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Against Marriage Equality

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Marriage once rested on three overlapping systems of legal inequality. The first elevated men over women as heads of households, entrusting them with decision-making authority and duties of support. The second restricted access to marriage on the basis of race and sexual orientation. The third privileged marital intimate unions over nonmarital ones, reserving societal support for the former while stigmatizing and criminalizing the latter. Marriage law has now changed to recognize the equal status of men and women in managing family finances and assuming responsibility for children. With the Supreme Court’s opinion in Obergefell, same-sex couples, like interracial couples before them, have won equal access to marriage. And through a long line of decisions, couples now have the ability to form intimate unions either within or outside of marriage. Most family law scholars argue that this final form of marriage equality also requires equal parenting rights and responsibilities for marital and nonmarital parents.

This Article pushes back against the scholarly consensus in favor of “marriage equality” for marital and non-marital parents. The Article argues that the commitments between married and unmarried couples differ, and it provides the first comprehensive defense of nonmarital couples’ ability to elect varied parental relationships with their children. By providing a close examination of the meaning of equality and autonomy in light of the reasoning in Obergefell, the Article lays the groundwork for what is likely to be a new wave of litigation testing the parenthood standards applicable to married same-sex couples and challenging the viability of procedures that distinguish between married and unmarried parents.

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INTRODUCTION

The movement for marriage equality has involved efforts to dismantle three different systems of inequality. The first addressed the system of gender hierarchy as a defining aspect of marriage, with the husband bound to provide for his dependent wife and children, the wife owing the husband the obligation to obey her “baron, or lord.”1 The second questioned restrictions on access to marriage, which a half-century ago banned interracial unions2 and which, until the Supreme Court’s decision in Obergefell v. Hodges, prohibited marriage between same-sex couples.3 The third effort challenged the law’s insistence on marriage as the only legitimate form of intimate relationships.4 Defenders of traditional marriage have argued that these three overlapping systems of inequality were necessary to forge the links between marriage and childrearing.5 The Obergefell decision, in contrast,

1. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *442-45 (1765)(emphasis added). As recently as 1971, the law in some states still provided that “the husband is the head of the family and the wife is subject to him.” Obergefell v. Hodges, 576 U. S. ____, 135 S. Ct. 2584, 2603-04 (2015)(quoting Ga. Code §53–501 (1935)).
5. See, e.g., WILLIAM KRISTOL, WOMEN’S LIBERATION: THE RELEVANCE OF TOCQUEVILLE, IN INTERPRETING TOCQUEVILLE’S DEMOCRACY IN AMERICA 480, 491 (Ken Masugi ed., 1991) (linking marriage to gender inequality and the necessity of marriage for women).
recognizes marriage as a choice premised on the equality of the spouses and their commitment to each other.

The fights to dismantle marriage as a hierarchal and coercive system have fundamentally remade the meaning of marriage—and the meaning of decisions not to marry. Marriage today is no longer intrinsically gendered, universally expected, nor permanent. Instead, the modern institution reflects a particular type of bargain: one premised on interdependence, not dependence, and formal (though not always practical) equality. As part of these bargains, spouses no longer vow to love, honor and obey. Instead, they agree to intertwine their lives and to treat any children who result from their union as their joint responsibility. This notion of joint responsibility requires a high degree of mutual respect, trust and flexibility. It is accordingly not for everyone.

Unmarried couples, in contrast, have made no similar commitment to each other, in many cases because the relationship does not involve the degree of flexibility, maturity and trust necessary to make marriage work.6 There is no reason to assume that couples who have decided not to make a commitment to each other are capable of undertaking such a joint commitment to their child, even if they otherwise receive recognition as legal parents and have a relationship with their children that should continue.

Yet, prominent legal scholars have advocated increased equality between marital and nonmarital couples when it comes to children, and the Obama administration has taken steps towards this outcome.7 A reflexive preference for equality leads them to impose uniformity on couples who increasingly establish parenting relationships that reflect differing degrees of commitment to children, and different allocations of parenting responsibility. The law tends to treat parenthood as an all or nothing status that either confers equal recognition or no recognition at all. This failure to develop alternative possibilities is inconsistent with the celebration of adult autonomy and with a true best interest of the child approach.

The claim for nonmarital marriage equality is likely to become increasingly important as a result of the Supreme Court’s decision in Obergefell and the high number of nonmarital births. First, for same sex couples, the fight for access to marriage has also included a fight for recognition of nonmarital parenting.8 When

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6 Indeed, ethnographic research indicates that in some communities, fifty percent of nonmarital relationships end because of domestic violence. See discussion at note 237, infra; Stacy Brustin & Lisa Vollendorf Martin, Paved with Good Intentions: Federal Proposals to Integrate Child Support and Parenting Time, 48 IND. L. REV. 803 (2015).


gays and lesbians who raised children together could not marry, they sought and won recognition of other forms of parenthood such as second-parent adoptions, de facto parenthood and parenthood by estoppel. Now that they can marry, the courts must determine whether the marital presumption of parenthood (both spouses are treated as legal parents even if they do nothing after the child’s birth to acknowledge their parental status) applies to same-sex couples – and whether couples who do not marry should be forced into the same legal system of parenthood as married couples.

The second reason these distinctions are likely to be of increasing importance is because of the rising number of children born outside of marital relationships, which now constitute 40% of all births. Marriage establishes both automatic parenthood and automatic custody rights at the termination of a relationship. Non-marriage, in contrast, requires some action both to establish the parental status of the second adult and to decide custody when the relationship ends. Prominent scholars argue that marriage equality requires applying the same parentage and custody presumptions to both the married and the unmarried.

Yet placing these claims in context shows that they paradoxically provide illusory equality, conflate the distinct jurisprudential promises of equality and autonomy -- and do not serve children’s interests.

This Article is the first to examine the emerging tensions between the principles of equality and the principles of autonomy that underlie Obergefell. In the face of a growing chorus to separate determinations of parental rights and responsibilities from marriage, the Article offers a new theory to show why this form of marriage equality is a misguided insistence on formal equality at the expense of autonomy. As the Article identifies, the reformed vision of marriage at the core of the Obergefell decision is an institution premised on equality between the spouses; correspondingly, that new vision leads to the idea of non-marriage in the post-Obergefell era as one founded on autonomy, on the ability to create a variety of alternatives to marriage.

Part I of the Article examines the legal changes in the nature of marriage, showing how it has become a partnership premised on equality, trust, and mutuality. Part II shows that marriage, in accordance with principles of equality,
recognizes an opt-out system of parenthood in which both spouses are presumed to be parents with equal rights and responsibilities absent a showing the contrary. Non-marriage, in contrast, is an opt-in system that recognizes more than one parent only when a second adult assumes a parental role. It analyzes the implications of this changed definition of marriage and of the marital presumption for gay and lesbian parents who wed – or who choose not to do so but still parent together. Part III explores just how marriage should matter, developing a new framework for making parenting decisions based on marital – and nonmarital – bargains. As marriage becomes institutionalized in accordance with equality principles, non-marriage should be institutionalized in accordance with autonomy; that requires different legal treatment based on a continuum of arrangements, not one size fits all rules. The Article thus lays the groundwork for what is likely to be a new wave of litigation testing the viability of distinctions between married and unmarried parents.

I. MARRIAGE AS PARTNERSHIP

Traditional marriage served as the universal institution for childrearing. It depended on a combination of inequalities and coercion; the legal system restricted access to marriage, enforced gendered differences within marriage, and criminalized relationships outside of it. The movement for greater “marriage equality” has sought to dismantle this system by loosening prohibitions on who may marry whom, remaking marriage into an institution premised on the equality of the spouses rather than the gendered assumption of unequal marital roles, and by increasing individual autonomy to opt into a variety of intimate relationships. In dismantling traditional marriage, jurisprudential concepts of equality and autonomy have often been seen to operate in tandem, with the majority opinion in Obergefell emphasizing both. While this Part shows how the principles of equality and autonomy have worked together to dismantle traditional marriage, later Parts of the Article explore how tensions between the two principles emerge now that the dismantling has succeeded.


In Obergefell v. Hodges, the Supreme Court emphasized that the twin commands of equality grounded in the Equal Protection Clause of the Constitution and autonomy based on the Due Process Clause were “connected in profound ways,” and both individually and together compelled recognition of marriage

12 Commentator Bill Kristol explained, women must be taught “to grasp the following three points: the necessity of marriage, the importance of good morals, and the necessity of inequality within marriage.” William Kristol, Women’s Liberation: The Relevance of Tocqueville, in Interpreting Tocqueville’s Democracy in America 480, 491 (Ken Masugi ed., 1991); see also James Q. Wilson, The Marriage Problem: How Our Culture Has Weakened Families 89 (2002)(“Underlying the questioning of marriage was a single core event: the slow emancipation of women.”).

13 Obergefell, 135 S. Ct. 2584.
equality. The majority opinion identified these principles with dismantling the systems of inequality and coercion associated with traditional marriage.

These principles come together with particular force in striking down restrictions on access to marriage. Limitations on the ability to marry reflect the traditional role of marriage in securing differential access to societal resources, reinforcing systems of hierarchy based on class, race, and sexual orientation. Restrictions on the ability to marry thus violate principles of equality (between men and women, whites and minorities and same sex and different sex couples) and autonomy (the ability to choose to enter into a relationship of one’s choice) in reinforcing ways.

In Loving v. Virginia, the Supreme Court invalidated bans on miscegenation in a decision that rested on both the Equal Protection Clause and the Due Process Clause. These bans once existed throughout the United States. In his Obergefell dissent, Chief Justice Roberts observed that racial restrictions on marriage arose as an incident to slavery, and served “to promote “White Supremacy.”” They did so, in part, because they operated as part of a system that treated all interracial unions as illegitimate and therefore incapable of establishing either equal respect for interracial couples or the transmission of property rights through inheritance. Loving vindicated the right to marry a spouse of one’s choice as an essential part of the liberty clause of the Constitution, and as an important element in dismantling racial hierarchies that stigmatized minorities.

14 Id. at 2602–03.
15 Id. at 2601 (emphasizing restrictions based on parental consent, race and gender); id. at 2603 (“In interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.”); id. at 2602 (“The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era”).
16 Id. at 2601 (noting that the state has made “marriage the basis for an expanding list of governmental rights, benefits, and responsibilities”). Historians have shown how strategic marriages have long served to advance elite families’ dynastic ambitions, as they carefully arranged family alliances to maximize the opportunities that would be available to their grandchildren. See June Carbone, From Partners to Parents: The Second Revolution in Family Law 60–61 (2000).
17 Obergefell, 135 S. Ct. at 2604.
19 Obergefell, 135 S. Ct. at 2614 (Roberts, C.J., dissenting).
21 See Perez v. Lippold, 198 P.2d 17, 19 (Cal. 1948) (using California constitutional due process and equal protection principles to strike down an anti-miscegenation law, and holding “the right to marry is the right to join in marriage with the person of one's choice”). But see Naim v. Naim, 87 S.E.2d 749, 749 (Va. 1955), vacated, 350 U.S. 891, (1955) and adhered to, 90 S.E.2d 849 (1956) (anti-miscegenation laws do “not violate due process of law or equal protection of the laws clauses of the Fourteenth Amendment”).
In *Obergefell*, the Court struck down restrictions on the ability of same-sex couples to marry on similar grounds. The Court recognized that such restrictions denied same-sex couples equal dignity for their relationships and equal claims for community support for childrearing within these relationships. The Court used the long history of discrimination against gays and lesbians as a justification for the decision, and it called attention to the equal protection jurisprudence that has gradually dismantled inequality among relationships based on sexual orientation.

The Court instead affirmed the importance of the ability to pick a spouse of one’s choice, whether the result is an interracial union, or a desired marriage to a spouse of the same sex. The recognition of these unions thus affirms both principles of equality (on the basis of race and sexual orientation) and autonomy (the ability to marry a spouse of one’s choice).

**B. From Patriarchy to Equality**

Until the mid-twentieth century, state and federal law imposed clearly delineated and unequal gender roles within marriage. Over the last half century, the Supreme Court and state law reforms have remade marriage in accordance with principles of equality.

The Supreme Court had repeatedly considered the legal enforcement of gendered obligations within marriage, but not until 1971 did it strike down a law establishing differing responsibilities for men and women. Since then, the Court has disestablished both the husband’s role as solely responsible for the legal and economic functioning of the marital unit and the wife’s role as primary caretaker.

The result has changed marriage from an easily administered system based on rigidly defined gender roles to an interdependent union that requires greater cooperation and coordination between the couple.

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22 *Obergefell*, 135 S. Ct. at 2594.
23 *Id.* at 2597 (marriage involves affirming the couples’ commitment to each other before their community); *id.* at 2600 (marriage establishes a concord with other families in the community); *id.* at 2601 (“Marriage remains a building block for our national community”).
24 *Id.* at 2604 (“Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm”). The Court’s use of equal protection jurisprudence to strike down anti-gay laws began in *Romer v. Evans*, 517 U.S. 620 (1996).
26 *See Obergefell*, 135 S. Ct. 2584.
27 Dismantling the gendered assignment of marital roles has simultaneously made the relationship between spouses more equal, increased the couples’ freedom to enter into binding premarital agreements with respect to their financial affairs, and enhanced women’s decision-making power (and thus autonomy) within marriage. These changes, however, do not represent complete freedom to determine the content of marriage, particularly with respect to children. *See infra* note 64 and accompanying text.
28 *Reed v. Reed* marked the first time that the Court applied the Equal Protection Clause to gender discrimination, finding unconstitutional an Idaho statute that favored men over women in estate administration. 404 U.S. 71 (1971).
29 *See*, e.g., June Carbone & Naomi Cahn, *Whither/Wither Alimony?*, 93 *Tex. L. Rev.* 925 (2015) (book review) (discussing the changing expectations of marriage); Douglas NeJaime,
The first steps in the changes addressed the financial administration of family assets. In 1971, the Supreme Court held in Reed v. Reed that state law violated the equal protection clause when it favored men over women as estate executors as a matter of administrative convenience.30 Ten years later, in Kirchberg v. Feenstra, the Supreme Court struck down a Louisiana statute that gave a husband, as “head and master” of property jointly owned with his wife, the unilateral right to dispose of such property without the spouse’s consent.31 As a result, the husband acting alone no longer had exclusive control over jointly held property.32

Second, the Supreme Court addressed expectations that men (and only men) would provide the financial support for their families. It struck down a Utah statute that established differing ages for ending child support for boys and for girls, even as it conceded it might “indeed be true” that, given their primary responsibility as breadwinners, men might need more support to ensure they were adequately educated.33 The Court next invalidated an Alabama statute that imposed alimony obligations only on men.34

In the meantime, state family laws moved towards recognition of a new model of marriage with spouses having interdependent and equal roles during marriage and afterwards. No longer was the husband solely liable for expenses incurred by his wife and no longer could he rape his wife with impunity.35 All states today accord both spouses equal management rights over jointly titled property. When one spouse dies, the other is entitled to a significant share of property in the decedent’s estate, even when the will sets out a contrary intent, in recognition of the partnership theory of marriage.36

Windsor’s Right to Marry, 123 YALE L.J. ONLINE 219, 244 (2013) (stating that marriage is now associated with “adult romantic affiliation, emotional and economic interdependence”).

30 Reed, 404 U.S. at 76.
31 Kirchberg v. Feenstra, 450 U.S. 455, 456, (1981). The wife had accused the husband of molesting their daughter. While in jail, the husband hired an attorney and secured payment though execution of a mortgage on the house he held as community property with his wife. Under Louisiana law at the time the mortgage was issued, the husband had the exclusive right to dispose of community property. The Supreme Court struck down the statute as a clear example of gender-based discrimination. As a result, the husband acting alone no longer had exclusive control over jointly held property. Instead, the states have adopted a variety of gender-neutral management systems, which they may apply to different types of property. Id. at 456–61.
At divorce, all states adopted some form of an equitable distribution system that gave both spouses a claim to property acquired during marriage. In 1994, Mississippi became the last state to abandon a common law title system in which property ownership typically depended on which party’s name was listed on the deed. \(^{37}\) States typically presume an equal division of marital property, regardless of which spouse earned the income. \(^{38}\)

At the same time, states have backed away from long term alimony. \(^{39}\) The law now treats marriage as a partnership premised on equal contributions, to be split when the relationship ends. \(^{40}\) It also treats spouses, whatever their division of labor during the marriage, as capable of independence upon divorce. \(^{41}\) It typically occurs only at the end of a long-term marriage, where one party was a full time homemaker and there is a significant different in income. \(^{42}\) These changes make marriage an institution that reflects each spouse’s choice to become a member “of a collective . . . [that] facilitates interdependent sharing, . . . intimacy and commitment.” \(^{43}\)

Third, states remade the relationship between parents and children to enforce more egalitarian principles of caretaking. Traditional marriage associated children’s interests with a breadwinning father and a caretaking mother who performed complementary roles. \(^{44}\) In the first half of the twentieth century, courts recognized a presumption in favor of maternal custody for children of “tender years.” \(^{45}\) They also presumed that if parents could not cooperate sufficiently to

\(^{37}\) Ferguson v. Ferguson, 639 So. 2d 921, 927 (Miss. 1994) (en banc).


\(^{39}\) Carbone & Cahn, Whither/Wither Alimony?, supra note 29.


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


\(^{43}\) Kelly, supra note 32, at 116.

\(^{44}\) Indeed, same-sex marriage opponents have often invoked the importance of complementary sex-based roles in children’s development. See Suzanne B. Goldberg, Risky Arguments in Social-Justice Litigation: The Case of Sex Discrimination and Marriage Equality, 114 COLUM. L. REV. 2087, 2153 (2014) (discussing – and debunking – such claims).

\(^{45}\) See J. Herbie DiFonzo, From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy, 52 FAM. CT. REV. 213, 228 (2014).
stay married, they were unlikely to be able to parent together after a divorce.\textsuperscript{46} Accordingly, just as the law gave husbands unilateral decision-making authority over the family’s assets, the law also insisted on recognition of a single custodial parent and accorded the other parent “visitation” if that parent enjoyed any right to see the child at all. Divided parental authority was thought to be inimical to children’s interests.\textsuperscript{47}

With the adoption of no-fault divorce and the dramatic increase in divorce rates, a continuation of the maternal presumption would have meant that a young woman would be able to leave her husband with the children in tow and command support through the children’s age of majority.\textsuperscript{48} In the name of gender equality, men fought for and won increasing recognition of gender neutral custody rights and a presumption that it was in children’s interests to retain contact with both parents.\textsuperscript{49} Parenting is no longer thought to depend on uniquely male or female attributes,\textsuperscript{50} rather, children’s interests are thought to lie with the stability of their relationships with the two adults who assume responsibility for their care.\textsuperscript{51}

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\textsuperscript{46} \textit{See, e.g.,} DeForest v. DeForest, 228 N.W.2d 919, 925 (N.D. 1975) (discussing the need for stability); Lapp v. Lapp, 293 N.W.2d 121, 130 (N.D. 1980) (associating shared custody with lax discipline); McCann v. McCann, 173 A. 7, 9 (Md. 1934) (noting that the decree in question “divided the control of the child, which is to be avoided, whenever possible, as an evil fruitful in the destruction of discipline, in the creation of distrust, and in the production of mental distress in the child”); Martin v. Martin, 132 S.W.2d 426, 428 (Tex. Civ. App. 1939) (“It is readily apparent that such practices are calculated to arouse serious emotional conflicts in the mind of the child”); McLemore v. McLemore, 346 S.W.2d 722, 724 (Ky. App. 1961) (quoting Towles v. Towles, 195 S.W. 437, 438 (Ky. App. 1917)) (stating divided custody “would be greatly to the detriment of the children, because it would give them no fixed or permanent home, but rather keep them unsettled and on the move. Nothing can be more demoralizing to a home or destructive to good citizenship . . . .”).

\textsuperscript{47} \textsc{Joseph Goldstein, Anna Freud, and Albert J. Solnit, Beyond the Best Interests of the Child} 32, 34, 38 (1973) (stressing the importance of deferral to the custodial parent).

\textsuperscript{48} \textit{See} McMullen, \textit{supra} note 411 (discussing women’s feelings of guilt about initiating divorce as factor in lack of alimony awards); \textit{see also} \textsc{Juditth S. Wallerstein & Joan B. Kelly, Surviving the Breakup: How Children and Parents Cope with Divorce} 23 (1996) (noting that the party initiating divorce likely to ask for less financial support).

\textsuperscript{49} DiFonzo, \textit{supra} note 455, at 216 (stating that almost all states have adopted policies favoring the child’s continuing contact with both parents); Deborah Dinner, \textit{Liberated Patriarchs: The Fathers’ Rights Movement, 1964-2000}, ___ Va. L. Rev. ___ (forthcoming 2015).

\textsuperscript{50} \textit{But see} Clifford J. Rosky, \textit{Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia}, 20 \textsc{Yale J.L. & Feminism} 257, 343 (2009) (arguing that gender stereotypes survive, despite gender neutral custody presumptions, and have a disproportionate impact on gay fathers).

\textsuperscript{51} Within marriage, this still means two and only two adults. For discussion of the possibility of three adults, see Yehezkel Margalit et. al., \textit{The New Frontier of Advanced Reproductive Technology: Reevaluating Modern Legal Parenthood}, 37 \textsc{Harv. J. L. & Gender} 107, 139 (2014); Nancy D. Polikoff, \textit{Response: And Baby Makes ... How Many? Using In Re M.C. to Consider Parentage of A Child Conceived Through Sexual Intercourse and Born to A Lesbian Couple}, 100 \textsc{Geo. L.J.} 2015, 2026 (2012).
These changes have reshaped marriage, and, consequently, made the ability to manage marriage more of a challenge. Marriage, during the eras in which it was intended to channel the effects of sexuality, occurred at relatively young ages, particularly for women.\(^\text{52}\) The spouses entered adulthood through the assumption of gendered marital roles.\(^\text{53}\) Today, it has become a union for the financially stable and mature.\(^\text{54}\) The husband no longer solely generates the family income with the legal authority to determine how it will be spent; instead, both spouses have the obligation to support each other and the need to cooperate in managing the family’s assets.\(^\text{55}\) Similarly, wives are no longer expected to take responsibility for children with little input from their husbands. Today’s marital ideal requires coordinating homework supervision, doctor’s visits, day care pickup, and after school activities. And if a split does occur, both parents are expected to support the other’s continuing participation as an equal in the child’s life.\(^\text{56}\)

The costs of attachment to an unreliable partner have accordingly increased.\(^\text{57}\) Equality within marriage involves the recreation of the institution as an interdependent economic union and one of shared and co-equal assumption of parental responsibilities.\(^\text{58}\) Both spouses therefore have reason to be wary of unreliable partners who do not carry their own weight in a relationship.\(^\text{59}\) This remaking of marriage along principles of equality does not allow spouses complete freedom to tailor the terms of marriage to their preferences. While they do have greater ability to enter into premarital agreements that alter the financial terms of the union, spouses have limited ability to change any aspect of the law governing parental rights and obligations. The championing of marriage equality as equality

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\(^\text{53}\) *Id.*


\(^\text{55}\) Public attitudes show declining support for the traditional hierarchical family and increasing support for equal roles of caretaking and breadwinning in marriage, although women still believe that a man is not ready for marriage until he can provide economic support to his family. Pew, *The Decline of Marriage and the Rise of New Families* (2010), available at http://www.pewsocialtrends.org/2010/11/18/the-decline-of-marriage-and-rise-of-new-families/6/.

\(^\text{56}\) See, e.g., Harris et al., Family Law 626 (5th ed. 2014).


between spouses accordingly involves some restriction on autonomy.\textsuperscript{60} Marriage remains an institution whose content comes from strong social and legal norms, not just from the agreement of the spouses.\textsuperscript{61}

\section*{C. From Necessity to Choice}

The final revolution in family law has eliminated the compulsion that once made marriage the sole legitimate institution for sex, procreation, and childrearing. Marriage (and it once went without saying, heterosexual marriage)\textsuperscript{62} defined women’s lives and constituted a critical part of full adult status for men.\textsuperscript{63} Women who wanted children needed to marry to secure respectability for themselves and support for their children.\textsuperscript{64} Men needed to marry to secure recognition as legal parents. Unmarried women – and men – faced suspicion, if not outright hostility and discrimination.\textsuperscript{65} The restrictions of any alternatives outside of marriage served to channel men and women into marriage and to keep them there, in accordance with the gendered assignment of family roles.\textsuperscript{66}

The fight against the inequality associated with marriage thus includes not just the long struggle to marry a partner of one’s choice,\textsuperscript{67} but also the effort to dismantle restrictions on the ability not to have to marry or stay married at all.\textsuperscript{68} That struggle includes the ability to have sex outside of marriage without fear of pregnancy or imprisonment, to divorce, and to raise children outside of marriage without destitution or ostracism.\textsuperscript{69} While dismantling the restrictions on nonmarital relationships is thus a critical part of the effort to secure the more equal status of men and women in society, the recognition of nonmarital relationships as relationships worthy of respect on their own terms ultimately rests on liberty rather than on the limitations of marriage.

\begin{thebibliography}{9}
\bibitem{} Although spouses do have greater ability to enter into premarital agreements addressing their financial obligations, they cannot alter custody and child support obligations. \textit{See HARRIS ET AL., supra note 56, at 675.}
\bibitem{} Cherlin, \textit{supra note 522.}
\bibitem{} \textit{See Obergefell}, 135 S. Ct. at 2613 (2015) (Roberts, C.J., dissenting) (referring to the traditional definition of marriage as “biologically rooted”).
\bibitem{} Cherlin, \textit{supra note 522.}
\bibitem{} And some argue that the unmarried continue to face such suspicion today. \textit{See} Courtney G. Joslin, \textit{Marital Status Discrimination} 2.0, 95 B.U. L. Rev. 805, 806 (2015).
\bibitem{} \textit{See SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY} (1991) (commenting on the relationship between the lack of a power of exit a marriage and the inequality within the marriage).
\bibitem{} Indeed, arranged marriages began to give way to marriages based on choice in Europe with the Enlightenment, but remain the norm in some parts of the world. \textit{See CARBONE, supra note 16, at 63.}
\bibitem{} \textit{See Rich, supra note 644.}
\bibitem{} To this end, the change in women’s status and the protection of employment discrimination laws also play a role. \textit{See Joslin, supra note 655; MARRIAGE MARKETS, supra note 59.}
\end{thebibliography}
than equality principles. It is thus a form of nonmarital autonomy and radically different from marriage equality.\footnote{Perhaps the best articulation of this principle came in Lawrence v. Texas, 539 U.S. 558 (2003). The Texas statute criminalizing same-sex sodomy was challenged on both equal protection and due process grounds. The Court chose to emphasize autonomy rather than equality principles, observing at the beginning of the opinion that:}

1. Sex

First, the sexual revolution and women’s fight for reproductive rights focused on the ability to have intimate relationships without the fear of pregnancy, and then, as part of the advocacy for same-sex equality, on the right to sexual autonomy. The Supreme Court’s recognition of a constitutional right to privacy took its modern form when the Court struck down a restriction on married women’s right of access to contraception in 1965.\footnote{Griswold v. Connecticut, 381 U.S. 479 (1965).} The Court extended that right to unmarried women in 1972.\footnote{Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).} Historically, contraceptive bans had been designed to discourage unmarried sexuality.\footnote{Id. at 448. In 1917, the Massachusetts Supreme Judicial Court explained that the law’s “plain purpose is to protect purity, to preserve chastity, to encourage continence and self restraint, to defend the sanctity of the home, and thus to engender in the State and nation a virile and virtuous race of men and women.” Commonwealth v. Allison, 227 Mass. 57, 62, 116 N.E. 265, 266 (1917). By the time of the Eisenstadt decision, however, the legislature had abandoned that justification for the statute. Eisenstadt, 405 U.S. at 448.} Rather than recognize an affirmative right to unmarried sexuality per se, the Court described the purpose of the legislation as arbitrary and irrational, reasoning that “[i]t would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication, which is a misdemeanor” under Massachusetts law.\footnote{Eisenstadt, 405 U.S. at 448.} In Lawrence and Obergefell, however, the Court cited Eisenstadt for the principle that personal choices relating to sexual conduct go beyond marriage and help to define personal identity.\footnote{Obergefell, 135 U.S 2584, 2589 (2015). In Lawrence, the Court confirmed recognition that “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.” Lawrence v. Texas, 539 U.S. 558, 567 (2003).} Presumably, such choices include a right that would never have been recognized in the eighteenth or nineteenth centuries – the right to engage in nonmarital sexual relationships.\footnote{In Obergefell, the Court treated Eisenstadt as resting on both equal protection and due process grounds, reasoning that the distinction between married and unmarried couples} Marriage thus no longer
serves as the exclusive venue for acceptable sexual intimacy—nor for longer lasting intimate relationships.

These changes, together with the Supreme Court’s recognition of a woman’s right to elect an abortion,77 fundamentally altered the relationship between sex, marriage, and childbearing. Between 1970 and 1975 (two years after the decision in Roe v. Wade), the number of babies placed for adoption fell in half.78 During the seventies, the number of women attending college who were married by age 23 fell from 50 to 30 percent.79 The availability of contraception persuaded more women to engage in sexual activity outside of marriage, and the availability of abortion meant that an unplanned pregnancy need not result in a shotgun wedding.80 Indeed, while more than a quarter of brides in 1960 gave birth within eight and a half months of the nuptials, very few marriages today are true shotgun affairs.81

Today, more than half of adults are unmarried, and those who do marry spend a larger portion of their life outside of a marital relationship.82 More than two out of every five children are born outside of marriage.83 Marriage has become a choice.

2. Divorce

The universality of marriage required not just an obligation to marry, but one to stay married. That changed with the adoption of no-fault divorce. Between the 1960s and the 1980s, every state liberalized its divorce laws.84 At the height of the “divorce revolution,”85 one out of every two marriages ended in divorce, though the divorce rates eventually leveled off in the nineties.86

79 Id.
82 Goldberg, supra note 54, at 2153.
84 See HARRIS ET AL., supra note 566, at 281.
86 The decline in divorce rates, however, masked a class-based divergence as the divorce rates of college graduates fell back to the divorce levels of the mid-sixties, while those of couples who did not attend college continued to rise. See HARRIS ET AL., supra note 566, at 300.
The increase in divorce accelerated the changes in the nature of marriage. Despite early criticism that no-fault divorce would encourage men to leave their wives, the ability to leave unhappy relationships appears to have improved the lot of women. Women initiate approximately two-thirds of divorces, and economists Betsey Stephenson and Justin Wolfers report that divorce reform was associated with a thirty percent decline in domestic violence and a significant drop in women’s suicide rates. Moreover, with the shift to no-fault divorce, couples now wait longer to marry, women have become more likely to continue working after the nuptials, and the better educated have become increasingly likely to marry each other. While economists debate the impact of legal changes on divorce rates, the liberalization of the grounds for divorce appears to have increased the egalitarian nature of enduring marriages.

3. Childbearing

Until the 1960s, the law established sharp distinctions between nonmarital and marital childbearing, privileging marital families. Fathers had few rights, mothers typically limited the recipients to needy widows; only three states provided aid to nonmarital mothers in 1931. It was not until the sixties that most restrictions

87 For a recent critique linking the decline in alimony awards to long term home-makers to no-fault divorce, see Cynthia Lee Starnes, The Marriage Buyout: The Troubled Trajectory of U.S. Alimony Law 36 (2014) (arguing that the elimination of fault undermined the justification for spousal support).
88 See Margaret F. Brinig & Douglas W. Allen, “These Boots Are Made for Walking”: Why Most Divorce Filers Are Women, 2 AM. L. & ECON. REV. 126, 128 tbl.1, 136-37 (2000) (stating that two-thirds of those filing for divorce are women and custody laws affect willingness to file); Andrew Hacker, Mismatch: The Growing Gulf Between Men and Women (2007) (finding in the mid-nineties that women initiated 60.7% of all divorces and 64% of those with children).
92 See, e.g., id.; Betsey Stevenson & Justin Wolfers, Marriage and Divorce: Changes and their Driving Forces, 21 J. ECON. PERSPECTIVES, 27, 46 (2007) (summarizing the literature demonstrating such liberalization has made enduring marriages more egalitarian); Justin Wolfers, Did Unilateral Divorce Raise Divorce Rates? A Reconciliation and New Results, 96 AM. ECON. REV. 1802 (2006) (assessing studies concerned with unilateral divorce rates).
limiting the Aid to Families with Dependent Children program to widows gave way, with the Supreme Court striking down the remaining provisions dealing with “immorality” and “illegitimacy” on statutory grounds in 1968. The same year, the Court held that children could not be disadvantaged in the matter of inheritance solely because of their parents’ failure to marry.

Perhaps the biggest changes came with the recognition of unmarried fathers. Before 1972, most states granted fathers of nonmarital children few rights with respect to custody or consent to adoption (although they did have support obligations). At English common law and in colonial America, nonmarital children had no legally recognized relationship with either biological parent, and the parents had no recognized familial relationship with the child. Most states did not enact laws recognizing that “illegitimate” children were part of their mothers’ families until the end of the nineteenth century. Unless they had “legitimated” their children, fathers could not exercise parental powers and, in effect, were defined as nonparents. In 1972 – the same year as Eisenstadt and one year after Reed – the Court held unconstitutional an Illinois statute that granted no parental recognition to nonmarital fathers. Illinois law deemed children as wards of the state following the death of a nonmarital mother. Peter Stanley, who had lived with the mother and their children off and on for eighteen years, challenged the law. Illinois argued it had an interest in the “moral, emotional, mental, and physical welfare of the minor and the best interest of the community.” The Court disagreed, and struck down the statute as violative of the Fourteenth Amendment.

96 Indeed, in Stanley v. Illinois, three justices opined: “the Equal Protection Clause is not violated when Illinois gives full recognition only to those father-child relationships that arise in the context of family units bound together by legal obligations arising from marriage.” Stanley v. Illinois, 405 U.S. 645, 663 (1972).
97 DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW Chapter 10 (forthcoming 2015). Slave children were treated like “illegitimate” children because their social status derived from their mothers, and their fathers had no parental rights. Children of a white male and black female were “illegitimate” because miscegenation was illegal, and because the infant received its social status from the mother. If both parents were slaves, their offspring were illegitimate, since marriage between slaves was not legally binding.
100 Id. at 652.
Amendment’s due process and equal protection clauses, finding that Illinois had incorrectly presumed that all nonmarital fathers were unfit parents.\textsuperscript{101} Since then, paternity statutes in virtually every state have been written to grant unmarried fathers greater recognition. And, federal law has encouraged the state to streamline paternity determinations through voluntary acknowledgments of paternity that can be signed in the hospital, to facilitate child support enforcement. Most unmarried parents sign such acknowledgements, and most children therefore have two legal parents whatever the marital status of their parents.\textsuperscript{102}

Ultimately, the dismantling of traditional marriage, which rested on the twin foundations of inequality and coercion,\textsuperscript{103} has both redefined marriage in accordance with principles of equality and given adults more freedom to choose marital or nonmarital relationships.\textsuperscript{104} What the Court has yet to do in any comprehensive way is to address a different kind of “marriage equality:” that is, the treatment of the differences between marriage and non-marriage.\textsuperscript{105}

As the Court acknowledged in Obergefell, marriage involves not just what two people do alone in the privacy of their bedrooms.\textsuperscript{106} It also involves a claim for community recognition, particularly in the effort to rear children.\textsuperscript{107} It is therefore critical to consider what the relationship between marriage and Non-marriage has

\textsuperscript{101} The Court held only that Peter Stanley had a right to a hearing as to whether he should receive custody of his children, rather than finding an automatic right as the surviving parent; the state could not treat him as a stranger to the children he had helped to raise. Stanley may not in fact have been a fit parent (he was an alcoholic who had already lost custody of an older daughter due to allegations of sexual abuse), but Illinois had denied him custody on the basis of his status as an unmarried father rather than his behavior. See Josh Gupta-Kagan, In re Sanders and the Resurrection of Stanley v. Illinois, 5 CAL. L. REV. CIR. 333, 383 (2014).

\textsuperscript{102} Leslie Joan Harris, Reforming Paternity Law to Eliminate Gender, Status, and Class Inequality, 2013 MICH. ST. L. REV. 1295, 1300, 1308–13 (2013) (hereinafter Reforming Paternity).

\textsuperscript{103} See discussion supra at notes 16-106 and accompanying text.


\textsuperscript{105} Indeed, the issue that has received the greatest attention from the Court involves consent to adoption. Fathers’ assertion to equal rights with mothers has received considerable attention in the context of adoption decisions, where either one party’s inclination (e.g., the mother’s desire to place the child for adoption) or the other’s (e.g., the father’s preference for raising the child himself) can prevail. See, e.g., Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013); In re Adoption of J.S., 2014 UT 51, petition for cert. filed, March 3, 2015. Obergefell, 135 S. Ct. at 2604.

\textsuperscript{106} Id. at 2597 (noting marriage involves affirming the couples’ commitment to each other before their community); id. at 2600 (marriage establishes a concord with other families in the community); id. at 2601 (“Marriage remains a building block for our national community”).
become, as the law insists on mandatory terms in the relationship to childrearing even as it celebrates adult freedom to construct relationships on a variety of terms.

II. MARRIAGE EQUALITY, NON-MARRIAGE, AND PARENTHOOD

Marriage, as both the majority and dissenting opinions in Obergefell emphasized, is not just about the adults. It also structures the relationship between parents and children. As marriage changes from a system based on gender hierarchy to one premised on equality, and from a mandatory institution to an optional one, the relationships between marriage and parenthood must also be redefined. That redefinition has been long underway; the move away from marriage as a universal institution has permitted recognition of nonmarital fathers108 and unmarried same-sex couples who parent together.109 This expansion in the categories of adults who can be recognized as parents, however, leaves open the question of whether all parents are the same, and whether they should all be subject to the same presumptions that shape legal approaches to children’s interests.

This section addresses the ways in which the changes in marriage have altered the nature of parenthood. It first shows how the principle of equality within marriage supports an opt-out system, in which both spouses are presumed to have equal parental status and equal claims to custody upon dissolution of their union. It then turns to non-marriage, showing how principles of autonomy support an opt-in system, which ties parental status and children’s interests in continuing ties to the adults to the roles the adults assumed in the relationship. It ends by identifying the unfinished nature of these changes.

A. Marriage, Equality and Parenthood

The movements towards marriage as a system of formal equality have fundamentally shifted the legal approach to parentage. Marriage has come to mean agreement of the spouses to assume joint and equal responsibility for any resulting children, a meaning reinforced by parentage and custody laws.

1. The Marital Presumption

The equal assumption of responsibility for children obligation starts with the marital presumption. The marital presumption makes parentage an “opt-out” status. The presumption, both legally and practically, is that children born to a married woman are the children of the two spouses.110 Neither spouse need take any action for both to receive recognition as parents, and their legal status

108 See supra Part I.C.3.
109 See infra Part III.B.
110 See, e.g., Nejaime, Marriage Equality, supra note 8 (draft at 42).
continues unless someone takes action to challenge this status. In many states, even proof that the husband is not the biological father does not in itself rebut the presumption; instead, doing so may involve consideration of the child’s interests, the degree to which the husband assumed a paternal role, and/or the biological father’s ability and willingness to provide support.

Historically, the marital presumption served to confer fatherhood on a husband. It began as a presumption of biology that could only be rebutted through proof that the husband had not fathered his wife’s child. In fact, however, in the era that treated marriage an institution designed to unite biology and parenthood, the marital presumption served as something of a fig leaf that covered up the inconvenient facts of reproduction in order to preserve the illusion of a biological family. As a practical matter, it restricted the evidence that could be used to rebut the presumption and thus preserved marital unity and protected the husband who assumed a paternal role, whatever the facts of his biological relationship to the child.

Today, the facts of paternity are easy to establish and, if the only relevant question were the existence of the biological connection between a spouse and the child, there would be little need for the marital presumption’s continued existence for anyone. The marital presumption, however, remains the most common way to determine parenthood in someone other than the birth mother and it continues to be associated with marriage’s role in creating and establishing recognition for families. In accordance with these principles, all states use the marital

111 See generally Carbone & Cahn, Marriage, Parentage and Child Support, supra note 114 (discussing operation of the marital presumption).
112 See generally Harris, Reforming Paternity, supra note 102, at 1300 (noting the role of marital presumption in protecting the relationship between husband and child).
114 It not only made parenthood for the married automatic, it also restricted those who could challenge the presumption (unmarried fathers typically did not have standing to establish paternity) and the testimony that could be used to rebut the husband’s paternity (testimony about the wife’s sexual behavior was not allowed). See June Carbone & Naomi Cahn, Marriage, Parentage, and Child Support, 45 FAM. L.Q. 219 (2011).
115 Typically, marital presumption statutes have denied standing to the biological father to establish paternity, and precluded testimony about a wife’s infidelity or sexual relations with a husband present in the household. See Theresa Glennon, Somebody’s Child: Evaluating the Erosion of the Marital Presumption of Paternity, 102 W. VA. L. REV. 547, 573, 564 (2000).
117 The states that place the greatest emphasis on the biological connection, in fact, make the presumption relatively easy to rebut. See Carbone & Cahn, Marriage, Parentage and Child Support, supra note 114.
119 This is true for two reasons. First, because, as Obergefell noted, marriage is important is commanding community recognition of the new family created, and second, because it
presumption as a matter of administrative regularity; it continues to apply unless someone chooses to challenge it, and lack of a biological tie alone does not necessary rebut the presumption. Thus, if a married couple were to leave the hospital and get into an automobile accident on the way home, the husband would be a legal parent who could make medical decisions for the child even if his name did not appear on the birth certificate and he had taken no other action to affirm his paternity. Indeed, even if both parents knew that someone else had fathered the child, and even if the hospital had on record DNA tests that showed that the husband could not have fathered the child, his legal status as a parent would be unaffected unless someone challenged the presumption. The marital presumption thus takes the form of an opt-out condition of marriage: presumed unless proven otherwise.

The ability of same-sex couples to wed, requires the states to reconsider of the relationship between the marital presumption and the meaning marriage. Courts have struggled with how to apply the marital presumption to a same-sex couple, considering whether it applies at all, and then analyzing when it can be challenged.

First, courts have considered whether the opt-out system used for different sex couples applies to same-sex couples; that is, are two same-sex couples automatically treated as parents of a child, or do they need to take some action, such as adoption, to secure legal parenthood? Most of the cases decided to date reflects the promises the spouses make to each other. Historically, the marital presumption reflected the husband’s assumption of a duty of support for children born within marriage and the wife’s promise of sexual fidelity to insure that marital children were in fact his. Obergefell, 135 S. Ct. at 2597 (marriage involves affirming the couples’ commitment to each other before their community); id. at 2600 (marriage establishes a concord with other families in the community); id. at 2601 (“Marriage remains a building block for our national community”).


121 While all states continue to apply the marital presumption to couples in intact marriages that do not challenge it, they differ in how they apply it at divorce. In Pennsylvania, for example, the marital presumption does not apply at all at divorce, allowing either parent to contest the parentage of a child born into the marriage. Pennsylvania then determines financial responsibility in accordance with estoppel principles. The states also vary in their willingness to allow mothers to challenge the parental status of a husband who wishes to continue in a parental role. And all states are more willing to entertain such challenges from either husband or wife, where the biological father is interested in assuming a parental role after the divorce. See, e.g., In re Waites, 152 So. 3d 306 (Miss. 2014).
have taken the position that the opt-system applies, but they differ in their reasoning.

Of course, all of the cases recognize that same-sex spouses, unlike different sex ones, necessarily include a third party in the process of reproduction. The cases involving lesbian spouses also acknowledge that the law in most states provides for termination of the parental status of a sperm donor and recognition of the birth mother’s consenting spouse. The law thus potentially provides two independent bases for parentage in these cases: reliance on the marital presumption or the sperm donor statutes, which, if applied on a gender-neutral basis, would eliminate the need to reach the question of whether the marital presumption applies at all in these circumstances.

In the most extensive litigation to date, Heather and Melissa Gartner challenged the Iowa Department of Public Health’s refusal to list the two mothers on the birth certificate. The Iowa Supreme Court noted that lesbian spouses using a sperm donor to conceive a child were in exactly the same position as heterosexual spouses using a sperm donor, and they should accordingly be recognized as parents. The court based its decision on equal protection grounds, and it concluded that the failure to apply the marital presumption, not just the sperm

122 At least one jurisdiction has changed its parentage statute to apply the preemption explicitly to same-sex couples. See, e.g., D.C. Code § 16-909(a-1)(2)(2015) (“There shall be a presumption that a woman is the mother of a child if she and the child’s mother are or have been married, or in a domestic partnership, at the time of either conception or birth, or between conception or birth, and the child is born during the marriage or domestic partnership”); see also Nancy D. Polikoff, A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty–First Century, 5 STAN. J. C.R. & C.L. 201, 247 (2009) (noting consideration or enactment of similar statutes elsewhere).


124 Most statutes provide for the termination of the parental status of the donor if a doctor performs the insemination. See Naomi Cahn, The New Kinship, 100 Geo. L.J. 367 (2012). These statutes have been extended to egg donors as well. When the spouses do not comply with the statutes, such as by using a turkey baster for an insemination, then parental status is conferred by the marital presumption. Surrogacy is subject to a different set of rules: parenthood for a same-sex or different-sex couple that uses surrogacy is based on state surrogacy law, not the marital presumption. See, e.g., Douglas NeJaime, Griswold’s Progeny: Assisted Reproduction, Procreative Liberty, and Sexual Orientation Equality, 124 YALE L.J. FORUM 340, 344 (2015); Andrea B. Carroll, Discrimination in Baby Making: The Unconstitutional Treatment of Prospective Parents through Surrogacy, 88 IND. L.J. 1187, 1191 (2013).

125 Gartner, 830 N.W.2d 335. The trial court judge cited earlier state court cases reinforcing the utility of the presumption in protecting the integrity of the marital unit, and ordered the state to place both women’s names on the birth certificate. Gartner v. Iowa Dept. of Public Health, 2012 WL 28078 (Iowa Dist.).

126 Gartner, 830 N.W.2d 335.
donor statute, to the two women violated the Iowa Constitution. Nonetheless, it limited its holding to circumstances in which the child was conceived through use of an anonymous donor.

Lower court decisions in other states have directly addressed the question of whether the marital presumption applies where the spouses fail to comply with the requirements of sperm donor statutes. These cases have found the non-biological spouse to be a parent on the basis of the marital presumption, again, however, in cases involving anonymous donors. At the same time, a Utah case held that the failure to apply the sperm donor statute in a gender-neutral fashion violated the constitution without addressing the marital presumption at all.

Whether they rely on the marital presumption or sperm donor statutes, the cases produce results consistent with the law that applies to heterosexual couples who use artificial insemination by donor; they base the non-biological spouse’s parental status on consent to the procedure.

The second, more difficult question concerns the identification of the circumstances in which the marital presumption can be rebutted. The courts often struggle with the difference between the first question (does the marital presumption apply at all) and this second question. Two New York cases illustrate the problem. In the first case, Wendy G-M., both spouses agreed to conceive a child through alternative insemination performed by a physician.

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127 Id. at 354 (“[t]he Department has been unable to identify a constitutionally adequate justification for refusing to list on a child's birth certificate the nonbirthing spouse in a lesbian marriage, when the child was conceived using an anonymous sperm donor and was born to the other spouse during the marriage”).

128 Id. at 354 ("[t]he Department has been unable to identify a constitutionally adequate justification for refusing to list on a child's birth certificate the nonbirthing spouse in a lesbian marriage, when the child was conceived using an anonymous sperm donor and was born to the other spouse during the marriage").


131 See Barse, 59 Conn. L. Rptr. 801; Patton, No. 2:15-CV-00253-DB, 2015 WL 4476734; Wendy G-M., 985 N.Y.S.2d at 861; Gartner, 830 N.W.2d 335; In re Baby Doe, 353 S.E.2d 877; K.S. v. G.S., 440 A.2d 64.

132 Indeed, the courts have been struggling with the meaning of the marital presumption as it applies to different sex couples as well. See Michael H. v. Gerald D., 491 U.S. 110 (1989), (leaving the matter to the states). The states also vary in their treatment of the issue. See Carbone & Cahn, Marriage, Parentage, and Child Support, supra note 114.

133 Wendy G-M, 985 N.Y.S.2d 845; see also Counihan v. Bishop, 974 N.Y.S.2d 137, 139 (App. Div. 2013) (applying the marital presumption to a Connecticut marriage); see
Although the relevant statute on alternative insemination referred to a married woman and her husband, the court nonetheless held that the marital presumption applied such that both women were mothers, and that the lack of a biological relationship to the child did not in itself rebut the presumption. The court concluded that marriage was on a par with biology and adoption in establishing parenthood.

By contrast, in *Q.M. v. B.C.*, the child was conceived while the two spouses were undergoing a temporary separation, and one wife became pregnant through a nonmarital relationship. When the biological father filed a paternity action, the court rejected automatic application of the marital presumption, holding that New York marital equality law did not preclude different treatment where the difference was “based on essential biology.” The court explained that the marital presumption would “effectively extinguish [the child’s] right to have a father.”

The court could have held that the marital presumption applied to same-sex couples on the same terms as heterosexual couples and that, if it did, the presumption would be rebuttable because of the affair. Such a result would have generally...

generally, Alexandra Eisman, Note, The Extension of the Presumption of Legitimacy to Same-Sex Couples in New York, 19 CARD. J.L. & GENDER 579, 583 (2013) (discussing the need to apply the marital presumption to same-sex couples, notwithstanding the lack of legal clarity).

135 “Any child born to a married woman by means of artificial insemination performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband, shall be deemed the legitimate, birth child of the husband and his wife for all purposes.” N.Y. Dom. Rel. Law § 73 (McKinney, 2015). The court also found that the couple’s failure to comply literally with the terms of the statute did not preclude its application to confer parenthood on both of the women on the grounds of the marital presumption. *Id.* at 854.

136 *Id.* at 860 (noting that at lack of a biological connection does not necessarily rebut the marital presumption in heterosexual cases either).

137 *Id.* at 857.


139 *Id.* at 474.


141 Approximately two-thirds of the states similarly allow the nonmarital father to challenge the marital presumption through either statute or case law. UNIF. PARENTAGE ACT § 607 cmt (2002). See, e.g., Watermeier v. Moss, No. W2009-00789-COA-R3-JV, 2009 WL 3486426, at *2 (Tenn. Ct. App. Oct. 29, 2009) (holding that a Tennessee statute required that, for the marital presumption to preclude paternity for the biological father, the married couple needed to have lived together at the time of conception, to have remained together through the filing of the petition, and that the husband and mother needed to sign an affidavit attesting to biological paternity); Draper v. Com., ex rel. Heacock, No. 2010-CA-000112-ME, 2011 WL 1813355 (Ky. Ct. App. Jan. 21, 2011), opinion not to be published (Aug. 17, 2011) (refusing to apply the marital presumption to block recognition of the biological father of a five-year-old, where the mother remarried her ex-husband one day before the child was born and divorced him three years later, before the paternity action was...
been consistent with the approach of the other New York case, which concluded that a lack of consent could rebut the presumption.\textsuperscript{142} Instead, the court held in \textit{Q.M. v. B.C.} that the marital presumption did not apply at all, effectively limiting it to cases of artificial insemination in which the donor’s parental rights had been terminated.\textsuperscript{143} The later case is discordant with equal treatment of same-sex couples because of its insistence on the child’s right to a “father” as opposed to a second parent, and its privileging of a father over a second mother solely on the basis of gender.\textsuperscript{144}

The resolution of cases involving the applicability of the marital presumption to same-sex spouses will ultimately depend on the relationship between marriage, parenthood, and equality. The \textit{Wendy G-M} court found that marriage, not biology, established equal parental rights, observing that: “The pervasive and powerful common law presumptions that link both spouses in a marriage to a child born of the marriage—the presumption of legitimacy within a marriage and the presumption of a spouse’s consent to artificial insemination—apply to this couple.”\textsuperscript{145} In contrast, the court in \textit{Q.M.} treated biology as the decisive factor, and regarded the second spouse as occupying “the position of many loving step-parents, male and female, who are not legal parents and are not entitled to court ordered custody or visitation with their step-children.”\textsuperscript{146} Marriage, according to the court, could not change that result.\textsuperscript{147}

Resolution of the differences between the two cases may spur greater reflection on the meaning of marriage, and it may increase existing differences among the states in doing so.\textsuperscript{148} Some states have already reinterpreted the meaning of the

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\textsuperscript{142} \textit{Wendy G-M}, 985 N.Y.S.2d at 859.

\textsuperscript{143} \textit{Q.M. v. B.C.}, 995 N.Y.S.2d at 474.

\textsuperscript{144} As a practical matter, the court faced a choice between the creation of two co-equal parents (the same-sex spouses) or a custodial parent and two other parties (a biological father and a step-parent living with the custodial mother) playing varied roles in the child’s life. The same result [choice?] occurs in heterosexual cases. For example, where the courts have granted visitation to step-parents on the basis of the functional relationship with the child, they typically stop short of granting equal decisionmaking or custodial rights with the primary parent. \textit{See}, e.g., McAllister v. McAllister, 779 N.W.2d 652, 662 (N.D. 2010) (granting the birth mother “decisionmaking responsibility and primary residential responsibility,” while the former stepfather (as psychological parent) and the biological father were each granted visitation).

\textsuperscript{145} \textit{Wendy G-M.}, 985 N.Y.S.2d at 861.

\textsuperscript{146} \textit{Q.M.}, 995 N.Y.S.2d at 474.

\textsuperscript{147} \textit{Id.}

\textsuperscript{148} \textit{See} NAOMI CAHN & JUNE CARBONE, RED FAMILIES v. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE 135–52 (2010) (noting that family law in the fifty states was largely the same in 1980, but has diverged since then even on relatively prosaic issues such as custody decision-making).
marital presumption to promote greater emphasis on the assumption of parental obligations; these states are likely to apply the presumption to same-sex couples on the same terms as those that currently apply to different sex couples.\textsuperscript{149} Other states object that the marital presumption allows the biological mother to choose who the second parent will be, undermining the rights of biological fathers; these states already make it relatively easy for putative fathers to challenge the presumption.\textsuperscript{150} Same-sex marriage may spur a further move away from the marital presumption in these states altogether. And in some states, the result may increase the pressure to recognize more than two adults as legal parents.\textsuperscript{151}

What neither New York court addressed, however, was the father’s status; even as a legal parent, he nonetheless was an unmarried, non-resident parent, and as such, he, too, may not have been fully equal in his relationship to the child – because of the operation of custody rather than parentage law. At the core of the debate over the marital presumption is a system that depends on two equal parents; where the presumption does not apply, the result is likely to be something less than full equality.

2. Custody

Custody for all children turns on a best interest of the child standard. Yet, the presumptions that underlie custody and their procedural implementation make the practical reality different for married and unmarried couples. Should a married couple divorce, continued recognition of both parents’ custodial rights is also automatic. Courts will not enter a divorce decree without listing the children born into the marriage and entering a custodial order. The law in most states presumes that the child’s interests lie with continuing contact with both parents.\textsuperscript{152} Continuing contact can take the form of joint physical and/or legal custody, or

\textsuperscript{149} Carbone & Cahn, Marriage, Parentage, and Child Support, supra note 114, at 239–37.
\textsuperscript{150} See, e.g., Draper v. Com., ex rel. Heacock, No. 2010-CA-000112-ME, 2011 WL 181355 (Ky. Ct. App. Jan. 21, 2011), opinion not to be published (Aug. 17, 2011) (refusing to apply the marital presumption to block recognition of the biological father of a five-year-old, where the mother remarried her ex-husband one day before the child was born and divorced him three years later, before the paternity action was brought).
\textsuperscript{151} Such a result would allow the courts to recognize the two spouses and the biological father, but is unlikely to produce three equal parents. See, e.g., S.M. v. E.C., 2014 Cal. App. Unpub. LEXIS 4574 (2014) (recognizing a same-sex couple as parents, but remanding for consideration of whether the biological father, who had an affair with the biological mother and who later planned to marry her, should also receive recognition as a parent); see also, Dept of Children & Family Servs. ex rel. A. L. v. Lowrie, --- So.3d ---, 2015 WL 2164619 (La. May 5, 2015) (recognizing the biological father’s liability for support despite recognition of the mother’s husband as a legal parent).
\textsuperscript{152} See DiFonzo, supra note 455, at 217, 225; Schwieterman v. Schwieterman, 114 So. 3d 984, 986–87 (Fla. Dist. Ct. App. 2012) (“It is the public policy of this state that each minor child has frequent and continuing contact with both parents after the parents separate . . . to share the rights and responsibilities, and joys, of childrearing”); N.H. REV. STAT. § 461-A:6(f)-(g) (2015); Charts, 48 FAM. L.Q. 654, 656 (2015) (depicting custody criteria in Chart 2).
parenting plans or other orders that allocate shares of the child’s time and parental decisionmaking authority.\textsuperscript{153}

Joint custody,\textsuperscript{154} rather than selection of a sole custodian, has become the norm. Although it was once dismissed as unworkable, it is now available in some form in all states, and has become the preferred outcome in some jurisdictions absent a showing of “detriment” to the child.\textsuperscript{155} Even when a court awards one parent primary custody, it may still be required to grant a minimum number of visitation days to the other parent.\textsuperscript{156}

National custody statistics are not available, but studies of child custody suggest a growing trend towards joint custody in practice.\textsuperscript{157} As a national task force declared in 2014, “[t]he most significant trend in contemporary child custody law is toward greater active involvement by both parents in continued child rearing after separation.”\textsuperscript{158} Fathers’ rights groups continue to press further for a presumption in favor of an equal division of the child’s time in all divorces, and even without such a presumption, some courts try to equalize the time spend with each parent where it is practicable.\textsuperscript{159}

\textsuperscript{153} See, e.g., HARRIS ET AL., supra note 56, at 570–89.

\textsuperscript{154} See Theresa Glennon, Still Partners?, supra note 1133, at 114. Indeed, “[d]ivorced fathers were among the chief supporters of the California joint custody statute that became effective in 1980, ten years after the no-fault divorce law.” Herma Hill Kay, No-Fault Divorce and Child Custody: Chilling Out the Gender Wars, 36 FAM. L.Q. 27, 36 (2002).

\textsuperscript{155} See, e.g., ARK. CODE § 9-13-101(a)(1)(A)(ii) (2015) (“an award of joint custody is favored in Arkansas”); N.H. REV. STAT. § 461-A:5 (2015) (establishing a presumption in favor of joint decision-making responsibility); DiFonzo, supra note 455, at 217 (“Forty-seven states and the District of Columbia have statutory provisions authorizing courts to award joint custody in one form or another (legal or physical),” and the other three do so by case law); Bernardo Cuadra, Family Law-Maternal and Joint Custody Presumptions for Unmarried Parents: Constitutional and Policy Considerations in Massachusetts and Beyond, 32 W. NEW ENG. L. REV. 599, 641 (2010) (listing joint custody statutes). States differ, however, about whether the preference extends just to joint legal custody, which refers to joint decision-making, or to both joint legal and physical custody. In addition, some states have moved away from the joint custody, sole custody and visitation vocabulary in favor of parenting plans or other forms of cooperative custody. DiFonzo, supra note 455, at 216–18.

\textsuperscript{156} E.g., UTAH CODE § 30-3-35 (2015) (“Minimum schedule for parent-time for children 5 to 18 years of age”).

\textsuperscript{157} WOMEN’S LAW CENTER OF MARYLAND, FAMILIES IN TRANSITION 35–36 (2006), http://www.wlcmd.org/wp-content/uploads/2013/06/Families-in-Transition.pdf (showing that from 1999-2003 “Maryland parents [were] sharing decision-making in more than half the cases – 55 percent – and with greater frequency”).

\textsuperscript{158} Marsha Kline Pruett & J. Herbie DiFonzo, Closing the Gap: Research, Policy, Practice and Shared Parenting, 52 FAM. CT. REV. 152 (2014).

\textsuperscript{159} For a discussion of these movements and the objections to them, see Margaret F. Brinig, Penalty Defaults in Family Law: The Case of Child Custody, 33 FLA. ST. U.L. REV. 779, 781 (2006); Dinner, supra note 49; Arnett Dugan, In Mass. and Elsewhere, A Push for Custody Reform, BOSTON GLOBE, Aug. 1, 2015, https://www.bostonglobe.com/metro/2015/07/31/massachusetts-and-elsewhere-push-for-child-custody-reform/Xh4N0w2qWyZ12VMuYP9J/story.html; see, e.g. Schwieterman v.
Moreover, many states that may not have an explicit preference for joint custody favor a custody award to the parent most likely to facilitate the continued involvement of the other parent. These “friendly parent” provisions give courts the ability to threaten parents who obstruct the other parent’s involvement with loss of custody, and the number of reported opinions transferring custody from mothers to fathers on this basis has increased.

Shared custody has won widespread public and judicial support. For example, a survey of Indiana family court judges found that, while only 4% preferred joint custody in 1998, only 4% did not prefer it in 2011. This acceptance goes beyond the legal system. When participants in an innovative study were asked to allocate parenting time upon divorce, they strongly preferred equal awards of the child’s time to each parent, irrespective of each parent’s involvement with the child during the marriage or the existence of conflict between the parents during the divorce. Study participants expressed significant reservations only when one of the parents had instigated the conflict.

This legal and normative commitment to shared parenting changes the meaning of marriage – and it changes the reasons not to marry. At its core, modern marriage means a commitment to the other spouse as an equal parent for any children born into the relationship; it also includes an obligation to encourage the other spouse’s relationship with the child if the relationship does not last. Married relationships, for better or worse, take place within a socially and legally defined context that has

Schwieterman, 114 So. 3d 984, 986–87 (Fla. Dist. Ct. App. 2012) (upholding an award of equal time to each parent without a statutory mandate).

See Difonzo, supra note 45, at 217, 225.

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

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


Braver et al., supra note 1633, at 236. Follow-up studies reaffirmed the basic intuitions about a strong preference for shared custody, but also found less of an inclination to award equal time to both parents where one had caused the breakup because of an affair or an unjustified decision to leave the marriage. Ashley M. Votruba et al., Moral Intuitions about Fault, Parenting, and Child Custody After Divorce, 20 Psychol. Pub. Pol’y & L. 251, 256 (2014). Even then, most participants continued to favor awarding each parent substantial time with the child.
established shared parenting as a societal norm.\textsuperscript{166} The courts have responded by according married parents higher rates of joint custodial rights.\textsuperscript{167}

By contrast, prospective parents unsure of whether their partners are worthy of the role have become more reluctant to commit to marital obligations,\textsuperscript{168} and these unmarried parents are less likely to have custodial orders at all, much less ones that provide for shared parenting following dissolution.\textsuperscript{169} The question then becomes how to interpret and make sense of nonmarital parenting.

\textbf{B. Non-marriage, Autonomy and Parenthood}

The ability to parent without marrying has become an important component of men’s and women’s reproductive autonomy, simultaneously with the development of increased marriage equality.\textsuperscript{170} Yet, the presumptions that govern parental status differ for the unmarried, and custody decisionmaking produces different results for the unmarried in fact, if not by law. These differences reflect in large part the adults’ greater freedom to enter a variety of parenting relationships outside of marriage, and the corresponding assessment of the child’s best interests that follows from the nature of the adult relationships.

Legally, the parental status of unmarried couples depends on an opt-in system. This system recognizes the woman who gives birth as a legal parent on the basis of her biological tie to the child.\textsuperscript{171} It then permits the addition of a second adult as a legal parent on the basis of some combination of biology, function or intent. All states automatically recognize an unmarried mother as a parent at the time of the child’s birth, and all states have opt-in methods for unmarried partners to receive recognition if they choose, though they vary in their requirements and the degree to

\textsuperscript{166} Andrew J. Cherlin, \textit{The Deinstitutionalization of American Marriage}, 66 J. Marriage & Fam. 848 (2004) (explaining that institutionalization comes from the establishment and reinforcement of institutions such as marriage that create shared expectations about acceptable behavior).


\textsuperscript{168} Wilson, \textit{When Work Disappears} 103–04 (including an account of an unmarried mother explaining how marriage makes it more difficult to leave the father of her children); Jason DeParle & Sabrina Tavernise, \textit{For Women Under 30, Most Births Occur Outside Marriage}, N.Y. Times (Feb. 17, 2012), available at http://www.nytimes.com/2012/02/18/us/for-women-under-30-most-births-occur-outside-marriage.html?pagewanted=all&_r=1& (recounting an unmarried mother’s explanation that she would not consider marriage to the father of her children because of his inability to assume equal responsibility for the children).

\textsuperscript{169} See Nejai, \textit{Marriage Equality}, supra note 8 (draft at 53).

\textsuperscript{170} See Nejai, \textit{Marriage Equality}, supra note 8 (draft at 53).

\textsuperscript{171} See, e.g., Uniform Parentage Act § 201(a)(1) (recognizing the woman who gives birth as legal mother).
which they give greater weight to biology or function.\textsuperscript{172}

Custodial rights, in contrast, depend on a best interest of the child standard. This standard applies, regardless of whether the parties are married or unmarried parents.\textsuperscript{173} But differences typically arise from the dissimilar circumstances of unmarried couples. In almost a third of the states, the nonmarital birth mother receives custody upon a child’s birth.\textsuperscript{174} A second parent who wants a custodial order has to establish rights as a parent, and then go to court to obtain an order. If the parties split, there is no automatic event, such as divorce, that will produce such an order, and unmarried parents, who tend to be poorer than married ones, are less likely to have the resources or the will to engage in litigation.\textsuperscript{175} Moreover, even if unmarried parents get to court, they may not have a sufficiently functional relationship with each other to make shared parenting child realistic.\textsuperscript{176}

Accordingly, this section shows how legal developments provide increasing recognition of unmarried legal parenthood, without necessarily producing the same custodial outcomes that occur at divorce.

\section*{1. Constitutional Recognition of Unmarried Parenthood}

The constitutional right to recognition as a father has been an important component of men’s right for gender equality in parenting\textsuperscript{177} and an important component in dismantling marriage as the universal institution for childrearing. Despite that, the constitutional principles have been used to invalidate express gender (and marriage) based exclusions. They do not mandate equal treatment of the married and the unmarried per se. Nor, as the next section will show, do they supplant a best interest of the child determination. Instead, they create a foundation for establishing paternity where it had once been a legal impossibility.

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{172} All states have some provision for unmarried biological fathers to establish paternity if they wish to do so. See Harris et al., supra note 56, at 865. Many states also have provisions for an adult playing a functional role to receive recognition as parents. For example, a number of states presume that a man who welcomes a child into his household and “holds out the child as his own” is a legal parent without requiring that he take any other action. See, e.g., Md. Code Ann., Est. & Trusts §1-208(b)(3)(2015); Unif. Parentage Act § 204(a)(5) (2002) (requiring that a father hold out the child as his own for two years). A smaller number of states recognize de facto parents, or parents by estoppel – that is, adults who assume a parental role at the encouragement of a legal parent without requiring that a person who seeks parental status take any formal action to receive recognition. See Harris et al., supra note 56, at 914–27.
\item\textsuperscript{173} See Harris et al., supra note 56, at 865; Huntington, Postmarital Family Law, supra note 7, at 203–04.
\item\textsuperscript{174} See Huntington, Postmarital Family Law, supra note 7, at 204, 227.
\item\textsuperscript{175} Carbone & Cahn, Marriage Markets, supra note 59.
\item\textsuperscript{176} See discussion infra at nn. 237-247 and accompanying text.
\item\textsuperscript{177} See Dinner, supra note 49.
\end{enumerate}
\end{footnotesize}
Between the Supreme Court’s 1972 decision in *Stanley v. Illinois*, and its 2013 decision in *Adoptive Couple*, the Court issued a number of opinions considering the rights of putative fathers. In this line of cases, the Court held that an unmarried biological father who had assumed the responsibilities of parenthood was constitutionally entitled to recognition, but it stopped short of saying either that the father’s rights rested on biology alone or that the mother was compelled to allow a father who wished to assume parental responsibilities to do so. The Court has never held that married and unmarried fathers stand on equal ground with respect to their children. Indeed, the Court has continued to uphold the differential treatment of marital and nonmarital fathers in a variety of circumstances.

The Supreme Court had done so because it tied the existence of fathers’ constitutional rights to the assumption of parental responsibilities. In many of these cases, the mothers have placed the child for adoption without giving the father an opportunity to object or take responsibility for the child himself. The Court held that *Stanley* did not require the state to grant a veto to a nonmarital father who had not shouldered significant responsibility for the child’s upbringing, providing that the father had rights at all only where he had a “substantial relationship” with his children.

180 The term “putative father” has historically been used to refer to an unmarried father who alleges that he is the biological father of a child. JOHN BOUVIER, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES (1856), available at http://legal-dictionary.thefreedictionary.com/Putative+father.
181 For a summary of these cases, see CARBONE, FROM PARTNERS TO PARENTS, supra note Error! Bookmark not defined., at Chapter 19.
183 Quilloin v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammed, 441 U.S. 380 (1979). In *Quilloin*, the mother had raised her nonmarital child without the presence of the biological father. When her husband, the child’s stepfather, sought to adopt the child, the biological father attempted to block the adoption. The Georgia statute only required that the nonmarital child’s mother approve the adoption. In *Caban*, because the father had established a substantial relationship, the Court held his status as a father merited protection.
184 Quilloin, 434 U.S. 246.
185 Id. at 389 n.7. See also, Lehr v. Robertson, 463 U.S. 248, 261–62. In *Lehr*, the Court held that the biological relationship between a nonmarital father and a child does not warrant constitutional protection unless the father had developed a substantial relationship with the child. Because Lehr had neither provided support nor lived with the child, the state’s interest in protecting the child outweighed the putative father’s interest in blocking the adoption. Dissenting Justices White, Marshall, and Blackmun characterized the putative father’s rights quite differently. They noted that Lehr had attempted to establish a
In the final case in the series, *Michael H. v. Gerald D.*, the Court found no constitutional violation when California applied the marital presumption against a man who could show, with almost conclusive certainty, that he was the biological father and that he had played a parental role for at least brief periods in the child’s life. Justice Scalia’s use of the opinion as an exposition on originalism limited the Court’s role in modernizing the status of nonmarital parents, effectively leaving the matter to the states.\(^{186}\)

Since then, the Court has not squarely addressed the rights of nonmarital fathers upon the birth of their children, although it has done so indirectly.\(^{187}\) In a recent Indian Child Welfare Act case, the Court accepted, without questioning, the dividing line between those men with “automatic” rights to be deemed fathers, such as husbands, and those without such rights.\(^{188}\)

2. Custodial Rights of Unmarried Parents

In the years after *Michael H.*, Congress and the states have made it easier for unmarried fathers to receive recognition as parents, but these efforts focused heavily on securing child support; custodial rights were an afterthought.\(^{189}\) At the time of *Michael H.* in 1989, relatively few unmarried fathers opted into formal parental status; only 31% of unmarried children had a father whose paternity had been established.\(^{190}\) Over the course of the eighties and nineties, Congress repeatedly created incentives for the states to streamline paternity establishment and improve child support collection efforts.\(^{191}\) Between 1992 and 2010, the number of paternity establishments tripled.\(^{192}\)

The most important innovation involved state recognition of Voluntary Acknowledgments of Paternity, often referred to as “VAPs.”\(^{193}\) VAPs created a process whereby unmarried fathers and mothers could sign a document in relationship with his child but that the mother had concealed her location from him, thereby thwarting him in his efforts to visit. *Id.* at 268–69 (White, J., dissenting). “The ‘biological connection’ is itself a relationship that creates a protected interest.” *Id.* at 271–72, 275–76.\(^{185}\) Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (noting that “Justice Brennan criticizes our methodology in using historical traditions”). Only four justices joined Justice Scalia’s plurality opinion.\(^{186}\) *Id.*

\(^{187}\) *Id.*

\(^{188}\) Even dissenting Justices Sotomayor, Ginsburg, Kagan and Scalia opined: “Although the Constitution does not compel the protection of a biological father's parent-child relationship until he has taken steps to cultivate it, this Court has nevertheless recognized that “the biological connection . . . offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring.” *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2575 (2013) (Sotomayor, J., dissenting) (internal citations omitted).\(^{189}\)

\(^{189}\) *See Huntington, Postmarital Family Law, supra* note 7, at 183–84 (discussing a state-initiated child support system independent of custodial rights).

\(^{190}\) Harris, *Reforming Paternity, supra* note 1022, at 1304 n.51.

\(^{191}\) *Id.* at n.52.

\(^{192}\) *Id.* at n.53.

recognition of paternity in the hospital at the time of the child’s birth. By law, these documents have the same force as a paternity judgment.\(^\text{194}\) Once signed, they are rarely set aside,\(^\text{195}\) although the men may later challenge paternity if they believe that they have been duped into supporting a child to whom they are not biologically related.\(^\text{196}\)

While federal and state laws encourage paternity establishment and try to eliminate many of the differences between marital and nonmarital parents in securing paternal recognition,\(^\text{197}\) these statutes do not address custody.\(^\text{198}\) This is true, at least in part, because the federal interest in paternity has been spurred primarily by child support concerns linked to the expansion, and expense, of federal welfare programs.\(^\text{199}\) It also reflects, however, the historic assignment of family law, including custody, to the states.\(^\text{200}\) The states, in turn, vary considerably when they translate the best interests of the child standard into state custody law.

The single most common state provision, adopted in fifteen states, presumptively awards custody of a child born to unmarried parents to the mother alone.\(^\text{201}\) If a father establishes paternity and challenges custody, however, most custody statutes do not distinguish explicitly between married and unmarried parents.\(^\text{202}\) Instead, in every state, the courts apply a best interest of the child

\(^{194}\) 42 U.S.C. § 666(a)(5)(D) (2015). They do not require paternity testing or judicial action and, unlike birth certificates, they required the participation of father and mother. Harris, Reforming Paternity, supra note 102, at 1306.

\(^{195}\) Id. at 1318.

\(^{196}\) Id. at 1306–07. In addition, in at least 19 states, a man is presumed to be a legal father if he lives with the mother and holds out the child as his own. Id. at 1319.

\(^{197}\) Id. at 1308. The law also sought to protect the equality of marital and non-marital children’s rights and interest in a relationship with their parents. Id.

\(^{198}\) Huntington, Postmarital Family Law, supra note 7, at 183 (discussing the independence of child support and custody systems for unmarried parents).

\(^{199}\) Harris, Reforming Paternity, supra note 102, at 1304.


\(^{201}\) Fifteen states’ statutes, however, expressly adopt a default rule that custody of a nonmarital child shall lie with the mother absent a ruling to the contrary. Huntington, Postmarital Family Law, supra note 7, at 204; Clare Huntington, Family Law and Nonmarital Families, 53 Fam. Ct. Rev. 233, 237 (2015).

\(^{202}\) One state, Massachusetts, explicitly applies different custody standards to married and unmarried parents. MASS. GEN. LAWS 209C § 10 (2015); see, e.g., Smith v. McDonald, 941 N.E.2d 1, 10 (Ma. 2010) (holding that a nonmarital father had no legal rights prior to paternity establishment, but that once established, visitation was appropriate). Second, for married parents, their rights “shall, in the absence of misconduct, be held to be equal . . . until a judgment on the merits is rendered, absent emergency conditions, abuse or neglect, the parents shall have temporary shared legal custody of any minor child of the marriage.” MASS. GEN. LAWS. 208 § 31 (2015).
Courts apply the best interest of the child standard in accordance with factors that reflect assumptions and social science evidence about the nature of children’s interests. These considerations, if applied in a neutral fashion, would ordinarily result in custody differences between married and unmarried couples because of the demographic differences between the two groups. Studies find, for example, that a factor that strongly correlates with a positive co-parental relationship is how the parents managed their relationship while they were still romantic partners. Parents who had a higher quality relationship when they were together were more likely to have positive co-parenting experiences once they separated. Yet, some nonmarital parents may not have lived together at all and many of those who have cohabited did so in the context of contingent relationships in which they made little commitment to each other. In these cases, the mother may be the only parent with whom the child has had a well-established caretaking relationship, and thus the child’s interests will be aligned with the strength of the continuing maternal tie.

Nonetheless, the biggest differences between married and unmarried couples may well be access to the courts. Unmarried fathers are dramatically less likely than married fathers to have a custody order giving them a right to see the child, in large part because they are less likely to get to court to seek one. Women initiate the majority of breakups. If they are married, they must secure an order


205 Researchers determined the quality of the relationship based on the mothers’ responses to questions such as: “(‘Father) is fair and willing to compromise when you have a disagreement’ and ‘(Father) encourages or helps you do things that are important to you.’” Id. at 11.


207 In all nonmarital families, less than 15% of children live with a single father. Philip Cohen, Family Diversity is the New Normal for America’s Children, Sep. 4, 2014, available at https://contemporaryfamilies.org/the-new-normal/ (noting that more than 50% live with single mothers, and one-third live with cohabiting parents).


ending the marriage. No judge will issue such a decree without listing the children born into the marriage and providing an order allocating responsibility for the children. If the couple is unmarried, however, one of the parents simply leaves. Neither parent has to go to court. Litigation is most likely to occur if the state pursues a child support action against the father, but fathers ordinarily cannot seek custody in such actions and filing an alternative action can be time consuming and expensive.\footnote{\textsuperscript{210}} The result produces a chasm in the ability to enforce custodial rights between married and unmarried fathers.

While co-equal assumption of parental responsibilities has become the norm associated with marriage and child-rearing in the middle class communities that still large bear children within marriage, it is not the norm in the communities moving away from marriage. Instead, in these communities, unmarried fathers’ relationships with their children occur in the context of the contingent relationships they negotiate with the mothers, and studies indicate that the father’s continuing relationship with his children depends on how he manages the relationship with the mother.\footnote{\textsuperscript{211}} The access to the child that the mother allows often depends on the father’s willingness to cooperate with the mother and assist financially and socially when she needs help.\footnote{\textsuperscript{212}} As Kathryn Edin and Timothy Nelson note: “unwed childbearing seems to offer mom, and not dad, all the power: ‘it’s her way or the highway,’ in the words of one father.”\footnote{\textsuperscript{213}} And women encourage the greater involvement of the men who contribute to their children, either financially or otherwise, and often form new relationships when the father does not remain involved.\footnote{\textsuperscript{214}}

\footnote{\textsuperscript{210} See Brustin & Martin, \textit{supra} note Error! Bookmark not defined. \textsuperscript{206}.}

\footnote{\textsuperscript{211} The mothers’ entry into new relationships also has an impact. See Laura Tach et al., \textit{Parenting as a “Package Deal”: Relationships, Fertility, and Nonresident Father Involvement Among Unmarried Parents}, 47 DEMOG. 181 (2010) (hereinafter \textit{Parenting as a “Package Deal”}). There are racial variations in the rate of positive coparenting, with black mothers reporting higher rates of effective co-parenting and more involvement from black fathers than other races. See Calvin Z. Ellerbe et al., \textit{Nonresident Fathers’ Involvement after a Nonmarital Birth: Exploring Differences by Race/Ethnicity}, 9–10, 20, 22 (2014), available at http://ccrw.princeton.edu/workingpapers/WP14-07-FF.pdf.}


\footnote{\textsuperscript{213} See EDIN & NELSON, \textit{DOING THE BEST I CAN}, supra note 2066, at 214.}

\footnote{\textsuperscript{214} Baker, \textit{Or Biology}, supra note 212, at 37; Laurie S. Kohn, \textit{Engaging Men as Fathers: The Courts, the Law, and Father Absence in Low-Income Families}, 35 CARDOZI L. REV. 511, 512 (2013). Men are also more likely to establish paternity if they have a close relationship
Those who choose not to marry often do so precisely because they do not want the commitment to financial interdependence and shared parenting that marriage entails. Rather than recognize the differences in these relationships directly, however, the law does so by looking the other way. Neither the Constitution nor state family laws mandate the equal treatment of relationships that are not alike.

C. Summary

Legally, parenthood no longer has a single meaning. Today the law is moving towards recognizing two distinct systems for the creation of various types of families. One system is based on marriage, and it locks in two parents to an equal assumption of responsibility for the child, based on a presumption that the parents’ shared obligations to the child will continue whether or not the marital union lasts. Marriage has become a model of co-equal parenthood, subject to a strong presumption that the child’s interests lie with the continuing involvement of both parents. While the new system of marital equality gives men and women greater ability to say “no” to marriage, it also locks in their mutual commitment to their children once they do marry, protecting men’s investments in their offspring and limiting women’s ability to leave. The new system enshrines parenthood as a mutually assumed and permanent obligation that survives the adult relationship and includes not only joint responsibilities to their children, but also a duty to foster the involvement of the other parent. The power balance is different in relationships outside of marriage. While the legal distinction between marital and nonmarital children has been largely dismantled, mothers retain greater responsibility for and greater authority over nonmarital children. As nonmarital births have become more common, the result has been the emergence of an alternative model that rests on contingent relationships and gatekeeper custodial parents.

This second system exists outside of marriage and does not make the same assumptions about the parents having assumed equal responsibilities to each other or even to their child. This system differs from marriage in that:

1) Only one adult – the woman who gives birth – automatically receives recognition as a legal parent at the child’s birth; a second person can receive such action only by taking an affirmative act, such as signing a VAP, bringing a paternity action or living with the mother and acting as a parent for a period of time.

2) While the law presumes that married parents have assumed equal and undivided responsibility for the child, the responsibilities that unmarried

with the mother. See Ronald Mincy et al., In-Hospital Paternity Establishment and Father Involvement in Fragile Families, 67 J. MARRIAGE & FAM. 611, 615 (2005). A smaller Wisconsin study found that almost half of the unmarried parents in the state filed VAPs within a few months of birth for children born in 2005. The parents were more likely to use VAPs if they were older or college educated, and less likely to do so if the mother was on receiving public support. Patricia R. Brown & Steven T. Cook, A Decade of Voluntary Paternity Acknowledgement in Wisconsin 1997-2007 (May 2008), http://www.irp.wisc.edu/research/childsup/pubtopics/paternity_estab.htm.
parents assume exist on a continuum from cohabitation and shared commitment to the child indistinguishable from that of married parents, to single parenthood without any involvement from another adult, and everything in between.

3) Married parents cannot dissolve their union without a custodial order; unmarried parents can and routinely do so.

Unmarried parenthood thus involves varied statuses for various purposes, with substantial variation among the states in their definitions of parental status and the degree to which they are tied to biology or function. These statuses, which taken together, do not necessarily come with either the same assumption of a coequal role, or the same presumption that the children’s interests necessarily lie in the continuation of the relationship.

Given the existence of these two distinct systems, the remainder of the article considers how to develop a legal framework that focuses on the only remaining uncontested goal of family law: promoting stable, responsive relationships for children.

III. REMAKING THE RELATIONSHIPS BETWEEN MARRIAGE, NON-MARRIAGE AND PARENTHOOD

As marriage has changed from the exclusive system for childrearing to an optional institution premised on economic interdependence and an equal assumption of parental responsibility, so too has non-marriage. Non-marriage has become an alternative system, with similar opportunities for recognition of parental status, but much more varied arrangements for childrearing. The law has yet to fully articulate the relationship between these two systems.

Two developments on the horizon make further definition of, and respect for, the relationship between marriage and non-marriage more critical. First, with national recognition of same-sex marriage, the legal system faces increasing pressures to define the relationship between marriage and parenthood. The cases decided to date show that courts are struggling to define the role marriage should play when parentage does not track with biology. Yet, the redefinition of marriage along terms of equality suggests that same-sex and different-sex couples should be treated similarly: that is, marriage creates a system of opt-out parenthood that presumes that spouses accept a co-equal assumption of parental responsibilities absent proof to the contrary. Same-sex couples who choose to marry can be assumed to accept the same commitments as different sex couples, and those include an equal assumption of parental responsibilities and an obligation to support the parental involvement of one’s spouse in the children’s lives. Now that marriage is no longer an institution designed to channel sex exclusively into the marriage, the fact that members of a same-sex couple may not both be biologically related to the child should not matter in the same way it does not matter that a husband may not be the biological father of a child born within a different-sex marriage.

Conversely, same-sex couples that choose not to marry should have access to
an opt-in system of parenthood that requires some action to acquire parental recognition. These proposals will be controversial because they start with different presumptions for married and unmarried couples, but they are consistent with the twin Obergefell principles of equality for same-sex couples and respect for the autonomous decisions different couples make.

The second factor prompting reconsideration of the relationship between marriage and parenthood is the increase in the number of children born outside of marriage, with many prominent scholars challenging unmarried fathers’ lack of more automatic parental rights. They would like to eliminate many, if not all, of the distinctions between the opt-in and opt-out systems that currently exist, and they would apply the opt-out system’s presumption that shared parenting benefits children to everyone. These proposals confuse formal equality (treating all parents the same) with actual equality (treating those who make similar decisions similarly). Instead, the practical distinctions between married and unmarried parents support different custody determinations; formal equality between married and unmarried parents sets an illusory goal that disserves the best interests of children and overlooks the dissimilarities of the parents. In effect, this implies the recognition of two different systems, each of which is internally consistent, and each of which provides respect to existing family systems.

This Part first explores how the marital presumption might fully support equality for parents, and then turns to examine how principles of autonomy can guide the legal approach to parentage and custody determinations in nonmarital families.

A. Marriage, parenthood, and equal parental status

The marital ideal underlying Obergefell is not the dissenters’ century old model that championed the unity of sex, marriage and biological reproduction. Instead, it is the remade modern model that celebrates marriage as an interdependent union of equals who choose to accept marriage’s responsibilities and obligations. Central to these obligations is acceptance of one’s spouse as an equal parent of any child born into the marriage. In accordance with these principles, same-sex spouses should be recognized as parents of any child born during the marriage as part of the opt-in system of parenthood associated with marriage.

Application of the marital presumption to same-sex couples makes sense because of the remade nature of marriage, and it is also consistent with the original purpose of the marital presumption. A major purpose of marriage, historically

\[215 \text{ See discussion supra at Part I(A).} \]

\[216 \text{ As we noted above, with the ability to determine paternity with certainty and the increase in assisted reproduction, more families raise children where the parents know from the time of the child’s birth that there is no biological relationship with at least one of the parents. The law governing different sex couples nonetheless presumes that both spouses are parents, unless someone seeks to rebut the presumption, and does not view evidence of the lack of a biological tie as a necessarily conclusive rebuttal of the presumption. See Baker, Or Biology?, supra note 2122, at 14, 42, 43 nn. 148, 149.} \]
and today, is to create a family. 217 Indeed, in Obergefell, the Supreme Court emphasized the importance of marriage as an institution that provides recognition for the parenting relationships that take place with it. 218 While same-sex couples who could not marry sometimes disagreed about the nature of their union and their relationship to the children they raised together, 219 same-sex couples today enjoy a choice: they can marry or they can choose not to. Principles of autonomy allow those who reject the implicit and explicit terms of marriage to fashion relationships on other terms. 220 Those who marry should accordingly be presumed to accept the equal parental status of their spouses. 221 The marital presumption should therefore apply in an initial sense in the same way it does for different sex couples - as an opt-out system that treats the spouses as parents unless they take some action to rebut the presumption. The use of assisted reproductive technology, whether through donor eggs or sperm or surrogacy, further offers an opportunity for express consent. When the two spouses agree to use of the technology, they should each be bound by their promises to each other. 222 The marital presumption in such cases becomes irrefutable in establishing the two spouses as parents with equal status. 223 Failure to apply the presumption in these circumstances while continuing to apply it to heterosexual couples should therefore be seen as a violation of equal protection. 224

Questions about whether the marital presumption applies should arise only when one spouse claims a lack of consent (such as at separation) or a third party claims parental rights. The determination of the grounds for rebutting the marital presumption should be structured in the same terms as its application: lack of mutual agreement to parent. With same-sex couples, unlike different-sex couples, there can be no surprise about the lack of a biological tie. 225 Therefore, the mere

217 “[A]lthough people enter into marriages for many reasons, creating familial bonds is one of the most significant reasons, particularly for the benefit of their children.” Wendy G-M., 985 N.Y.S.2d at 857.
218 Obergefell v. Hodges, 135 S. Ct. 2584, 2597 (marriage involves affirming the couples’ commitment to each other before their community); id. at 2600 (marriage establishes a concord with other families in the community); id. at 2601 (“Marriage remains a building block for our national community”).
220 See discussion supra at Part III(A).
221 See Wendy G-M, 985 N.Y.S.2d 845.
222 See, e.g., Cahn, The New Kinship, supra note 1244, at 390-91 (observing that most states have sperm donor statutes that terminate the parental status of a donor, and recognize instead the parental status of a consenting spouse). Consent should be in writing, to ensure enforceability, but consent can also be implied by conduct, such as through helping choose the donor gamete and functioning as a parent.
223 See Wendy G-M, 985 N.Y.S.2d 859 (noting that consent, properly executed and acknowledged under the applicable New York statute, is irrefutable).
224 See, e.g., Gartner v. Iowa Dep’t of Pub. Health, 830 N.W.2d 335 (Iowa 2013).
225 For many gays and lesbians, children are born into their relationship. Others have children born into heterosexual marriages, and they raise these children with their same-sex
fact that both spouses do not have a biological tie to the child should not be grounds for rebuttal. Instead, because support for the mutual assumption of parenting responsibilities is a core component of spouses’ commitment to each other, rebuttal should, correspondingly, be based on a showing that the two spouses did not consent to each other’s assumption of a parental role. And even if the spouses did not consent initially, their consent should be inferred from the assumption of a parental role after the child’s birth. Moreover, the states should be able to consider the child’s interests before ruling either that a non-biological spouse has no obligation to support the child she helped raise during a marriage, or that a biological parent can exclude a non-biological spouse from the child’s life solely because the child was conceived through an affair rather than artificial insemination.

Grounds for rebutting the presumption should be reconciled with the state’s approach to different sex couples. On this point, the states vary considerably in the degree to which they allow spouses to block a biological father’s effort to establish a relationship with a child being raised within an intact marriage. Consequently, allowing a biological father standing to assert paternity in a case like Q.M. does not necessarily violate equal protection principles.

These principles reflect the way all married couples are the same: they have entered an institution designed to support the creation of a family and the spouses should thus be presumed to accept each other’s equal parental status for any children born into the union. The same principles recognize the way in which partners after the break-up of the relationship that produced the child. See Gary Gates, Family Formation and Raising Children Among Same-Sex Couples (2011), available at http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Badgett-NCFR-LGBT-Families-December-2011.pdf. If the same-sex couples marry, these become classic step-parent relationships.

Some courts have applied the same standard to unmarried same-sex partners who could not marry for the same reasons. See Elisa B. v. Superior Court, 117 P. 3d 660 (Cal. 2005).


See discussion at supra note 185, and accompanying text.

Q.M. v. B. C., 995 N.Y.S.2d 470 (Fam. Ct. 2014). For most married couples, same-sex or different sex, the marital presumption will control because there will be no third party seeking parental rights. Questions about the marital presumption are likely to arise only in situations where there is some challenge to the spouses’ commitment, such as at divorce or when one spouse has been involved with a nonmarital partner. States choose how to resolve these issues on principles that have little to do with marital unity per se, but are instead based on gender power in cases that involve unplanned pregnancies. See Carbone & Cahn, Marriage, Parentage, and Child Support, supra note 114 (discussing state policy choices concerning when to apply the marital presumption).

In this sense, gay men are different because a child cannot be “born into the marriage” in the same way. Nonetheless, if one spouse arranges for the birth of a child through use of surrogate, his husband should be presumed to be a parent unless the parental status of the woman giving birth has not been terminated or the presumption of consent is rebutted.
same-sex unions are different: there will ordinarily be a biological connection to no more than one of the spouses, and therefore the marital presumption becomes a presumption of consent rather than one of biology. For all spouses, however, the marital presumption should serve to advance children’s interests in stable and secure families, and in continuing ties with the adults who have assumed parental roles in their lives.

B. *Non-Marriage, Parenthood, and Private Ordering*

At one time, when the law told gay and lesbian couples that they could not marry, they fought for and often obtained recognition as parents outside of marriage. They won recognition of second-parent adoption, step-parent adoption within civil unions and domestic partnerships, de facto parentage, and other forms of functional parenthood.232 Today, with access to marriage, the question becomes whether these doctrines will retain their vitality – for different sex and same sex couples alike.

This section maintains that recognition of the parental status and custodial rights of those who do not marry should respect the adults’ autonomy in entering into a variety of different parenting arrangements, and acknowledge the relationship between the practicalities of children’s interests and the nature of the adult arrangements. Only those adults who have assumed an equal commitment to the child should be presumed to be capable of vindicating an equal assignment of custodial responsibilities.

1. The Decision Not to Marry

While the decision to marry has an established meaning reinforced by law and custom, the decision not to marry has no such shared meaning. A system for nonmarital relationships has simply not been institutionalized to the same degree as marital relationships;233 the reasons for not marrying are not universally shared. Some couples do not marry because the state creates incentives not to do so, 234 LGBT couples have historically been excluded from marriage, and some will still not marry because they do not believe in the institution.235 The largest group,
they do not believe in marriage even when they can marry. See Pew Research Center, A Survey of LGBT Americans, June 13, 2013, at 64, available at http://www.pewsocialtrends.org/files/2013/06/SDT_LGBT-Americans_06-2013.pdf (noting that 60% of LGBT respondents are either married or would like to marry one day, while 27% say they are not currently sure if they want to marry someday). As for the general public, a similar question on a 2010 Pew Research survey found that 76% of adults were either currently married or thought they wanted to get married, and 13% said they were not sure. A sizeable minority of the LGBT community believes same-sex marriage advocacy has assumed too high a priority. Jens Manuel Krogstad, What LGBT Americans Think of Same-Sex Marriage (2015), available at http://www.pewresearch.org/fact-tank/2015/01/27/what-lgbt-americans-think-of-same-sex-marriage/.

In the United States, most people continue to express positive views about marriage and express a desire to marry, with those who are not married most likely to say that it is because they have not met the right person. Wendy Wang and Kim Parker, Record Share of Americans Have Never Married (2014), http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married/ (explanation of 30% of those who are not yet married but would like to do so).

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

And in some cases, choose not to live together. One study found that though 51% of unmarried parents were living together at the time of the child’s birth, only 16% were married one year later. Of the couples that were romantically involved at the time of the child’s birth, only 12% remained so one year later. SARA McLANAHAN ET AL., THE FRAGILE FAMILIES AND CHILD WELLBEING STUDY: BASELINE NATIONAL REPORT (2003), available at http://www.fragilefamilies.princeton.edu/research_associates.asp.

See, e.g., EDIN AND KELFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 81 (2015) (hereinafter PROMISES I CAN KEEP) (estimating that domestic violence contributed to about half of the breakups among unmarried mothers
Indeed, fifty percent of poor women’s intimate relationships break up at least in part because of domestic violence, and every state mandates consideration of such violence in custody awards.\textsuperscript{242} Even where disqualifying behavior such as domestic violence is not an issue, unmarried couples report that the instability in their lives that comes from insecure employment, unstable income, substance abuse, and involvement with the criminal justice system make them wary of the type of commitment marriage entails.\textsuperscript{243} Moreover, unmarried relationships, in part because they do not involve the same commitment as marriage, are more likely than marriages to end because of sexual jealousy or other forms of mistrust.\textsuperscript{244} These same factors make truly shared parenting much less likely to work.\textsuperscript{245}

While equal assumption of parental responsibilities has become the norm associated with marriage and child-rearing in the middle class communities that still large bear children within marriage, it is not the norm in the communities moving away from marriage. Instead, in these communities, unmarried fathers’ relationships with their children occur in the context of the contingent relationships they negotiate with the mothers, and studies indicate that the father’s continuing relationship with his children depends on how he manages the relationship with the mother.\textsuperscript{246} The access to the child that the mother allows often depends in turn on

in their sample and repeated and flagrant infidelity contributed to about four in ten of the breakups).

\textsuperscript{242} Id. See also HARRIS ET AL., supra note 566, at 614–15 (noting that domestic violence directed at caretakers has been found to be harmful to children and all states mandate consideration of such violence as a factor in custody awards).

\textsuperscript{243} See, e.g., WILLIAM J. WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR 99 (1996); HANNA ROsin, THE END OF MEN AND THE RISE OF WOMEN 92–93 (2012). In their 2005 book, sociologists Kathy Edin and Maria Kefalas, for example, quote one young woman, a white high school dropout who had a child in her teens with a man who was awaiting trial: “That’s when I really started [to get better], because I didn’t have to worry about what he was doing, didn’t have to worry about him cheating on me, all this stuff. [It was] then I realized that I had to do what I had to do to take care of my son.” EDIN & KEFALAS, PROMISES I CAN KEEP, supra note 2411, at 194.

\textsuperscript{244} EDIN & KEFALAS, PROMISES I CAN KEEP, supra note 2411, at 81 (discussing infidelity and domestic violence); Heather D. Hill, Steppin’ Out: Infidelity and Sexual Jealousy among Unmarried Parents, in UNMARRIED COUPLES WITH CHILDREN 104 (Paula England & Kathryn Edin eds., 2007); Joanna Reed, Anatomy of the Break-up: How and Why Do Unmarried Couples with Children Break-Up?, in id. at 133.

\textsuperscript{245} For the women, already struggling economically, “single parenthood reduces the emotional burden and shields them from the type of exploitation that often accompanies the sharing of both living arrangements and limited resources.” EDIN & NELSON, supra note 2066, at 17, 18, 208. Even studies that show strong support for joint custody indicate hesitation where a divorce occurs because of one parties’ misbehavior. See Ellman & Braver, supra note 41..

\textsuperscript{246} The mothers’ entry into new relationships also has an impact. See Laura Tach et al., Parenting as a “Package Deal,” supra note 2111. There are racial variations in the rate of positive coparenting, with black mothers reporting higher rates of effective co-parenting and more involvement from black fathers than other races. See Ellerbe et al., supra note 2111,
the father’s willingness to cooperate with the mother and assist financially and socially when she needs help.\textsuperscript{247} As Kathryn Edin and Timothy Nelson note: “unwed childbearing seems to offer mom, and not dad, all the power: ‘it’s her way or the highway,’” in the words of one father.\textsuperscript{248} And women encourage the greater involvement of the men who contribute to their children, either financially or otherwise, and often form new relationships when the father does not remain involved.\textsuperscript{249} Given the factors that undermine relationship stability in poorer communities, a norm that counsels hesitation about marriage and about truly shared parenting makes sense.\textsuperscript{250}

It therefore makes no sense to insist on formal equality between the married and the unmarried in custody proceedings. Existing law, of course, permits consideration of factors such as domestic violence,\textsuperscript{251} and substance abuse, criminality, and incarceration are grounds to limit parental contact even among married couples. Yet, in the face of clear statutory mandates to take parental misbehavior into account, courts have difficulty determining when factors such as domestic violence and substance abuse are serious enough to justify limitations on custodial rights and they appear reluctant to the limit a parent’s contact with a child in the face of a strong presumption for the continuation of such contact.\textsuperscript{252} Instead, there should be recognition that the reasons parents do not marry often overlap with reasons that counsel against shared custody. The result should give rise to presumptions that track the behavior that leads some into marriage and some into non-marriage, with recognition that the presumptions should be rebuttable in appropriate cases.\textsuperscript{253} Such an alternative system would apply existing


\textsuperscript{247} See \textsc{Nancy E. Dowd, Redefining Fatherhood} 3 (2000); \textsc{Baker, Or Biology?}, \textit{supra note 212}; \textsc{Harris, Questioning Child Support Enforcement}, \textit{supra note 211}. Sociologists have found that the mothers valued fathers’ contributions not by the amount of financial support, but by non-economic factors, such as role modeling. \textit{E.g.}, \textsc{Maureen R. Waller, supra note 212}. 

\textsuperscript{248} See \textsc{Edin & Nelson, Doing the Best I Can}, \textit{supra note 2066}, at 214. 

\textsuperscript{249} \textsc{Baker, Or Biology?}, \textit{supra note 212}, at 37; \textsc{Kohn, supra note 216}. Men are also more likely to establish paternity if they have a close relationship with the mother. \textit{See Ronald Mincy et al., In-Hospital Paternity Establishment and Father Involvement in Fragile Families, 67 J. Marriage & Fam.} 611, 615 (2005). A smaller Wisconsin study found that almost half of the unmarried parents in the state filed VAPs within a few months of birth for children born in 2005. The parents were more likely to use VAPs if they were older or college educated, and less likely to do so if the mother was on receiving public support. \textsc{Brown & Cook, supra note 213} 

\textsuperscript{250} What produces this distrust is not just economic marginality, but the mismatch between men and women. \textit{See Carbone & Cahn, Marriage Markets, supra note 59}. 


\textsuperscript{252} \textsc{Scott & Emery, Gender Politics and Child Custody, supra note 2033}. 

\textsuperscript{253} As Scott and Scott recognize, “cohabiting couples are a heterogeneous category with diverse goals and expectations for their relationships. This heterogeneity, together with the defining decision not to marry, impedes the creation of networks and sends a confusing
law to married parents who otherwise meet the jurisdiction’s criteria for shared custody. For unmarried parents, the law should assume that the children’s interests lie in the security and stability of their attachment to the person who has acted as their primary caretaker, unless there are:

a) Two adults who are both legal parents in accordance with the opt-in system described above;

b) Who have lived together for a period of at least two years during which they shared parenting or who have shared parenting in an approximately equal way for a period of at least two years without living together; and,

c) Who can demonstrate the capacity to parent together without violence, abuse, or excessive conflict.

If the presumption in favor of a single primary custodial parent were not rebutted, the other parent would still be able to seek visitation in accordance with a best interest standard. While the presumption would be that the child’s interests lie with visitation, the presumption should also be that the child’s interests lie with the strength of the relationship to the primary caretaker.

The resulting new framework articulates distinct standards for custody based on whether the parents have explicitly or implicitly assumed joint responsibility for

signal about the nature of cohabiting unions.” Scott & Scott, From Contract to Status, supra note 233, at 296 (draft at 5–6).

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

255 Today, most different sex cohabitants in fact sign voluntary acknowledgments of paternity. Same-sex couples would similarly have to take action, such as adoption, for the partner who is not biologically related to the child to receive recognition as a parent. Many states, however, also consider of functional parenthood either as a basis for full parental status (see discussion of “holding out statutes,” supra note 172) or as a basis for visitation in accordance with a best interest test.

256 This means, as a practical matter, that where two parents cannot cooperate, the burden should not be on the custodial parent to insure the inclusion of the other parent in the child’s life. For disturbing examples of the opposite rule, see Sharp v. Keeler, 256 S.W.3d 528 (Ark. App. 2007); K.T.D. v. K.W.P, 119 So. 3d 418 (Ala. Civ. App. 2012) (transferring custody of a child with cancer to a father with whom the child had never had an overnight visit because of the mother’s failure to ensure the father’s involvement). In both cases, the courts valued contact with the non-custodial parent more than the child’s interest in the relationship with the custodial parent who had provided care from birth.

257 At least one state has already implemented a somewhat comparable system. Since 1986, Massachusetts has used two different standards for determining custody. First, for nonmarital parents, “the court shall, to the extent possible, preserve the relationship between the child and the primary caretaker parent,” considering where the child has resided “and whether one or both of the parents has established a personal and parental relationship with
caretaking in the context of a stable long-term relationship. Such a system is consistent with emerging norms that draw sharp (and evolving) distinctions between marital and nonmarital parenting partnerships, and which focus on the child’s interests in the stability of a relationship with the parent or parents who have consistently provided caretaking and who have taken care of the child emotionally and financially irrespective of marriage.\(^{258}\) By ratifying the arrangements that families are developing themselves, it reflects Obergefell’s joint emphasis on equality and autonomy, allowing couples to make the choice between an opt-in or an opt-out, system.

2. Objections

To be sure, such a system, which draws a bright-line rule based on marriage and which gives custodial parents (who tend to be women) greater rights than non-custodial parents, is likely to be controversial for several reasons. First, it may appear to promote marriage at the expense of other institutions. In fact, it does not; the very argument for this system rests on the recognition that marriage has become a distinct, rather than a universal, parental bargain, and that non-marriage is becoming a separate and robust system on its own. Marriage encourages a joint assumption of responsibility for children. In return, it protects the investment both parents make in the children. The result makes marriage riskier in some ways for parents who fear losing custody, but it also encourages greater care in the selection of a partner. Recognizing non-marriage as a legitimate system on its own terms requires acknowledging the different patterns of commitment between adults and to children. This Article tries to identify the traits that link marriage and shared parenting, and it extends them to unmarried couples who demonstrate the same traits, but only to those couples.\(^{259}\)

the child or has exercised parental responsibility in the best interests of the child.”

\(^{258}\) The ALI’s system of proportional custody could be justified in similar terms. See Scott & Emery, Gender Politics and Child Custody, supra note 2033. The system proposed in this Article is different in that it distinguishes between marital and nonmarital children, and it assumes there should be a single primary caretaker who receives sole custody except where the parents demonstrate that they have jointly assume caretaking responsibility in a manner similar to long term committed cohabitants. (To be sure, most nonmarital children are born to cohabitants, but the cohabitation is less likely to be stable, co-equal or long-lasting.) See McLanahan, supra note 240.

\(^{259}\) It also accepts the possibility of alternative family patterns with one or more parents. To date, the interests of third parties, such as biological fathers, have been seen as at odds with recognition of same-sex partners, but accepting the notion that not all parents have the same
Second, the system may, in the guise of recognizing existing bargains, mischaracterize nonmarital relationships as more contingent and riskier than they are in practice. The Fragile Families studies, for example, demonstrate that the majority of nonmarital fathers cohabit with the mothers of their children at birth, and contribute substantially to them materially and emotionally. Failing to grant these fathers equal standing with married fathers may thus be perceived as further entrenching the class-based differences between families, deepening the differences between low-income families, which are more likely to be nonmarital, and everyone else, and discouraging low-income fathers from further involvement. The state should, indeed, be wary of reifying this situation. Moreover, the existing system already discourages paternal investment in children. State-initiated child support enforcement, for example, has had counterproductive effects on father’s involvement with their children, and the increased emphasis on paternal custodial rights has encouraged some women to forego child support, so that they will not be subject to fathers’ efforts to control their lives through their children.

Nonetheless, while the state should encourage the involvement of parents with their children, the means for doing so should not disrupt a child’s stable environment and the ability of the primary caretaker to continue providing care. Rather than removing family decision-making from the parents to the state, the state should defer to the parties’ own arrangements. Left to their own devices, non-custodial parents contribute more when the state does not intervene, particularly when that intervention comes over the objections of both parents. Given what we know about the reasons poor couples do not marry creating a system of greater automatic custody rights would confer some of the greatest advantages on the parties least likely to cooperate.
In contrast, measures to address the class gap directly, rather through family law, offer more promise.\textsuperscript{267} Fathers in nonmarital families who cannot play the role they desire are typically unable to do so because of their unstable living situations, ranging from periodic unemployment to incarceration.\textsuperscript{268} If society invested more in the fathers, rather than in efforts to promote marriage or joint custody, greater family stability would follow. In the meantime, this proposal provides stability for children, according to their expectations and needs. It does not exclude non-custodial parents from the children’s lives, and should not stand in the way of proposals that focus on parenting skills and the ability to cooperate.\textsuperscript{269}

Relatedly, even for married couples, the equal parenting presumptions may in fact not be the status quo, but instead be an effort to impose the ex ante bargain expected from marriage or an arrangement never even contemplated before or during the marriage. Yet the legal meaning of marriage depends on these assumptions of equal caretaking responsibilities. By contrast, non-marriage presumes more varied allocations of caretaking responsibilities,\textsuperscript{270} and each choice deserves recognition.

Third, making family law decisions by presumptions raises serious due process concerns.\textsuperscript{271} The possibility of false negatives (denying custody where it is warranted) and false positives (granting joint custody where it is unwarranted) are salient whenever the law uses presumptions. Yet the proposed statute does not impose irrebuttable presumptions. Consequently, given the ability to rebut the presumption, nonmarital relationships that look like marriage should be treated similarly in the end.\textsuperscript{272}


\textsuperscript{268} See, e.g., EDIN & NELSON, supra note 2066; EDIN &. KEFALAS, PROMISES I CAN KEEP, supra note 2411; ALICE GOFFMAN, ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY (2014).


\textsuperscript{271} \textit{See, e.g.}, Orr v. Orr, 440 U.S. 268 (1979) (striking down an Alabama statute which irrebuttably denied alimony to husbands); Stanley v. Illinois, 405 U.S. 645 (discussing presumptions regarding nonmarital fathers).

\textsuperscript{272} This Article does not address the circumstances in which an unmarried partner with no biological relationship to the child should be recognized as a legal parent. The states vary considerably in whether they allow such recognition at all, and if they do, whether they require adoption or merely the assumption of the functional role. In addition, they differ considerably on whether the result is a legal parental status equal to that of the partner with the initial legal tie to the child or a secondary status, such as that of step-parent or parent by
Finally, on the equal protection challenge, discrimination occurs when like are treated unlike. Here, the particular lens being used to classify becomes critical. On the one hand, fathers with the same biological links to their children will be treated differently based on the fact of marriage. On the other hand, fathers (and others who have functioned as parents) will be treated similarly if they have served as caretakers.\textsuperscript{273}

CONCLUSION

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

By contrast, non-marriage is about the ability to craft custom arrangements, even if they are seemingly unequal. That is, marriage is a fixed institution premised on equality with a set of clear rules, while non-marriage implies the freedom to contract on a continuum of terms. Because the law does not impose those terms, greater autonomy is possible, but formal equality between parents is not mandated and may not be appropriate. The law can only routinize these relationships if it acknowledges the reasons parents choose non-marriage over marriage, and incorporates these differences into custody decision-making.\textsuperscript{274}

The legal reality is that the relationships – and the nature of children’s interests that follow from the content of the adult relationships – are on a continuum. Insistence on formal equality between the two parents and between estoppel in accordance with the ALI principles. While this article does not address these issues, it favors tying recognition of full and equal parental status to those circumstances in which there is both assumption of an equal role, and explicit consent to that role by the partner. Merely living together and changing a few diapers should not by itself establish equal parental status. See Librers v. Black, 129 Cal. App. 4th 114, 123 (2005).

\textsuperscript{273} Poor fathers are currently being treated unfairly less because of a denial of custody rights than by unwarranted emphasis on child support enforcement. See, e.g., Brustin & Martin, supra note Error! Bookmark not defined.. For married fathers, custody rights have become automatic and a significant factor in reducing child support payments. Maria Cancian et al., supra note 167 (documenting a substantial increase in shared custody at divorce). In contrast, fathers subject to state-initiated child support enforcement actions, who are much less likely to be married, cannot seek custodial orders in the context of such actions, and get no credit for either the material or the caretaking contributions they make to their children. These procedures are unfair, but the solution is to return control of such actions to the couples themselves rather than to impose state-initiated custody actions to offset state-initiated child support actions that neither parent wants. See Brustin & Martin, supra note Error! Bookmark not defined..\textsuperscript{274} For unmarried biological parents, pressure is building to institutionalize equality in parents’ ongoing contact with children following dissolution of the adult relationships. See, e.g., Huntington, Postmarital Family Law, supra note 7.
married and unmarried parents coerces heterogeneous couples into homogenous relationships. Not only do married and unmarried biological parents differ in the parenting relationships they adopt, but the position of unmarried same-sex and different-sex couples is also not the same. For unmarried same-sex couples, where there is no biological tie to at least one of the adults, the core question is the recognition of parental status, of the circumstances under which that adult attains legal parenthood. This issue is novel in a post-Obergefell world, where the full meaning of marriage equality is a work-in-progress as the LGBT community absorbs the impact of the ability to make an affirmative choice between marriage and non-marriage. Moreover, the basis for conferring parental status will then affect the appropriate standards for custody decision-making: whether in marriage or non-marriage, the assumption of equal parental responsibilities should produce a presumption of shared parenting following dissolution of the relationship, while the rejection of equal parental status should produce wariness about the imposition of shared custodial presumptions. The achievement of multiple forms of marital equality has created opportunities for the flourishing of nonmarital families. This growing acceptance of parenthood outside of marriage, however, leads to questions about how the law can respect these newly developing familial norms without imposing marital terms on the unmarried. True respect for autonomy neither privileges marriage over non-marriage nor imposes the same terms on those who have not chosen them voluntarily; this is not a marriage promotion strategy that only lets married couples have certain privileges, nor that forces all nonmarital relationships to comply with the same terms as marriage. Instead, it serves as a recognition that in a new era of private ordering, marriage has been defined to lock in a very particular type of bargain, one premised on interdependence, commitment and equality. By contrast, parents often choose not to marry precisely because they may not love, respect or trust each other – or because they simply prefer a different type of relationship. Imposition of equal parental roles on parties who have not voluntarily assumed them thus violates both principles of equality and autonomy. Like patriarchal marriage, they amount to an insistence that childrearing can only take place within societally mandated relationships. Many unmarried partners, of course, can and should co-parent their children, and the law should foster their ability to do so when they demonstrate a commitment to each other and the ability to provide stability for their children.

The commitment to equality within marriage, however, means that marriage, and its assumptions and standards, cannot be universal and should not be imposed on those who do not marry.

276 See also Judith Baer, Ironic Freedom: Personal Choice, Public Freedom, and the Paradox of Reform (2013) (noting that policies that grant freedoms may then become coercive). Because marriage makes these assumptions about co-parenting, while these assumptions should not be available only within marriage, they should also not serve to coerce marriage.