer hours in the workforce and performing more child care than husbands).

65. See Reynolds et al., *supra* note 63, at 1666 (describing study findings that “[f]athers also usually sought primary physical custody when they were plaintiffs, but were less likely than mothers to do so”).

that when states amend their custody laws directing courts to maximize the time a child spends with each parent,<sup>66</sup> custody orders are far more likely to reflect equally shared custody and less likely to reflect sole physical custody for the mother.<sup>67</sup>

It is hard, then, to conclude definitively that the court system is biased in favor of mothers, and there are legitimate reasons to be concerned about mandating custody-sharing regimes.<sup>68</sup> But both the placement outcomes and the resistance to shared custody rules is some evidence that family law still embraces traditional gender roles.

Similarly, child support rules are facially gender neutral, with both parents having a legal obligation to provide economically for children. But in practice, it is overwhelmingly fathers who pay child support, because the children of divorced parents primarily live with their mothers.<sup>69</sup> Even more fundamentally, child support laws focus only on the economic contributions of the noncustodi-

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66. See, e.g., ARIZ. REV. STAT. ANN. § 25-403.02(B) (2014) (“Consistent with the child’s best interests . . . , the court shall adopt a parenting plan that provides for both parents to share legal decision-making regarding their child and that maximizes their respective parenting time.”); WIS. STAT. § 767.41(4)(a)(2) (2014) (“The court shall set a placement schedule that allows the child to have regularly occurring, meaningful periods of physical placement with each parent and that maximizes the amount of time the child may spend with each parent, taking into account geographic separation and accommodations for different households.”); see also *infra* note 320 (listing other states with similar statutes).

67. See PATRICIA BROWN & STEVEN T. COOK, CHILDREN’S PLACEMENT ARRANGEMENTS IN DIVORCE AND PATERNITY CASES IN WISCONSIN 2, 9-12, 18-19 (2012), available at [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). Brown and Cook tracked cases from before and after Wisconsin changed its custody law. They found that after the law took effect in 2000, fathers in divorce cases were still highly unlikely to have sole physical custody but were much more likely to have equally shared physical custody, with the percentage of such cases rising from 15.8% to 30.5%; although this trend predated the law, it appears the law accelerated the trend. See *id.* at 2, 10 tbl.2a, 14-15. The study defined equally shared custody as a fifty-fifty split of the child’s time. See *id.* at 9. The study also found that the percentage of divorce cases in which the mother had sole physical custody decreased from 60.4% to 45.7%. *Id.* at 10 tbl.2a. For more discussion of the law, see text accompanying notes 321-25 below.

68. See *infra* text accompanying note 373 (discussing a possible connection between mandated sharing and an increase in domestic violence). Women’s groups have successfully fought off equal-custody reforms in many states, including California, Michigan, and New York, largely out of the concerns that mandated sharing is dangerous for women who have been in violent relationships and that men are motivated more by the desire to limit their child support payments than their interest in spending more time with their children. See Elizabeth S. Scott & Robert E. Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best Interest Standard* 11-15 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 9200, 2013), available at [http://lsr.nellco.org/cgi/viewcontent.cgi?article=1092&context=columbia\\_pllt](http://lsr.nellco.org/cgi/viewcontent.cgi?article=1092&context=columbia_pllt).

69. Two factors generally determine a child support award: how much money each parent earns, and how many nights the child spends with each parent. The more time a parent spends with a child, the less that parent owes in child support. For an explanation of the history of child support rules and a description of their basic operation, see GROSSMAN & FRIEDMAN, *supra* note 42, at 223-28.



al parent, requiring that parent to provide money, but not time or attention, to a child.<sup>70</sup>

Indeed, in most states, the child support system operates independently of the system for determining child custody and visitation. With limited exceptions, states do not require a visitation order as a prerequisite or corequisite to the imposition of a child support order. And in many states, an administrative agency, not a court, is empowered to issue a child support order, further bifurcating child support and custody.<sup>71</sup> Consider, too, the extensive legal apparatus

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70. *See, e.g.*, CAL. FAM. CODE § 4053 (West 2014) (setting uniform rules for the determination of child support and framing those support obligations under principles that prioritize financial payments); N.Y. DOM. REL. LAW § 240(1)(a) (McKinney 2014) (requiring noncustodial parents to pay a share of child support expenses but not mandating that noncustodial parents visit their children).

71. *See, e.g.*, FLA. STAT. § 409.2563(2)(a) (2014) (“It is not the Legislature’s intent to limit the jurisdiction of the circuit courts to hear and determine issues regarding child support. This section is intended to provide the department with an alternative procedure for establishing child support obligations in Title IV-D cases in a fair and expeditious manner when there is no court order of support.”); GA. CODE ANN. § 19-6-26(a)(1) (2014) (“‘Child support order’ means a judgment, decree, or order of a court or authorized administrative agency requiring the payment of child support in periodic amounts or in a lump sum . . . .”); HAW. REV. STAT. § 576E-2 (2014) (“[T]he attorney general, through the agency and the office, shall have concurrent jurisdiction with the court in all proceedings in which a support obligation is established, modified, or enforced . . . .”); 305 ILL. COMP. STAT. 5/10-11 (2014) (“In lieu of actions for court enforcement of support . . . , the Child and Spouse Support Unit of the Illinois Department . . . may issue an administrative order requiring the responsible relative to comply with the terms of the determination and notice of support due . . . .”); IOWA CODE § 252C.2(3) (2014) (“The provision of child support collection . . . creates a support debt due and owing to the individual or the individual’s child or ward by the responsible person in the amount of a support obligation established by court order or by the administrator. The administrator may establish a support debt in favor of the individual or the individual’s child or ward and against the responsible person . . . .”); KY. REV. STAT. ANN. § 205.712(2) (West 2014) (“The duties of the Department for Income Support, Child Support Enforcement, or its designee, shall include: . . . Serve as collector of all court-ordered or administratively ordered child support payments . . . .”); MO. REV. STAT. § 454.470(1) (2014) (“The director [of the division of child support enforcement] may issue a notice and finding of financial responsibility to a parent . . . if a court order has not been previously entered against that parent, a court order has been previously entered but has been terminated by operation of law or if a support order from another state has been entered but is not entitled to recognition . . . .”); OR. REV. STAT. § 416.419(2) (2014) (“When a hearing is requested . . . , the tribunal is the Office of Administrative Hearings . . . . When an order is appealed . . . , the tribunal is a circuit court.”); S.C. CODE ANN. § 63-17-710 (2013) (“[T]he Child Support Enforcement Division of the Department of Social Services, or its designee, also has jurisdiction to establish paternity, to establish and enforce child support, and to administratively change the payee in cases brought pursuant to Title IV-D of the Social Security Act in accordance with this article.”); S.D. CODIFIED LAWS § 25-7A-56.3 (2014) (“In actions involving either the establishment of paternity, or the establishment, modification, or enforcement of a support order, any Title IV-D agency shall have the administrative authority to perform . . . functions without the necessity of obtaining an order from any other judicial or administrative entity . . . .”); TEX. FAM. CODE ANN. § 233.001(a) (West 2013) (“The purpose of the procedures specified in the child support review process authorized by this chapter is to enable the Title IV-D agency to take expedited administrative actions to establish, modify, and enforce child support . . . .”); VA. CODE ANN. § 63.2-1903(A) (2014) (“In the absence of

designed to enforce child support obligations,<sup>72</sup> with federal incentives for states to collect payments.<sup>73</sup> This system is not designed to ensure noncustodial parents have visitation orders in place,<sup>74</sup> and unlike the incentives to collect payments, there is no corresponding set of incentives for states to establish and enforce visitation orders. The child support system thus reinforces the idea that a father's most important contribution is financial and that this alone is sufficient.

The interplay between legal rules and social norms is complex.<sup>75</sup> However, the traditional gender norm that fathers provide economic support and mothers care for children informs and is reinforced by the implementation of the rules governing child custody and child support.

## II. CHILDREN OUTSIDE THE LAW

Family law may be based on marriage, but family life increasingly is not. The American family is undergoing a seismic shift, with marriage rates sharply declining for large portions of the population.<sup>76</sup> These changes have become a

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a court order, the Department shall have the authority to issue orders directing the payment of child, and child and spousal support . . .”).

72. See Office of Child Support Enforcement, *FY2013 Preliminary Report—Table P-2*, ADMIN. FOR CHILD. & FAMS. (Apr. 1, 2014), <http://www.acf.hhs.gov/programs/css/resource/fy2013-preliminary-report-table-p-2>. During the 2013 fiscal year, the program distributed more than \$28 billion to families. See Office of Child Support Enforcement, *FY2013 Preliminary Report—Table P-1*, ADMIN. FOR CHILD. & FAMS. (Apr. 1, 2014), <http://www.acf.hhs.gov/programs/css/resource/fy2013-preliminary-report-table-p-1>.

73. See 42 U.S.C. § 658a (2013).

74. The Federal Office of Child Support Enforcement (OCSE) recognizes this problem. According to the OCSE,

There is currently no systematic, efficient mechanism for families to establish parenting time agreements for children whose parents were not married at the time of their birth. Divorcing parents often establish parenting time responsibilities as part of their divorce proceedings in family court. However, child support systems and other family law systems are often distinct, requiring unmarried parents to participate in multiple, often overlapping, legal proceedings in order to resolve issues of child support and parenting time. While state or local court systems provide ways to resolve parenting disputes, this typically requires a parent to initiate a separate legal proceeding. And, in order to clarify multiple legal obligations and responsibilities, many families with modest means must engage with complicated legal systems, usually without the benefit of legal representation.

OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD SUPPORT FACT SHEET SER. NO. 13, CHILD SUPPORT AND PARENTING TIME: IMPROVING COORDINATION TO BENEFIT CHILDREN 1-2 (2013) (footnote omitted), available at [http://www.acf.hhs.gov/sites/default/files/programs/css/13\\_child\\_support\\_and\\_parenting\\_time\\_final.pdf](http://www.acf.hhs.gov/sites/default/files/programs/css/13_child_support_and_parenting_time_final.pdf); accord Jessica Pearson, *Addressing Access and Visitation Problems at the Child Support Agency: Preliminary Findings from Demonstration Projects in Colorado and Texas*, CHILD SUPPORT Q., Summer 2006, at 33, 33.

75. See Clare Huntington, *Familial Norms and Normality*, 59 EMORY L.J. 1103, 1116-27 (2010) (describing the relationship between family law and familial norms).

76. See, e.g., *Marriage Rates by State: 1990, 1995, and 1999-2011*, CENTERS FOR DISEASE CONTROL & PREVENTION, [http://www.cdc.gov/nchs/data/dvs/marriage\\_rates\\_90\\_95\\_99-11.pdf](http://www.cdc.gov/nchs/data/dvs/marriage_rates_90_95_99-11.pdf) (last visited Jan. 7, 2015).

point of political contention, with right-leaning commentators decrying the loss of marriage<sup>77</sup> and left-leaning commentators arguing that all family forms deserve respect.<sup>78</sup> The truth, of course, is more complicated. Simply marching a couple down to city hall and issuing a marriage license will not ensure that the parents stay together and give their children the attention they need, nor does it address the multiple factors affecting child outcomes, most notably poverty. Conversely, ignoring the influence of family form means policymakers are missing an important source of inequality.<sup>79</sup>

This Part first describes the enormous increase in nonmarital families and the likely impact of this family structure on child outcomes and inequality. It then argues that family law is part of the problem. A fundamental mismatch between marital family law and the needs of nonmarital families destabilizes nonmarital families, affecting both the quality of parenting and a parent's ability to remain in a child's life. In particular, the mismatch increases the stress and friction in a mother's life, in turn affecting the quality of her parenting. The mismatch also makes it more difficult for a father to maintain any relationship with his child. When children grow up without the kind of attention needed for child development, it is much more difficult for them to thrive at school and beyond, virtually ensuring that inequality will only grow.

#### A. *Nonmarital Families*

Social scientists have been studying nonmarital childbearing for decades, and there is now an extensive body of research identifying the strengths and weaknesses of these families and how they differ from marital families. Quanti-

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77. See CHARLES MURRAY, *COMING APART: THE STATE OF WHITE AMERICA*, 1960-2010, at 143-208 (2012); Ross Douthat, Op-Ed., *More Imperfect Unions*, N.Y. TIMES (Jan. 25, 2014), <http://www.nytimes.com/2014/01/26/opinion/sunday/douthat-more-imperfect-unions.html>.

78. See STEPHANIE COONTZ, *THE WAY WE REALLY ARE: COMING TO TERMS WITH AMERICA'S CHANGING FAMILIES* 3-9 (1997); NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 126 (2008).

79. Part of the reluctance of liberals to discuss the influence of family form is the legacy of the Moynihan Report. In 1965, Daniel Patrick Moynihan, then the Assistant Secretary of Labor, completed a government report titled *The Negro Family: The Case for National Action*, which came to be known as the Moynihan Report. See OFFICE OF POLICY PLANNING & RESEARCH, U.S. DEP'T OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965). Arguing that measures such as the Civil Rights Act of 1964 were insufficient to assure African Americans of full participation in society, the report identified the heart of the problem as "the deterioration of the Negro family," *id.* at 5, which centered around a "tangle of pathology . . . capable of perpetuating itself without assistance from the white world," *id.* at 47. Although the report placed the blame squarely on "three centuries of exploitation," *id.* at 5, unsurprisingly, the report's reductionism and paternalism about families drew a strong negative reaction from civil rights leaders, the press, academics, and the African American community, see DAVID C. CARTER, *THE MUSIC HAS GONE OUT OF THE MOVEMENT: CIVIL RIGHTS AND THE JOHNSON ADMINISTRATION, 1965-1968*, at 67-73 (2009), and made it taboo to talk about the impact of family form on child outcomes.

tative social science research, such as the ongoing Fragile Families and Child Wellbeing Study,<sup>80</sup> is painting a rich statistical portrait of the differences between marital and nonmarital children. The study is following nearly 5000 children born to both married and unmarried parents between 1998 and 2000.<sup>81</sup> The researchers are trying to identify the resources and abilities of unmarried parents, with a particular focus on fathers; explore the relationship between the unmarried parents; assess the well-being of the children in the families; and gauge the effect of different policies and environmental conditions on both parents and children.<sup>82</sup> In addition to this and other empirical studies, scholars have been using in-depth ethnographic studies to develop a nuanced and multi-dimensional narrative portrait of unmarried mothers<sup>83</sup> and unmarried fathers.<sup>84</sup>

This Subpart draws on this research to limn the contours of contemporary nonmarital families, emphasizing several often-counterintuitive points. As elaborated below, nonmarital pregnancies, although generally unplanned, typically occur within the context of a romantic relationship, and the man greets the news of impending fatherhood with excitement and anticipation. Despite this early optimism, most couples do not stay together, and even fewer get married. After the relationship ends, the child lives with the mother, and, because he typically does not get a custody order, the father is able to see his child only if he can stay on good terms with the mother. Both parents usually go on to find new partners, often bearing new children. This family complexity makes it harder for both parents to provide children with the time and attention they need to thrive. Fathers want to be involved in their children's lives and see it as their responsibility to provide emotional support and guidance, if not financial support. Most fathers are unable to maintain relationships with all of their children but are actively involved in the life of at least one child.

### 1. *A statistical portrait*

In the United States today, family form is strongly correlated with socioeconomic status. As compared with their married counterparts, unmarried parents

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80. *About the Fragile Families and Child Wellbeing Study*, FRAGILE FAMS. & CHILD WELLBEING STUDY, <http://www.fragilefamilies.princeton.edu/about.asp> (last visited Jan. 7, 2015).

81. *See id.* For more information about the study sample, including an explanation of how the sample is overrepresentative of nonmarital births but representative along other specified axes, see BENDHEIM-THOMAN CTR. FOR RESEARCH ON CHILD WELLBEING, INTRODUCTION TO THE FRAGILE FAMILIES PUBLIC USE DATA: BASELINE, ONE-YEAR, THREE-YEAR, AND FIVE-YEAR CORE TELEPHONE DATA 22-24 (2008), available at [http://www.fragilefamilies.princeton.edu/documentation/core/4waves\\_ff\\_public.pdf](http://www.fragilefamilies.princeton.edu/documentation/core/4waves_ff_public.pdf).

82. *See About the Fragile Families and Child Wellbeing Study*, *supra* note 80.

83. *See* KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 4-6 (2005).

84. *See* EDIN & NELSON, *supra* note 16, at 202-03.

are younger,<sup>85</sup> lower income,<sup>86</sup> less educated,<sup>87</sup> disproportionately nonwhite,<sup>88</sup> and more likely to have children from multiple partners.<sup>89</sup> The Fragile Families Study adds more detail to this broad statistical portrait. The unmarried<sup>90</sup> parents in the study were generally in their early twenties at the time of the focal child's birth, as compared with the married parents, who tended to be in their late twenties and thirties.<sup>91</sup> At the time of the birth, 45% of the unmarried fathers did not have a high school diploma as compared with 19% of the married fathers, and only 4% of the unmarried fathers had a college degree as compared with 30% of the married fathers.<sup>92</sup> Mothers had similar patterns of educational attainment: 49% of the unmarried mothers did not have a high school diploma at the time of birth as compared with 18% of the married mothers, and only 2%

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85. Most unmarried mothers are not teens. *See* Hamilton et al., *supra* note 1, at 4, 14 tbl.6. Younger women, however, are more likely to have a nonmarital birth than a marital birth. *See* SHATTUCK & KREIDER, *supra* note 6, at 2, 4-5 (reporting findings from a nationally representative survey of women that inquired about births in the twelve months preceding the survey and noting that 61.5% of births to women age 20-24 were nonmarital, as compared with 17.4% for women age 35-39); Hamilton et al., *supra* note 1, at 4 (noting that of all nonmarital births in 2013, 37% were to women aged 20-24, the highest concentration of nonmarital births). It is difficult to determine the age of unmarried fathers because the age of the father is missing on 30% of all birth certificates for nonmarital births. Joyce A. Martin et al., *Births: Final Data for 2012*, NAT'L VITAL STAT. REP., Dec. 30, 2013, at 1, 9-10.

86. In a nationally representative survey inquiring about births in the preceding twelve months, 68.9% of all births to women with a household income of less than \$10,000 were nonmarital, as compared with only 9.0% of births to women with a household income of at least \$200,000. SHATTUCK & KREIDER, *supra* note 6, at 4-5.

87. In the same nationally representative survey, 57.0% of the births to women who did not have a high school diploma were nonmarital. *Id.* at 4. By contrast, only 8.8% of the births to women with a college degree were nonmarital. *Id.*

88. Nationally, 40.6% of all births in 2013 were nonmarital, but 71.4% of all African American births and 53.2% of Hispanic births were to unmarried parents, as compared with 29.3% of non-Hispanic white births. *See* Hamilton et al., *supra* note 1, at 14 tbl.6.

89. *See* McLanahan & Garfinkel, *supra* note 3, at 147 tbl.8.1 (noting that among the participants in the Fragile Families Study, 11.7% and 27.1% of the married mothers and fathers, respectively, had a child with another partner at the time of the birth of the focal child, as compared with 38.8% and 64.2% of the unmarried, cohabiting mothers and fathers, respectively, and 34.5% and 76.4% of the unmarried, noncohabiting mothers and fathers, respectively).

90. One of the factors the study is following is whether a couple marries soon after the birth of the child. Thus, the study is really tracking three groups: married at birth, married soon after birth, and never married.

91. *See* McLanahan & Garfinkel, *supra* note 3, at 147 tbl.8.1.

92. *Id.* These statistics are for the unmarried fathers who were not cohabiting with the mothers at the time of birth. Although there is some variability between unmarried cohabiting fathers and unmarried noncohabiting fathers (40% of the unmarried cohabiting fathers had no high school diploma at the time of the birth, as compared with 45% of the unmarried noncohabiting fathers), the main difference in educational attainment is between the unmarried fathers and the married fathers. *Id.*

of the unmarried mothers had a college degree as compared with 36% of the married mothers.<sup>93</sup>

Not surprisingly, earnings followed these educational patterns. The average income of the unmarried fathers at the time of the birth was \$15,893, as compared with \$38,568 for the married fathers.<sup>94</sup> Similarly, the unmarried mothers earned significantly less money at the time of the birth than the married mothers—\$10,764 as compared with \$25,619.<sup>95</sup> The economic prospects of the unmarried fathers were particularly dim due to a combination of their low educational attainment and involvement in the criminal justice system.<sup>96</sup> Forty-two percent of the unmarried fathers in the study had spent some time in prison at the time of the birth, and even more had been in prison by the time the child reached age five.<sup>97</sup>

Despite these differences between unmarried and married parents, one of the intriguing findings of the Fragile Families Study is that the vast majority of unmarried parents are romantically involved at the time of the birth: 82% of the unmarried parents were in a relationship, and 50% were living together.<sup>98</sup> Belying the stereotype of men interested only in one-night stands, most fathers in the study provided financial support during the pregnancy (81%) and visited the mother in the hospital (77%).<sup>99</sup> Most unmarried fathers also voluntarily claimed paternity at the hospital.<sup>100</sup>

Notwithstanding these early ties, the relationships between unmarried parents typically do not last. Of the unmarried parents in the study who were romantically involved at the time of the birth, 69% ended their relationship within

93. *Id.* Again, the statistics in the text are for unmarried mothers who were not cohabiting at the time of birth. Although there is some difference with unmarried mothers who were cohabiting at birth (41% of the unmarried cohabiting mothers did not have a high school diploma, as compared with 49% of the unmarried noncohabiting mothers), the main difference is with married parents. *Id.*

94. *Id.* The dollar figures given in the text are for noncohabiting unmarried fathers; the cohabiting unmarried fathers had average earnings of \$20,461. *Id.*

95. *Id.* The dollar figures given in the text are for noncohabiting unmarried mothers; the cohabiting unmarried mothers had average earnings of \$11,434. *Id.*

96. Robert I. Lerman, *Capabilities and Contributions of Unwed Fathers*, FUTURE CHILD., Fall 2010, at 63, 64, 70.

97. *See id.* at 70.

98. *See Fragile Families and Child Wellbeing Study Fact Sheet*, FRAGILE FAMS. & CHILD WELLBEING STUDY fig.1, <http://www.fragilefamilies.princeton.edu/documents/FragileFamiliesandChildWellbeingStudyFactSheet.pdf> (last visited Jan. 7, 2015) (reporting that 50% of the unmarried parents were cohabiting, and 32% were in a “visiting union”). Only 10% of unmarried fathers had little or no contact with the mother at the time of birth. *Id.*

99. *See* Sara S. McLanahan, *Fragile Families and the Marriage Agenda*, in FRAGILE FAMILIES AND THE MARRIAGE AGENDA 1, 8 & tbl.1-2 (Lori Kowaleski-Jones & Nicholas H. Wolfinger eds., 2006).

100. *See Fragile Families and Child Wellbeing Study Fact Sheet*, *supra* note 98, at tbl.1 (noting that 96% of the cohabiting fathers claimed paternity at the hospital, 80% of the “visiting” fathers claimed paternity at the hospital, and 52% of the nonromantically involved fathers claimed paternity at the hospital).

five years of the child's birth.<sup>101</sup> And the percentage of unmarried couples living together declined to 38% by the five-year mark.<sup>102</sup>

After the relationship between unmarried couples ends, children almost always stay with their mothers,<sup>103</sup> and unmarried fathers become much less involved.<sup>104</sup> In the Fragile Families Study, at the time the children were five years old, 37% of the nonresidential fathers had not seen their child once in the previous two years,<sup>105</sup> although 43% of the nonresidential fathers had seen their child more than once in the previous month.<sup>106</sup> This is in contrast to children of divorced parents, who see their fathers more frequently.<sup>107</sup> Additional-

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101. Sharon H. Bzostek et al., *Mothers' Repartnering After a Nonmarital Birth*, 90 SOC. FORCES 817, 828 tbl.2, 833 (2012).

102. *Id.* at 826, 827 tbl.1. Although marriages are more stable than cohabiting relationships, marriages in the United States are less stable than in many other industrialized countries. A child living with two *married* parents in the United States is more likely to experience a family breakup than a child living with two *unmarried* parents in Sweden, even though Sweden has even higher rates of nonmarital births than the United States. ANDREW J. CHERLIN, *THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY* 3 (2009). Regardless of whether their parents are married or cohabiting, forty percent of children in the United States will experience a family breakup by the time they are fifteen years old; almost half of the children who see their parents break up are living with a new adult within three years, and many of their parents go on to have a child with this new partner. *See id.* at 16-19, 23.

103. Researchers using the Fragile Families dataset typically do not report on the number of children in the study living with a mother versus a father and instead appear to assume that all children live with their mothers. *See, e.g.*, Sara McLanahan & Audrey N. Beck, *Parental Relationships in Fragile Families*, FUTURE CHILD., Fall 2010, at 17, 22-23 (describing father involvement after a relationship ends and not mentioning any fathers with custody).

104. The strongest predictor of whether a father will make financial and social investments in his children is whether he lives with them. *See* McLanahan & Garfinkel, *supra* note 3, at 148.

105. Marcia J. Carlson et al., *Coparenting and Nonresident Fathers' Involvement with Young Children After a Nonmarital Birth*, 45 DEMOGRAPHY 461, 479 (2008).

106. *Id.* at 480; *see also id.* at 473 (noting that fathers who had seen their child more than once in the previous month had seen their child an average of thirteen days at years one and three and twelve days at year five); Laura Tach et al., *Parenting as a "Package Deal": Relationships, Fertility, and Nonresident Father Involvement Among Unmarried Parents*, 47 DEMOGRAPHY 181, 197-201 (2010) (noting several reasons for limited father involvement, including the absence of a formal custody or visitation agreement and the social norm that unmarried parents have more fluid and frequent transitions to new partners, who then "crowd[] out" the old partners).

107. This is true only as a relative matter. Divorced fathers also tend to drift away from their children, just to a lesser degree than unmarried fathers. Fewer than one in three fathers communicates weekly with his child after a divorce, and of those who do communicate regularly, only forty percent are actively involved in their child's life and take on a parenting role by setting limits and so on. *See* Mindy E. Scott et al., *Postdivorce Father-Adolescent Closeness*, 69 J. MARRIAGE & FAM. 1194, 1195 (2007) (summarizing research). This means that only a small minority of fathers continue as active parental figures following a divorce. Fathers with joint custody tend to see their children more often. *See* Judith A. Seltzer, *Father by Law: Effects of Joint Legal Custody on Nonresident Fathers' Involvement with Children*, 35 DEMOGRAPHY 135, 144 (1998).

ly, never-married fathers are less likely to pay full child support than previously married fathers.<sup>108</sup> (When unmarried fathers *do* live with their children, they are more involved than nonresidential unmarried fathers, but they still do less caregiving and contribute less financially to the family than married fathers.)<sup>109</sup>

The quality of the relationship between the parents is an important factor affecting whether nonresidential fathers see their children. When the parents in the Fragile Families Study had a high-quality co-parenting relationship,<sup>110</sup> the fathers were much more likely to see their children and engage in activities with them.<sup>111</sup>

Additionally, there are important nuances in the data. For example, among the Fragile Families Study participants, African American fathers who did not live with their children were more likely to maintain better co-parenting relationships with the mothers of their children and more likely to be involved with their children than Latino or white fathers.<sup>112</sup> Moreover, although unmarried fathers typically do not maintain a relationship with all of their children, one study found that 70% of nonmarital fathers were intensively involved in the life of at least one of their children.<sup>113</sup>

108. See GRALL, *supra* note 63, at 9 fig.5 (showing that 39.6% of never-married custodial parents received full child support, as compared with 51.2% of divorced custodial parents).

109. When unmarried fathers do live with their children—typically because they are cohabiting with the mother, not because they are single fathers—they contribute less to the family through paid and unpaid work than married fathers. See PARKER & WANG, *supra* note 62, at 6, 29. Similarly, these fathers are less likely than married fathers to care for children while the mother works. See LYNDIA LAUGHLIN, U.S. CENSUS BUREAU, NO. P70-135, WHO'S MINDING THE KIDS? CHILD CARE ARRANGEMENTS: SPRING 2011, at 3 tbl.2 (2013), available at <http://www.census.gov/prod/2013pubs/p70-135.pdf> (finding that 32.3% of preschool children whose mothers were employed and married were cared for, at least in part, by their fathers, while only 23.8% of preschool children whose mothers were employed but have never married were cared for by their fathers).

110. See Carlson et al., *supra* note 105, at 461 (defining a high-quality co-parenting relationship “as one in which the parents agree about how their child should be raised, cooperate in carrying out shared objectives, and demonstrate mutual support and commitment in rearing their common child”); *id.* at 468 (describing the measures for evaluating the strength of the co-parenting relationship as well as the degree of father involvement).

111. See *id.* at 473-78 (setting forth these findings and concluding that there was strong although not conclusive support for the proposition that the high-quality co-parenting relationship was a causal factor of father involvement); *id.* at 479 (breaking down the findings by different variables and concluding that if the father had a child by another woman, he was less involved with the focal child; if he had an additional child with the mother, he spent more time with the focal child; and if he had a history of incarceration, he was less involved).

112. *Id.* at 473-74; see also Lerman, *supra* note 96, at 75.

113. See Robert Lerman & Elaine Sorensen, *Father Involvement with Their Nonmarital Children: Patterns, Determinants, and Effects on Their Earnings*, 29 MARRIAGE & FAM. REV. 137, 145 (2000) (finding that in one year of the study, 48.6% of fathers with children born outside of marriage lived with at least one nonmarital child, and another 21.6% visited at least one nonmarital child once a week or more).



After the relationship between unmarried parents ends, both mothers and fathers typically go on to form new relationships and have additional children with the new partners (“multipartner fertility”).<sup>114</sup> In the Fragile Families Study, by the time their children were five years old, more than half of the unmarried mothers had lived with or dated at least one new partner.<sup>115</sup> Unmarried fathers were even more likely to have multiple new partners.<sup>116</sup> This new partnering often leads to new children. By the time the focal child in the study was five years old, 45% of unmarried mothers and 47% of unmarried fathers had a child by another partner.<sup>117</sup> Thus, 67% of the nonmarital children at age five had at least one parent who had a child by another partner, as compared with only 25% of the marital children.<sup>118</sup>

For the mothers, sometimes the new partners were more appealing partners than the biological father. Within five years of the focal child’s birth, 32% of the unmarried mothers in the study had found subsequent partners who had better economic prospects than the biological father.<sup>119</sup> These relationships, however, tended not to last either, in part because of the challenges facing the couple as a result of family complexity.<sup>120</sup>

## 2. *A qualitative portrait*

Two studies provide much-needed context and nuance to this statistical portrait. Sociologists Kathryn Edin and Maria Kefalas conducted an in-depth, ethnographic study of 162 unmarried mothers living in Philadelphia, Pennsylvania, and Camden, New Jersey.<sup>121</sup> Subsequently, Edin and Timothy Nelson conducted a similar study of 110 unmarried fathers living in the same areas.<sup>122</sup>

The researchers found that, beginning with the decision to have a child, both men and women told similar stories. The pregnancy was neither an accident nor a planned event. Rather than waiting to find a suitable long-term part-

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114. See McLanahan & Garfinkel, *supra* note 3, at 151.

115. *Id.* at 152; see also *id.* at 152 fig.8.3 (showing that by the time the child had reached age five, 29% of the children had experienced one or two maternal relationship transitions, 33% had experienced three or four maternal relationship transitions, and 13% had experienced five or more maternal relationship transitions).

116. *Id.* at 152 fig.8.3 (showing that by the time the child had reached age five, 19% of the children had experienced one or two paternal relationship transitions, 26% had experienced three or four paternal relationship transitions, and 32% had experienced five or more paternal relationship transitions).

117. *Id.* at 152-53 (giving these statistics and noting that “at the time of the focal child’s birth,” 37% and 40% of the unmarried mothers and fathers, respectively, had children by other partners, meaning that the family complexity both pre- and postdated the birth of the child in the study).

118. *Id.* at 153.

119. See Bzostek et al., *supra* note 101, at 829 tbl.3.

120. See McLanahan & Garfinkel, *supra* note 3, at 154.

121. EDIN & KEFALAS, *supra* note 83, at 5.

122. EDIN & NELSON, *supra* note 16, at 6.

ner and then having a child, as married parents generally do, unmarried parents typically had a child in the context of a romantic, but relatively unstable, relationship. The men and women interviewed said that they would begin seeing a person, and once the relationship reached some modicum of stability, often within a few months, they stopped using birth control on a regular basis.<sup>123</sup> This decision was understood as a sign of commitment to the relationship.<sup>124</sup>

For the young couples, marriage was not a viable option. In their interviews with mothers, Edin and Kefalas found that the women wanted to be married—indeed, they thought single parenthood was second best<sup>125</sup>—but they held marriage to a high standard and would not settle for the unreliable men who were their current partners.<sup>126</sup> Few men in the women's circles met this standard, but despite this lack of marriageable men, the women were unwilling to forgo motherhood.<sup>127</sup> The women saw motherhood as essential to their sense of self and their place in the world, and they did not want to postpone it until their thirties, a strategy typically employed by middle-class women.<sup>128</sup>

Moreover, there was no career reason to delay childbearing. Living in impoverished neighborhoods with bleak economic prospects means that having a child at a young age does not derail a career, as it might for a middle-class young woman, because there are few career prospects in the first place.<sup>129</sup> Thus, although they were well aware of the risks of getting pregnant, the women Edin and Kefalas studied did not try particularly hard to avoid pregnancy.<sup>130</sup>

In their study of unmarried fathers, Edin and Nelson found a similar pattern.<sup>131</sup> Men also aspired to marriage,<sup>132</sup> but they idealized it, believing marriage was possible only if they could find their “soul mate,” a standard the women in their lives did not meet.<sup>133</sup> And yet men did not view this as a barrier to having a child. Contrary to the stereotype of the callous unmarried father, but consistent with the Fragile Families Study's finding that the unmarried fathers were supportive during the pregnancy,<sup>134</sup> the men in the study typically were delighted by the news of their partner's pregnancy and looked forward to the birth of the child.<sup>135</sup> As Edin and Nelson describe it, the young men saw fa-

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123. *See id.* at 24, 202-03; EDIN & KEFALAS, *supra* note 83, at 7, 38.

124. EDIN & KEFALAS, *supra* note 83, at 38 & 253 n.16.

125. *See id.* at 135-36.

126. *See id.* at 6, 136.

127. *See id.* at 6, 130-31, 202-03.

128. *See id.* at 172. As Edin and Kefalas concluded, the women “rely on their children to bring validation, purpose, companionship, and order to their often chaotic lives—things they find hard to come by in other ways.” *Id.*

129. *See id.* at 205-06.

130. *See id.* at 51.

131. *See* EDIN & NELSON, *supra* note 16, at 62-64, 221.

132. *Id.* at 205.

133. *Id.*

134. *See supra* text accompanying notes 98-100.

135. *See* EDIN & NELSON, *supra* note 16, at 62-69, 203-04.

therhood as a way of giving positive meaning to their otherwise difficult lives and a good reason to give up an unfulfilling lifestyle.<sup>136</sup>

In the typical unmarried family, the pregnancy would transform a casual relationship into a much more serious one and would, at least initially, bring the couple closer.<sup>137</sup> During the pregnancy and the early days of the child's life, the relationship would be relatively smooth, but soon after the baby arrived, problems were common. Couples generally did not know each other well; they had not chosen each other after a long search for a compatible partner, there were high levels of distrust, and both parents were struggling with the stresses of poverty.<sup>138</sup> Not surprisingly, relationships between the parents typically unraveled.<sup>139</sup>

Once fathers were no longer living with their children, and once relationships with the mothers had ended, fathers typically contributed little to the family economically. Edin and Nelson found that fathers in their study had embraced, at least partially, the new middle-class norm of involved fatherhood.<sup>140</sup> But for middle-class married men, this means caregiving *and* breadwinning.<sup>141</sup> In contrast, the unmarried fathers in the study did not see breadwinning as essential to fatherhood; instead, they emphasized their role as caregivers.<sup>142</sup> The fathers' vision of providing for children was very modest.<sup>143</sup> Fathers considered it a feat if they could take care of themselves, help with their current household (if they had a new partner and she had existing children), and then, if anything was left over, make small contributions to any nonresidential children.<sup>144</sup>

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136. *See id.* at 65-67 (describing the endemic violence in the neighborhoods where the fathers lived); *id.* at 67 ("In [one father]'s environs the rhetorical contrast of guns versus babies—rejecting violence and death and embracing innocence and new life—gives an almost mythic aura to the act of becoming a father."); *id.* at 211 (describing how the men in their study had few if any sources of positive attention and identity because almost all family relationships were fraught, friendship was difficult, and work meant a low-wage job in a workplace that did not care for its workers); *id.* at 212-13 (describing how fathers saw children as a way to make a positive impact on the world that they were otherwise unable to do); *id.* at 224 ("Many acknowledge that when they extend into adulthood, extreme forms of adolescent male behavior are exhausting at best, life threatening at worst, and ultimately not that fulfilling."); *id.* at 224-25 (describing the desire of young men to give up the "street life" of drugs, violence, and multiple women and instead to settle down).

137. *Id.* at 203 ("[H]aving a baby is not a symbol of love and commitment; instead, pregnancy and birth are often the relationship's impetus. . . . Fathers- and mothers-to-be . . . usually work fairly hard to forge a stronger bond around the impending birth.").

138. *See id.* at 204-05.

139. *See id.*

140. *Id.* at 218-22.

141. *See supra* note 62.

142. *See* EDIN & NELSON, *supra* note 16, at 144, 207-09, 220-23.

143. *See id.* at 206.

144. *Id.*

Although they gave very little financial support, the fathers were fairly engaged on the social front. Highly valuing their emotional relationship with their children, the unmarried fathers in the study believed they should provide love, time, and open communication.<sup>145</sup> This did not mean the fathers were regular caregivers to their nonresidential children; instead, they would see the children when they could manage it.<sup>146</sup> Thus, the fathers viewed their role in their children's lives not as providing economic support or daily caregiving but rather as providing moral guidance and friendship to their children.<sup>147</sup>

Despite their good intentions and interest in being active fathers, over time men would drift away from their children. Edin and Nelson found multiple reasons for this, including the fathers' own behavior, particularly their continued use of drugs and alcohol and involvement in the criminal justice system.<sup>148</sup> They also found that the fathers' inability to pay for even the most basic items, such as an ice cream cone, made them feel ashamed and kept them away, especially if the mother's new partner could afford such treats.<sup>149</sup>

In addition to the fathers' own shortcomings, their relationship with the mother of the child was a central factor affecting whether the fathers saw their children.<sup>150</sup> A consistent view articulated by fathers was that the relationship with the mother had never been particularly significant, and once that relationship ended, the mother was even less important to the father.<sup>151</sup> He cared about his child and saw the mother primarily as a conduit to that child.<sup>152</sup> Unmarried fathers thus rejected "the old package deal," where men were husbands first and fathers second and the relationship between the adults bound the family together.<sup>153</sup> Instead, the men wanted "a new package deal," where their relationship with their children came first and mothers were on the periphery.<sup>154</sup>

Yet this was not how it worked in practice. Instead, the relationship between the mother and father was still very much at the center of the family dynamic. When the romantic relationship ended, unmarried fathers typically did not go to court to secure visitation with their children.<sup>155</sup> This meant that the mothers controlled fathers' access to their children: the mothers physically had the children, and there was no court order requiring them to split either legal or

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145. *Id.* at 207.

146. *See id.* at 208-10.

147. *See id.* at 220-27.

148. *Id.* at 208-09.

149. *Id.*

150. *See id.* at 169, 208. Sometimes a mother's decision to keep a father at bay was warranted, as when a father turned violent, but Edin and Nelson found that this was not always the case and that instead other factors affected the decision. *See id.* at 169.

151. *See id.* at 205-06.

152. *Id.*

153. *Id.* at 85-86.

154. *See id.*

155. *See id.* at 214.

physical custody with the fathers.<sup>156</sup> Mothers thus became “gatekeepers,” deciding if and when fathers could see their children.<sup>157</sup>

If mothers were frustrated with fathers, as they often were, they would keep the fathers away. Thus, the men were able to see their children only if they could stay on good terms with the mothers of those children, which the men were not always able to do.<sup>158</sup> In particular, mothers wanted fathers to do more—pay more child support or help more with the child care—and they became exasperated with fathers’ inability or unwillingness to do so.<sup>159</sup> The fathers, by contrast, felt that they were doing the best they could, providing what little money they were able to earn and giving the children an emotional relationship.<sup>160</sup> In light of their low levels of educational attainment, their criminal backgrounds, and the very few jobs available, meaningful economic contributions were unlikely.<sup>161</sup> As Edin and Nelson consistently found, the fathers in their study resented the legal system’s monetization of their relationship with their children and did not want to be “just a paycheck”; instead, they wanted recognition for the hands-on parenting they provided to their children.<sup>162</sup>

Another relationship factor that led mothers to keep fathers at bay was the stress of managing new relationships. When a mother began seeing someone new, the new man was often jealous of the father. To maintain the new relationship, it was easiest for the mother to keep the father away from the family.<sup>163</sup> As in the Fragile Families Study, Edin and Nelson found that the African American men in their study were better able to negotiate the postbreakup family, maintaining closer ties to their children and smoother relationships with the mothers of their children.<sup>164</sup>

All of this paints a common narrative: An unmarried mother and father have a child within the context of a romantic but not particularly enduring relationship. Soon after the birth, the relationship founders. The couple does not go to court for a custody order specifying legal rights; instead, the mother becomes an informal gatekeeper to the child, keeping the father away for good reasons and bad. If the father can stay on good terms with the mother, he is able to see his child. But maintaining a co-parenting relationship is difficult because the mother is understandably frustrated with the father’s limitations, and she is juggling the demands of a new partner. The unmarried father wants to be involved

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156. *Id.* at 214-16.

157. *Id.* at 169.

158. *See id.* at 169-70.

159. *See id.* at 215; EDIN & KEFALAS, *supra* note 83, at 100-03.

160. EDIN & NELSON, *supra* note 16, at 221-23.

161. *See id.* at 208, 220-21.

162. *Id.* at 215.

163. *Id.* at 169. The Fragile Families Study documented the same dynamic. Biological fathers had less contact with their children when the mothers had a new partner, but when that new relationship ended, the biological father would become more involved in the child’s life. McLanahan & Garfinkel, *supra* note 3, at 154.

164. EDIN & NELSON, *supra* note 16, at 215.

in the child's life, but to him this means maintaining an emotional relationship, not providing financial support, which he is unable to do anyway given his economic prospects. Despite his high hopes for fatherhood, a combination of his own shortcomings and a fractious relationship with the mother drives the father away. The father and mother then both start the cycle again, with new partners and new children, compounding the problem by making the family structure even more complex. From the mother's perspective, the new partner is sometimes better situated economically and thus may be a more appealing partner, but the new relationship founders, in part because of the challenges of multipartner fertility. Although the father is not able to parent all of his children, he does intensively parent at least one child.

This family pattern has direct, and unfortunate, consequences for children, as the next Subpart describes.

### B. *Long-Term Consequences for Children*

There are a number of different consequences that flow from the trend toward nonmarital childbearing, but the most important is the long-term effect on children. There is overwhelming evidence that children raised by unmarried parents have worse life outcomes than children raised by married parents.<sup>165</sup> Studies show that these children score lower on measures of academic achievement<sup>166</sup> and academic self-concept,<sup>167</sup> do not stay in school as long,<sup>168</sup> are more likely to show negative behaviors such as aggressiveness,<sup>169</sup> are more likely to use illegal substances and have contact with the police,<sup>170</sup> are more likely to have sex and begin bearing children at an early age,<sup>171</sup> have worse physical and mental health outcomes as adults,<sup>172</sup> and earn less in the labor

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165. Although not the subject of this Article, children in divorced families tend to do worse than children in married families, at least in the short term; however, there are considerable nuances to this data. See HUNTINGTON, *supra* note 13, at 32-34 (discussing the mixed evidence and noting that the worst outcomes are for children who go through a high-conflict divorce).

166. Wendy Sigle-Rushton & Sara McLanahan, *Father Absence and Child Well-Being: A Critical Review*, in THE FUTURE OF THE FAMILY 116, 120-21 (Daniel P. Moynihan et al. eds., 2004).

167. Academic self-concept is a scale that gauges a student's self-assessment of academic performance and potential. *Id.* at 121; see also Thomas Ewin Smith, *Parental Separation and the Academic Self-Concepts of Adolescents: An Effort to Solve the Puzzle of Separation Effects*, 52 J. MARRIAGE & FAM. 107, 113, 116 (1990).

168. Sigle-Rushton & McLanahan, *supra* note 166, at 121.

169. *Id.* at 122-23; *Fragile Families and Child Wellbeing Study Fact Sheet*, *supra* note 98.

170. Sigle-Rushton & McLanahan, *supra* note 166, at 123.

171. *Id.* at 124.

172. *Id.* at 124-25; see also Jane Waldfogel et al., *Fragile Families and Child Wellbeing*, FUTURE CHILD., Fall 2010, at 87, 97-99.

market as adults.<sup>173</sup> Differential outcomes persist even when children live with two cohabiting but unmarried biological parents. Data from 40,000 nationally representative households reveal that children living with cohabiting parents fare worse than children living with married parents, as measured by a child's performance in school and behavioral problems.<sup>174</sup> In other words, the difference in outcomes is between marital and nonmarital families, not between single-parent and two-parent families.<sup>175</sup>

At first glance, it seems this difference in outcomes must be attributable to the family form because family structure is such a strong predictor of child outcomes. It turns out, however, that much of the difference can be attributed to other factors that tend to accompany family structure, such as income level and parental education. In the study of the 40,000 families, for example, once the researchers controlled for poverty and parental resources, the differences between the groups were far less pronounced.<sup>176</sup> This is not terribly surprising given the clear connection between income and educational outcomes.<sup>177</sup>

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173. Sigle-Rushton & McLanahan, *supra* note 166, at 125.

174. Susan L. Brown, *Family Structure and Child Well-Being: The Significance of Parental Cohabitation*, 66 J. MARRIAGE & FAM. 351, 355, 357 (2004). The study asked questions about children's relationships with others, performance in school, ability to concentrate, behavioral maturity, tendency to lie, feelings of depression, and so on. *Id.* at 355.

175. *See id.* at 364.

176. For younger children, ages six to eleven, after controlling for income levels and parental resources, the only difference that remained between the two groups was the level of school engagement, which was lower for children of cohabiting parents. For children ages twelve to seventeen, after controlling for income levels and parental resources, the only difference that remained between the two groups was the rate of behavioral and emotional problems, which was higher for children of cohabiting parents. *Id.* And in the Fragile Families Study, once the researchers controlled for income, parental mental health, and other observable characteristics, the differences in outcomes were less marked. *See* Waldfogel et al., *supra* note 172, at 100-04, app. 2 at 106. Looking at the worse behavioral outcomes for children in single-parent homes, for example, only half of the effect could be attributed to higher levels of stress and poorer parenting quality. *Id.* at 98. The findings contain considerable nuance, however, and show that at least for some outcomes, family stability is an important factor. Cognitive outcomes, for example, were strongly correlated with the consistency of the family form, regardless of whether that form was marriage, cohabitation, or single parenthood. *See id.* at 97. By contrast, behavioral and health outcomes turned on the type of family structure, even when that family structure was stable. *See id.* at 97-98 (noting these findings and also that children of cohabiting parents had worse outcomes than children of married parents on some but not all measures of health outcomes).

177. For an excellent summary of the effect of income and parental education on children's achievement, see generally JULIA ISAACS & KATHERINE MAGNUSON, BROOKINGS INST., INCOME AND EDUCATION AS PREDICTORS OF CHILDREN'S SCHOOL READINESS (2011), available at [http://www.brookings.edu/~media/research/files/reports/2011/12/15%20school%20readiness%20isaacs/1214\\_school\\_readiness\\_isaacs.pdf](http://www.brookings.edu/~media/research/files/reports/2011/12/15%20school%20readiness%20isaacs/1214_school_readiness_isaacs.pdf). To give just a flavor of some of the ways income can affect educational outcomes, consider how a lack of financial resources makes it difficult for parents to invest in children's participation in after-school programs, summer camps, and so on. In the 1970s, parent spending on these kinds of enrichment activities was already pronounced, with families in the top quintile of income spending \$2700 more per year (adjusted for inflation) than families in the bottom quintile, but by 2006, the

The question is whether the factors correlated with family structure *fully* explain the different outcomes for marital and nonmarital children or whether family structure is an additional causal factor.<sup>178</sup> The Fragile Families researchers are concluding that there *is* a causal relationship between family structure and child outcomes. The assessment of the two principal investigators, Sara McLanahan and Irwin Garfinkel, is that although the factors associated with nonmarital childbearing, including lower income, lower levels of parental education, and so on, certainly contribute to the worse outcomes for nonmarital children, these factors alone cannot fully explain the difference.<sup>179</sup> Instead, they believe that the new approach to family life discussed above—with young adults having a child early in a relationship without first deciding that the current partner is a suitable long-term mate—leads to higher levels of relationship instability and multipartner fertility, factors that themselves contribute to worse outcomes for children.<sup>180</sup>

To appreciate how relationship instability and multipartner fertility affect child outcomes requires an understanding of the dynamics of the parent-child relationship and child development.<sup>181</sup> Attachment theory posits that for healthy child development, a child needs a consistent caregiver who can provide a “secure base” for the child’s exploration of the world.<sup>182</sup> Recent neuroscience research confirms the importance of relationships during early child-

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gap had almost tripled to \$7500. Greg J. Duncan & Richard J. Murnane, Op-Ed., *Economic Inequality: The Real Cause of the Urban School Problem*, CHI. TRIB. (Oct. 6, 2011), [http://articles.chicagotribune.com/2011-10-06/opinion/ct-perspec-1006-urban-20111006\\_1\\_poor-children-graduation-rate-gap](http://articles.chicagotribune.com/2011-10-06/opinion/ct-perspec-1006-urban-20111006_1_poor-children-graduation-rate-gap).

178. The discussion in the text notwithstanding, this remains a partly unanswerable question. Even after controlling for observable characteristics, there may be other, unobservable characteristics that affect both family structure and outcomes. A person with strong interpersonal skills might choose to get married and stay married, and this kind of person might also be a more effective parent. This separate characteristic would drive the family structure and the child outcome, but it is very difficult for an outside researcher to identify this characteristic. Researchers try to account for this selection bias in a number of different ways, but there is no easy way around the problem. See Waldfogel et al., *supra* note 172, at 92-93. The longitudinal nature of the Fragile Families Study is an attempt to account for selection bias by identifying events early in a child’s life, such as a high-conflict parental relationship, that predate a family breakup and might separately influence the child’s outcomes. See Sigle-Rushton & McLanahan, *supra* note 166, at 127.

179. McLanahan & Garfinkel, *supra* note 3, at 151.

180. *Id.*

181. For an in-depth exploration of the overwhelming research establishing the essential role of the parent-child relationship in child development, see HUNTINGTON, *supra* note 13, at 5-22.

182. See MARY D. SALTER AINSWORTH, *INFANCY IN UGANDA: INFANT CARE AND THE GROWTH OF LOVE* 345-46 (1967). This does not mean that a parent must be a constant presence in a child’s life, every moment of every day. Rather, what is important to attachment is that a parent is a steady, reliable presence. See *id.*; see also 1 JOHN BOWLBY, *ATTACHMENT AND LOSS: ATTACHMENT* 371-74 (1969) (describing how a securely attached infant will seek proximity to a caregiver, protest when separated from this caregiver, and look for the caregiver when in danger or need).



hood to brain development.<sup>183</sup> And studies have established that academic achievement has deep roots, beginning in the first few years of life and turning on the relationship between a child and a caregiver.<sup>184</sup>

Relationship instability influences the parenting behavior of both mothers and fathers in ways that make it harder for children to get the attachment relationships and attention they need for healthy child development. Beginning with mothers, there is evidence that a transition in partners has a negative effect on maternal parenting. The transition is correlated with an increase in a mother's stress level.<sup>185</sup> This stress, in turn, affects the quality of her parenting, with mothers using harsher discipline and engaging in fewer literacy activities.<sup>186</sup>

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183. A critical mechanism for making and strengthening neural connections is what some neuroscientists call "serve and return" interaction between an attentive, responsive caregiver and a child. See Nat'l Scientific Council on the Developing Child, *Young Children Develop in an Environment of Relationships* 1 (Ctr. on the Developing Child at Harvard Univ., Working Paper No. 1, 2009); see also Nat'l Scientific Council on the Developing Child, *The Timing and Quality of Early Experiences Combine to Shape Brain Architecture* 1-4 (Ctr. on the Developing Child at Harvard Univ., Working Paper No. 5, 2007). The child initiates interaction through babbling, movements, and facial expressions, and the adult responds with sounds and gestures. Through this serve and return, neural connections between different areas of the brain are established and reinforced. See Nat'l Scientific Council on the Developing Child, *Young Children Develop in an Environment of Relationships*, *supra*, at 2. These neural connections forged through interactions with a caregiver become the basis for future communication and social skills. Much critical brain development occurs before a child enters formal schooling at age five, so a family's role is essential. See Nat'l Scientific Council on the Developing Child, *The Timing and Quality of Early Experiences Combine to Shape Brain Architecture*, *supra*, at 1.

184. Consider a study begun in the 1970s by researchers at the University of Minnesota. See L. ALAN SROUFE ET AL., *THE DEVELOPMENT OF THE PERSON: THE MINNESOTA STUDY OF RISK AND ADAPTATION FROM BIRTH TO ADULTHOOD* (2005); Shane Jimerson et al., *A Prospective Longitudinal Study of High School Dropouts Examining Multiple Predictors Across Development*, 38 J. SCH. PSYCHOL. 525 (2000). The Minnesota study began following young, low-income, first-time mothers with low educational attainment while the mothers were still pregnant, and thus researchers were able to track the effect of early childhood experiences on high school graduation rates. See Jimerson et al., *supra*, at 529. The results of the study are startling. Looking back at the data, the researchers could predict with seventy-seven percent accuracy the chance of a three-and-a-half-year-old dropping out of high school using observations of the mother-child relationship and the quality of the home environment. See SROUFE ET AL., *supra*, at 210; see also Jimerson et al., *supra*, at 537-39 (reporting the same seventy-seven percent figure for the combination of gender and the other two factors). This remained true even after controlling for other variables, such as the child's IQ and the family's income level. See L. Alan Sroufe et al., *Conceptualizing the Role of Early Experience: Lessons from the Minnesota Longitudinal Study*, 30 DEVELOPMENTAL REV. 36, 41 (2009).

185. Audrey N. Beck et al., *Partnership Transitions and Maternal Parenting*, 72 J. MARRIAGE & FAM. 219, 220, 230 (2010); McLanahan & Garfinkel, *supra* note 3, at 153.

186. See Beck et al., *supra* note 185, at 230; see also *id.* (finding that parental education influenced these outcomes, with college-educated mothers more likely to respond to partner transitions with decreased literary activities and mothers with less education more likely to respond with harsh parenting strategies). Additionally, a transition in partners is associated with a decline in maternal physical and mental health, even if only temporarily. McLanahan & Garfinkel, *supra* note 3, at 152-53. Other researchers have found that the *entry* into a new

Family instability also affects parenting by fathers. The problem is that when relationships between unmarried parents end, fathers slowly disengage from the family. Children thus lose out; studies have found numerous benefits for children when nonresidential fathers maintain a high-quality relationship with their children.<sup>187</sup>

Paternal involvement is particularly sensitive to the presence of the mother's new partner. When she has a new relationship, the biological father reduces both the quantity and quality of his contact with his child.<sup>188</sup> If the mother leaves the new partner, the biological father's involvement increases again.<sup>189</sup>

And the mother's new partner is not necessarily an adequate replacement for the biological father. Earlier research indicated that mothers' new partners (whether married or unmarried) typically invested less in the children than the

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relationship has a positive or neutral impact on maternal well-being but the *exit* from a relationship, whether with a biological or social father, negatively influences maternal well-being. See Cynthia Osborne et al., *Family Structure Transitions and Changes in Maternal Resources and Well-Being*, 49 *DEMOGRAPHY* 23, 35 (2012) (using the one-year and five-year interviews from the Fragile Families dataset to measure the influence of transitions on mothers, and concluding that the dissolution of a relationship is associated with a decrease in perceived social support and increases in material hardship, maternal depression, and parenting stress).

187. For example, a meta-analysis of fifty-two studies of involvement by nonresidential fathers, both divorced and unmarried, found that father involvement in children's activities and a high-quality father-child relationship were both positively associated with child outcomes, although contact alone (the amount of time a father spent with a child) was not determinative. Kari Adamsons & Sara K. Johnson, *An Updated and Expanded Meta-Analysis of Nonresident Fathering and Child Well-Being*, 27 *J. FAM. PSYCHOL.* 589, 595-98 (2013). The researchers further found that the strongest correlation was for social outcomes, although there was a statistically significant correlation for children's emotional well-being, academic achievement, and behavioral adjustment. *Id.* at 589, 593 tbl.2, 596. In a different study, two researchers performed a meta-analysis of sixty-three studies of nonresidential fathers, although they did not distinguish which studies were of divorced families versus nonmarital families, and found that the payment of child support and engagement in authoritative parenting were positively associated with academic achievement and fewer externalizing and internalizing behaviors. Paul R. Amato & Joan G. Gilbreth, *Nonresident Fathers and Children's Well-Being: A Meta-Analysis*, 61 *J. MARRIAGE & FAM.* 557, 567-69 (1999). They tentatively concluded that father involvement was a causal factor in the outcomes. *Id.* at 568-69. Finally, researchers examining both divorced and unmarried nonresidential fathers found that responsive parenting and high-quality relationships between nonresidential fathers and their children that included warm and supportive fathering were associated with fewer externalizing and internalizing behaviors among adolescent children. Valarie King & Juliana M. Sobolewski, *Nonresident Fathers' Contributions to Adolescent Well-Being*, 68 *J. MARRIAGE & FAM.* 537, 546-54 (2006). The researchers further found that these factors were associated with academic success for boys but not girls. *Id.* at 550.

188. McLanahan & Garfinkel, *supra* note 3, at 153. When a father takes on a new partner he also decreases his involvement with the child, but his repartnering has less of an impact on his involvement than the mother taking on a new partner. *Id.*

189. *Id.* at 154.

biological fathers.<sup>190</sup> More recent research, however, suggests that new partners may be doing more parenting than previously thought,<sup>191</sup> although many questions remain.<sup>192</sup>

Multipartner fertility also affects the parenting of both mothers and fathers. When a mother has a child by a new partner, her family and friends are less willing to help out, especially financially, increasing the economic strain on the mother and making it harder for her to care for her children.<sup>193</sup> And when a father has children with multiple partners, the quality of his relationship with his current partner is diminished and the relationship is less likely to last, often because of jealousy of the father's other children and former partners.<sup>194</sup> When the new relationship does end, the poor quality of the relationship makes it harder for the father to co-parent the most recent child, meaning he is likely to disengage from this new family as well.<sup>195</sup>

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190. See Sandra L. Hofferth & Kermyt G. Anderson, *Are All Dads Equal? Biology Versus Marriage as a Basis for Paternal Investment*, 65 J. MARRIAGE & FAM. 213, 227, 230 (2003); Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families*, 65 J. MARRIAGE & FAM. 876, 879, 890 (2003). And children who live with a mother and her partner face other risks, such as a greatly heightened incidence of child abuse and neglect. ANDREA J. SEDLAK ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4): REPORT TO CONGRESS 12 (2010), available at [http://www.acf.hhs.gov/sites/default/files/opre/nis4\\_report\\_congress\\_full\\_pdf\\_jan2010.pdf](http://www.acf.hhs.gov/sites/default/files/opre/nis4_report_congress_full_pdf_jan2010.pdf). For a summary of the older research on stepfathers and cohabiting partners, see Susan D. Stewart, *How the Birth of a Child Affects Involvement with Stepchildren*, 67 J. MARRIAGE & FAM. 461, 462 (2005).

191. See Lawrence M. Berger et al., *Parenting Practices of Resident Fathers: The Role of Marital and Biological Ties*, 70 J. MARRIAGE & FAM. 625, 629-36 (2008) (using the Fragile Families data from the five-year phone interviews with mothers to examine the parenting practices of biological and social fathers, married and unmarried, and finding that, contrary to earlier research, the parenting practices of social fathers, regardless of marital status, were equal to and in some cases superior to the parenting practices of biological fathers, as measured by engagement with the nonbiological child, shared responsibility with the biological mother, cooperation with the biological mother, and trust by the biological mother).

192. There were several limitations of this study. First, the data were drawn from reports by mothers, which could be biased in favor of the current partner rather than the biological father because other studies have suggested a divergence between reports by mothers and fathers on parenting contributions by fathers. Second, the sample may not have been representative. Third, the data did not account for other kinds of parenting investments, such as material support. Finally, the data reflected a point-in-time approach and did not inquire into the long-term impact of social fathers; if the relationship between a mother and social father dissolved, as is often the case, the child would not have the benefit of the social father over an extended period of time. See *id.* at 636-37.

193. See McLanahan & Garfinkel, *supra* note 3, at 154.

194. *Id.* Parents report that this relationship difficulty stems from jealousy about the existing family, distrust about where the fathers' loyalties lie, and resentment of the time the fathers spend with children in other households because it takes away from the children in the current household. *Id.*

195. See *id.*

In sum, family instability and multipartner fertility are additional causal factors that influence child outcomes because both practices affect the quality of parenting, the kind of attention children receive, and the investment by fathers in the family.

As the next Subpart demonstrates, marital family law is part of the problem, making it much harder for parents to get along with each other and provide their children with the relationships that are critical to child development.

### C. *Marital Family Law's Fundamental Mismatch*

As the narrative portrait makes clear, relationships that lead to nonmarital childbearing are tenuous from the start and unlikely to last. One problem with marital family law is that it fails to offer unmarried couples a legal status that might be more appealing culturally and socially<sup>196</sup> and that might, in turn, help solidify the relationship between the parents. But given the tenuous nature of the bond between the parents and the limited economic and social resources of the men, it is far from clear that family law should try to cement the relationship through marriage. The bigger problem with marital family law, then, is that it does not help unmarried parents develop a co-parenting relationship that would defuse conflict and enable both parents to provide children with the attentive, responsive relationships they need. Co-parenting outside of a committed relationship is challenging, but marital family law makes it particularly difficult for unmarried parents.

As elaborated below, marital family law's legal rules encourage maternal gatekeeping and increase acrimony between parents. Marital family law's reliance on the court system to help families transition from a romantic relationship to a co-parenting relationship leaves many unmarried parents without an effective institution to help them negotiate this transition. Finally, marital family law's reinforcement of traditional gender norms casts unmarried fathers as failures in the eyes of children and mothers.

#### 1. *Legal rules*

Marital family law's rules harm nonmarital families in two important ways. First, marital family law empowers mothers to determine whether and when fathers will see their children. This gatekeeping is a problem because of the developmental importance of strong relationships with caregivers. When fathers do not see their children consistently, it is much harder for them to provide their children with the time and attention necessary for child development.

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196. See Lenhardt, *supra* note 15 (manuscript at 15-36) (describing the multiple reasons why unmarried couples may choose not to marry, particularly in light of the role marriage historically has played in the racial subordination of nonwhite populations, including African Americans, Puerto Ricans, and Native Americans).

As explained in Part I, marital family law is solicitous of the relationship between married fathers and their children. The marital presumption ensures that married fathers are automatically considered legal fathers. The vast majority of married fathers live with their children at birth, so custody is not an immediate concern. And if marriages end, courts will issue legally binding orders determining exactly when and where fathers will see their children.

Unmarried fathers have none of these protections.<sup>197</sup> They are not automatically granted parental rights at birth.<sup>198</sup> Instead, family law insists that an unmarried father prove his fatherhood by, for example, signing a “voluntary acknowledgment of paternity,”<sup>199</sup> living with the child for two years and holding the child out as his own,<sup>200</sup> initiating a legitimacy action,<sup>201</sup> or, if he is unsure if a child even exists, placing his name on a putative father registry.<sup>202</sup>

Even if a man is considered a legal father, this does not necessarily mean he has custody or a right to visitation. Marital family law assumes the child is living with both parents; therefore, most states do not have a default rule allo-

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197. As explained in the text, family law does offer unmarried fathers some avenues for establishing parental rights, and in this way, family law is trying to accommodate nonmarital families, but many of these provisions are incomplete and unsatisfying. *See Harris, supra* note 35, at 1307-35 (explaining how a voluntary acknowledgment of paternity provides less protection to the named father than the marital presumption). Moreover, to the extent the avenues for legal rights require unmarried couples to act like married couples or married parents, these rules do not reflect the reality of nonmarital family life. *See AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* § 6.01(1), at 907, § 6.03(1), at 916 (2002) (treating a couple as domestic partners if they “share a primary residence and a life together” for a “significant period of time”); *id.* § 2.03(1)(c), at 107-08 (conferring parental rights on a functional, or “*de facto*,” parent when the person lives with the child for at least two years and provides at least an equal share of the caretaking responsibilities for the child for a primary purpose other than remuneration).

198. Biology alone is not enough to establish paternal rights as a constitutional matter. *See Lehr v. Robertson*, 463 U.S. 248, 267-68 (1983) (holding that where an unwed father had taken no steps to establish a relationship with his child or support the child economically, the state could order an adoption without his consent). Fathers do have a procedural due process right to establish that they are fit custodians of their children. *Stanley v. Illinois*, 405 U.S. 645, 656-58 (1972).

199. 42 U.S.C. § 666(a)(5)(C) (2013) (setting out the requirements); UNIF. PARENTAGE ACT §§ 201(b)(2), 301 (amended 2002), 9B U.L.A. 15, 20-22 (Supp. 2008); UNIF. PARENTAGE ACT § 302, 9B U.L.A. 314 (2000). For a sample voluntary acknowledgment of paternity, which clarifies that the father has no rights until he signs it, see Div. of Child Support Enforcement, N.Y. State Office of Temp. & Disability Assistance, In-Hospital Acknowledgement of Paternity (2013), *available at* <https://www.childsupport.ny.gov/dese/pdfs/aop2013A.pdf>. At the time it was initially written in 1973, the Uniform Parentage Act was understood to be a progressive response that at least offered nonmarital fathers a means for establishing paternity. *See Harris, supra* note 35, at 1301-03.

200. UNIF. PARENTAGE ACT § 204(a)(5), 9B U.L.A. at 16-17 (Supp. 2008).

201. *Id.* §§ 601, 602(3), 9B U.L.A. at 338-39 (2000).

202. *Id.* §§ 402, 411, 9B U.L.A. at 322, 324-25 (2000).

cating custody between parents at birth.<sup>203</sup> If a state does have a default rule, it strongly favors the mother: in fifteen states, when a child is born to unmarried parents, the mother automatically gets sole custody of the child, and the father must petition the court for custody or visitation.<sup>204</sup> Sometimes this is done as

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203. The majority of states do not have a rule governing custody at birth. A number of states have provisions that say both parents, regardless of marital status, have a right to a relationship with the child. *See, e.g.*, COLO. REV. STAT. § 19-4-103 (2014) (“The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.”); 750 ILL. COMP. STAT. 45/3 (2014) (“The parent and child relationship, including support obligations, extends equally to every child and to every parent, regardless of the marital status of the parents.”). But this is very different from granting actual custody, because it is possible to be a legal parent but still not have custody of a child.

204. Arkansas’s statutory scheme illustrates this approach. That state’s laws provide that “[w]hen a child is born to an unmarried woman, legal custody of that child shall be in the woman giving birth to the child until the child reaches eighteen (18) years of age unless a court of competent jurisdiction enters an order placing the child in the custody of another party.” ARK. CODE ANN. § 9-10-113(a) (2014). After establishing paternity, an unmarried father “may petition the circuit court in the county where the child resides for custody of the child,” *id.* § 9-10-113(b), but he does not get custody, or even visitation, without a court order, *see id.* § 9-10-113(d) (“When in the best interest of a child, visitation shall be awarded in a way that assures the frequent and continuing contact of the child with the mother and the biological father.”). Other states have similar regimes. *See* ARIZ. REV. STAT. ANN. § 13-1302(B) (2014) (“If a child is born out of wedlock, the mother is the legal custodian of the child for the purposes of this section until paternity is established and custody or access is determined by a court.”); FLA. STAT. § 744.301(1) (2014) (“The mother of a child born out of wedlock is the natural guardian of the child and is entitled to primary residential care and custody of the child unless the court enters an order stating otherwise.”); GA. CODE ANN. § 19-7-25 (2014) (“Only the mother of a child born out of wedlock is entitled to custody of the child, unless the father legitimates the child . . . .”); IOWA CODE § 600B.40 (2014) (“The mother of a child born out of wedlock whose paternity has not been acknowledged and who has not been adopted has sole custody of the child unless the court orders otherwise.”); MD. CODE ANN., EST. & TRUSTS § 1-208(a) (LexisNexis 2014) (“A child born to parents who have not participated in a marriage ceremony with each other shall be considered to be the child of his mother.”); MASS. GEN. LAWS ch. 209C, § 10(b) (2014) (“Prior to or in the absence of an adjudication or voluntary acknowledgment of paternity, the mother shall have custody of a child born out of wedlock. In the absence of an order or judgment of a probate and family court relative to custody, the mother shall continue to have custody of a child after an adjudication of paternity or voluntary acknowledgment of parentage.”); MINN. STAT. § 257.541(1) (2014) (“The biological mother of a child born to a mother who was not married to the child’s father when the child was born and was not married to the child’s father when the child was conceived has sole custody of the child . . . .”); MINN. STAT. § 257.541(3) (“If paternity has been recognized . . . , the father may petition for rights of parenting time or custody in an independent action . . . .”); NEV. REV. STAT. § 126.031(2)(a) (2014) (“[T]he mother of a child born out of wedlock has primary physical custody of the child . . . .”); OHIO REV. CODE ANN. § 3109.042 (LexisNexis 2014) (“An unmarried female who gives birth to a child is the sole residential parent and legal custodian of the child until a court of competent jurisdiction issues an order designating another person as the residential parent and legal custodian.”); OKLA. STAT. tit. 10, § 7800 (2014) (“Except as otherwise provided by law, the mother of a child born out of wedlock has custody of the child until determined otherwise by a court of competent jurisdiction.”); S.C. CODE ANN. § 63-17-20(B) (2014) (“Unless the court orders otherwise, the custody of an illegitimate child is solely in

part of a paternity action, but not always.<sup>205</sup> Family law thus assumes that there are either two married (or cohabiting) parents or only one unmarried parent. There is no accommodation for two unmarried parents living apart but both invested in establishing a relationship with the child.

This lack of an automatic right to custody upon birth for fathers allows mothers to act as *de facto* gatekeepers, permitting a father to see his child only if the mother approves of the contact.<sup>206</sup> This can be exceptionally difficult in light of family complexity. Mothers may have good reasons for limiting contact, such as domestic violence or substance abuse. However, some mothers may bar fathers from seeing their children for less sympathetic reasons, such as a desire to limit jealousy from a current partner.<sup>207</sup> Unmarried fathers could go to court to secure a custody order, but most do not.<sup>208</sup>

The second way that marital family law's legal rules harm nonmarital families is by exacerbating the stress associated with a complex family. As described above, the difficulty of managing former and current partners distracts a mother from providing her child with the time and attention needed for healthy child development. Marital family law's rules make it harder for her to maintain a functioning co-parenting relationship with the father or fathers of her children, likely contributing to the difficulty of family complexity.

Consider the child support system, which plays an enormous role in family life today, affecting one in four children in the United States and half of all children living in poverty.<sup>209</sup> For nearly every family in the Edin and Nelson

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the natural mother unless the mother has relinquished her rights to the child.”); S.D. CODIFIED LAWS § 25-5-10 (2014) (“The mother of an unmarried minor born out of wedlock is entitled to its custody . . . .”); TENN. CODE ANN. § 36-2-303 (2014) (“Absent an order of custody to the contrary, custody of a child born out of wedlock is with the mother.”); WIS. STAT. § 767.82(2m) (2014) (“If there is no presumption of paternity . . . or if paternity is acknowledged . . . , the mother shall have sole legal custody of the child until the court orders otherwise.”). There is no study showing that mothers in these states are more likely to act as gatekeepers than in states with a different initial allocation of custody, but the anachronistic rule reflects and expresses marital family law's differential treatment of unmarried fathers.

205. *See, e.g.*, BROWN & COOK, *supra* note 67, at 1, 3, 5.

206. *See supra* text accompanying notes 155-59.

207. *See supra* text accompanying notes 156-63.

208. The OCSE identified several reasons why unmarried fathers typically do not secure a custody order, including the absence of a “systematic, efficient mechanism for [unmarried parents] to establish parenting time agreements.” *See* OFFICE OF CHILD SUPPORT ENFORCEMENT, *supra* note 74, at 1. The OCSE further noted the problem that “child support systems and other family law systems are often distinct, requiring unmarried parents to participate in multiple, often overlapping, legal proceedings in order to resolve issues of child support and parenting time,” which “typically requires a parent to initiate a separate legal proceeding. And, in order to clarify multiple legal obligations and responsibilities, many families with modest means must engage with complicated legal systems, usually without the benefit of legal representation.” *Id.* at 1-2.

209. OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD SUPPORT FACT SHEET SER. NO. 1, FAMILY-CENTERED INNOVATIONS IMPROVE

study, child support was a source of tremendous acrimony and divisiveness, making an already difficult co-parenting situation even worse.<sup>210</sup> The central problem is that the system imposes unrealistic expectations, angering mothers, who are annoyed that fathers are not meeting their obligations, and fathers, who are frustrated by the onerous debt.<sup>211</sup>

Child support laws are relatively effective for divorcing families, with most custodial parents (typically mothers) receiving full or partial payment of the child support owed.<sup>212</sup> These laws are also an important tool in fighting poverty, at least for those families that receive child support payments.<sup>213</sup> But never-married custodial parents are much less likely to receive full payment than divorced custodial parents,<sup>214</sup> and they receive a lower percentage of the overall amount owed.<sup>215</sup> This should come as no surprise given the characteristics of unmarried fathers. Recall that in the Fragile Families Study, at the time the focal child was born, 42% of the unmarried fathers had been in prison, and 45%

CHILD SUPPORT OUTCOMES 1 (2011), available at [http://www.acf.hhs.gov/sites/default/files/ocse/family\\_centered\\_innovations.pdf](http://www.acf.hhs.gov/sites/default/files/ocse/family_centered_innovations.pdf).

210. See EDIN & NELSON, *supra* note 16, at 111-12, 144, 165, 215.

211. Another problem is the “assignment” rules under the federal welfare program, Temporary Assistance for Needy Families (TANF). To receive the maximum amount of TANF funds to which she is eligible, a mother must cooperate with the state in establishing paternity, 42 U.S.C. § 608(a)(2) (2013), and then assign to the state her right to receive child support, 42 U.S.C. § 608(a)(3). The state thus becomes the beneficiary of the child support obligation, and instead of owing the mother money, the father owes the state money. Fathers are particularly resentful of this policy because it means their children are not receiving the money they are paying, at least not directly. See Kohn, *supra* note 34, at 535.

212. See GRALL, *supra* note 63, at 7 tbl.2 (reporting that in 2007, 51.2% of divorced custodial parents received the full amount of child support due, and 75.6% received at least partial payment).

213. See OFFICE OF CHILD SUPPORT ENFORCEMENT, *supra* note 209, at 2 (stating that child support payments lift one million people out of poverty each year, and that child support payments account for 10% of all income for custodial families living in poverty and 40% of all income for custodial families living in poverty who receive child support payments); VICKI TURETSKY, CTR. FOR LAW & SOC. POLICY, THE CHILD SUPPORT ENFORCEMENT PROGRAM: A SOUND INVESTMENT IN IMPROVING CHILDREN’S CHANCES IN LIFE 2-4 (2005), available at <http://www.clasp.org/resources-and-publications/publication-1/0245.pdf> (describing how the child support program has grown since its inception and its record in fighting poverty). *But see* OFFICE OF CHILD SUPPORT ENFORCEMENT, *supra* note 209, at 2 (acknowledging that the child support program “has been less effective for the approximately 25 percent of noncustodial parents who have a limited ability to pay child support”); Brito, *supra* note 34, at 628-33 (arguing that the enforcement system effectively collects child support payments from economically stable fathers at the expense of the 26% of noncustodial fathers who lack economic means).

214. See GRALL, *supra* note 63, at 7 tbl.2 (finding that 39.6% of never-married custodial parents received the full amount of child support owed, as compared with 51.2% of divorced custodial parents).

215. See *id.* (finding that never-married custodial parents received 53.0% of child support owed, as compared with 70.4% for divorced custodial parents).



of those fathers had dropped out of high school.<sup>216</sup> These men face a marketplace with few available jobs for individuals with such backgrounds. Various forces have contributed to the loss of middle-class jobs,<sup>217</sup> and manufacturing jobs in particular are in decline and projected to erode even further.<sup>218</sup> The result is a polarized marketplace that needs workers with analytical skills and higher education on the one hand and workers for low-paying service jobs on the other.<sup>219</sup> Men with a college degree are able to take advantage of higher-paying jobs, but the opportunities for men without college degrees are in the service sector, doing low-skilled work in retail, health care, education, and food service.<sup>220</sup> In these jobs, women predominate, partly because service jobs de-

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216. See *supra* text accompanying notes 92, 97.

217. These factors include technology, globalization, and the growing manufacturing power of the developing world, most notably India and China. See DAVID AUTOR, CTR. FOR AM. PROGRESS & THE HAMILTON PROJECT, THE POLARIZATION OF JOB OPPORTUNITIES IN THE U.S. LABOR MARKET: IMPLICATIONS FOR EMPLOYMENT AND EARNINGS 4, 11, 13 (2010), available at [http://www.brookings.edu/~media/research/files/papers/2010/4/jobs%20autor/04\\_jobs\\_autor.pdf](http://www.brookings.edu/~media/research/files/papers/2010/4/jobs%20autor/04_jobs_autor.pdf) (suggesting that the recession of 2007-2009 continued the trend of computerizing middle-skill jobs and sending many of these jobs offshore, and further arguing that following the recession, there was no change in unemployment rates for high-skill occupations or low-skill service jobs, while employment dropped 8% for mid-level sales and office jobs and 16% for blue-collar manufacturing and operative jobs); ALLAN ORNSTEIN, CLASS COUNTS: EDUCATION, INEQUALITY, AND THE SHRINKING MIDDLE CLASS 225 (2007); Richard B. Freeman, *Is a Great Labor Shortage Coming? Replacement Demand in the Global Economy*, in RESHAPING THE AMERICAN WORKFORCE IN A CHANGING ECONOMY 3, 10 (Harry J. Holzer & Demetra Smith Nightingale eds., 2007).

218. News Release, Bureau of Labor Statistics, Employment Projections—2010-20 (Feb. 1, 2012), available at [http://www.bls.gov/news.release/archives/ecopro\\_02012012.pdf](http://www.bls.gov/news.release/archives/ecopro_02012012.pdf). The middle class continues to shrink as the disparity between wages for those who have graduated from college and those who have not widens. As Autor describes:

Real hourly earnings of college-educated workers rose anywhere from 10 to 37 percent between 1979 and 2007, with the greatest gains among workers with a postbaccalaureate degree.

Simultaneously, real earnings of workers with high school or lower educational levels either stagnated or declined significantly. These declines were especially steep among males: 12 percent for high school graduates and 16 percent for high school dropouts.

AUTOR, *supra* note 217, at 6. He further found that “[c]ollege graduates work more hours per week and more weeks per year than high school graduates, spend less time unemployed, and receive a disproportionate share of nonwage fringe benefits, including sick and vacation pay, employer-paid health insurance, pension contributions, and safe and pleasant working conditions.” *Id.* at 5.

219. High-skill jobs require the problem-solving and intuitive abilities that are usually developed in higher education and cannot be mechanized or easily taught to employees abroad. On the other end of the spectrum, low-skill manual jobs such as home health aides, cab drivers, and janitors require little education but do demand an ability to communicate with others and adapt to a variety of situations, physical presence, and, often, physical strength, none of which can be replicated by a computer or by workers who are located in other countries. See AUTOR, *supra* note 217, at 12.

220. HARRY J. HOLZER & MAREK HLAVAC, A VERY UNEVEN ROAD: US LABOR MARKETS IN THE PAST 30 YEARS 19, 20 tbl.5b (2012), available at <http://www.s4.brown.edu/us2010/Data/Report/report03082012.pdf>.

mand interpersonal skills more typically associated with women but also because involvement in the criminal justice system disproportionately excludes men from consideration.<sup>221</sup>

Despite some promising reforms,<sup>222</sup> child support laws largely fail to take into account the dismal economic circumstances of unmarried fathers and instead create unrealistic obligations.<sup>223</sup> Perhaps the starkest example of this is that many states continue to impose child support obligations when fathers are in prison, meaning that men leave prison terms only to face extraordinarily high debts and very few options for lawful work.<sup>224</sup> One study found the average increase in child support debts during a prison term to be \$5250.<sup>225</sup> In light of the strict enforcement scheme required under federal law,<sup>226</sup> fathers who are behind in their payments—as these men surely are—face serious penalties, including incarceration.<sup>227</sup> Moreover, some of the penalties for nonpayment of child support, such as the suspension of a driver’s license, make it even harder for men to earn money.<sup>228</sup> This creates a vicious cycle: fathers who are behind in their child support payments face sanctions that virtually ensure they will fall even further behind.

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221. See WILLIAM JULIUS WILSON, *MORE THAN JUST RACE: BEING BLACK AND POOR IN THE INNER CITY* 76-78 (2009). Women, including women with lower levels of educational attainment, have not experienced the same job losses, partly because they are in so-called “pink-collar” jobs—low-skill, service-based jobs such as home health aides. Women are also far less likely than men to have a criminal record. In 2012, for example, 73.8% of all arrestees were male and 26.2% were female. See *Table 42: Arrests by Sex, 2012*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/42tabledatadecoverviewpdf> (last visited Jan. 7, 2015).

222. See OFFICE OF CHILD SUPPORT ENFORCEMENT, *supra* note 209, at 1-3 (describing efforts to establish more realistic payment obligations for noncustodial parents and grant debt relief for past amounts due where parents are making payments, and further describing the shift from a purely enforcement model to a model of “family-centered services”); Jane C. Venohr, *Child Support Guidelines and Guidelines Reviews: State Differences and Common Issues*, 47 *FAM. L.Q.* 327, 340-41 (2013) (describing state efforts to address problems facing low-income obligors, including some states ensuring that child support obligations do not accrue while the obligor is in prison and also setting very minimal payments, such as fifty dollars per month). For further discussion of these nascent efforts, see text accompanying notes 326-36 below.

223. See Kohn, *supra* note 34, at 533 (discussing the difficulty low-income men face in meeting even seemingly low child support obligations).

224. See Cammett, *supra* note 34, at 314-15.

225. Esther Griswold & Jessica Pearson, *Twelve Reasons for Collaboration Between Departments of Correction and Child Support Enforcement Agencies*, *CORRECTIONS TODAY*, June 2003, at 87, 87.

226. See 42 U.S.C. § 654 (2013).

227. REBECCA MAY & MARGUERITE ROULET, *CTR. FOR FAM. POLICY & PRACTICE, A LOOK AT ARRESTS OF LOW-INCOME FATHERS FOR CHILD SUPPORT NONPAYMENT: ENFORCEMENT, COURT AND PROGRAM PRACTICES* 8-11 (2005).

228. See Brito, *supra* note 34, at 650 (describing the range of penalties).

Mothers are understandably angry that they have little economic support,<sup>229</sup> but child support rules make it seem like the fathers *should* be able to pay, when in fact many cannot. Fathers are understandably angry because they are saddled with unrealistic expectations and little help in trying to fulfill them. As a result, each parent blames the other,<sup>230</sup> making it much harder to cooperate in raising the shared child.

In both of these important ways—allowing mothers to exclude fathers from their children’s lives and exacerbating acrimony in an already challenging situation—marital family law makes it harder for parents to provide children with the relationships they need.

Family law does make some accommodations for nonmarital families. Unmarried fathers at least have mechanisms for establishing legal fatherhood, and child support laws apply equally to parents, regardless of marital status.<sup>231</sup> Family law’s legal rules thus acknowledge that nonmarital families exist but treat these families as marginal, unworthy of the same rights and presumptive default rules as marital families. Even more important, marital family law fails to recognize the needs of nonmarital families for clear custody rules on birth as well as laws and policies that help decrease acrimony.

## 2. *Legal institutions*

The second problem with marital family law is that it relies solely on the court system, leaving many unmarried couples without an effective mechanism to transition from a romantic relationship to a co-parenting relationship. As Part I described, when a married couple divorces, the courts manage the family transition. Custody and visitation orders ensure both parents have a legally enforceable right to maintain a relationship with a child; detailed parenting plans provide parents an opportunity to think through tricky co-parenting issues before conflicts arise; parenting coordinators mediate conflicts; and co-parenting classes prepare parents for the new world of parenting after a divorce.

Although these services are accessible in theory, most unmarried couples do not have this support in practice. Unmarried couples have no need for a court order of dissolution because the state never sanctioned the relationship at its start. An unmarried couple *could* go to court at the end of the relationship and seek a custody or visitation order,<sup>232</sup> giving them access to court-based re-

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229. See EDIN & NELSON, *supra* note 16, at 215.

230. See *id.* at 208, 215.

231. Historically, only married fathers were obliged to support their children economically, not unmarried fathers. See Kristin Collins, Note, *When Fathers’ Rights Are Mothers’ Duties: The Failure of Equal Protection in Miller v. Albright*, 109 YALE L.J. 1669, 1682-85 (2000).

232. The right to custody is not limited to marital parents. See *supra* note 203.

sources such as parenting programs and parenting coordinators.<sup>233</sup> But in practice, court orders are difficult to come by for low-income families.<sup>234</sup> Lawyers are expensive.<sup>235</sup> Legal services and legal aid cannot begin to meet the demand for representation in family law matters.<sup>236</sup> And litigants are often unfamiliar with, or wary of, the court system.<sup>237</sup> Indeed, family law is one of the top access-to-justice issues facing the legal system.<sup>238</sup>

Without custody orders and parenting plans in place, unmarried mothers continue to act as de facto gatekeepers to shared children, and unmarried fathers are less likely to see their children as a result. Additionally, when parents have no assistance in negotiating the tricky world of co-parenting, they must handle the stress of the family transition on their own, likely affecting the quality of their parenting.

In short, by assuming all couples will go to court when their relationship dissolves, marital family law fails to provide an effective institution for helping a nonmarital family transition to a postrelationship life and establish clear expectations and legally protected rights, particularly around custody.

### 3. *Gender norms*

The final way that marital family law harms nonmarital families is by reinforcing traditional gender norms that are completely out of sync with nonmarital family life. The mother-as-caregiver and father-as-breadwinner norms are increasingly inapt for married parents.<sup>239</sup> But they are wholly inaccurate for unmarried parents: women, in addition to full-time caregiving, are typically the primary source of economic support for the family, and men contribute little socially and even less economically.<sup>240</sup>

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233. An additional hurdle, however, is that some resources, such as parenting coordinators, are paid for by the couple, not the state. *See, e.g.*, COLO. REV. STAT. § 14-10-128.1(6) (2014).

234. *See supra* note 74 (describing a report from the OCSE explaining why unmarried parents typically do not go to court).

235. The high level of pro se representation in family law matters is some evidence that families cannot afford lawyers or at least are choosing not to invest their limited resources in hiring a lawyer. *See, e.g.*, TASK FORCE ON SELF-REPRESENTED LITIGANTS, JUDICIAL COUNCIL OF CAL., STATEWIDE ACTION PLAN FOR SERVING SELF-REPRESENTED LITIGANTS 2 (2004) (noting that in California, sixty-seven percent of litigants in family court proceedings are self-represented).

236. *See, e.g.*, COLO. LEGAL SERVS., REPORT ON THE LEGAL NEEDS ASSESSMENT 17, 21, 23, app. C at 2 (2011) (describing the tremendous demand for family law representation in Colorado).

237. *See supra* note 74 and accompanying text.

238. *See* LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 1-2 (2009).

239. *See supra* note 62.

240. *See supra* text accompanying notes 140-49 (describing the limited economic and social contributions made by the nonresidential fathers in the Edin and Nelson study); *see*

In addition to fueling animosity between unmarried parents, then, another problem with the child support laws is that they reinforce the notion that men add value to the family primarily through their economic contributions, not their caregiving. Given the disparity between their abilities and the jobs available, unmarried fathers are unlikely to become meaningful breadwinners. By sending the message that the only “parenting” required of fathers is that they pay child support, marital family law underscores the economic failure of these fathers and devalues the caregiving that they try to offer. As Edin and Nelson found, the fathers in their study wanted a more meaningful relationship with their children than simply providing funds,<sup>241</sup> and yet the only thing the legal system demands of them is money.

The continued application of these outdated norms, and the sense of failure they generate among unmarried fathers, leads many men to disengage from their children. Many of the men Edin and Nelson interviewed wanted to see their children but felt they could do so only when they had money to spend on them.<sup>242</sup> When they did not have enough money to buy even the smallest of treats, they chose to stay away altogether.<sup>243</sup> These men inevitably compared themselves with the mother’s new partner, who often was able to spend money on the child, leaving the fathers feeling even worse about their role as a father.<sup>244</sup>

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Income is a factor in most of these problems, exacerbating the mismatch between marital family law and nonmarital family life. Fathers could overcome gatekeeping by going to court, but most unmarried fathers cannot afford to do so.<sup>245</sup> Parents could access court-related resources such as parenting coordinators, but only if they had the money to bring a court action and pay the coordinator. And child support is less of an issue for economically stable men than for

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*also supra* note 109 (describing the limited economic and social contributions unmarried fathers make even when they do live in the same household as the mother and child as compared with residential married fathers).

241. *See* EDIN & NELSON, *supra* note 16, at 215.

242. *See id.* at 104-29, 208-09.

243. *Id.* at 208.

244. *See id.* at 209.

245. *See supra* text accompanying notes 234-35. Even before a breakup, unmarried middle-class couples are increasingly finding ways to work around the problems with marital family law. *See* Tatiana Boncompagni, *All the Conventional Cohabitation, but No Nuptials*, N.Y. TIMES (July 3, 2014), <http://www.nytimes.com/2014/07/06/fashion/weddings/all-the-conventional-cohabitation-but-no-nuptials.html> (describing a growing trend among unmarried middle-class couples to write cohabitation or “no-nuptial” agreements specifying obligations toward each other, division of property, and so on); *see also* FREDERICK HERTZ, COUNSELING UNMARRIED COUPLES: A GUIDE TO EFFECTIVE LEGAL REPRESENTATION, at xxiv, 161-64 (2d ed. 2014) (providing advice to unmarried couples on how to structure legally binding agreements that determine issues such as property division upon separation).

those with low incomes. But these economic challenges are not limited to low-income families. Lawyers are still expensive for middle-income families,<sup>246</sup> and the impact of the changing economy affects both low- and middle-income men, making it harder for both to earn sufficient wages to support a family.<sup>247</sup> Moreover, in some instances, income does not matter. Married fathers, for example, do not need to take any action to establish parental rights to their children, but unmarried fathers do.

In short, we need a fundamentally new way for the state to approach family life, which begins with a new understanding of what should drive that regulatory regime.

### III. A THEORY OF POSTMARITAL REGULATION

Consider the following thought experiment: If marriage had never existed, how would the law regulate families? Most people would agree that the state has both a moral and an instrumental interest in the well-being of children, but there is deep disagreement about how to promote that well-being. Some feminist scholars would answer that the parent-child relationship is the only relationship that matters to the state and that legal regulation should therefore shore up that relationship and leave romantic relationships between adults out of the purview of direct legal regulation. By contrast, others would contend that children are best cared for within the context of a two-parent family, that a single parent is more likely to turn to the state for support, thus creating an unhealthy dependency, and, therefore, that the state should create an institution that solidifies the relationship between the adults and allows the state to step back from family life. This institution could be called marriage, and proponents would say that the state should focus its efforts on defining and protecting that core institution.

Both sides get it wrong. The feminist argument fails to recognize that even if we never had marriage, as is true for nonmarital families, the relationship between the parents would still deeply influence child outcomes and therefore is an important focus of legal regulation. And the marriage primacy view fails to recognize that marriage alone will not help a family address the multiple structural problems compounding inequality and, for many families, would cement an unhealthy relationship.

This Part accordingly proposes a new theoretical framework for postmarital family law that centers the parental relationship outside of marriage. The animating principle is that not all romantic relationships between parents will or should last, but parents' functional relationships are still essen-

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246. The high rate of pro se representation in family law cases is some indication of the inability or unwillingness of large portions of the population to hire a lawyer. *See supra* note 235 (describing how sixty-seven percent of family law litigants in California are pro se).

247. *See supra* text accompanying notes 217-19 (describing the structural changes in the economy associated with the loss of middle-class jobs, especially for men).

tial for child well-being. The goal of legal regulation should be to help parents become effective co-parents so they can provide children with the relationships necessary for child development. Helping parents work together should not, however, be the sum total of the state's efforts to support nonmarital families because even high-quality co-parenting does not address other causes of inequality. Instead, it must be part of a package that first helps young adults delay childbearing until they have found a relatively stable partner and then provides critical supports for parents in the transition to parenthood and the first few years of a child's life.

This Part first describes two competing frameworks for the regulation of nonmarital families that currently predominate and then proposes an alternative theoretical framework that is normatively more attractive and practically better aligned to the reality of contemporary family life.

#### A. *A Feminist Focus on Caregiving, Not Adult Relationships*

Feminists have long criticized marriage as a patriarchal institution that oppresses women.<sup>248</sup> Different theorists have recommended a variety of approaches to this problem,<sup>249</sup> but one dominant refrain, best associated with Fineman, is that the state should not regulate the relationship between adults at all and instead should focus only on the parent-child relationship.<sup>250</sup> As Fineman argues, the law improperly organizes the family along sexual lines, privileging the horizontal relationship between husband and wife over all other connections, even the parent-child connection.<sup>251</sup> Fineman notes that “[t]he very label ‘single mother’ separates some practices of motherhood from the institution of ‘Mother’ by reference to the mother’s marital situation.”<sup>252</sup> Similarly, the focus on “nonmarital” children is a way of categorizing children by ref-

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248. See, e.g., BETTY FRIEDAN, *THE FEMININE MYSTIQUE* 32 (1963).

249. See, e.g., LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 155-57, 197-207 (2006) (arguing in favor of a “marriage plus” approach to the problem of inequality among families, with the states supporting greater sex equality within marriage, access to marriage—such as a registration system—for same-sex couples, and alternatives to marriage for those who do not want to marry); TAMARA METZ, *UNTYING THE KNOT: MARRIAGE, THE STATE, AND THE CASE FOR THEIR DIVORCE* 134-47 (2010) (arguing that the state should abolish marriage as a legal category and replace it with an “intimate caregiving union” status that would protect caregivers by, for example, ensuring distribution of property upon dissolution of the union to ensure substantive equality); Ristroph & Murray, *supra* note 43, at 1270-79 (exploring the notion of disestablishing the family, along the lines of the First Amendment’s Establishment Clause, and arguing that the state should be agnostic about family form and thus promote pluralism to a much greater degree than today’s system of extensive legal regulation).

250. See FINEMAN, *supra* note 24, at 2-6, 228-36.

251. *Id.* at 2-6, 145 (noting that once children are of age, they are no longer part of the legal family and thus the horizontal relationship is the enduring legal entity).

252. *Id.* at 148.

erence to their parents' marital status.<sup>253</sup> To the extent the law recognizes alternative families, Fineman argues that it does so only if they mimic traditional married couples—that is, if they are in committed, monogamous, sexual relationships.<sup>254</sup> Fineman argues that this fixation on the “sexual dyad” both renders other relationships deviant and obscures the dependency needs of children, the elderly, and disabled people because marriage is supposed to address these dependency needs and yet does not.<sup>255</sup>

Her solution is to end legal support for “the sexual family,”<sup>256</sup> including marriage and any similar arrangement.<sup>257</sup> Thus, her goal is not to expand marriage to include cohabitants and same-sex partners but rather to do away with privileging the sexual relationship between adults altogether.<sup>258</sup> In place of this regulation, she would offer state support for the relationship that she thinks does matter—that between caregiver and dependent.<sup>259</sup>

Fineman's call to focus on the vertical relationship between caregiver and dependent rather than the horizontal relationship between adults continues to animate other feminist legal theorists. Vivian Hamilton, for example, has argued that because caregiving is so essential to society, the state should focus legal regulation and support on caregiving relationships, not romantic relationships between adults.<sup>260</sup> The state would do so by de-emphasizing the family form and adopting a series of policies to support caregiving and ensure economic well-being, such as subsidized full-day public day care, longer school days and years, paid family leave, and income supports.<sup>261</sup> Hamilton's approach rests on the proposition that it is possible to “[d]issect[ the family] unit into its functional parts” and support some relationships (caregiving) and not others (adult romantic relationships).<sup>262</sup>

Laura Rosenbury has taken the argument even further, challenging the privileging of familial caregiving as the basis for legal recognition. Rosenbury argues that family law's myopic focus on marriage and marriage-like relationships, to the exclusion of other adult relationships, most notably friendship, re-

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253. *Id.*

254. *Id.* at 1-2, 6 (arguing that the family tie is sexual at its core). Indeed, “sexuality is central to our understanding of intimacy and family connection,” and marriage still informs its alternatives. *Id.* at 2.

255. *Id.* at 47-48, 161-66, 226-36. It also obscures the “derivative dependency” of the caregivers themselves, the subject of a subsequent book. See MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 67, 121 (2004).

256. FINEMAN, *supra* note 24, at 228.

257. *Id.* at 228-30.

258. She suggests that partners use contract law to arrange their affairs. *Id.* at 229-30.

259. *Id.* at 230-33.

260. Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL'Y & L. 307, 368 (2004).

261. *Id.* at 368-69.

262. *Id.* at 370.



inforces gender inequality.<sup>263</sup> Rosenbury contends that by making a clear distinction between family members, who have explicit and all-encompassing rights and obligations to each other, and friends, who have none, the state reinforces the gendered notion that care is given only within the family, primarily by women.<sup>264</sup> Rosenbury's solution is to de-emphasize this dividing line and instead recognize a plurality of caregiving relationships.<sup>265</sup>

Despite some differences among these theorists, a common theme is that the state should not privilege the relationship between adults, especially those in romantic relationships, to the exclusion of other caregiving relationships. Implicit in the argument is the belief that the relationship between parents does not affect children, or at least that regulating the relationship between adults will not benefit children to a degree that justifies state regulation. For Fineman and Hamilton, the state can and should play a robust role in family life, but this role is limited to supporting caregiving across diverse family forms.

### B. *Marriage Primacy*

In contrast to the rejection of marriage by some feminists, many conservative commentators argue that marriage is essential to society. In the words of the National Marriage Project and the Institute for American Values,

Marriage is not merely a private arrangement; it is also a complex social institution. . . . Because marriage fosters small cooperative unions—otherwise known as stable families—it not only enables children to thrive, but also shores up communities, helping family members to succeed during good times and to weather the bad times.<sup>266</sup>

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263. Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 201-02, 212 (2007). Rosenbury is particularly critical of marriage. See Laura A. Rosenbury, *Marital Status and Privilege*, 16 J. GENDER RACE & JUST. 769, 783-84 (2013) (arguing that the state has created a hierarchy of relationships with marriage at the top and that “[o]verlooking that hierarchy is one of the unearned privileges of marriage and, more generally, of the romantic couple form”). She also criticizes the emphasis on sexual, romantic relationships to the exclusion of other adult intimacies and the priority given to one two-person relationship over other relationships and over multiple commitments to multiple people. See Rosenbury, *Friends with Benefits?*, *supra*, at 200, 221-23. For a nuanced argument about how the state can unbundle the benefits and obligations of marriage and instead tie these to other forms of relationships, see Kerry Abrams, *Marriage Fraud*, 100 CALIF. L. REV. 1, 61-66 (2012).

264. Rosenbury, *Friends with Benefits?*, *supra* note 263, at 191 (“[T]he divide between friendship and marriage is not gender neutral. Rather, it amounts to state support of the types of domestic caregiving that traditionally played vital roles in maintaining state-supported patriarchy and that still largely follow gendered patterns today.”).

265. See *id.* at 220-21.

266. Elizabeth Marquardt et al., Nat’l Marriage Project & Inst. for Am. Values, *The President’s Marriage Agenda for the Forgotten Sixty Percent*, in THE STATE OF OUR UNIONS: MARRIAGE IN AMERICA 2012, at 1, 6 (2012).

In this view, marriage benefits children by ensuring they are cared for by two parents,<sup>267</sup> and it benefits society by ensuring families are self-sufficient and not dependent on the state.<sup>268</sup>

Promoting marriage has long played a central role in the political response to poverty and perceived family dysfunction.<sup>269</sup> Consider three examples: During the Reconstruction period, marriages among newly freed slaves were highly regulated in an attempt to make such families self-sufficient, rather than dependent on the state, and to ensure they conformed with dominant social norms.<sup>270</sup> In the welfare reform of 1996, Congress touted marriage as a way to end dependence on the state.<sup>271</sup> And conservative politicians continue to prescribe marriage as a cure for poverty. In a debate during the 2012 Republican presidential primaries, candidates were posed the following question: “Given the crisis situation among a group of historically disadvantaged Americans, do you feel the time has come to take special steps to deal with poverty afflicting one race?” Rick Santorum answered by explaining, “A study done in 2009 determined that if Americans do three things, they can avoid poverty. Three

267. *Id.* at 32.

268. *See id.* at 12, 32 (describing a study finding “that if family fragmentation were reduced by just 1 percent, U.S. taxpayers would save an estimated \$1.1 billion annually”). For an extended argument about the importance of marriage, see KAY S. HYMOWITZ, MARRIAGE AND CASTE IN AMERICA: SEPARATE AND UNEQUAL FAMILIES IN A POST-MARITAL AGE 31-47, 147-67 (2006).

269. For an excellent history, see Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform’s Marriage Cure as the Revival of Post-Bellum Control*, 93 CALIF. L. REV. 1647, 1663, 1673-82 (2005). *See also* Kristin A. Collins, *Administering Marriage: Marriage-Based Entitlements, Bureaucracy, and the Legal Construction of the Family*, 62 VAND. L. REV. 1085, 1088 (2009) (“[M]arriage is employed . . . as a substitute for social provision.”); Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1713-14 (2003) (“Lawmakers still presume that fixing marriage by strengthening its core meaning as a permanent provider-dependent relationship and by bringing more women within its ostensibly protective confines will provide a powerful check on female poverty. Operating within this logic, it makes perfect sense to allocate hundreds of millions of dollars of federal welfare money to state programs designed to promote marriage. . . . [But marriage] has proven persistently incapable of effectively serving that public, economic function.”).

270. *See* Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251, 280 (1999).

271. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, sec. 103, § 401(a)(2), 110 Stat. 2105, 2113 (codified at 42 U.S.C. § 601(a)(2) (2013)) (setting forth the goals of welfare reform, including to “end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage”). Congress made the following findings: “(1) Marriage is the foundation of a successful society. (2) Marriage is an essential institution of a successful society which promotes the interests of children. (3) Promotion of responsible fatherhood and motherhood is integral to successful child rearing and the well-being of children.” *Id.* § 101, 110 Stat. at 2110.

things: work, graduate from high school, and get married before you have children. Those three things result in only 2% of people ending up in poverty.”<sup>272</sup>

Commentators also tie inequality to the demise of marriage. Charles Murray, for example, contends that socioeconomic inequality among whites in the United States—particularly between the top twenty percent and the bottom thirty percent—can be attributed to a difference in values.<sup>273</sup> According to Murray, the top quintile embraces what he describes as the four “founding virtues” of America: marriage, industriousness, honesty, and religiosity.<sup>274</sup> The bottom thirty percent, by contrast, does not live according to these values, which has led to a loss of social capital.<sup>275</sup> The solution, according to Murray, is libertarianism.<sup>276</sup> To Murray, marriage is an essential component of independence: through marriage a family can take care of its own and not be dependent on the state.

In contrast to the libertarian approach, some marriage primacy advocates believe the government can and should play a role in shoring up the institution of marriage.<sup>277</sup> Policies to do so include providing incentives to marry, eliminating disincentives to marry, and making it harder to end a marriage.<sup>278</sup>

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272. Rick Santorum in Fox News Debate on MLK Day in Myrtle Beach, ONTHEISSUES, [http://www.issues2000.org/Archive/2012\\_GOP\\_SC\\_MLK\\_Rick\\_Santorum.htm](http://www.issues2000.org/Archive/2012_GOP_SC_MLK_Rick_Santorum.htm) (last updated Oct. 13, 2012).

273. See MURRAY, *supra* note 77, at 143-208.

274. *Id.* at 130-40, 149-208 (emphasis omitted). Murray does not uncritically laud the top twenty percent. Instead, he contends that there is a hollowness to this group. See *id.* at 285-95 (“Personally and as families, its members are successful. But they have abdicated their responsibility to set and promulgate standards. The most powerful and successful members of their class increasingly trade on the perks of their privileged positions without regard to the seemliness of that behavior.”).

275. See *id.* at 149-208.

276. When the government tries to help the bottom thirty percent, Murray argues, it robs them of responsibility for their lives. See *id.* at 282. He cites raising children as an example: “[I]f you’re a low-income parent who finds it easier to let the apparatus of an advanced welfare state take over,” this diminishes “[t]he deep satisfactions that go with raising children.” *Id.* at 281. He believes that families and communities are strong only because they know they have the responsibility to get things done; when government takes over for these institutions, both families and communities disintegrate. *Id.* at 282.

277. See Marquardt et al., *supra* note 266, at xi-xii.

278. See *id.* at xii (“These proposals for federal and state policies and cultural change include eliminating marriage penalties and disincentives for the poor, for unwed mothers, and for older Americans; tripling the child tax credit; helping young men to become marriageable men; ending anonymous fatherhood; preventing unnecessary divorce; providing marriage education for newly-forming stepfamilies; investing in and evaluating marriage and relationship education programs; engaging Hollywood; launching social media campaigns about the facts and fun of marriage; and modeling how to talk about our shared marriage values despite our differences.”); *id.* at 13-31 (providing details on these proposals); see also Douthat, *supra* note 77 (“[O]ne hypothetical middle ground [between liberals and conservatives] on marriage promotion might involve wage subsidies and modest limits on unilateral divorce, or a jobs program and a second-trimester abortion ban.”).

A common theme in the marriage primacy line of argument is the assumption that people are poor *because* they are unmarried. If low-income individuals found long-term partners before having children, and if they postponed family formation until they had completed their education, these individuals would have similar outcomes to middle- and upper-income individuals. Another theme is the strong preference for marriage over other types of relationship recognition, largely because of the strong social norms that accompany marriage.<sup>279</sup>

For marriage primacy advocates, there is an underlying theoretical commitment at work that is the opposite of the feminist view described above. These theorists argue that the relationship between adults deeply affects children and therefore intervention at the adult level will help children. For libertarians such as Murray, the institution of marriage allows the state to step out of family life because family members will take care of each other. For other marriage primacy commentators, libertarianism is not the answer. Instead, these commentators favor active state intervention, such as programs that try to improve the economic circumstances of young men to make them more marriageable.<sup>280</sup> In both views, the focus is on one particular, and particularly defined, adult relationship as a means for promoting child well-being.

C. *Neither Caregiving in a Vacuum nor the Marriage Cure: Centering Parental Relationships*

1. *The limits of the dominant discourse*

In charting a conception of law in an increasingly nonmarital society, both sides of the current discourse are a little bit right but mostly wrong. It is true, as some feminists argue, that marriage creates a hierarchy that renders other relationships second class, and it is also true that focusing on the adult relationship facilitates the privatization of dependency. In marital family law, the state assumes that by creating the institution of legal marriage, the family will take care of its dependents. It is this assumption that Fineman and others critique because it obscures the benefit caregivers render to society by raising children

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279. See Scott, *supra* note 26, at 562-63.

280. See Marquardt et al., *supra* note 266, at 18-24 (detailing such programs). For further discussion of the diversity of views on encouraging responsible fathers, see MCCLAIN, *supra* note 249, at 129-34, 138-41 (describing the split in the debates about encouraging responsible fatherhood in the late 1990s and early 2000s, with some advocates promoting marriage and others arguing that the state should strengthen families as they were, including working on the relationship between the mother and father to improve co-parenting even in the absence of marriage).

and fails to acknowledge the cost to caregivers who invest in the family at their own economic expense.<sup>281</sup>

The solution to this problem, however, is not to ignore parental relationships. Even with additional state support for both caregiving and caregivers, Part II demonstrated that the relationship *between parents*, regardless of legal status, is an important part of family dynamics and deeply informs child well-being. For this reason, it is a legitimate focus of state concern.

It is also true, as marriage primacy commentators argue, that stability in parental relationships benefits children. But it is important to specify precisely why parental commitment matters. As Part II showed, when parents have a functioning partnership with each other, regardless of the formal status of their relationship, it is more likely they will maintain relationships with their children and provide the time and attention needed for child development.

Marriage primacy commentators are correct that in the past, marriage has served as society's primary mechanism for bonding families, but given the substantial challenges facing nonmarital families, a more holistic approach to family stability is now needed. To improve child outcomes, it may well be better for young people to, as the marriage primacy view holds, stay in school and delay childbearing until they find a suitable long-term partner. But commentators are too quick to assume that there are suitable partners available to marry (or that programs can transform young men into such partners), that completing an education is an option for people who have been alienated from school from an early age, and that there are significant alternatives to childbearing for young people to find purpose and give their lives a sense of meaning.

Starting with the first point—the availability of viable marriage partners—as the Edin and Kefalas study demonstrated, the young, low-income, unmarried mothers they interviewed would prefer to be married, but the mothers were not willing to marry the men currently in their lives because they considered them poor marriage prospects.<sup>282</sup> This is not an irrational response. Recall that unmarried fathers in the Fragile Families Study were much more likely than their married counterparts to have a criminal record, low educational attainment, and low earnings.<sup>283</sup> Given this structural reality, encouraging a woman through marriage subsidies or penalties to marry the father of her child may well be misguided policy. Those holding the marriage primacy view contend that it is

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281. Fineman identified these issues in *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies*, see FINEMAN, *supra* note 24, but developed them much more extensively in later work, see FINEMAN, *supra* note 255, at 44-49.

282. See EDIN & KEFALAS, *supra* note 83, at 8-10.

283. See *supra* text accompanying notes 92-97. On the other hand, it is not entirely true that there are *no* marriageable men; in the Fragile Families Study, 31.8% of the unmarried mothers found subsequent partners within five years of the child's birth who were somewhat more appealing in terms of income and education than the child's father. See Bzostek et al., *supra* note 101, at 829 tbl.3. Still, the strength of the new partner's economic prospects was only relative to the very poor economic prospects of the biological father. See *id.*

possible to transform at least some men into viable partners.<sup>284</sup> To the extent this is possible, it is an important goal to pursue, but programs designed to do so often have limited or poor results given the larger problems facing these young men.<sup>285</sup>

Moreover, encouraging young people to stay in school would likely help improve economic prospects, but this is not always realistic, especially for young men who have been marginalized in schools from the earliest grades.<sup>286</sup> Longitudinal studies of academic achievement have determined that there is a developmental pathway to dropping out that begins in early childhood and continues through the school years.<sup>287</sup> Education reform is critical, but to advocate education as a means of restoring the institution of marriage raises Herculean questions.

Turning to the decision to have a child outside of a stable relationship, encouraging women and men to delay childbearing is difficult when there is no real opportunity cost to having a child now. The young women Edin and Kefalas studied were not going to college and did not have other long-term plans for advancement, and so having a child could not derail a nonexistent career plan.<sup>288</sup> And both men and women saw children as a source of positive emotion and meaning in their lives, something that was hard to find elsewhere.<sup>289</sup>

There are similar problems with other aspects of the marriage primacy prescriptions. Advocates contend, for example, that eliminating the so-called marriage penalties—policies that create an incentive for low-income couples not to

284. See, e.g., Marquardt et al., *supra* note 266, at 18-24.

285. See James J. Heckman, *Skill Formation and the Economics of Investing in Disadvantaged Children*, 312 SCIENCE 1900, 1901 & fig.2 (2006) (reviewing investments in human capital across the lifespan and finding that investments in remedial programs, such as job training for adults and adult literacy programs, provide a poor return on investment). *But see* Haskins, *supra* note 27, at 68 (describing one successful program, career academies).

286. See MICHAEL GURIAN & KATHY STEVENS, *THE MINDS OF BOYS: SAVING OUR SONS FROM FALLING BEHIND IN SCHOOL AND LIFE* 21 (2005) (noting that African American boys are more likely to be placed in special education classes and academically underperform); Thalia González, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, 41 J.L. & EDUC. 281, 283 (2012) (noting that in 2006, rates of suspensions among African American public school students were disproportionate to their demographic representation, as African Americans made up 17.1% of public school students but “accounted for 37.4 percent of total suspensions and 37.9 percent of total expulsions nationwide” (quoting NAACP LEGAL DEF. & EDUC. FUND, INC., ANNUAL REPORT OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. 2007-2009, at 43 (2009)) (internal quotation marks omitted)).

287. See *supra* note 184 (discussing the Minnesota study that found that the pathway to dropping out begins in early childhood).

288. See EDIN & KEFALAS, *supra* note 83, at 204-07; *supra* text accompanying note 129.

289. EDIN & NELSON, *supra* note 16, at 221-22, 224-25; EDIN & KEFALAS, *supra* note 83, at 27-42.

marry and, further, to live apart—will help stabilize families.<sup>290</sup> In the past, governmental assistance programs were explicitly limited to single mothers living alone.<sup>291</sup> Even though assistance programs no longer have these explicit requirements, the concern is that eligibility rules create the same effect, penalizing recipients for being married or living with a partner.

Consider two of the most important assistance programs for low-income families: the Earned Income Tax Credit (EITC) and the Supplemental Nutrition Assistance Program (SNAP, but commonly known as food stamps). Administered through the tax code, the EITC is a tax credit that individuals apply for when filing their tax returns. Through a formula that accounts for the number of children in the home and the income of the worker, a family can receive a lump-sum tax credit (in effect, a payment) of several thousand dollars.<sup>292</sup> The tax credit increases with additional earnings by the worker up to a plateau and then decreases as the worker earns more money. The problem, however, is that the program contains a so-called marriage penalty. If the worker is married, then the earnings of both spouses are counted in the calculation. By contrast, if the worker is single, then only the earnings of the filer are counted. In 2013, the income limits for a family with three children were \$46,227 for a single filer but only marginally more—\$51,567—for a married couple.<sup>293</sup>

Like the EITC, food stamps are means-tested, but when a family applies for assistance, the state looks at the income of the entire household. Spouses are automatically considered part of the household,<sup>294</sup> but the definition of household also includes “[a] group of individuals who live together and customarily purchase food and prepare meals together for home consumption.”<sup>295</sup> Thus, to the extent unmarried parents want to live together and raise children jointly, the income of both parents counts toward the eligibility requirement.

These provisions appear troubling on their face, but beyond anecdotal evidence,<sup>296</sup> it is difficult to prove as an empirical matter that these rules influence the decision to marry or live together.<sup>297</sup> And there is some evidence that they do not.<sup>298</sup>

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290. See *supra* note 278.

291. See Onwuachi-Willig, *supra* note 269, at 1665-73, 1685 (describing this history).

292. *Earned Income Tax Credit; Do I Qualify?*, INTERNAL REVENUE SERV., <http://www.irs.gov/uac/Newsroom/Earned-Income-Tax-Credit-Do-I-Qualify> (last updated Jan. 31, 2014).

293. *Id.*

294. 7 C.F.R. § 273.1(b)(1)(i) (2014).

295. *Id.* § 273.1(a)(3).

296. See, e.g., EDIN & NELSON, *supra* note 16, at 88 (describing how, when one study participant proposed marriage to his daughter’s mother, “she turned him down flat, saying that she didn’t want to lose her freedom, her food stamps, or her subsidized apartment”).

297. See Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 559-64 (1995) (discussing the difficulty of assessing the impact of marriage penalties).

298. See David T. Ellwood, *The Impact of the Earned Income Tax Credit and Social Policy Reforms on Work, Marriage, and Living Arrangements*, 53 NAT’L TAX J. 1063, 1070-

A final limitation to the arguments advanced by the marriage primacy advocates is that in a complex modern world, all families are dependent on the state, and thus it is an illusory goal to foster independence. As I have elaborated at length elsewhere,<sup>299</sup> all families rely on the state, regardless of income level. For example, economically stable families look to the state to reinforce parental rights to ensure that a third party does not make important decisions for a child,<sup>300</sup> and economically stable parents also receive considerable state support, such as public education, tax deductions for dependents, federally guaranteed student loans, and so on.<sup>301</sup> There are no private, independent families. Thus, the question is not *if* the state is involved but rather *how* the state should be involved.

The state should *try* to address the reasons why young people do not delay childbearing and relationships do not last,<sup>302</sup> but these issues are so deeply entrenched and so interrelated that it will not be easy to change the life circumstances that lead young people to have children in the context of unstable relationships. Given the structural changes in the economy described above,<sup>303</sup> the difficulty of reversing a lifetime of alienation from school, and the absence of positive reinforcement, we need a more immediate answer to the pressing needs of nonmarital families.

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72, 1087-97, 1100 (2000) (studying the expansion of the EITC to determine whether its greater availability affected marriage or cohabitation rates and not finding “any real evidence that the EITC marriage penalties were reducing marriage” rates). Moreover, eligibility rules that consider pooled income have the important goal of identifying which families need assistance most. *See* Alstott, *supra* note 297, at 559-64 (describing the inevitable trade-off between avoiding marriage penalties and targeting programs to those most in need). Alstott notes, for example, that if income were treated on an individual, rather than pooled, basis, then a couple with one spouse earning \$200,000 and the other earning \$10,000 would qualify for the EITC on the basis of the second spouse’s earnings, even though the children in the family are not nearly in the same situation as the children of an unmarried worker who earns \$10,000 and is raising children alone. *Id.* at 564. Nonetheless, there is a legitimate concern that program structures that create a disincentive to marry or live together have some impact on family behavior or, at the very least, send a mixed message about the importance of two adults jointly raising a child.

299. HUNTINGTON, *supra* note 13, at 147-53.

300. *See* Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 837 (1985).

301. SUZANNE METTLER, *THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE AMERICAN DEMOCRACY* 37 (2011) (finding that 91.6% of Americans benefit from governmental support programs but that the programs that benefit economically stable families are not perceived as support programs).

302. I explore these ideas in greater length in my book. *See* HUNTINGTON, *supra* note 13, at 173-80.

303. *See supra* text accompanying notes 217-19.



## 2. *An alternative model*

The state has an interest in caregiving (as some feminists argue) and in parental commitment (as marriage primacy advocates argue), but we need to actualize these goals in light of the limited circumstances of nonmarital families. Instead of focusing on the parent-child relationship in isolation, and instead of touting marriage as the solution, a new theory of legal regulation would recognize that marriage is not always a realistic option for parents but that the relationship between parents is essential to child well-being. In other words, it may be possible to separate marriage and parenthood, as the literature on nonmarital family life underscores, but it is simply not possible to separate relationships and parenthood.

The goal of state regulation for all families should be to strengthen relationships between parents so that they can effectively co-parent the child and give the child the time and attention needed for child development.<sup>304</sup> For some families, marriage does and will continue to serve this purpose. If these parents divorce, marital family law will help them transition into a co-parenting relationship that is not based on marriage and will facilitate interaction between both parents and the child. But for those parents who never marry, legal regulation should serve the same goal. An effective co-parenting relationship will likely reduce the stress in a mother's life, enabling her to focus on the child's needs. And an effective co-parenting relationship will encourage involvement by a nonresidential father,<sup>305</sup> which, in turn, can benefit the child.<sup>306</sup>

It is thus essential to address those aspects of nonmarital family life that make it harder for parents to maintain a relationship with a child and co-parent. Recall the salient aspects of nonmarital family life outlined above: children are born to romantically involved parents, and fathers are excited about the birth of the child; despite this early optimism, relationships soon end; mothers become informal gatekeepers to children, and fathers can see children only if they can stay on good terms with the mothers; both parents often go on to find new partners and have other children, and these transitions can negatively influence

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304. For additional work on the idea that family law should focus on the horizontal relationship between parents, see WEINER, *supra* note 35, arguing that family law should impose a parent-partner status on all couples at the birth of the child, regardless of marital status, and that this status should carry enforceable rights and responsibilities. *See also* Ayelet Blecher-Prigat, *The Costs of Raising Children: Toward a Theory of Financial Obligations Between Co-Parents*, 13 THEORETICAL INQUIRIES L. 179, 180, 187-88 (2012) (arguing that family law should impose the costs of raising children on both parents, even apart from the mechanisms already in place to do so, such as child support and division of property). For an argument that, in specified circumstances, the state should obligate a woman to inform the man of her pregnancy and the man should be obligated to support her financially during the pregnancy and her recovery, see Shari Motro, *The Price of Pleasure*, 104 NW. U. L. REV. 917, 958-60 (2010).

305. *See supra* text accompanying notes 110-11.

306. *See supra* text accompanying note 187 (describing the positive influence of high-quality parenting by nonresidential fathers).

mothers' parenting; fathers drift away over time. These features of nonmarital family life make it harder for parents to provide children with the relationships they need for healthy child development because fathers are uninvolved and mothers are distracted by the stress of managing a complex family.

An initial step is helping parents delay childbearing until they have found a reliable partner and providing an alternative legal status that better suits the needs and interests of unmarried couples. I have elaborated both points elsewhere,<sup>307</sup> but the main relevance here is that in the age of no-fault divorce, marriage or a similar status will not keep a couple together and therefore is not a complete solution. To the extent legal status can help cement a relationship,<sup>308</sup> the state should provide nonmarital families with this option, but there is clearly a need for other approaches to nonmarital families.

In light of the current empirical reality that most nonmarital relationships end fairly quickly, the real focus should be on helping unmarried parents transition to a co-parenting relationship after their romantic relationship ends. This would encourage fathers to stay involved in their children's lives; it would likewise decrease maternal stress and distraction, enabling mothers to spend more crucial development time with their children and use more effective parenting strategies. This is not a panacea and can work only in tandem with other supports for nonmarital families.<sup>309</sup> But improving the adult-adult co-parenting relationship is a crucial piece of the puzzle and should inform family law throughout. Helping unmarried parents become effective co-parents and lessen the stress in their lives from managing complex families is an essential step toward improving outcomes for nonmarital children and, in turn, reducing inequality.

#### IV. POSTMARITAL FAMILY LAW

The new theoretical framework for legal regulation leads to different legal rules, institutions, and social norms. New legal rules should discourage maternal gatekeeping, defuse conflict, and encourage cooperation. New institutions must help parents negotiate co-parenting. And new social norms should embrace a broader notion of unmarried fatherhood. In some instances, as this Part illustrates, the reforms will coexist with current family law, but other reforms will require changing the underlying law for everyone. Additionally, although some of the proposals address the particular needs of low-income nonmarital families, most of the proposals address the needs of nonmarital families regard-

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307. See HUNTINGTON, *supra* note 13, at 160, 185-87 (discussing ways to encourage young men and women to delay childbearing); *id.* at 177-80 (discussing alternatives to marriage).

308. See Scott, *supra* note 26, at 562-66 (explaining how social norms accompanying an institution like marriage can help solidify a commitment).

309. I focus on these at length in my book. See HUNTINGTON, *supra* note 13, at 145-63, 180-99.

less of income. This Part concludes with a discussion of several potential concerns raised by the proposals.

A. *Rules: Encouraging Co-Parenting*

As Part II elaborated, the central problems with the legal rules of marital family law as applied to nonmarital families are that they encourage maternal gatekeeping and fuel animosity between parents, making it harder to co-parent and increasing the stress on mothers. By focusing on the relationship between parents and the importance of co-parenting, the new theoretical framework for postmarital family law demonstrates the need for rules that will give fathers clear rights to see their children and decrease acrimony between parents so that both parents can better meet the challenges of complex families. There are numerous doctrinal changes that can and should be made to advance these ends, but four stand out in particular.

First, to put married and unmarried parents on level playing ground, it is essential to disrupt the formal relationship between marriage and parental rights. The most direct way to do so is to eliminate the marital presumption.<sup>310</sup> This legal rule is a shortcut that was originally designed to promote marital harmony and protect children from being rendered illegitimate.<sup>311</sup> But at a time when illegitimacy carries little legal stigma, the marital presumption unnecessarily privileges marital families at the expense of nonmarital families. In lieu of the presumption, states should adopt other methods for the automatic conferral of parental rights, many of which are already in place, such as voluntary acknowledgment of paternity.<sup>312</sup> A decision to sign the birth certificate, for example, should be sufficient evidence of a parent's intention to claim the child as his or her own. When one parent does not want to sign, the legal system can use the mechanisms it already has in place for establishing parentage, but requiring all parents to take the affirmative step of signing the birth certificate is an important step toward treating mothers and fathers equally and married and unmarried parents equally. In this way, marriage would no longer be the guarantor of parental rights. Although this step would not help unmarried parents directly, it would mean that the state would be using the same rule for all families.<sup>313</sup>

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310. Others have called for this reform as well. See, e.g., June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1067-68 (2003); Nancy E. Dowd, *Parentage at Birth: Birthfathers and Social Fatherhood*, 14 WM. & MARY BILL RTS. J. 909, 926, 929 (2006).

311. See GROSSMAN & FRIEDMAN, *supra* note 42, at 288-89.

312. See *supra* text accompanying notes 199-201.

313. This proposal raises considerable implementation questions. The role of biology, for example, has always been a difficult question in family law, particularly with respect to fathers. See Harris, *supra* note 35, at 1307-17. But family law is already struggling with these issues, and the proposal to eliminate the marital presumption simply means that family law has to struggle with the question for all families.

Second, once we eliminate marriage as the default category for parental rights, we need to think in more nuanced ways about legal recognition of families. Consistent with the theoretical framework that centers parental relationships, postmarital family law should grant all parents, regardless of marital status, a legally significant designation of “co-parent.” An individual would thus be recognized as a parent in two ways: as a father or mother to a particular child and as a co-parent to another person.<sup>314</sup> This designation would attach at the birth of a child, and, like the legal designation of “parent,” it could not be dissolved until the child reached age eighteen, absent a decision to relinquish a child for adoption or a court’s order to terminate parental—including “co-parental”—rights.<sup>315</sup>

This designation would have both expressive and practical value. As an expressive matter, the designation reflects the reality that even if a romantic relationship ends, a co-parenting relationship continues, and it underscores the relevance to child well-being of the relationship *between* the parents. The designation would indirectly help with gatekeeping by making clear that the father is as important to the child as the mother. Rather than reinforcing the idea that the mother is the real parent and the father is a visitor in the child’s life, the designation sends the message that the child has two parents. It could also help lower levels of animosity by underscoring for parents that raising the child is a shared endeavor. To be sure, this could become a weapon (as in, “my supposed *co-parent* is falling down on the job again”), but it could also be used in the affirmative (as in, “I’m a *co-parent*, so I better pull my weight”).<sup>316</sup>

As a practical matter, the designation would have legal weight, giving each parent formal recognition of rights and responsibilities to each other concerning the child. This new legal category could, for example, give a parent something akin to a right of first refusal for time with the child. If the parents are living together, there may be little practical effect. But for parents who do not live together, as with many unmarried parents, it would mean that if the custodial parent took on a full-time job, or was going out of town without the child for an

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314. For another proposal that a legal status should attach to parents on the birth of a child, see WEINER, *supra* note 35.

315. See Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1276-77 (2008) (describing these as the only two ways to terminate a parent-child relationship). The co-parent designation would follow the parentage designation, and thus the sometimes-contested question of *who* is a parent would be determined before the rights and obligations of co-parentage status attach.

316. One concern with this proposal is that it valorizes the parental relationship over other potentially important relationships in a child’s life. See Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 391-94 (2008) (describing how families use a broad network to provide care for children). This may be true, but it is a way to ensure that children have at least two dedicated adults to share responsibility for them, and it is also a way to break down the divide in family law between marital and nonmarital families. Moreover, as notions of parenthood continue to evolve, the co-parent designation could evolve too, such that it could be shared between, for example, one parent and a grandparent, or one parent and a close friend.

extended period of time, the custodial parent would have an obligation to check with the other parent to determine if that parent could spend the time with the child. Many divorcing couples write this kind of provision into custody agreements, and it could form the basis for a default rule through the co-parent designation for all parents.

The legal category of co-parent, moreover, could govern assumptions about parental involvement in many of the ways that the combination of marriage and divorce arrangements do now. The default legal right attaching to the co-parent designation would be one of joint legal custody. This would mean that co-parents, regardless of the status of their romantic relationship, would have to consult one another about the major issues in a child's life, such as whether to raise the child in a religious tradition, where to send the child for school, and so on.<sup>317</sup>

Third, absent a history of domestic violence, states should adopt default rules that assign legal and physical custody to both parents at birth, regardless of marital status. The fifteen states that currently grant sole custody to an unmarried mother<sup>318</sup> should repeal these laws and replace them with a legal rule that grants custody to both parents. And the majority of states that do not address this issue should adopt the same rule, affirmatively granting custody to both parents. This reform is essential to defusing what is troubling about mothers being gatekeepers. Allowing both parents to have automatic custody of the child affirms that both parents count, that fathers can and should be involved with their children from birth, and that mothers are not in complete control. Unlike the current rule, which effectively ousts an unmarried father from all roles except the breadwinner role, this rule expects fathers to participate in their children's upbringing. It also builds productively on the fact that many unmarried fathers want a greater role in their children's lives and uses law to facilitate that role. In short, this approach recognizes the unmarried father as a full father.

For couples who do not live together, the default rule of shared legal and physical custody means that the couple will either work out an arrangement on their own or, perhaps through the use of a non-court-based institution,<sup>319</sup> come to an agreement. Alternatively, the couple could go to court and seek a judicial order of custody. This will almost certainly present challenges, but the goal is to require both parents to consider the other as a full parent.

Another aspect of the default custody rule should be an attempt to maximize the time a child spends with each parent through an "equal access" rule.<sup>320</sup>

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317. As with disagreements about custody orders, a court or similar arbiter would need to adjudicate disputes between parents. I recognize that this invites court involvement in a family's life, which is often undesirable, but the goal of postmarital family law is parity between married and unmarried parents.

318. *See supra* text accompanying note 204.

319. *See infra* Part IV.B.

320. *See* ALASKA STAT. § 25.20.070 (2014) ("Unless it is shown to be detrimental to the welfare of the child . . . , the child shall have, to the greatest degree practical, equal access to both parents during the time that the court considers an award of custody . . . ."); ARIZ. REV.

For example, in 1999, Wisconsin amended its law to direct state courts to maximize the time a child spends with each parent, regardless of the marital status of the parents.<sup>321</sup> A recent study assessed the impact of the law in three kinds of cases—divorce, adjudicated paternity (where the state or the mother initiated the action), and voluntary acknowledgment of paternity, which did not involve a court action but often ended up in court because of child support issues.<sup>322</sup> After the law’s enactment, equal custody<sup>323</sup> increased more for marital families than nonmarital families,<sup>324</sup> but unmarried fathers still gained a greater share of custody than before the law, if not an equal share.<sup>325</sup> Laws such as this reflect the underlying belief that both parents are important in a child’s life.

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STAT. ANN. § 25-403.02(B) (2014) (“Consistent with the child’s best interests . . . , the court shall adopt a parenting plan that provides for both parents to share legal decision-making regarding their child and that maximizes their respective parenting time.”); IOWA CODE § 598.41(1)(a) (2014) (“The court, insofar as is reasonable and in the best interest of the child, shall order the custody award, including liberal visitation rights where appropriate, which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents . . . .”); OKLA. STAT. tit. 43, § 110.1 (2014) (“It is the policy of this state to assure that minor children have frequent and continuing contact with parents . . . and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or dissolved their marriage . . . .”); TEX. FAM. CODE ANN. § 153.131(b) (West 2013) (“It is a rebuttable presumption that the appointment of the parents of a child as joint managing conservators is in the best interest of the child.”); VT. STAT. ANN. tit. 15, § 650 (2014) (“[A]fter parents have separated or dissolved their civil marriage, it is in the best interests of their minor child to have the opportunity for maximum continuing physical and emotional contact with both parents . . . .”); WIS. STAT. § 767.41(4)(a)(2) (2014) (“The court shall set a placement schedule that allows the child to have regularly occurring, meaningful periods of physical placement with each parent and that maximizes the amount of time the child may spend with each parent, taking into account geographic separation and accommodations for different households.”).

321. 1999 Wisconsin Act 9, sec. 3054cr, § 767.24(4)(a), 1999 Wis. Sess. Laws 15, 643 (codified as amended at WIS. STAT. § 767.41(4)(a)(2)).

322. BROWN & COOK, *supra* note 67, at 2-5 (tracking cases from 1996 to 2007).

323. The study defined equally shared custody as a fifty-fifty split. *See id.* at 9.

324. Equally shared physical custody rose in divorce cases from 15.8% before enactment to 30.5% in the most recent study cohort, but only from 0.9% to 4.5% in adjudicated paternity cases. *Id.* at 10 tbl.2a, 11 tbl.2b. The study began collecting data on cases involving voluntary acknowledgment of paternity in 2000-2001, *id.* at 4 tbl.1a, 12 tbl.2c, and thus there is no data for these cases before the passage of the law, but from 2000 to 2007, the percentage of equally shared physical custody in these cases rose from 3.3% to 8.8%, *id.* at 12 tbl.2c. The trend toward greater sharing of custody among divorcing couples predated the law, *id.* at 2, but sharing of physical custody rose much more dramatically after the law was enacted. Family income and legal representation were associated with a greater chance of equally shared physical custody. *See id.* at 18 tbl.3a (providing data in divorce cases showing that rates of shared physical custody increased with income and were greatest when either both parents had legal representation or only the father had legal representation).

325. For adjudicated paternity cases, the percentage of cases in which an unmarried mother had sole physical custody decreased from 96.3% before the law was enacted to 90.9% in the most recent study cohort. *Id.* at 11 tbl.2b. For voluntary acknowledgment of paternity cases, from 2000-2001, when data collection began on these cases, to the most recent cohort, the percentage of cases in which an unmarried mother had sole physical custody

In practice, an equal access rule would either be a background rule, influencing the negotiations between the couple, on their own or through a non-court-based institution, or be the rule used by courts. For many unmarried couples, the result of the maximization rule would not be anything close to a fifty-fifty split. But the rule could help increase the amount of time the father spends with the child, allowing him greater opportunity to develop a high-quality relationship with the child and also sending the message that fathers can and should play an important role in their children's lives.

Finally, it is critical to reform child support policies to decrease acrimony between unmarried parents. In a change from past policies, the Federal Office of Child Support Enforcement (OCSE) has recognized the need to address the underlying reasons why low-income, noncustodial parents often do not pay child support.<sup>326</sup> In a multipronged effort, the OCSE is starting to work *with* families rather than simply enforcing child support orders.<sup>327</sup> Three such efforts are particularly relevant to the issues identified in this Article: engaging fathers when a child is first born, addressing the economic circumstances of fathers through work support programs, and improving family relationships.<sup>328</sup>

To engage fathers early on, the OCSE is funding state programs that recognize that unmarried fathers are typically involved in a child's life at birth.<sup>329</sup> Programs include efforts to work specifically with fathers, not just mothers, so that both parents are treated as full parents.<sup>330</sup> This idea is built on research documenting a virtuous cycle: when fathers are involved with their children's lives, they are more likely to pay child support, and when they pay child support, they are more likely to stay involved.<sup>331</sup>

To improve the economic circumstances of fathers, the OCSE is funding state programs that connect fathers with job training programs and case managers trained to help fathers find and keep work.<sup>332</sup> Studies have found that even

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decreased from 91.9% to 80.9%. *Id.* at 12 tbl.2c. By contrast, only 45.7% of divorce cases in the most recent cohort resulted in sole physical custody to the mother. *Id.* at 10 tbl.2a. The differences between the adjudicated paternity and voluntary paternity cases likely are related to the differences between the fathers involved. The fathers who voluntarily assumed paternity had incomes fifty percent higher than the adjudicated paternity fathers, and the adjudicated paternity fathers experienced three times the incarceration rate of the voluntary paternity fathers. *Id.* at 5, 6 tbl.1b.

326. See OFFICE OF CHILD SUPPORT ENFORCEMENT, *supra* note 209, at 2-3.

327. See *id.* at 3.

328. See *id.*

329. See OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD SUPPORT FACT SHEET SER. NO. 3, ENGAGEMENT OF FATHERS FROM BIRTH 2-3 (2011), available at [http://www.acf.hhs.gov/sites/default/files/ocse/engagement\\_of\\_fathers.pdf](http://www.acf.hhs.gov/sites/default/files/ocse/engagement_of_fathers.pdf).

330. See *id.*

331. See *id.* at 1.

332. See OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD SUPPORT FACT SHEET SER. NO. 4, ECONOMIC STABILITY 2-4 (2011), available at [http://www.acf.hhs.gov/sites/default/files/ocse/economic\\_stability.pdf](http://www.acf.hhs.gov/sites/default/files/ocse/economic_stability.pdf); OFFICE OF CHILD

simple programs, such as job placement assistance, increase both earnings and child support payments.<sup>333</sup>

To improve family relationships, the OCSE is funding state efforts to provide mediation, relationship counseling, parenting programs, and, critically, visitation programs that help fathers see their children.<sup>334</sup> These programs, especially the Access and Visitation Program,<sup>335</sup> which secures parenting time for fathers, have been shown to increase child support payments and parental engagement and also improve the co-parenting relationship.<sup>336</sup>

These promising efforts embody the twin principles of postmarital family law: improving the working relationship between co-parents and engaging fathers in the lives of their children. They also help change the underlying gender norm that assumes fathers are only breadwinners.

The reach of these scattered programs, however, should not be overstated. Consider the Access and Visitation Program. In fiscal year 2008, the most recent year for which statistics are available, the OCSE had a caseload of 15.7 million,<sup>337</sup> but the Access and Visitation Program served only 85,237 parents or guardians.<sup>338</sup> This modest reach is unsurprising in light of the limited funds dedicated to the program: in fiscal year 2008, the OCSE dedicated nearly \$4.3 billion to funding state child support enforcement and family support programs,<sup>339</sup> but only \$10 million was for the Access and Visitation Program.<sup>340</sup>

SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD SUPPORT FACT SHEET SER. NO. 11, IMPROVING CHILD SUPPORT OUTCOMES THROUGH EMPLOYMENT PROGRAMS 2-6 (2012), available at [http://www.acf.hhs.gov/sites/default/files/ocse/improving\\_outcomes\\_through\\_employment\\_programs.pdf](http://www.acf.hhs.gov/sites/default/files/ocse/improving_outcomes_through_employment_programs.pdf).

333. See OFFICE OF CHILD SUPPORT ENFORCEMENT, ECONOMIC STABILITY, *supra* note 332, at 1.

334. These efforts all fall under the category of "healthy family relationships." See OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD SUPPORT FACT SHEET SER. NO. 5, HEALTHY FAMILY RELATIONSHIPS 2 (2011), available at [http://www.acf.hhs.gov/sites/default/files/ocse/healthy\\_family\\_relationships.pdf](http://www.acf.hhs.gov/sites/default/files/ocse/healthy_family_relationships.pdf).

335. See 42 U.S.C. § 669b(a) (2013); 45 C.F.R. § 303.109 (2014); OFFICE OF CHILD SUPPORT ENFORCEMENT, *supra* note 74, at 2.

336. See James McHale et al., *Coparenting Interventions for Fragile Families: What Do We Know and Where Do We Need to Go Next?*, 51 FAM. PROCESS 284, 289-90 (2012) (reviewing states' efforts under the Access and Visitation Program); Pearson, *supra* note 74, at 33-35 (same).

337. Office of Child Support Enforcement, *FY2008 Annual Report to Congress*, ADMIN. FOR CHILD. & FAMS. (Dec. 1, 2008), <http://www.acf.hhs.gov/programs/css/resource/fy2008-annual-report>.

338. OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD ACCESS AND VISITATION GRANTS: STATE/JURISDICTION PROFILES FOR FY 2008, at 1 (2010), available at [http://www.acf.hhs.gov/sites/default/files/ocse/access\\_visitation\\_fy2008.pdf](http://www.acf.hhs.gov/sites/default/files/ocse/access_visitation_fy2008.pdf).

339. ADMIN. FOR CHILDREN & FAMILIES, DEP'T OF HEALTH & HUMAN SERVS., JUSTIFICATION OF ESTIMATES FOR APPROPRIATIONS COMMITTEES 271 (2012), available at [http://www.acf.hhs.gov/sites/default/files/olab/2012\\_all.pdf](http://www.acf.hhs.gov/sites/default/files/olab/2012_all.pdf).

340. See 42 U.S.C. § 669b(b)-(c)(1).



Thus, these programs should be understood as initial steps in the right direction, not sea changes in the approach to child support.

Postmarital family law should embrace these kinds of programs by, for example, fully integrating access and visitation into the core mission of the OCSE.<sup>341</sup> Indeed, a truly radical change to the child support program would be to link support orders to visitation orders, allowing the former only after evaluating whether the latter is appropriate. In many states, this would require a thorough revamping because too often child support orders and visitation orders can be imposed by different systems,<sup>342</sup> but it would be an important step toward engaging fathers as caregivers.

### B. *Institutions: Assistance for Family Transitions*

The second problem with marital family law is that it does not provide an effective institution to help unmarried parents transition from a romantic relationship to a co-parenting relationship. Unmarried parents can use the court system, but many do not. In lieu of a court-only approach to family transitions, postmarital family law would create a new institution to help unmarried parents manage the transition. Parents will need assistance resolving both quotidian issues, such as where the child will be on particular days of the week, and larger issues, such as how to respond to a medical problem or whether one parent should move to a distant town or another state.

A promising example of reform comes from Australia and the introduction in 2006 of Family Relationship Centres (FRCs).<sup>343</sup> The FRCs were part of a larger package of reforms intended to produce a “cultural shift” to encourage co-parenting following a separation.<sup>344</sup> The goals of the reforms were to keep parents together, increase involvement by both parents following a separation, and help separating parents work together to decide matters relating to shared children.<sup>345</sup> There were a series of legislative reforms, including a presumption of shared parental responsibility following a separation and the introduction of less adversarial court-based procedures,<sup>346</sup> but the reform that is most relevant

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341. The OCSE often uses a graphic that shows its core mission—finding parents, establishing paternity, establishing orders, and collecting support—surrounded by related but still peripheral efforts, such as “Healthy Family Relationships.” See, e.g., OFFICE OF CHILD SUPPORT ENFORCEMENT, *supra* note 209, at 1.

342. See *supra* note 71.

343. See PATRICK PARKINSON, FAMILY LAW AND THE INDISSOLUBILITY OF PARENTHOOD 187 (2011).

344. RAE KASPIEW ET AL., AUSTL. INST. OF FAMILY STUDIES, EVALUATION OF THE 2006 FAMILY LAW REFORMS, at E1 (2009).

345. *Id.*

346. *Family Law Act 1975* (Cth) s 61DA (Austl.) (establishing a presumption of shared parental responsibility, which is not tantamount to equal parenting time); *id.* s 65DAA (establishing that an order of shared parental responsibility means a court must consider wheth-

to the problem of court dominance in the United States is the development of the FRCs.

FRCs are community-based mediation centers designed to help parents address relationship issues so they can stay together or otherwise help parents in the initial transition as they separate, whether they were married or not.<sup>347</sup> Built in centrally located areas such as shopping malls, the centers are designed to be easily accessible and in familiar places.<sup>348</sup> The centers focus on issues concerning children and offer relationship counseling to parents and also referrals to outside services for specific needs, such as addiction and anger management.<sup>349</sup>

For separating parents, the FRCs offer free or nearly free mediation services with the goal of developing a short-term workable plan to help parents make “the transition from parenting together to parenting apart.”<sup>350</sup> The plans are not legally binding, but the idea is that by forging an agreement for the first year or two after the romantic relationship ends, a couple will get in the habit of working together; then, as their lives inevitably change, they will be better positioned to adapt and continue their co-parenting. There are now more than sixty-five centers throughout the country, in every region.<sup>351</sup> For clients who cannot visit the centers in person, there is also a website and telephone hotlines that offer relationship services.<sup>352</sup> The Australian government funds the centers, but they are run by nongovernmental organizations focused on counseling and mediation.<sup>353</sup> A group in Colorado has developed a pilot program to bring the idea of FRCs to the United States.<sup>354</sup>

Although it is too early to assess the long-term impact of the FRCs on paternal engagement, the theory behind the centers is that if parents have assistance resolving their parenting difficulties, then fathers are more likely to stay involved in their children’s lives.<sup>355</sup> Initial assessments of the FRCs have shown that they have reached families that would not otherwise have gone to court<sup>356</sup> and that most clients are satisfied with the services they received.<sup>357</sup>

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er it is in the child’s best interest and is reasonably practical to also order equally shared parenting time); *see also* KASPIEW ET AL., *supra* note 344, at E1.

347. *See* PARKINSON, *supra* note 343, at 187.

348. *See id.* at 188.

349. *See id.* at 187-88.

350. Patrick Parkinson, *The Idea of Family Relationship Centres in Australia*, 51 FAM. CT. REV. 195, 195-96 (2013). FRCs also help intact families work through difficult issues in an effort to avoid family breakdown. *See id.* at 206.

351. *See* PARKINSON, *supra* note 343, at 187.

352. *See* KASPIEW ET AL., *supra* note 344, at 4-5.

353. Parkinson, *supra* note 350, at 196.

354. *See* Res. Ctr. for Separating & Divorcing Families, *About Us*, U. DENV., <http://www.du.edu/rcsdf/about.html> (last visited Jan. 7, 2015).

355. *See* PARKINSON, *supra* note 343, at 200.

356. *Id.* at 208-09.

357. *See* KASPIEW ET AL., *supra* note 344, at E2, 58-62.

One of the most intriguing ideas of these new institutions is that they are specifically designed to resolve issues at the relationship level rather than resorting to the legal system. Most alternative dispute resolution systems are still legal in nature, either issuing legally binding agreements or established as a part of the court system. FRCs, however, are a community-based approach to family conflicts, not a court-based approach, and are designed to forestall court involvement.<sup>358</sup> In the words of Patrick Parkinson, the Australian academic who was the driving force behind the FRCs, “The concept behind the . . . FRCs is that when parents are having difficulty agreeing on the post-separation parenting arrangements, they have a relationship problem, not necessarily a legal one.”<sup>359</sup> The courts are available if the FRCs cannot help with the problem, but courts are only a backup system.

These centers offer a completely different paradigm for addressing the conflicts between unmarried parents. The centers are also an important way to address the pressing access-to-justice issue in family law because the services are free and widely available, with options to access help online or by telephone. The centers thus provide unmarried parents with the kind of third-party assistance that can help move them beyond their conflicts.

As the creation of the FRCs makes clear, family law needs to prepare for a world in which couples do not necessarily need to go to court to end their romantic relationship but still need assistance transitioning into a co-parenting relationship and negotiating ongoing obligations. This is one way to address this problem, and there are surely others as well.

### C. Norms: Fathers as Breadwinners and Caregivers

The final problem with marital family law is that it perpetuates the traditional gender norm that fathers are valuable only as breadwinners. Given the limited earning potential of most unmarried fathers, this norm renders unmarried fathers failures because most do not and likely cannot support their children economically. And yet they still want to be involved in their children’s lives. The problem, then, is that we are in a period of flux, with the old model of breadwinning no longer applicable but no new model yet readily available. Indeed, there is no institutionalized role or set of expectations for this group of men at all beyond the unrealistic expectation of paying child support in meaningful amounts.<sup>360</sup>

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358. Parkinson, *supra* note 350, at 196-97. The FRCs interact with the court system in another way. Under Australian law, litigants are required to attend a mediation session before initiating a court case (absent exigent circumstances, such as domestic violence), *Family Law Act 1975* (Cth) s 60I(7), (9) (Austl.), and the mediation provided by the FRCs fulfills this obligation, *see* KASPIEW ET AL., *supra* note 344, at 4.

359. Parkinson, *supra* note 350, at 197.

360. EDIN & NELSON, *supra* note 16, at 213-16.

Postmarital family law would help build new norms by encouraging fathers to be both caregivers *and* breadwinners, thus broadening the current script and giving parents clearer expectations of each other's roles.<sup>361</sup> The study by Edin and Nelson suggests a future in which fathers want to be emotionally involved in their children's lives but also need help playing an economic role. Even though most unmarried fathers likely will not be the sole economic support for their children, with some help, they could play a larger role. Postmarital family law would nurture this dual role of breadwinner and caregiver without using punitive measures.

Beginning with breadwinning, postmarital family law could create a new wage-support program for noncustodial parents, perhaps modeled on the EITC.<sup>362</sup> As explained above, the EITC is administered through the tax code and, in addition to food stamps, is the primary support program for low-income families.<sup>363</sup> The problem, however, is that the EITC only helps a parent who has custody of a child. Without a qualifying child, the payments are minimal.<sup>364</sup> For tax year 2013, for example, the maximum possible payment was \$3250 for a worker with one qualifying child in the home but only \$487 for a worker with no qualifying child.<sup>365</sup> Among other requirements, a qualifying child is someone who lives with the parent for at least six months of the year.<sup>366</sup> This means that the vast majority of unmarried fathers cannot claim a meaningful wage supplement through the EITC. The state may be supporting the child through EITC payments to the mother, but the father does not have an opportunity to contribute economically. This is true not only because he cannot earn much in the labor market but also because he cannot take advantage of the EITC unless he has equal custody of the child, which, even if the law changed to maximize time between parents, is unlikely to happen for most unmarried fathers.

One possible solution is to institute a wage-support program for noncustodial fathers that would provide another payment to the family beyond the EITC payment received by the mother. For example, some European countries have a

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361. For a thoughtful discussion of how to make caregiving a central feature of fatherhood for all fathers regardless of marital status, see DOWD, *supra* note 60, at 157, 213-31.

362. Cf. Gordon L. Berlin, *Rewarding the Work of Individuals: A Counterintuitive Approach to Reducing Poverty and Strengthening Families*, FUTURE CHILD., Fall 2007, at 17, 28-31 (proposing an expansion of the EITC to cover all low-wage workers regardless of parental and marital status).

363. See *supra* Part III.C.1; see also Victor Yang, *A Tenuous Safety Net*, HARV. POL. REV. (Sept. 17, 2010, 4:39 PM), <http://harvardpolitics.com/arusa/a-tenuous-safety-net> (comparing federal budget allocations for antipoverty programs in 2011 and finding that the EITC and food stamps predominate, with \$49.5 billion for the EITC and \$80 billion for food stamps but only \$18.6 billion for TANF, the traditional "welfare" program).

364. See *Earned Income Tax Credit; Do I Qualify?*, *supra* note 292.

365. *EITC Income Limits, Maximum Credit Amounts and Tax Law Updates*, INTERNAL REVENUE SERV., <http://www.irs.gov/Individuals/EITC-Income-Limits,-Maximum-Credit--Amounts-and-Tax-Law-Updates> (last updated Mar. 27, 2014).

366. 26 U.S.C. § 152(c)(1) (2013).

child support guarantee. If fathers do not pay child support, then the state pays what the mother is owed.<sup>367</sup> This approach is politically unworkable in the United States because it would be perceived as a handout that discourages fathers from working. But a program that supplements a father's wages with the express purpose of paying the differential to the mother would increase the incentive to work, ensure mothers have greater financial support, and help decrease acrimony between parents because the parents would be less resentful of each other.

The precise method for supplementing the wages of noncustodial fathers is beyond the scope of this Article. Expanding the EITC to cover noncustodial parents would raise a host of implementation questions for an already complex program, but at least one state is experimenting with the idea. In 2006, New York adopted a program known as the Noncustodial Parent EITC.<sup>368</sup> Eligibility is limited to noncustodial parents who have paid their child support in full,<sup>369</sup> and thus the program operates as an incentive to both work and pay child support. A study found that the program modestly increased child support payments and employment rates.<sup>370</sup> In the New York program, the tax credit is not paid to the custodial parent, but a program could be designed in this way, with the parent filing for the noncustodial parent EITC naming the other parent as the beneficiary. To be sure, a wage supplement would reinforce the social norm of fathers as economic providers, but to the extent the rule is coupled with other reforms that encourage more hands-on fathering, it would reinforce the notion that, like mothers, fathers are both breadwinners and caregivers. These work-focused reforms must also be accompanied by other efforts to encourage a norm of paternal caregiving. In particular, they should be adopted alongside efforts to share custody at birth and maximize the time a child spends with each parent.

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367. Lee Rainwater & Timothy M. Smeeding, *Single-Parent Poverty, Inequality, and the Welfare State*, in *THE FUTURE OF THE FAMILY*, *supra* note 166, at 96, 110.

368. AUSTIN NICHOLS ET AL., URBAN INST., *THE NEW YORK NONCUSTODIAL PARENT EITC: ITS IMPACT ON CHILD SUPPORT PAYMENTS AND EMPLOYMENT*, at iii (2012), available at <http://www.urban.org/UploadedPDF/412610-The-New-York-Noncustodial-Parent-EITC.pdf>. The Noncustodial Parent EITC was part of a series of other programs targeting low-income, noncustodial fathers. See KYE LIPPOLD ET AL., URBAN INST., *STRENGTHENING FAMILIES THROUGH STRONGER FATHERS: FINAL IMPACT REPORT FOR THE PILOT EMPLOYMENT PROGRAMS*, at v (2011), available at <http://www.urban.org/uploadedpdf/412442-Strengthening-Families-Through-Stronger-Fathers.pdf>.

369. *Noncustodial Parent New York State Earned Income Tax Credit (EITC)*, OFF. TEMPORARY & DISABILITY ASSISTANCE, <https://otda.ny.gov/workingfamilies/noncustodial.asp> (last visited Jan. 7, 2015).

370. See NICHOLS ET AL., *supra* note 368, at 19 (concluding that the program resulted in a 1% increase in the number of child support orders paid in full and also a 1.6% increase in the percentage of employed low-income noncustodial parents); see also *id.* at 5-6 (noting implementation challenges, such as how to treat a father who has custody of some children, and thus is eligible for the regular EITC, but does not have custody of other children, and thus might be eligible for the noncustodial EITC).

In all these ways, postmarital family law would develop more realistic norms and expectations. And by redefining the norms around unmarried fatherhood, the state would facilitate more effective co-parenting because both mothers and fathers would have a clearer and more realistic sense of what is expected of fathers.

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Through these proposals, postmarital family law would address many of the challenges facing nonmarital families and diminish the mismatch between marital family law and nonmarital family life. Each proposal addresses the twin problems of maternal gatekeeping and fractious relationships between parents. Although they do not directly reduce multipartner fertility, the proposals would help parents manage the challenges associated with complex families.

#### D. *Anticipating Resistance*

There are several reasons to be skeptical about the proposals described above, most notably a concern that they might be harmful to mothers or children and thus negatively affect family well-being. Before addressing each concern, it is worth reiterating the twin principles underlying this Article. First, children benefit from a high-quality relationship with each parent. Second, the law should not assume unmarried fathers are differently situated with respect to their children than married fathers simply by virtue of their marital status. With marriage all but disappearing in some communities, marriage should not be used as a proxy for willingness to undertake the responsibilities of parenthood. It is true that unmarried fathers tend to be less involved in the lives of their children than married fathers, both economically and socially, but it is hard to disentangle how much of this is due to family preferences and how much is due to the law privileging maternal caregiving. Moreover, simply because unmarried fathers tend to be low income with dim economic prospects does not mean they love their children any less than economically stable fathers.

For these reasons, family law's assumptions about married fathers—that the law should protect their relationship with their children and that they are equal partners with mothers—should apply to unmarried fathers. For married parents, the law does not assume that the mother knows best and that she can decide whether the father sees the child. The rule should be the same for unmarried parents. Similarly, much resistance to these proposals may well stem from an image of unmarried fathers as violent threats to the family. In some cases, this is surely accurate, as it is for married fathers, but family law assumes married fathers are not a threat until proven otherwise. It should do the same for unmarried fathers.

1. *Harmful to mothers?*

Turning to the specific concern that the proposals will harm mothers, a default rule of shared legal and physical custody at birth and a rule that requires courts to maximize the time a child spends with both parents would affect mothers in numerous ways. As an initial matter, it is essential that the reforms not compromise safety, an aim that can be achieved through the current rules for domestic violence. Family law has well-developed, if also criticized, rules for addressing domestic violence that apply to both marital and nonmarital families.<sup>371</sup> In the context of custody disputes, for example, states have rules that change default presumptions about shared custody when there is a history of domestic violence.<sup>372</sup> These laws already apply in the context of custody disputes between unmarried couples and thus at least partially address fears about safety. To the extent rules requiring shared custody increase the incidence of domestic violence, this is reason to resist such a regime. At present, however, it is unclear whether these rules do have such an effect.<sup>373</sup>

Additionally, there may well be resistance to this Article's proposals because of a concern that they will make life harder for mothers with very little in return.<sup>374</sup> The gatekeeping preference embedded in the custody rule of unmarried parents could be justified as giving one party control commensurate with responsibility. Moreover, if there are reasons to doubt whether the parents will be able to co-parent, it may be rational to ensure that there is at least one parent responsible for the child.

These are valid concerns, and in some instances it may make sense to have only one parent in charge, particularly in cases that involve domestic violence. But family law goes to great lengths to protect the involvement of both parents following a divorce,<sup>375</sup> and there is no reason why there should be a different rule for unmarried couples. Rules allowing or favoring joint custody are now

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371. See LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 106-10, 121-24 (2012).

372. See DiFonzo, *supra* note 17, at 224-25 (describing the interplay between domestic violence and presumptions about custody).

373. One study of Arizona's custody rule, which requires courts to maximize the time a child spends with both parents, found that sharing custody beyond a particular point was associated with an increase in filings for a protective order. See Margaret F. Brinig, *Shared Parenting Laws: Mistakes of Pooling?* 42 (Notre Dame Law Sch. Legal Studies Research Paper No. 1426, 2014), available at <http://ssrn.com/abstract=2480631>. The study also noted, however, that this increase may be attributable to a failure to screen properly for domestic violence at the time of the initial award of custody, not to the additional contact between the parents. See *id.*

374. Cf. Susan B. Boyd, *Autonomy for Mothers? Relational Theory and Parenting Apart*, 18 FEMINIST LEGAL STUD. 137, 150 (2010) ("The responsibility cast upon mothers to ensure contact between children and fathers can be both a burden and a constraint on maternal autonomy.").

375. See DiFonzo, *supra* note 17, at 214-21 (describing the change in custody rules away from "the rule of one" and toward a norm of shared parenting).

the norm in most states,<sup>376</sup> and thus applying this as a default rule at birth, rather than as the result of a custody dispute in court, is not so far afield from the general trend.

A final concern is that the rules would upset expectations and the bargaining power of mothers in ways that may be detrimental to mothers and possibly families. In communities where there are fewer marriageable men, for example, giving women power over children enables these women to have at least some power over the fathers.<sup>377</sup>

There is no clear answer to this concern. Mothers will likely have less bargaining power. But it is not clear that this will harm families. It is a cost of the proposals, but one that will hopefully be outweighed by the benefits to families of a less fractious relationship between the parents.

## 2. *Harmful to children?*

The second major counterargument—that the reforms may be harmful to children—raises many of the same issues, particularly a concern about safety. As explained above, safety should always be promoted, but with the appropriate safeguards, family law can use the same presumptions for all families.

Another concern is that more involvement by fathers might actually be detrimental to children rather than helping them. In particular, there might be a concern that unmarried fathers, with their low levels of educational attainment and high levels of incarceration, might be poor candidates for active fathering. It is true that these fathers face many challenges, and they may well need assistance in learning how to be responsive parents. But the evidence does suggest that if they can do so, then their involvement will likely benefit their children.<sup>378</sup>

Looking more specifically at shared custody, the admittedly incomplete evidence<sup>379</sup> suggests that the determinative factors influencing child outcomes are

376. *See id.* at 216 (“By 2013, thirty-six states ha[d] authorized joint custody, either by presumption, preference, or by adopting statutory language in support of cooperative parenting.”). It is difficult, however, to generalize about whether the preference for joint custody is only for joint legal custody or for joint legal and physical custody with either a primary placement with one parent or an equally shared placement with both parents. *See id.* at 216-18.

377. *See CAHN & CARBONE, supra* note 33, at 118-23.

378. *See supra* text accompanying note 187.

379. *See* JUDI BARTFELD, SHARED PLACEMENT: AN OVERVIEW OF PREVALENCE, TRENDS, ECONOMIC IMPLICATIONS, AND IMPACTS ON CHILD WELL-BEING 1-2, 24 (2011) (defining shared custody to mean substantial amounts of time with both parents, but noting that studies are difficult to compare, partly because of differing definitions of shared custody); BELINDA FEHLBERG ET AL., DEP’T OF SOC. POLICY & INTERVENTION, UNIV. OF OXFORD, CARING FOR CHILDREN AFTER PARENTAL SEPARATION: WOULD LEGISLATION FOR SHARED PARENTING TIME HELP CHILDREN? 6 (2011) (describing the limitations of the current studies, such as selection bias, and concluding that there is no evidence that shared custody, defined flexibly to mean any amount of substantial time with both parents, improves or harms child outcomes).



the quality of parenting, the quality of the relationship between parents, and the resources available to the family.<sup>380</sup> The parenting arrangement is not the determinative factor. There is evidence, however, that shared parenting can harm children in certain circumstances, particularly in cases of high levels of ongoing conflict between the parents, continued family violence, and very young children.<sup>381</sup> Postmarital family law must be attentive to these circumstances.

In sum, the proposals are no panacea for the multiple challenges facing nonmarital families, but they are a step in the right direction.

#### CONCLUSION

Nonmarital families are the new normal in low-income communities, and the trend is spreading into the middle class. This new diversity in family form could be cause for celebration—the patriarchal, marriage-based family has always benefited some at the expense of others—but there is reason to be concerned. Numerous factors influence child well-being, but growing evidence demonstrates that family structure is not merely correlated with poor outcomes; it is also partly responsible. This, in turn, exacerbates inequality among children.

As we prepare for a future in which marriage is largely absent, at least in some communities, the only question is whether the law will adequately respond to this challenge. Imposing marital family law on nonmarital families is not the answer. Marital family law's rules, institutions, and social norms all have a pernicious effect on nonmarital families. By continuing to apply a system of law that is designed for marital families, the state is undermining the shaky bonds in nonmarital families, making it more likely that children will grow up without the relationships they need.

To address this pressing problem, this Article has articulated a vision for a postmarital family law built on the understanding that the relationship between parents is critical to child well-being. If family law can help parents make the transition from romantic relationships to effective co-parenting, there is a much greater chance children will grow up with the relationships they need for healthy development. This, in turn, will help decrease inequality among children by ensuring that children are prepared for school, the workplace, adult relationships, and much more.

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380. FEHLBERG ET AL., *supra* note 379, at 6; *see also* BARTFELD, *supra* note 379, at 29-31 (reporting that research from Wisconsin indicates that economic well-being and low-conflict relationships among parents appear to yield benefits in shared placements); HUNTINGTON, *supra* note 13, at 32-34 (describing studies showing which factors affect child outcomes following a divorce).

381. *See* FEHLBERG ET AL., *supra* note 379, at 8; *see also* BARTFELD, *supra* note 379, at 17-19 (discussing the economic impact of shared parenting on children and noting that while the impact is modest, children will likely have fewer economic resources because of changes in each parent's direct costs).

This effort to reimagine family law is not intended to blame poverty and poor child outcomes on personal failings. It is essential to address the larger structural issues facing struggling families, but we cannot ignore the real harm to children from unstable families. The solution is not a marriage cure, but neither is it a denial of the place of families in contributing to poor outcomes. Nonmarital families are here to stay. Family law needs to adapt.