

Family Law Agreement and the New Gender Bargains

by

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Abstract

The great family law divide is said to be marriage, as marriage has emerged as a marker correlated with race and socioeconomic status. This article argues that the real family law divide, inside and outside of marriage, is agreement. Family law, and the family court system that implements it, produce agreement when legal rules, societal norms, and family court procedures operate together to encourage shared understandings expressed through statuses such as marriage or parenthood, and legally enforceable agreements. In an increasingly unequal society, the family understandings of the college-educated middle class have moved apart from those much less privileged in income and education. Family doctrines and proceedings lock in the understandings of the elite while clashing with those of the rest of the population. Family law reformers, to the extent that they recognize these issues at all, propose the imposition of status-based doctrines on the unmarried. This article argues that the movement from contract to status in the recognition of unmarried relationships has been a mistake that misunderstands the nature of the problem. The needed approach is the redesign of family law procedures to provide greater support for the different agreements and understandings of those marginalized by the current system.

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Introduction

The core of modern Family Law is agreement.³ The shotgun marriage compelled by parents and peers in the case of an improvident pregnancy is gone; marital unions are a matter of choice. Family roles are no longer legally assigned by gender; intimate partners negotiate their own terms inside or outside of marriage, influenced by the default provisions that reflect mainstream family norms.⁴ Judicial decrees based on marital fault are largely a thing of the past.⁵ Instead, family courts have become reconciliation centers using various alternative dispute resolution techniques to encourage the parties to create a foundation for their post-divorce financial and parenting lives.⁶

In short, Family Law today is designed to encourage couples to enter into and formalize relationships of choice, except in one salient area: nonmarital unions. The exclusion of that category is troubling at a time when more American adults have lived in

³ Cf. Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 834-41 (2004) (recounting the casting of family law in such terms and objecting to it as an overgeneralization).

⁴ See, e.g., Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 955 (1979) (observing that default legal provisions influence family bargains, that while courts have the authority and obligation to review divorce bargains to ensure protection of children's interests, "available evidence on how the legal system processes undisputed divorce cases involving minor children suggests that parents actually have broad powers to make their own deals," and that separation agreements are typically "rubber stamped even in cases involving children.").

⁵ See, e.g., India A. Butler, "Fault" in Divorce: *Its History and Current Role (and a Recommendation for the Future)*, 37 J. AM. ACAD. MATRIM. LAW. 439, 455, 457-58 (2025) (describing how fault-based considerations have declined over the years, even in states such as Mississippi, where they are still allowed, and identifying the purpose of modern divorce laws as promoting "fairness, equity, expediency, and autonomy in the dissolution of marriage"); Ester Rosenfeld et al., *Confronting the Challenge of the High-Conflict Personality in Family Court*, 52 FAM. L.Q. 79 (2019) (stating that only an estimated 10% of family law disputes go to trial).

⁶ Jane C. Murphy & Jana B. Singer, *Rethinking the Role of Courts in Resolving Family Conflicts*, 21 CARDOZO J. CONFLICT RESOL. 625, 626-30 (2020); see also AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.07 (2002) (hereinafter, "ALI, PRINCIPLES") (discussing the use of mediation for child custody determinations).

unmarried than married unions,⁷ approximately 40% of children do not live with married biological parents,⁸ and many couples choose not to marry precisely because of the lack of agreement either with each other or with mainstream marital norms. These couples opt out of legally recognized statuses and enforceable agreements, in part, because the mainstream statuses do not correspond to their own understandings of the terms of their relationships and, in part, because they do not have the means better off couples enjoy to lock in agreed terms of their choosing.⁹

In what follows, Part I outlines some of the differences – both legal and demographic – between married and unmarried couples. Part II describes the absence of agreements among nonmarital couples. Part III considers the ways in which family law encourages agreement among married couples, and proposes mechanisms to encourage unmarried couples to enter agreements of their own.

I. Differences Between Married and Nonmarried Couples

Many commentators decry declining marriage rates, but few address the lack of agreement. Instead, critics acknowledge that the absence of legally enforceable agreements for long-term partners contributes to unjust outcomes, particularly for women paired with higher-earning partners, less educated fathers, people of color, and functional parents without a genetic tie to the child.¹⁰ These groups are either less likely to marry, or less likely, whether married or not, to have access to lawyer-crafted agreements that secure legal recognition for their relationships on terms of their

⁷ Nikki Graf, *Key Findings on Marriage and Cohabitation in the United States*, PEW RESEARCH CENTER (Nov. 6, 2019).

⁸ Glenn T. Stanton, *Mapping US Fertility and Married Parenting Rates*, DAILY CITIZEN (Aug. 22, 2024), <https://dailycitizen.focusonthefamily.com/mapping-us-divorce-rates/>.

⁹ See June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 1185, 1208 [hereinafter, Carbone & Cahn, *Triple*] (describing how low income relationships are “built on short-term, transactional exchanges about parenting that may or may not ever develop into anything more permanent” and that “to the extent that the law intrudes into these relationships, it tends to impose parental status on the basis of biology in ways that may bear little relationship to the underlying parenting norms.”).

¹⁰ See *infra* notes 75-79 and accompanying text.

choosing.¹¹ Proposed solutions, both in the United States and in Europe, advocate the imposition of status-based obligations. For example, on the American side, the *ALI Principles of Family Dissolution*, completed in 2000, included a form of partnership obligation (which no state has adopted), with terms varying based on the duration of the relationship¹²; and the *Uniform Cohabitants' Economic Remedies Act*, promulgated by the Uniform Law Commission in 2021 (which no state has yet adopted), proposed more limited status-based remedies.¹³ Status-based parental obligations, by contrast, have been widely adopted to address unmarried parenthood, and recent initiatives propose expansion.¹⁴ Earlier efforts streamlined paternity establishment and imposed formulaic child support obligations.¹⁵ New proposals advocate recognizing parental status on the basis of the assumption of functional parental roles, without requiring marriage, adoption, or a genetic tie.¹⁶

What these proposals fail to recognize, however, is that the dividing lines between those who marry and those who do not, those with access to lawyer-crafted agreements and those without,

¹¹ See, e.g., Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1 (2017) [hereinafter, Antognini, *Nonmarriage*]; Albertina Antognini, *Nonmarital Contracts*, 73 STAN. L. REV. 67, 152-53 (2021) [hereinafter, Antognini, *Nonmarital Contracts*]; Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167 (2015); Courtney G. Joslin & Douglas NeJaime, *How Parenthood Functions*, 123 COLUM. L. REV. 319 (2023).

¹² See ALI, PRINCIPLES, *supra* note 6, ch. 6; see also Marsha Garrison, *Marriage Matters: What's Wrong with the ALI's Domestic Partnership Proposal*, in RECONCEIVING THE FAMILY 305-330 (Robin Fretwell Wilson ed. 2006) [hereinafter, Garrison, *Marriage Matters*].

¹³ The text of the Uniform Act is available on the website of the Uniform Law Commission, <https://www.uniformlaws.org/home>. A small number of states have independently developed a status-based approach to nonmarital cohabitation, the best-known and most highly developed being the court-created status in Washington State. See *Connell v. Francisco*, 898 P.2d 831 (Wash. 1995).

¹⁴ See, for example, the Uniform Parentage Act (2017), which extends parental recognition on the basis of both intent and function. The UPA text is available at [uniformlaws.org](https://www.uniformlaws.org).

¹⁵ See Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL'Y 267, 283 (2009) (discussing congressional efforts to streamline paternity establishment and incentivize child support enforcement, primarily though status-based mechanisms, that routinized paternity establishment on the basis of biology and child support tied to mandatory guidelines.).

¹⁶ See, e.g., Joslin & NeJaime, *supra* note 11.

are not just the traditional fault lines of race, socioeconomic status, and LGBT status. Rather these divisions occur in significant part because different groups form families in accordance with radically different gender bargains. Today's family law provisions and procedures assume a reciprocal exchange between couples who either share and tradeoff wage-earning and caretaker responsibilities or elect a more traditional division of domestic responsibilities between a primary wage-earner and a primary caretaker.¹⁷ Family law's channeling function,¹⁸ default marriage provisions, and post-separation counseling and reconciliation services then start from an assumption that what marriage means is sharing, with a presumptively equal division of the family's accumulated resources and custodial rights and responsibilities for children at the termination of the relationship.¹⁹ Agreements to marry reflect an embrace of these norms; premarital agreements involve conscious decisions to alter the terms (though within set limits), and post-separation services effect negotiated settlements within the established framework that promotes these terms.²⁰ However, these terms do not reflect the norms underlying the relationships of a large part of the country.

Lower-income families often lack any accumulated assets.²¹ Any post-marriage or post-relationship financial division would likely involve primarily the distribution of debts rather than assets. The decision to cohabit rather than to marry (for both same-sex and opposite-sex couples) may reflect financial exigencies rather than relationship commitments. In addition, those without college degrees often have more traditional attitudes about the division of family responsibilities; as a practical matter, that means

¹⁷ Eleanor Brown, Naomi R. Cahn & June Carbone, *The Price of Exit*, 99 WASH. U. L. REV. 1897, 1915-19 (2022).

¹⁸ See Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992).

¹⁹ Brown et al., *supra* note 17, at 1904.

²⁰ See Shelly Lundberg, Robert A. Pollak & Jenna Stearns, *Family Inequality: Diverging Patterns in Marriage, Cohabitation, and Childbearing*, 30 ECON. PERSPS. 79, 89 (2016) ("Unlike marriages, cohabiting unions can be ended simply and quickly outside of the legal system.").

²¹ FEDERAL RESERVE BOARD, REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2018 at 2, 21 (2019) (indicating that four of ten adults would have trouble covering an unexpected \$400 expense and would have to run up credit card debt or borrow from family or friends, if they could cover the debt at all).

that the person who gave birth is more likely to assume primary responsibility for children – even if she is also the more reliable breadwinner.²² For these couples, the default norms are that each partner assumes responsibilities for their own financial affairs, often during the relationship and definitely after the break-up. In addition, while the couple may have jointly assumed parenting responsibilities, the default norms in many communities are mother-centric ones, with an assumption that she will bear primary responsibility for children following a break-up and that her partner, even if a legal parent, must win the mother's cooperation to remain involved in the children's lives.²³ These assumptions reflect the practical realities in communities where income is volatile and the couple may lack the emotional and material resources to forge longer-lasting relationships.²⁴ These relationships also involve very different gender bargains: where one person is both the primary caretaker and the more reliable breadwinner, relationships are not based on equal contributions and opting into legal relationships based on sharing principles would be foolish for the party who does more.²⁵ At the same time, the lack of enforceable understandings may undermine the agreements such couples reach on their own, potentially undercutting Pareto optimal settlements.²⁶ While such results may be unfortunate, the imposition of status-based results would often be worse. For low-income couples, for example, the *ALI Principles* may mean that primary caretakers with modest savings may be forced to share those assets with partners whom the caretakers asked to leave because of the partners' spendthrift

²² KATHRYN EDIN & TIMOTHY NELSON, *DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY* 18 (2013) (observing that in low-income communities, the fathers often “leave all the hard jobs – the breadwinning, the discipline, and the moral guidance – to the moms.”).

²³ *Id.* at 169, 208–09 (explaining that because unmarried parents typically do not have a formal custody order, and because children almost always live with their mothers, mothers usually have the sole ability and authority to control fathers' access to their children).

²⁴ *See, e.g.*, PAUL R. AMATO, ALAN BOOTH, DAVID R. JOHNSON & STACY J. ROGERS, *ALONE TOGETHER: HOW MARRIAGE IN AMERICA IS CHANGING* 14 (2007) (describing increased tensions due to economic distress in families after 2000 compared to twenty years earlier).

²⁵ Carbone & Cahn, *Triple*, *supra* note 9, at 1207.

²⁶ June Carbone & Clare Huntington, *Fatherhood, Family Law, and the Crisis of Boys and Men*, 124 COLUM. L. REV. 2153, 2209–11 (2024) (describing how low-income parents do not control the outcomes and prefer informal exchanges).

habits or irresponsible behavior. Functional parenthood provisions may also mean that a partner angry at being evicted from the relationship could respond by the enforcement, or threat of enforcement, of custodial rights. The imposition of equality-based bargains on the unequal is itself unjust.

II. The Lack of Agreement

In comparing marriage and parenthood to less formal relationships, there are three differences that create challenges for reaching agreement. The first is the absence of bright-line conventions that mark the beginning of relationships and end of relationships. Instead, particular events, such as the purchase of a house or birth of a child, may prompt relationship agreements or understandings about the particular event, but not necessarily about the relationship as a whole. Second, the substance of the norms that underlie nonmarital relationships are often in tension with mainstream norms. These conflicts may discourage legal recognition where agreement exists or frustrate efforts at agreement, given the lack of reinforcement for community norms. Finally, unmarried couples are less likely to have access to agreement-producing mechanisms. Married couples cannot dissolve a relationship without a divorce, and family courts today have adopted agreement-producing procedures. Unmarried couples often prefer to stay out of court, and are less likely to have access to alternative procedures such as mediation or counseling. We will address each of these issues in turn.

A. Entry into Relationships

Marriage has often been described as a “contract,”²⁷ that is, as a legally enforceable agreement.²⁸ (This is generally meant more or less metaphorically, though, in the Islamic and Jewish traditions,

²⁷ See, e.g., June Carbone, *Marriage Contract*, in 2 THE PHILOSOPHY OF LAW: AN ENCYCLOPEDIA 535-37 (Christopher B. Gray, ed., Garland, 1999).

²⁸ See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES *434 (“[O]ur law considers marriage in no other light than as a civil contract”); Peter Goodrich, *Habermas and the Postal Rule*, 17 CARDOZO L. REV. 1457, 1470 (1996) (observing that “[i]n premodern English law, the use of the term contract was often synonymous with marriage, and it was from the law of ‘spousals’ that many of the doctrines of modern contract law were first taken.”).

marriage is entered, literally, through a written contract.²⁹) While marriage has varied over time, it has always been premised on explicit consent to marital roles and duties.³⁰ There is no such thing as accidental marriage; even common law marriage requires (present) consent to be married, and the couple's holding themselves out as married as a manifestation of that consent.³¹ In entering marriage, a couple both exchange vows to each other, and make a public declaration of the status of their relationship.³² Accordingly, their status as married is a matter of public record. Children born into the marriage are automatically treated as the legal offspring of the woman giving birth and her spouse, unless someone takes action to rebut the attribution of parentage.³³ And marriage involves, both legally and culturally, a commitment to assume responsibility for those children.³⁴

In contrast, there is no bright line for the beginning of other intimate relationships. Unmarried couples have been described as

²⁹ See, e.g., LOUIS M. EPSTEIN, *THE JEWISH MARRIAGE CONTRACT* (Jewish Theological Seminary, 1927); *THE ISLAMIC MARRIAGE CONTRACT: CASE STUDIES IN ISLAMIC FAMILY LAW* (Asifa Quraishi & Frank E. Vogel eds. 2008); see also BRIAN H. BIX, *FAMILIES BY AGREEMENT* 55-59 (2023).

³⁰ Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 *UCLA L. REV.* 815, 821 (2005) [hereinafter, Garrison, *Consent*].

³¹ *Id.* at 822 (“Common law marriage traditionally depended not only on the fact of cohabitation and holding out a marital relationship to the community, but also on a marriage agreement,” an agreement that needed to “manifest a present intention to marry.”).

³² *Id.* at 824 (“Marriage is a public commitment.”).

³³ Same-sex spouses are entitled to a presumption of parentage in most states, either on the basis of the marital presumption of paternity or on the basis of sperm donor laws recognizing a spouse who consents to the other spouse's insemination as a parent. See, e.g., *Pavan v. Smith*, 582 U.S. 563, 565 (2017). Not all states, however, apply the marital presumption to same-sex couples and state laws addressing the parentage of children born through use of assisted reproduction vary in their requirements. See, e.g., *Gatsby v. Gatsby*, 495 P.3d 996 (Idaho 2021) (denying parentage of a same-sex spouse because of the couples' failure to comply with technical requirements of the state artificial insemination by donor statute).

³⁴ Indeed, husbands who had assumed a parental role for children they knew not to be their biological offspring have historically been estopped from contesting paternity. See generally ALI, *PRINCIPLES*, *supra* note 6, at § 2.03(1)(b) (listing circumstances for “parenthood by estoppel”).

“drifting” into relationships,³⁵ but the level of intentionality differs with education. College graduates are more likely to see cohabitation as signaling greater commitment in a relationship, and these cohabitations are more likely to progress to marriage.³⁶ Those who have not graduated from college are more likely to move in together in order to share expenses without necessarily having an emotional commitment at all.³⁷ Unmarried couples often do not marry because they are unwilling to undertake the obligations marriage entails,³⁸ with 44% stating that they (and 47% indicating that their partners) are not ready “to make that kind of commitment.”³⁹ Nonetheless, the cohabitations of those who do not graduate from college, while less likely to result in marriage,⁴⁰ are more likely to result in unplanned pregnancy.⁴¹

Unlike married couples, unmarried cohabitants, with or without children, rarely enter into express agreements with one another, the status of their relationships is not necessarily a subject of public expression, and the meanings the parties attach to their union can change over time.⁴² Much of the criticism of the *ALI Principles*, which imposed obligations on cohabitants after a two-year period, is the lack of notice and consent.⁴³ The decision to live together, while significant for some couples, does not

³⁵ See, e.g., ISABEL V. SAWHILL, *GENERATION UNBOUND: DRIFTING INTO SEX AND PARENTHOOD WITHOUT MARRIAGE* *passim* (2013) (describing couples as “drifting” into relationships rather than consciously choosing them).

³⁶ See PEW RESEARCH CENTER, *KEY FINDINGS ON MARRIAGE AND COHABITATION IN THE U.S.* (2019) <https://www.pewresearch.org/short-reads/2019/11/06/key-findings-on-marriage-and-cohabitation-in-the-u-s/> (indicating that less educated cohabitators are less likely to see their relationships as leading to marriage and more likely to view cohabitation as a matter of convenience).

³⁷ See, e.g., Sharon Sassler & Amanda J. Miller, *Waiting to Be Asked: Gender, Power, and Relationship Progression Among Cohabiting Couples*, 32 J. FAM. ISSUES 49 (2011) (describing how some couples decide to live together to share expenses without any necessary emotional commitment to each other).

³⁸ See RICHARD V. REEVES, *PARENTING, CAM NEWTON, AND MARRIAGE VS. COHABITATION* (2016).

³⁹ See, e.g., JULIANA HOROWITZ, NIKKI GRAF & GRETCHEN LIVINGSTON, *MARRIAGE AND COHABITATION IN THE U.S.* (Pew Research Center 2019).

⁴⁰ PEW RESEARCH CENTER, *supra* note 36.

⁴¹ Sharon Sassler & Amanda J. Miller, *Class Differences in Cohabitation Processes*, 60(2) FAM. REL. 163 (2011).

⁴² See, e.g., SAWHILL, *supra* note 35, at Foreword.

⁴³ Garrison, *Consent*, *supra* note 30, at 815.

necessarily trigger any particular understandings between intimate couples.

To the extent that couples come to express agreements about their financial affairs, it is likely to be in the context of a joint undertaking: starting a business, buying a house, or opening a joint bank account. Starting a business requires obtaining a business license, obtaining a tax ID, arranging financing, and registering with the state.⁴⁴ These tasks prompt decisions about ownership structure, financial contributions, and liability.⁴⁵ Similarly, buying a house also involves a formal process that requires a determination of ownership and financing.⁴⁶ Couples who have the assets necessary to undertake these activities typically make more conscious decisions about the nature of their relationships,⁴⁷ and the acquisition of assets often prompts consideration of whether these undertakings are sole or joint.⁴⁸ Joint bank accounts similarly require mutual consent to open the account and, as a practical matter, a measure of trust before doing so.⁴⁹

Parenthood, unlike cohabitation, is a formal status with legal consequences. At one time, determinations of parenthood were

⁴⁴ Joshua Stowers, *How to Start a Business: A Step-by-Step Guide*, BUS. NEWS DAILY (Sept. 17, 2025), <https://www.businessnewsdaily.com/4686-how-to-start-a-business.html>.

⁴⁵ *Id.*

⁴⁶ For example, Washington provides that “[n]either person shall purchase or contract to purchase community real property without the other spouse or other domestic partner joining in the transaction of purchase or in the execution of the contract to purchase.” WASH. REV. CODE ANN. § 26.16.030. Similar statutes could provide that a person cohabitating with another person for longer than six months may purchase property without the other person either by joining in the purchase or signing a statement indicating no intent to claim an interests in the purchase. Alternatively, a state could mandate that deeds for the purchase or real property could require identification of a cohabitant and a declaration signed by both cohabitants as to their intent with respect to any claims to title.

⁴⁷ PEW RESEARCH CENTER, *supra* note 36.

⁴⁸ Indeed, the Consumer Finance Protection Bureau recommends that couples planning to buy a home together enter into a cohabitation agreement before doing so. *Can Two Unmarried People Apply Jointly for a Mortgage or a Home Equity Loan?*, CONSUMER FINANCE PROTECTION BUREAU (July, 24, 2024), <https://www.consumerfinance.gov/ask-cfpb/can-two-unmarried-people-apply-jointly-for-a-mortgage-or-a-home-equity-loan-en-357/>.

⁴⁹ Fenaba R. Addo & Sharon Sassler, *Financial Arrangements and Relationship Quality in Low-Income Couples*, 59 FAM. REL. 408, 415, 417-19 (2011).

tied to marriage.⁵⁰ The woman who gave birth was automatically treated as a parent and, if she was married, her husband was presumed to be the father, without the need for either parent to take action to receive recognition.⁵¹ Starting in the seventies, however, Congress and the courts have provided for equal recognition of nonmarital parents.⁵²

A major step in that recognition was streamlining recognition of paternity. Congress, as a condition of state eligibility for various federal benefits, required the states to adopt “voluntary acknowledgments of paternity” (VAPs), which allowed mothers and fathers to sign an acknowledgment attesting to the father’s status as the biological father and file it with the state.⁵³ VAPs have the legal effect of a judgment of paternity.⁵⁴ As a result of the federal legislation, all states today have VAPs (which go by different names in different states, such as voluntary declaration of parentage or affidavit of parentage) and they have become the principal method for establishing paternity outside of marriage,⁵⁵ with the majority of unmarried couples who are together at the time of the child’s birth signing such acknowledgements.⁵⁶ Such declarations, like marriage, establish bright-line determinations of parental status.

The same is not necessarily true of unmarried partners who assume parenting roles without a genetic tie to the child. Married couples are automatically presumed to be the parents of a child born into the marriage, and the majority of states to address the issues have extended the marital presumption to same-sex couples,

⁵⁰ Indeed, in a draft opinion, Chief Justice Burger wrote, “Unmarried fathers are not recognized, they are given no rights, and they are burdened with no responsibilities. . . . This has been the pattern of society’s dealing with the support and paternity of illegitimate children for centuries and never challenged until now.” Chief Justice Warren E. Burger, *Draft Dissent in Stanley v. Illinois*, quoted in Serena Mayeri, *Foundling Fathers: (Non-)marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292, 2323 (2016).

⁵¹ Huntington, *supra* note 11, at 178 (observing that a married father does not need to take an additional step to establish parental rights over his child).

⁵² See Mayeri, *supra* note 50, at 2323.

⁵³ 42 U.S.C. § 666(a)(5)(C).

⁵⁴ Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 302 (2020).

⁵⁵ Leslie Joan Harris, *Reforming Paternity Law to Eliminate Gender, Status, and Class Inequality*, 2013 MICH. ST. L. REV. 1295, 1296, 1318.

⁵⁶ See *id.*; Carbone & Huntington, *supra* note 26, at 2189-90.

recognizing both spouses as parents on the basis of the marriage.⁵⁷ Some states also allow partners without a biological tie to establish parenthood through consent to assisted reproduction at the time of conception of the child or adoption,⁵⁸ although many states only recognize the parental status of a consenting partner to gamete donation if the two partners are married,⁵⁹ and many states place obstacles to adoption outside of marriage.⁶⁰ The marital presumption, consent forms at the time of conception, adoption, and the ability to sign voluntary acknowledgments of parenthood, where they are available,⁶¹ establish clear determinations of parental status.⁶²

Unmarried partners without a biological tie to the child who undertake parenting without such formalities or do so after a child's birth have a more uncertain status. While some states recognize parentage on the basis of function,⁶³ there is rarely a

⁵⁷ Kristin J. Rempe, *The Marital Presumption as Applied to Birth Certificates, Immigration, and Same-Sex Couples: How and Why Some States Have Diverged*, 57 WAKE FOREST L. REV. 519, 528–29 (2022).

⁵⁸ See Susan Hazeldean, *Illegitimate Parents*, 55 U.C. DAVIS L. REV. 1583, 1605–11 (2022) (summarizing state doctrines).

⁵⁹ Thirty-three states limit the automatic effect of sperm donor statutes to married couples. See Movement Advancement Project, *Equality Maps: Assisted Reproduction* (Oct. 27, 2025), <https://www.lgbtmap.org/img/maps/citations-assisted-reproduction.pdf>.

⁶⁰ Hazeldean, *supra* note 58, at 1586 (reporting that “only eleven states provide robust legal rights to unmarried same-sex couples and their children, while thirty provide only limited or uncertain protection, and nine offer no recognition at all”).

⁶¹ The Uniform Parentage Act of 2017, *see supra* note 14, extended VAPs to same-sex couples. By one count, as of January 2025, twelve states have extended their VAPs in this way. *Voluntary Acknowledgements of Parentage (VAPs): What LGBTQ+ Parents Need to Know*, FAMILY EQUALITY (Jan. 2025), <https://family-equality.org/resources/voluntary-acknowledgements-of-parentage-vaps-what-lgbtq-parents-need-to-know/>.

⁶² Some of these statuses can be rebutted, however, if a parent who believes he has a biological tie to the child later discovers that he does not. See June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1307 (2005) (observing that historically the standard necessary to rebut the marital presumption was high, and that common law courts had precluded evidence of the mother's infidelity, making the presumption effectively irrebuttable in the era before reliable paternity tests. Today, the presumption is easier to rebut).

⁶³ See Joslin & NeJaime, *supra* note 11.

bright-line in these states defining the point at which a cohabitant becomes a legal parent, and neither partner may be aware of precisely when the change in status occurs.⁶⁴ Low-income parents, like cohabitants without a college degree, often enter into cohabitation because of the need for assistance with expenses, without recognition that their partners may be acquiring legal rights that last after the end of the relationship.

The lack of bright-line determinations for the beginning and end of such statuses makes it less likely that couples will reach agreements on their own and complicates the challenges in legally prescribing the obligations that follow from such relationships. The next section will consider how even if unmarried couples were to consider the foundation for their relationships, they would still be unlikely to agree with each other on the terms.

B. *The Content of Agreements*

The second difference between married and unmarried couples is that unmarried couples are less likely than married couples to agree either with each other or with mainstream norms about the terms that govern their relationships. That makes setting default terms, following recognition of status, more fraught. The default terms that govern marriage and divorce reflect mainstream norms that associate marriage with financial interdependence and shared parenting.⁶⁵ Unmarried cohabitants are more diverse than married couples in a variety of ways, and the community norms associated with cohabitation are more varied and inchoate.⁶⁶ As a result, it should hardly be surprising that married couples are

⁶⁴ See, e.g., *Charisma R. v. Kristina S.*, 175 Cal. App. 4th 361, 366, 387, 96 Cal. Rptr. 3d 26, 50 (2009), disapproved of by *Reid v. Google, Inc.*, 50 Cal. 4th 512, 235 P.3d 988 (2010) (describing a concept of “inchoate parentage,” with no time limit on the period necessary to establish a relationship with the child, in a case in which the couple planned for the birth of a child together but separated approximately thirteen weeks after the child’s birth).

⁶⁵ See, e.g., Jonathan Simon, *Inevitable Dependencies: A Comment on Martha A. Fineman, the Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies*, 5 COLUM. J. GENDER & L. 152, 154 (1995) (describing Fineman’s work on the privatization of dependency, historically within marriage, and commenting that “to a degree unique among modernized societies the United States has also experienced a cultural loathing for dependency”).

⁶⁶ Sharon Sassler & Daniel T. Lichter, *Cohabitation and Marriage: Complexity and Diversity in Union-Formation Patterns*, 82(1) J. MARRIAGE & FAM.

much more likely to agree on the terms of their unions than are unmarried couples.⁶⁷

The differences between unmarried couples as a group start with the fault lines of race, class, and gender. Married couples are more likely to be white or Asian, to have college degrees, to have secure incomes, and to agree with each other on the understood (and often gendered) terms of their relationships.⁶⁸ Unmarried couples are more likely to be Black or Latino, to have less education and income, and to disagree both about the current nature of their relationships and their future prospects as a couple.⁶⁹ Complicating matters, couples who have not attended college — male partners in particular — are likely to have more traditional gender attitudes (e.g., that the husband's financial contributions to the family are more important than the wife's) and, at the same time, less ability than better-off couples to realize the expectation that the male partner will in fact earn more.⁷⁰

In addition, cohabitants in different communities may have different understood terms for their relationships. Among college graduates, for example, both partners may expect the continued involvement of the other in parenting following a separation, while in lower-income communities there is a greater expectation that the mother will assume primary responsibility for children following a break-up.⁷¹ Moreover, higher earners are generally reluctant to assume financial obligations toward an ex-partner after

35, 48 (2020) (unmarried couples are more likely than married couples to differ in age, race, education, and other personal characteristics).

⁶⁷ June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55 (2016) [hereinafter Carbone & Cahn, *Nonmarriage*].

⁶⁸ See, e.g., HOROWITZ ET AL., *supra* note 39, at 16 (indicating that while “57% of white adults and 63% of Asian adults are married, fewer than half of Hispanic (48%) and black adults (33%) are.”).

⁶⁹ *Id.* See *infra* note 79 and accompanying text.

⁷⁰ See KATHLEEN GERSON, *THE UNFINISHED REVOLUTION: COMING OF AGE IN A NEW ERA OF GENDER, WORK, AND FAMILY* 127 (Oxford, 2010) (indicating that less educated women are more likely to prioritize their own economic self-reliance than better educated women); Katie Newkirk, Maureen Perry-Jenkins & Aline G. Sayer, *Division of Household and Childcare Labor and Relationship Conflict Among Low-Income New Parents*, 76 SEX ROLES 319, 319–33 (2017) (indicating that middle-class parents tend to be supportive of each other's careers while working class couples are more likely “to believe that mothers should be more responsible for family work”).

⁷¹ EDIN & NELSON, *supra* note 22, at 81.

dissolution of their union, setting up diverging expectations between partners with diverging incomes. But among college graduates, the higher earner is more likely to be male, while among non-college graduates, the party with the more regular income is often female.⁷² This affects expectations not just about property settlements and spousal support, but also about children: a partner who is both the primary earner *and* the primary caretaker may have different expectations about post-separation terms than partners in other types of arrangements.⁷³ In short, there is every reason to expect both that unmarried couples will be more likely to disagree with each other about the implicit terms of their agreements than married couples are, and that they are less likely to share the same starting presumptions about partnership obligations than married couples (or couples from different communities).

Status-based obligations thus substitute not (or not only) for the *lack of opportunity* to enter into formal agreements, but (also) for the *lack of agreement*. And such imposition of status-based terms is likely to impose mainstream, majoritarian values on communities and individuals that may not share them.⁷⁴

Three areas, in particular, produce tension. The first is a question of whether partners should share property acquired during the relationship or bear responsibility for the post-separation financial well-being of their former partners. Within marriage, the presumptions are that both parents contributed equally to the accumulations of assets, that property accumulated during marriage will be shared, and spousal support is an option following divorce. In contrast, the default norms following the end of a cohabitation are that title determines property ownership, and that each party is responsible for their own financial affairs.

As already noted, the cohabitants that have received the most attention – and generated the most litigation – involve high

⁷² Brown et al., *supra* note 17, at 1916, 1921 (noting that husbands earn more than wives in the top quintile of earners and wives earn more than husbands in the bottom quintile).

⁷³ Carbone & Cahn, *Triple*, *supra* note 9.

⁷⁴ These status-based terms, like older status-based marital terms, generally reflect the normative commitments of elites. For example, while the norm of equal post-relationship parental rights may reflect the community terms among higher-income families, it poorly fits the values or the usual practices where the birth parent had intended to be a single parent, or where the relationship was rocky: situations that are more common among low-income couples.

earners who refuse to acknowledge an obligation to lower earning partners that survives the relationship. Albertina Antognini describes this as “the New Coverture,” and argues that “services that take on the form of homemaking or childrearing—duties undertaken by the wife under coverture—do not lead to any attendant property rights.”⁷⁵ She concludes that these cases continue to marginalize work traditionally performed by women.⁷⁶ A core part of this critique is accurate: men, overall, earn more than women; women, overall, are more likely to take on uncompensated domestic responsibilities,⁷⁷ and men—at least, better-off men—appear to be more reluctant to commit to their partners. Among cohabitants between the ages of 18 and 29, for example, with at least some college, 68% of women but only 46% of the men expect to marry their current partner.⁷⁸ And better-educated men are more likely than less educated men and similarly educated women to report concerns about relationships limiting their future opportunities, and to fear that a commitment to their current partner may hold them back.⁷⁹

Some reformers who share Antognini’s critique argue for the imposition of status-based remedies, creating marriage-like property rights based on the fact of cohabitation and the presumably equal contributions of homemakers and breadwinners.⁸⁰ A primary problem with these proposals, however, is that the cases that involve substantial disparities in wealth may also be the ones

⁷⁵ Albertina Antognini, *Nonmarital Coverture*, 99 B. U. L. REV. 2139, 2145 (2019) [hereinafter Antognini, *Coverture*].

⁷⁶ Antognini, *Nonmarriage*, *supra* note 11, at 61 n.353 (describing “the ways in which the law denies women property rights by continuing to prioritize marriage as a status they should seek out, given the type work they have undertaken”).

⁷⁷ HOROWITZ ET AL., *supra* note 39.

⁷⁸ KAY HYMOWITZ, JASON S. CARROLL, W. BRADFORD WILCOX, & KELLEEN KAYE, KNOT YET: THE BENEFITS AND COSTS OF DELAYED MARRIAGE IN AMERICA 28 (National Marriage Project 2013).

⁷⁹ See MARK REGNERUS & JEREMY UECKER, *PREMARITAL SEX IN AMERICA: HOW YOUNG AMERICANS MEET, MATE, AND THINK ABOUT MARRIAGE* 192 (2011); GERSON, *supra* note 70, at 172 (discussing different relationship expectations of young men versus young women, with young men placing greater weight on establishing their own careers). Better educated cohabitants are also, however, most likely those with less education to transition to marriage.

⁸⁰ See, e.g., ALI, *PRINCIPLES*, *supra* note 6, at ch. 6, Cynthia Grant Bowman, *UNMARRIED COUPLES, LAW AND PUBLIC POLICY*. 221-224 (2010).

most likely to involve unequal contributions.⁸¹ Consider the classic case of *Marvin v. Marvin*.⁸² Lee Marvin was a famous movie star. His partner, Michele Triola Marvin, had been a nightclub singer.⁸³ The California Supreme Court, in a precedent-setting opinion, ruled that promises between unmarried couples could be enforced, but on remand, in the face of conflicting testimony between the partners, the courts concluded that Michele had not established that Lee had promised to support her for the rest of her life or to split his \$3.6 million in earnings during their time together.⁸⁴ Moreover, the parties' contributions to their relationship were unequal for reasons that went beyond the gendered nature of the relationship; their relationship began as his career was taking off and hers was not, and it did not involve children.⁸⁵ The argument for compensation for her domestic contributions is an argument for imposing marriage-like obligations on couples who choose not to marry; that is, it presumes that the couple both contributed to the acquisition of assets during their relationship in ways that make the allocation of the assets to only one party unjust.⁸⁶

While the relationship in *Marvin v. Marvin* may have reflected the Hollywood mores of a different age, examination of today's unmarried couples suggests that they too are wary of commingling their financial affairs. Compared to unmarried couples, married couples are more likely to trust their partners to be faithful (84% to 71%), to act in their best interests (74% to 58%), to always tell them the truth (68% to 52%), and to handle money responsibly (56% to 40%).⁸⁷ Among cohabitating couples,

⁸¹ These relationships do not inevitably involve callous, higher-earning men. See, e.g., *Simmons v. Samulewicz*, 304 P.3d 648 (Haw. Ct. App. 2013) (denying equitable and contract claims by a male partner of a seven-year relationship).

⁸² 557 P.2d 106 (Cal. 1976).

⁸³ Elaine Woo, *Michelle Triola Marvin Dies at 75; Her Legal Fight with Ex-lover Lee Marvin Added 'Palimony' to the Language*, L.A. TIMES, Oct. 31, 2009, <https://www.latimes.com/local/obituaries/la-me-michelle-triola-marvin31-2009oct31-story.html>.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ The divorces resulting from marriages with such radically unequal earnings were once the ones where courts were least likely to impose equal divisions, but that has changed. See, e.g., Joan C. Williams, *Do Wives Own Half? Winning for Wives After Wendt*, 32 CONN. L. REV. 249 (1999).

⁸⁷ HOROWITZ ET AL., *supra* note 39, at 6.

approximately 30% of those who “are not engaged but say they would like to get married someday say their partner’s (29%) or their own (27%) lack of financial readiness is a major reason why they’re not engaged or married to their current partner.”⁸⁸ A larger number (approximately 40%) indicate that not being far enough along in their career was a reason not to be engaged.⁸⁹ Given the lack of trust, unmarried couples are less likely than married couples to embrace financial interdependence; for example, unmarried couples are less likely to have joint bank accounts or jointly titled property,⁹⁰ though the likelihood of joint accounts increases the longer the (unmarried) relationship lasts.⁹¹

In short, cohabitants as a group expressed wariness of exactly the kind of joint financial obligations most status-based remedies propose. Moreover, high earning men are not the only ones reluctant to commit to such obligations. While male cohabitants with at least some college expressed greater skepticism about marriage than their female partners, female cohabitants who had not graduated from high school were more reluctant to marry than their male partners.⁹² Part of the reason appears to be that less-educated women are warier of men the women feel that they may need eventually to “evict”⁹³; that is, women (who initiate the majority of

⁸⁸ *Id.* at 9. In addition, 24% say their partner’s not being ready financially is a minor reason, and 29% say the same about their own finances.

⁸⁹ *Id.* These figures do not distinguish, however, between those couples who simply feel that they have not yet reached the point where marriage is an appropriate option and those who do not want to commit to their current partner because they expect to be better off in the future.

⁹⁰ Carbone & Cahn, *Nonmarriage*, *supra* note 67, at 68–69; D’VERA COHN, COHABITING COUPLES AND THEIR MONEY (Pew Rsch. Ctr. 2011); *see also* Joanna R. Pepin & Philip N. Cohen, *Nation-Level Gender Inequality and Couples’ Income Arrangements*, 42 J. FAM. ECON. ISSUES 13, 14 (2021) (noting, in a survey of twenty countries, that “[t]he nearly universal tendency of cohabiting couples to exhibit lower levels of financial integration is surprising given the disparate trends in cohabitation.”).

⁹¹ Addo & Sassler, *supra* note 49, at 415. Cohabitants, who had such accounts, however, viewed the joint accounts as a symbol of the partner’s commitment to the relationship. *Id.* at 417–19.

⁹² HYMOWITZ et al., *supra* note 78, at 28.

⁹³ *See* Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 J. L. & FAM. STUD. 1, 12 (2007) (finding that low income women report reluctance to marry men they may have to “evict”); Amanda J. Miller et al., *The Specter of Divorce: Views from Working-and Middle-Class*

break-ups among all couples⁹⁴) are particularly wary of men capable of threatening or erratic behavior or who may be a drain on the finances necessary to support the family.⁹⁵ Moreover, as Kathy Edin and Timothy Nelson concluded in an ethnographic study of unwed, low-income parents, “she, he, and the community at large assign her – not them – ultimate parental responsibility.”⁹⁶ In many communities, the fathers “leave all the hard jobs – the breadwinning, the discipline, and the moral guidance – to the moms.”⁹⁷ These relationships often end because of the absence of equal contributions (or worse, the threat of harm),⁹⁸ and community norms, if not formal legal rules, recognize that inequality and accord unmarried mothers greater authority following a break-up.⁹⁹ A status-based obligation to share assets at the end of relationship could deplete the savings that the more responsible party relies on to provide for children.

This contributes to a second point of tension with mainstream norms: custodial and child support rights. Parental rights and responsibilities, to a much greater degree than adult responsibilities of partners to one another, remain, and *should* remain, largely a matter of status. The fact that status as a parent establishes the basis for such rights and responsibilities, however, does not resolve the question of how to manage responsibilities between parents. With respect to these matters, the formal law is relatively clear: parental status has become easier to establish irrespective of marriage, and parental status establishes the foundation for child support, and the right to seek parenting time (or, as it is still called in some jurisdictions, custody and visitation). Even with relatively

Cohabitors, 60 FAM. REL. 602, 613 (2011) (“Working-class cohabitators — particularly the women — were more than twice as likely to express concerns regarding how hard marriage was to exit than were middle-class respondents, emphasizing the legal and financial challenges of unraveling a marriage”).

⁹⁴ See, e.g., Margaret F. Brinig & Douglas W. Allen, “*These Boots Are Made for Walking*”: Why Most Divorce Filers Are Women, 2 AM. L. & ECON. REV. 126 (2000).

⁹⁵ Kathryn Edin, *What Do Low-Income Single Mothers Say About Marriage?*, 47 SOC. PROBS. 112, 117-18 (2000).

⁹⁶ EDIN & NELSON, *supra* note 22, at 81.

⁹⁷ *Id.* at 18.

⁹⁸ As Katharine Baker observes, insisting on giving them equal custodial rights “would be treating unalikes alike.” Katherine K. Baker, *Equality, Gestational Erasure, and the Constitutional Law of Parenthood*, 35 J. AM. ACAD. MATRIM. LAW. 1, 18 (2022).

⁹⁹ Compare Huntington, *supra* note 11, with Cahn & Carbone, *Triple*, *supra* note 9.

formulaic laws, however, parental preferences – and the ability to realize such preferences – differs widely.

The mainstream system of family law identifies children's interests with the continuing involvement of both parents, following dissolution of their relationship. The changes in paternity establishment facilitated an increased federal emphasis on child support enforcement.¹⁰⁰ The most significant change involved federal requirements that the states adopt quantitative child support guidelines that made child support amounts more consistent (and higher than in the pre-guideline period), with the biggest improvement in state performance occurring after further changes in the 1990s.¹⁰¹ The adoption of mandatory child support guidelines¹⁰² streamlined the determination of amounts, with judges required to provide written justifications for deviations from the prescribed levels of support.¹⁰³ Toward the end of the twentieth century, a growing fathers' rights movement responded to the increase in divorce and child support impositions by winning more equal custodial rights.¹⁰⁴ Greater custodial rights, in turn, could justify reductions in child support obligations.¹⁰⁵ A 2014 family law report wrote that "[t]he most significant trend in contemporary child

¹⁰⁰ Congress initially created the federal Office of Child Support Enforcement in 1974, convinced that more women were seeking welfare benefits because fathers were failing to support their children. The legislation "provided that states must establish support enforcement programs to continue receiving full AFDC funding. Aid recipients were required to assign their child support rights to the states and to cooperate in efforts to establish paternity and secure support orders." Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL'Y 267, 283 (2009). Congress also required the states to establish child support enforcement programs to assist both AFDC recipients and others with outstanding unpaid child support orders. *Id.*

¹⁰¹ *Id.* at 298.

¹⁰² These were also incentivized by federal legislation conditioning receipt of federal grant money on state adoption of the guidelines. *Id.* at 283.

¹⁰³ See, e.g., Raymond C. O'Brien, *Child Support and Joint Physical Custody*, 70 CATH. U. L. REV. 229, 261-62 (2021).

¹⁰⁴ See Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 VA. L. REV. 79, 131 (2016) (observing that fathers' rights activists "fought for a legislative presumption that joint custody served the best interest of the child in all cases.").

¹⁰⁵ See, e.g., ARIZONA JUDICIAL BRANCH, ARIZONA CHILD SUPPORT GUIDELINES 16-22 (2022); FLA. STAT. ANN. § 61.30; 750 ILL. COMP. STAT. ANN. 5 / 510 (all allowing an offset for time with the parent); MICH. COMP. LAWS SERV. § 552.605.

custody law is toward greater active involvement by both parents in postseparation childrearing.”¹⁰⁶ By 2012, forty-seven states and the District of Columbia had enacted statutes authorizing joint legal or physical custody awards and the other three did so as a matter of case law.¹⁰⁷ In addition, almost all states have statutes identifying children’s best interest with frequent and continuing contact with both parents.¹⁰⁸ As a practical matter, this means that most courts in divorce and contested custody proceedings favor awards of shared parenting, giving both parents a substantial and continuing role in the child’s life.

This formal system, with prescribed child support amounts and presumptions in favor of shared custody, does not correspond to the realities of low-income relationships. The child support system can operate as a trap for low-income men.¹⁰⁹ Men with stable incomes typically pay the amount they are obligated to provide.¹¹⁰ Courts have more difficulty assessing the ability of men with variable incomes to pay:¹¹¹ they impose unrealistic child support

¹⁰⁶ Marsha Kline Pruett & J. Herbie DiFonzo, *Closing the Gap: Research, Policy, Practice and Shared Parenting*, 52 FAM. CT. REV. 152, 156 (2014).

¹⁰⁷ Dorothy R. Fait, et al., *The Merits and Problems with Presumptions for Joint Custody*, 45 MD. BAR J. 12, 14 (Feb. 2012).

¹⁰⁸ J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 FAM. CT. REV. 214, 216 (2014) (observing that, “[a]s a matter of public policy, the phrase ‘frequent and continuing contact with both parents’ appears in most state statutes with nearly mechanical regularity”).

¹⁰⁹ See Tonya Brito, *The Child Support Debt Bubble*, 9 U. C. IRVINE L. REV. 953, 954 (2019) [hereinafter, Brito, *Bubble*].

¹¹⁰ See ASCEND ASPEN INSTITUTE, SETTING REALISTIC AND ACCURATE CHILD SUPPORT ORDERS: CHILD SUPPORT POLICY FACT SHEET 2 (2022) (“The best predictor of compliance with a child support order is the noncustodial father’s monthly income.”); Leslie Hodges, Daniel R. Meyer & Maria Cancian, *What Happens When the Amount of Child Support Due Is a Burden? Revisiting the Relationship Between Child Support Orders and Child Support Payments*, 94 SOC. SERV. REV. 238, 243 (2020) (“The child support system typically works well for families in which the noncustodial parent has regular and adequate earnings from formal employment and is supporting children from a single relationship.”).

¹¹¹ Income volatility further exacerbates racial differences. Black and Latino families generally, in comparison with whites and Asians, have been subject to “growing precarious employment, lower wages, more erratic schedules, and greater job unpredictability.” Newkirk, Perry-Jenkins & Sayer, *supra* note 70, at 421. See also Yoonsook Ha, Margaret M. C. Thomas, Thomas Byrne & Daniel P. Miller, *Patterns of Multiple Instability Among Low-Income Families with*

orders on men, who then often, and unsurprisingly, fail to pay the full amount set.¹¹² The amounts can be difficult to modify, the modifications that occur can be prospective, not retroactive, and judges are often unsympathetic, suggesting that the failure involves a deliberate shirking of family responsibilities.¹¹³ In contrast, while some custodial parents are angry at the other parent's failure to contribute, when mothers and fathers directly negotiate child support obligations between themselves, the parents tend to be more realistic about the fathers' ability to pay, more willing to adjust for variable income, and more likely to accept contributions in kind.¹¹⁴

Children, 94 SOC. SERV. REV. 129, 130 (2020) ("About 70 percent of low-income families experienced income instability over the 20-month observation period, defined by an arc percentage change reduction of 25 percent or more in a given month from the average of the prior 3 months.").

¹¹² Elizabeth G. Patterson, *Turner in the Trenches: A Study of How Turner v. Rogers Affected Child Support Contempt Proceedings*, 25 GEO. J. POVERTY L. & POL'Y 75, 100-13 (2017) (reporting the results of two studies finding that courts often make inaccurate determinations of a parent's ability to pay). Approximately 70% of the outstanding child support debt is owed by men with annual incomes below \$10,000. See Brito, *Bubble*, *supra* note 109, at 954. There are a few innovations on the margins. See, e.g., N.Y.C. HUMAN RESOURCES ADMINISTRATION, DEPARTMENT OF SOCIAL SERVICES, CHILD SUPPORT HANDBOOK FOR NONCUSTODIAL PARENTS 9 (2016) (explaining that in New York State, the maximum child support order is \$25 a month for a noncustodial parent whose earnings are below the federal poverty level and that arrearages are capped at \$500). The system has particularly harsh effects for the incarcerated. Imprisonment makes it impossible to hold a job, but in most states, incarceration does not automatically suspend child support obligations. See Lynne Haney, *Incarcerated Fatherhood: The Entanglements of Child Support Debt and Mass Imprisonment*, 124 AM. J. SOC. 1, 21-23 (2018) (explaining that even in the minority of states that consider incarceration as possible grounds to modify a child support order, incarcerated persons must initiate the judicial process by petitioning the court upon entering prison).

¹¹³ See Brito, *Bubble*, *supra* note 109, at 1883-84 (observing that legal actors "assume fathers are not committed to their parenting responsibilities" as a baseline).

¹¹⁴ Leslie Joan Harris, *Questioning Child Support Enforcement Policy for Poor Families*, 45 FAM. L.Q. 157, 171 (2011) (discussing studies showing that "routine vigorous child-support-enforcement efforts applied to poor, absent fathers is not very effective at reducing childhood poverty, and it harms some children by reducing the amount of in-kind support they receive and by undermining their relationships with their fathers"); Lenna Nepomnyaschy & Irwin Garfinkel, *Child Support Enforcement and Fathers' Contributions to Their Nonmarital Children*, 84 SOC. SERV. REV. 341, 344 (2010) (describing advantages of voluntary transactions that include contributions in kind).

The insistence on shared custody is even more at odds with the preferences of low-income women. It is generally the women who have the power to end the relationship,¹¹⁵ and when they do, in accordance with the community norms,¹¹⁶ the men leave, women retain custody of the children, and men need to stay on the women's good side to secure access to their children.¹¹⁷ While some fathers win over the mother's cooperation by providing support, other couples end their relationships altogether. The fathers do not pay support, and they do not see the children.¹¹⁸ These differences in the power of custodial parents are even greater when a partner who co-parents is not a legal parent under state law. Yet the custodial parent's superior power, to the extent it is recognized

¹¹⁵ See KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 81 (2005) (noting that, for women, financial instability is a factor in the decision not to marry and that "[i]t is the drug and alcohol abuse, the criminal behavior and consequent incarceration, the repeated infidelity, and the patterns of intimate violence that . . . loom[] largest in poor mothers' accounts of relational failure").

¹¹⁶ In such families, mothers may act as "gatekeepers," protecting children by "maintaining a modicum of control over family life by avoiding a formal paternity determination and acting as primary breadwinners and caregivers for their children." Mayeri, *supra* note 50, at 2296 n.3; see Carbone & Cahn, *Triple*, *supra* note 9 (discussing such families). For analysis of maternal "gatekeeping" norms in impoverished urban communities, see EDIN & NELSON, *supra* note 22, at 169–74.

¹¹⁷ See EDIN & NELSON, *supra* note 22, at 169, 208–09 (explaining that because unmarried parents typically do not have a formal custody order, and because children almost always live with the mother, the mother usually has the sole ability and authority to control fathers' access to their children); *id.* (noting the reasons mothers keep fathers away from children, including the belief that the father is not a competent caregiver, concern about drug use and violence, and the desire to appease a new partner, who may be jealous of the father); see also Shelly Lundberg, Robert A. Pollak & Jenna Stearns, *Family Inequality: Diverging Patterns in Marriage, Cohabitation, and Childbearing*, 30 ECON. PERSPS. 79, 89 (2016) ("Unlike marriages, cohabiting unions can be ended simply and quickly outside of the legal system.").

¹¹⁸ TIMOTHY GRALL, U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2017, at 8 fig.4 (2020), <https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-269.pdf> (listing the reasons a custodial parent lacked grounds to seek a child support order, including the top two reasons: 39% of custodial parents reported that they "[d]id not feel need to make legal"; 38% reported that the "[o]ther parent provides what he or she can") 16.9% of custodial parents, however, did not have a child support order because they did not want contact with the other parent.).

at all, is either viewed as aberrant or unfair.¹¹⁹ It conflicts with the mainstream emphasis on the importance of two-parent financial and custodial support for children.

The third difference involves the greater support married couples enjoy in reaching enforceable agreements. As the divorce system came to emphasize shared custody and creation of a foundation for “postdivorce families,” Jana Singer describes a paradigm shift that “replaced the law oriented and judge-focused adversarial model with a more collaborative, interdisciplinary, and forward-looking family law dispute resolution regime.”¹²⁰ The changes started with greater incorporation of alternative dispute resolution techniques. Every state today either mandates mediation before parents can litigate custody disputes or encourages it on a voluntary basis.¹²¹ In addition, many states offer state-sponsored education programs to help parents learn how to work together after the divorce,¹²² for the purpose of increasing parental cooperation and agreement.¹²³ When divorced parents nonetheless experience conflict, parents can choose, or courts can require, the parents to use parenting coordinators — typically mental health professionals who can resolve disputes without court involvement.¹²⁴

¹¹⁹ See, e.g., GREGORY ACS ET AL., *THE MOYNIHAN REPORT REVISITED* (Urban Institute 2013); Baker, *supra* note 98, at 18.

¹²⁰ Jana B. Singer, *Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift*, 47 FAM. CT. REV. 363, 363 (2009).

¹²¹ See CONNIE J.A. BECK, MICHELE E. WALSH, MINDY B. MECHANIC, AURELIO JOSE FIGUEREDO & MEI-KUANG CHEN, *INTIMATE PARTNER ABUSE IN DIVORCE MEDIATION: OUTCOMES FROM A LONG-TERM MULTI-CULTURAL STUDY* 11 (2011).

¹²² Such classes may be mandated or voluntary. See, e.g., COLO. REV. STAT. § 14-10-123.7.

¹²³ See Jeffrey T. Cookston, Sanford L. Braver, William A. Griffin, Stephanie R. De Luse & Jonathan C. Miles, *Effects of the Dads for Life Intervention on Interparental Conflict and Coparenting in the Two Years After Divorce*, 46 FAM. PROCESS 123, 132-35 (2007).

¹²⁴ Association of Family and Conciliation Courts Task Force on Parenting Coordination, *Guidelines for Parenting Coordination*, 44 FAM. CT. REV. 164, 165 (2006); see also AMERICAN PSYCHOLOGICAL ASSOCIATION, *GUIDELINES FOR THE PRACTICE OF PARENTING COORDINATION* (2011) (describing the role of parenting coordinators, which can be ordered by the judge or used voluntarily by the parties); Christine A. Coates, *The Parenting Coordinator as Peacemaker and Peacebuilder*, 22 FAM. CT. REV. 398 (2018) (explaining how parents with financial means often include a provision for a parenting coordinator in their parenting plans, allowing the parents to select the coordinator jointly and using the coordinator to avoid costly court visits); Sophie B. Mashburn, “*Throwing the Baby*

In theory, unmarried parents are subject to the same system, if they litigate custody and support issues, preferably after having secured lawyers. In fact, low-income unmarried couples are much more likely to face an all-or-nothing system. Either they are subject to a status-based system that imposes results, or they are on their own, with little ability to resolve disputes in the face of an intransigent partner.

With respect to custody and support issues, Jacobus tenBroek described the divide in the sixties¹²⁵ between the system that governed the families of the married middle class versus the system that addressed the needs of low-income unmarried families as “the dual system of family law.”¹²⁶ Central to the differences between the two systems was the ability to reach enforceable agreements. tenBroek described the mainstream divorce system, even before the widespread adoption of mediation and other family court services, as a private system that gave families wide latitude to reach their own bargains, with judges deferring to lawyer-negotiated agreements.¹²⁷ In contrast, the public system that governed low-income

Out with the Bathwater”: Parenting Coordination and Pennsylvania’s Decision to Eliminate Its Use, 2015 J. DISP. RESOL. 191, 201 (describing the functions of a coordinator and the criticism that some courts have delegated judicial determinations to the coordinator).

¹²⁵ The idea of a dual system arguably began much earlier. At the height of the Great Depression, many husbands simply left with no formal proceedings. Couples who lacked property, or the money necessary to secure a divorce, simply lived apart without filing divorce proceedings. “In New York, desertion is called in popular speech the ‘poor man’s divorce’ due to the practical inability of many poor persons to obtain a divorce.” Sidney B. Jacoby, *Legal Aid to the Poor*, 53 HARV. L. REV. 940, 957 (1940); see also Michael J. Higdon, *Common Law Divorce*, 74 ALA. L. REV. 365, 398 (2022).

¹²⁶ See Jacobus tenBroek, *California’s Dual System of Family Law: Its Origin, Development, and Present Status, Part I*, 16 STAN. L. REV. 257, 257–58 (1964) [hereinafter tenBroek, *Part I*] (“One is public, the other private. One deals with expenditure and conservation of public funds and is heavily political and measurably penal. The other deals with the distribution of family funds, focuses on the rights and responsibilities of family members, and is civil, nonpolitical, and less penal. One is for underprivileged and deprived families; the other for the more comfortable and fortunate.”).

¹²⁷ See Jacobus tenBroek, *California’s Dual System of Family Law: Its Origin, Development, and Present Status, Part III*, 17 STAN. L. REV. 614, 675–82 (1965) [hereinafter tenBroek, *Part III*] (describing the ability of couples with lawyers to effect their own bargains); see also tenBroek, *Part I*, *supra* note 126, at 262 (“[T]he family law of the poor came to be dominantly legislative, [and] the

families dependent on public support involved state-initiated actions that imposed status-based outcomes. These actions limited the parties' ability to reach their own agreements,¹²⁸ and they have historically imposed support obligations without allowing noncustodial parents to counterclaim for custodial rights¹²⁹ (rights routinely sought in divorce proceedings and that, if granted, would reduce the amount of child support owed). With 20% of American children involved in state enforcement efforts,¹³⁰ that system is a principal component of a continuing dual system of family law that affirms the choices of married parents, while denying unmarried couples the same degree of autonomy in managing their affairs.¹³¹

Couples who do not marry – and do not receive public assistance – have much more ability to resolve matters on their own – if they remain on good terms.¹³² Left to their own devices, a majority of low-income custodial parents do not have a child support order in place, with many custodial parents explaining that they do not want an order because the other parent has no money

family law of the rest of the community dominantly judicial.”); Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status, Part II*, 16 STAN. L. REV. 900, 970–78 (1964) (Family law “is dual and distinguishes among families on the basis of poverty . . . [with separate] rules applicable to families in comfortable circumstances.”). For a modern recent account of courts rubber-stamping lawyer negotiated agreements, see O'Brien, *supra* note 103, at 261–62.

¹²⁸ See tenBroek, *Part I, supra* note 126, at 257–59, 278 (identifying the “paternal, custodial, coercive, and punitive attitudes” underlying systems governing lower-income families); JESSICA TOLLESTRUP, CHILD SUPPORT ENFORCEMENT: PROGRAM BASICS 2 (Congressional Research Service, 2023) (indicating that custodial parents who receive a variety of federal benefits including Medicaid are required to cooperate with state-initiated child support actions against the non-residential parent as a condition of eligibility).

¹²⁹ Huntington, *supra* note 11, at 183.

¹³⁰ See DANIEL L. HATCHER, INJUSTICE, INC.: HOW AMERICA'S JUSTICE SYSTEM COMMODIFIES CHILDREN AND THE POOR 157 (2023) (estimating that 20% of American children are involved in state-initiated child support actions and that the rate is double for Black children). Hatcher observes further that in California, 40% of child support debt is owed to the state. *Id.* at 54.

¹³¹ See *id.* at 54–55 (concluding that child support enforcement policies push fathers out of legitimate jobs, tear fragile families apart, and increase economic instability and crime rates by driving debtor parents into the underground economy).

¹³² Carbone & Cahn, *Triple, supra* note 9 (describing the ability to escape mainstream norms by staying out of court as a third system of family law).

or is already providing informal support. Both mothers and fathers report a preference for informal support, that trades off contributions in-kind, assistance with childcare, and access to children.¹³³ Custodial parents prefer these informal bargains because they reinforce their control of custodial matters;¹³⁴ noncustodial parents prefer the informal agreements, because they allow the parties to renegotiate the terms of their contributions as circumstances change.¹³⁵ While overall such informal agreements produce greater second-parent involvement than the formal system, they also make it easier to effect arrangements that courts are unlikely to approve, such as the termination of visitation and support, or repeated shifts in primary custody from one-parent to another as parental needs change.¹³⁶ If one of the parents is intransigent, however, or if the two cannot get past a history of conflict or violence on their own, there is little recourse.¹³⁷

In dealing with the financial terms between adults, unmarried couples also face all-or-nothing systems. The relationship between the parties is likely to be at a low point at the time of a break-up. In most jurisdictions, ownership follows title; if one party has title to the assets accumulated during the relationship, the other party may have little recourse.¹³⁸ In contrast, if the jurisdiction imposes a shared property regime on cohabitation, property acquired during the relationship may be subject to a presumptive fifty-fifty division.¹³⁹ Parties may be more willing to negotiate – or specify their

¹³³ Nepomnyaschy & Garfinkel, *supra* note 114, at 344. Despite this, informal contributions are often disregarded. See Tonya L. Brito, *Nonmarital Fathers in Family Court: Judges' and Lawyers' Perspectives*, 99 WASH. U. L. REV. 1869, 1887 (2022) [hereinafter, Brito, *Nonmarital*] (critiquing how legal actors consistently discourage fathers from providing in-kind support).

¹³⁴ Nepomnyaschy & Garfinkel, *supra* note 114, at 344.

¹³⁵ *Id.*; see also Brito, *Nonmarital*, *supra* note 133, at 1890-91 (describing fathers' frustration when mothers obstruct visitation). Informal support is also correlated with greater closeness between children and fathers. See *id.* at 1886-87.

¹³⁶ See EDIN & NELSON, *supra* note 22, at 215; Calvina Z. Ellerbe, Jerrett B. Jones & Marcia J. Carlson, *Race/Ethnic Differences in Nonresident Fathers' Involvement After a Nonmarital Birth*, 99 SOC. SCI. Q. 1158, 1159 (2018); see generally *The Future of Families & Child Wellbeing Study (FFCWB)*, PRINCETON UNIVERSITY, <https://ffcws.princeton.edu/> (last visited Nov. 6, 2025).

¹³⁷ See Brito, *Nonmarital*, *supra* note 133, at 1890-91.

¹³⁸ Antognini, *Coverture*, *supra* note 75.

¹³⁹ See Connell, 898 P.2d 831.

respective contributions – earlier in a relationship. We take up the possibilities for such provisions in the next section.

III. Promoting Agreement

This article argues that the movement from contract to status in the recognition of unmarried relationships¹⁴⁰ has been a mistake that misunderstands the nature of the problem. The critical difference between marital and nonmarital relationships is not the inability to secure legal recognition for custom-drafted obligations; couples today can win legal recognition for most arrangements inside or outside of marriage if they are sufficiently motivated and careful.¹⁴¹ Instead, the problem stems from the lack of recognition that the understandings between unmarried couples may systematically differ from the arrangements that underlie marriage, and that existing family law and procedures do not recognize these agreements or provide an infrastructure that helps formalize and enforce them.

Greater recognition of nonmarital relationships, as we noted above, initially took an all or nothing approach. Either the states did not recognize such relationships as giving rise to enforceable obligations¹⁴² or reforms applied obligations equivalent to marital obligation on the basis of status.¹⁴³ Such status-based obligations

¹⁴⁰ The reversal of Sir Henry Maine's famous observation that "the movement of the progressive societies has hitherto been a movement *from Status to Contract*." HENRY SUMNER MAINE, *ANCIENT LAW* 141 (Dorset Press, 1986) (1861) (emphasis in original).

¹⁴¹ *But see* Antognini, *Nonmarital Contracts*, *supra* note 11 (arguing that courts frequently refuse to enforce express agreements between nonmarital partners). Even arrangements banned in theory, such as polygamy or contracts for domestic services, might, at least in principle, be secured through clever workarounds. *Cf.* Philip de Sa e Silva, Note, *Throuples and Family Law*, 108 MINN. L. REV. 1559 (2024) (throuples); Hasday, *supra* note 3, at 837-41 (domestic services).

¹⁴² Courtney G. Joslin, *Autonomy in the Family*, 66 UCLA L. REV. 912, 926 (2019) ("[A]s is true with all . . . legal strangers, the default rule that applies to nonmarital partners is one of no sharing." emphasis omitted).) [hereinafter, Joslin, *Autonomy*]. Joslin, *supra* note 8, at 927-29. Georgia, Illinois, and Louisiana, however, "permit no or only a very limited set of claims as between unmarried cohabitants." *Id.* at 929 & nn.91-93.

¹⁴³ See discussion *supra* notes 12-13 and accompanying text.

often prompted objections, widespread evasion, or both.¹⁴⁴ More recently, states have been moving away from all or nothing remedies, recognizing restitution-based remedies in the context of the financial obligations that follow from cohabitation or expanding third-party standing to seek custodial rights without necessarily recognizing co-equal parental status.¹⁴⁵ What these reforms have not comprehensively explored, however, is the effect of such provisions on agreement: that is, the role of the background law in prompting the couples to opt into arrangements that express their preferences or in providing assistance with reaching and enforcing agreements. This last section considers how agreement-enhancing mechanisms could complement these doctrines, starting with the financial arrangements underlying cohabitation, then considering third party custodial statuses, and ending with discussion of alternative dispute resolution opportunities to manage custody and child support.

A. *The Financial Obligations of Cohabitation: Triggering Agreements*

The states vary widely in their treatment of nonmarital cohabitation. Georgia, Illinois, and Louisiana continue to limit recognition of claims between unmarried cohabitants,¹⁴⁶ and do not base the limited recognition they provide on the relationship itself, disfavoring unmarried cohabitation as a matter of public policy.¹⁴⁷

At the other end of the spectrum is the state of Washington, which has adopted a status-based theory of recovery, imposing a shared property regime on cohabitants in a “committed intimate relationship” (CIR).¹⁴⁸ Washington determines the existence of a

¹⁴⁴ See, e.g., Carbone & Cahn, *Triple*, *supra* note 9 (documenting evasion); Garrison, *Marriage Matters*, *supra* note 12; Garrison, *Consent*, *supra* note 30 (objecting to the lack of notice).

¹⁴⁵ See, e.g., *supra* note 13 and accompanying text.

¹⁴⁶ Joslin, *Autonomy*, *supra* note 142, at 929 & nn.91–93; Emily J. Stolzenberg, *Nonconsensual Family Obligations*, 48 B.Y.U. L. REV. 625, 647-49 (2022).

¹⁴⁷ See Long v. Marino, 441 S.E.2d 475 (Ga. Ct. App. 1994); Blumenthal v. Brewer, 69 N.E.3d 834 (Ill. 2016), *reh’g denied* (Oct. 20, 2016), *aff’g* Hewitt v. Hewitt, 394 N.E.2d 1204 (Ill. 1979); Schwegmann v. Schwegmann, 441 So. 2d 316 (La. Ct. App. 1983).

¹⁴⁸ See *Connell*, 898 P.2d at 835; *In re Marriage of Pennington*, 14 P.3d 764, 773, 770 (Wash. 2000).

CIR in accordance with “five relevant factors” listed as “continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties.”¹⁴⁹ If the Washington courts find that a CIR exists, the court equitably distributes the property acquired during the relationship.¹⁵⁰

In between, the vast majority of states, recognize claims based either on express agreements¹⁵¹ or restitution-based claims typically tied to particular assets.¹⁵² The *Uniform Cohabitants’ Economic Remedies Act*, promulgated by the Uniform Law Commission in 2021, adopts this approach, linking recovery to either agreements or “contributions to the relationship,” broadly defined.¹⁵³ While the Act has yet to be adopted, it incorporates the intermediate approach emerging in the majority of states, albeit employing a broader definition of contributions than many states.¹⁵⁴

These intermediate provisions, while they do not provide comprehensive solutions, do provide an opportunity to reconsider how to prompt more explicit agreements. While unmarried couples may not necessarily view their relationships as involving

¹⁴⁹ *Pennington*, 14 P.3d 764.

¹⁵⁰ See *Matter of Harris & Brimlow*, 31 Wash. App. 2d 1051 (2024), at *8 (citations omitted):

If a court determines that a CIR exists, it then (1) evaluates the interest each party has in the property acquired during the relationship and (2) makes a just and equitable distribution of the property. Courts presume that property acquired during a CIR is community-like. But a party may rebut this presumption if the distribution of property would unjustly enrich one party at the expense of the other at the end of the relationship.

¹⁵¹ Florida, Minnesota, New Jersey, and Texas require such contracts to be in writing, while other states, such as California, may infer an implied contract on the basis of the conduct of the parties. Stolzenberg, *supra* note 147, at 650–51.

¹⁵² HANOCH DAGAN, *THE LAW AND ETHICS OF RESTITUTION* 166-67 (2004) (noting that “the various restitutionary hearings” supply “the main source of” cohabitant recovery).

¹⁵³ Laura W. Morgan, *The Uniform Cohabitants’ Economic Remedies Act* (2021), 36 J. AM. ACAD. MATRIM. LAW. 129, 136 (2023).

¹⁵⁴ See, e.g., Kaiponanea T. Matsumura, *The Marital Habitus*, 99 WASH. U.L. REV. 2033, 2037 (2022) (observing that the cohabitation remedies remain “largely limited to untangling shared property interests and reimbursing extraordinary contributions made by one partner to the other’s business or property interests.”).

a commitment to commingle their financial affairs to the same degree as married couples, they often do make explicit decisions about individual assets.

Consider joint bank accounts. For unmarried couples, opening a joint account signals greater commitment and trust within the relationship.¹⁵⁵ Yet, joint accounts do not necessarily establish shared expectations. Indeed, one treatise observes that:

Few activities have been more productive of litigation than the common practice of depositing funds in various banking institutions in the names of or payable to two or more persons. Lack of uniformity in the manner of specifying the type of account intended, variance from state to state in the legal effects flowing from the type of account selected, lack of knowledge on the part of depositors and often of banking personnel of the purposes and effects of various types of accounts, and depositors' attempts to make bank accounts serve a wide variety of purposes, all combine to make this one of the most confused and confusing areas of banking law.¹⁵⁶

A potential solution is to use the opening of a joint account as a trigger prompting couples to consider their relationship, or at least the account. Where two people who are not married or otherwise related open a joint bank account, legislation in individual states or banking regulations¹⁵⁷ could require that they be notified that doing so can be evidence of a relationship giving rise to financial obligations.¹⁵⁸ The bank could be required to provide the couple with forms that allow them to establish an agreement with each other about the nature of the joint account. *Florida Business Forms*, for example, includes a form contract that allows co-residents to agree, *inter alia*, that:

¹⁵⁵ See Addo & Sassler, *supra* note 49, at 415, 417-19.

¹⁵⁶ 7 AM. JUR. PROOF OF FACTS 2d 311 (originally published in 1975).

¹⁵⁷ The question of which regulators could proscribe such regulations and whether they should occur at the federal or state level is beyond the scope of this article.

¹⁵⁸ See, e.g., *Pennington*, 14 P.3d at 770; *Watts v. Watts*, 405 N.W.2d 303 (Wis. 1987) (allegations that long term cohabitants held joint bank accounts, made joint purchases, filed joint tax returns, among other things, gave rise to the inference that the parties intended to share equally, and strongly implied that parties intended their relationship to be in nature of joint enterprise, financially as well as personally); *Reed v. Parrish*, 286 P.3d 1054 (Alaska 2012) (considering joint accounts as evidence of intent to share assets accumulated during a relationship).

... to establish a joint banking account for the payment of utilities, water, phone, cable, internet service, routine maintenance, property taxes, mortgage payments, and other such costs associated with the Residence.

Each cohabitant will have equal ability to withdraw funds for payment of costs associated with the Residence as set forth in this agreement.

Each month, [name of cohabitant 1] will deposit the sum of \$[dollar amount of sum] and [name of cohabitant 2] will deposit the sum of \$[dollar amount of sum] into the joint banking account. Failure to deposit this amount will be considered a material breach of this agreement unless notice is given to the other cohabitant and that cohabitant consents to the failure to deposit the specified funds into the joint banking account. . . .¹⁵⁹

Such agreements could then provide a basis for determining financial obligations if the couples separate.

A similar approach can be taken to the purchase of a house or the establishment of a business during a cohabitation. Securing a mortgage loan to purchase a home typically requires identification of the source of the down payment, and whether a person acquiring title is married, given that a spouse may have an interest in the house even if the spouse's name is not on the deed.¹⁶⁰ Borrowers could similarly be required to disclose whether there are any intended cohabitants, particularly in states where the cohabitant may acquire an interest in the house on the basis of the cohabitation, and any contribution the cohabitant makes to acquisition of the house or assumption of responsibility for home maintenance or mortgage payments.¹⁶¹ Identification of such a cohabitant could then prompt requirements that the cohabitants sign agreements to govern their relationship with respect to the house. As noted above, the Consumer Finance Protection Bureau recommends that couples planning to buy a home together enter into a cohabitation agreement.¹⁶² That recommendation should extend to cohabitants,

¹⁵⁹ FLORIDA JUR. FORMS LEGAL AND BUSINESS § 36A:16; *see also id.*, § 27A:21; 12 N.J. FORMS LEGAL & BUS. § 27A:21 (providing a similar form).

¹⁶⁰ *FHA Finance Questions You Should Be Ready to Answer*, FHA.COM (Feb. 10, 2009), https://www.fha.com/fha_article?id=316.

¹⁶¹ *See, e.g., Tapplin v. Tapplin*, 908 S.E.2d 210 (Ga. 2024) (awarding a spouse an interest in appreciation of a house titled solely in the name of the other spouse based on a theory of unjust enrichment during the parties' cohabitation before their marriage).

¹⁶² *See supra* note 48.

whether they intend to buy the home individually or together. Similarly, individuals who wish to start a business must file forms with the state. The forms could be designed to identify spouses or cohabitants who might have an interest in the business on the basis of their relationship or uncompensated contributions to the business. Such express agreements are unlikely to resolve all issues underlying cohabitation. Nonetheless, cohabitants with assets are more likely to plan their relationships. Prompts or nudges as they acquire, finance, and sell assets may provide a clearer foundation for later dissolution of a relationship. The combination of some basis for liability with opportunities to specify agreement may create a firmer foundation for later distribution of relationship assets.

B. *Parentage Determinations: Choice over Status*

Over the last several decades, the courts have simultaneously expanded the groups of adults with standing to seek parenting time with children¹⁶³ and increased the rights associated with designation as a parent.¹⁶⁴ This makes all-or-nothing determinations of parentage ill-suited to deal with realities of diverse family arrangements. In this section, we contrast two developments: the extension of parentage determinations at birth, that lock in agreements to establish legal parentage between two adults, and after the fact determinations of functional parentage. We emphasize that the result has been the creation of multiple categories of adults with standing to seek parenting time.

The development with the greatest potential to acknowledge parentage by agreement involves voluntary acknowledgements of parenthood (VAPs). For unmarried biological parents, VAPS have become the principal mechanism for the recognition of paternity, with the two parents signing the document at the time of the child's birth, and the VAP having the same legal significance as a judicial

¹⁶³ See Joslin & NeJaime, *supra* note 11. We use the term “parenting time” here, rather than custodial rights, to provide a broader category that includes everything from joint custody to occasional visitation.

¹⁶⁴ See, e.g., ARKANSAS S.B. 901, 89TH GEN. ASSEMBLY, REG. SESS. (amending ARKANSAS CODE ANN. § 9-13-101(a)), favoring “the approximate and reasonable equal division of time with the child by both parents individually as agreed to by the parents or as ordered by the court.”).

decree.¹⁶⁵ The Uniform Parentage Act of 2017¹⁶⁶ changed voluntary acknowledgments of “paternity” to voluntary acknowledgments of “parenthood” (VAPs), authorizing the use of the VAPs to recognize the parental status of adults who are not biologically related to the child.¹⁶⁷ These acknowledgments of parenthood at birth establish both parents’ commitment to each other’s parental status, and provide a firm foundation for the grant of parental rights and responsibilities.

In contrast, the imposition of parental function on the basis of the assumption of parental status after birth potentially encompasses a wide variety of circumstances, including the inclusion of grandparents, stepparents, and unmarried partners who do not necessarily assume *primary or shared* responsibility for the child. While some of these doctrines do establish equal parental status,¹⁶⁸ many do not. Consider, for example, the evolution of the doctrines of de facto parentage. During the 1970s, California recognized the concept of de facto parenthood,¹⁶⁹ as a basis for granting foster parents standing to appear in a dependency proceeding.¹⁷⁰ The California courts nonetheless emphasized that de facto parenthood is not to be “equated with . . . parents or guardians for purposes of dependency proceedings and standing to participate does not give them all of the rights and preferences accorded [parents or guardians].”¹⁷¹

In the nineties, the Wisconsin Supreme Court drew on the courts’ equitable authority (the same basis that had been used in California) to recognize de facto parenthood as grounds for a same-sex partner to seek visitation with a child. To demonstrate

¹⁶⁵ See *supra* discussion at notes 50-56 and accompanying text.

¹⁶⁶ See UNIFORM PARENTAGE ACT (2017), *supra* note 12, at art. 3.

¹⁶⁷ See *State ex rel. Secretary of Dep’t for Children & Fam. v. Smith*, 392 P.3d 68, 79 (Kan. 2017) (“The VAP form sets up a situation by which an individual may become a legal parent even though not a biological or adoptive one.”).

¹⁶⁸ See, e.g., *Elisa B. v. Superior Ct.*, 117 P.3d 660 (Cal. 2005); *Charisma R.*, 175 Cal. App. 4th at 374 (emphasizing “public policy favoring that a child has two parents rather than one”).

¹⁶⁹ *In re B. G.*, 523 P.2d 244, 253, n.18 (Cal. 1974) (en banc) (defining it as a “person who, on a day-to-day basis, assumes the role of parent, seeking to fulfill both the child’s physical needs and his psychological need for affection and care.”).

¹⁷⁰ See *id.*

¹⁷¹ *In re Kieshia E.*, 6 Cal. 4th 68, 77–78, 859 P.2d 1290, 1295–96 (1993), as modified (Nov. 23, 1993).

the existence of a “parent-like relationship with the child,” a de facto parent had to prove that “the biological or adoptive parent consented to, and fostered, the petitioner’s formation and establishment of a parent-like relationship with the child” and that the de facto parent had assumed obligations of parenthood by taking significant responsibility for the child’s care, education and development” for a “length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.”¹⁷² Even then, de facto parenthood established a basis to seek visitation over a legal parent’s objection, not a parental status equal to that of the initial legal parent.¹⁷³

In 2005, the State of Washington, referring to the Wisconsin case and numerous other precedents, adopted a common law de facto parent status, finding that “a *de facto* parent who meets this definition stands in legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise.”¹⁷⁴ The court nonetheless held that “[a] de facto parent is not entitled to any parental privileges, as a matter of right, but only as is determined to be in the best interests of the child,”¹⁷⁵ thus distinguishing de facto parents from legal parents. In other states, including California, the courts have created multiple categories of standing, recognizing some functional parents as full legal parents,¹⁷⁶ while continuing to create opportunities for de facto parents to have standing, subject to a best interest determination that overcomes the presumption of deference to parental preferences.¹⁷⁷

We favor the continuation of these distinctions. Full legal parenthood should depend on agreement: the agreement to the acts

¹⁷² *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 421 (Wis. 1995).

¹⁷³ *Id.* at 435-36.

¹⁷⁴ *In re Parentage of L.B.*, 122 P.3d 161, 176 (Wash. 2005). The court nonetheless held that “[a] de facto parent is not entitled to any parental privileges, as a matter of right, but only as is determined to be in the best interests of the child.” *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Elisa B.*, 117 P.3d 660 ; *Charisma R.*, 175 Cal. App. 4th 361.

¹⁷⁷ See, e.g., *Stuard v. Stuard*, 244 Cal. App. 4th 768, 773, 199 Cal. Rptr. 3d 821, 824-25 (2016), as modified on denial of reh’g (Mar. 1, 2016) (upholding the grandparent visitation statute in a case where the grandparents demonstrated that it was in the child’s best interest to preserve “an already existing grandparent-grandchild relationship that is threatened.”).

producing a biological child,¹⁷⁸ the agreement to arrange for the birth of a child conceived through assisted reproduction,¹⁷⁹ or the agreement to jointly raise a child expressed in a VAP or adoption proceeding. For those who assume parenting roles without such agreements, we endorse intermediate statuses that allow for a determination of the child's best interest in the continuation of the relationship, with appropriate deference to the primary legal parent. Still, the inclusion of more than one adult in a child's life following dissolution of the adult relationship requires cooperation. Agreement is not just a product of events at the beginning of a relationship, but of its constructive continuation.

C. *Parental Agreements*

Given the strength of the presumption in favor of child support enforcement and the continued involvement of both parents in the child's life, we have argued that low-income couples acquire a measure of autonomy only by staying out of marriage and out of court.¹⁸⁰ Yet, today's family court procedures incorporate mediation and conciliation services, and assistance with the type of mental health, substance use, employment, and interpersonal violence issues that complicate family relationships.¹⁸¹ A potential solution is the creation of community centers, which operate outside of the court setting, that incorporate such dispute resolution and counseling procedures, in accordance with community rather than legal norms. Australian Family Centres provide a model for doing so.¹⁸²

¹⁷⁸ Although we note that not all conceptions are voluntary. See, e.g., Deirdre M. Smith, *Termination of Parental Rights as a Private Remedy: Rationales, Realities, and Alternatives*, 72 SYRACUSE L. REV. 1173, 1243 (2022) (discussing termination of the parental rights of rapists).

¹⁷⁹ See Hazeldean, *supra* note 58 (discussing consent to assisted reproduction as a basis for parenthood).

¹⁸⁰ See, e.g., Carbone & Cahn, *Triple*, *supra* note 9, at 1218.

¹⁸¹ See Singer, *supra* note 120.

¹⁸² Family Relationship Centres of Australia, <https://www.familyrelationships.gov.au/talk-someone/centres> (last visited Nov. 6, 2025). See PATRICK PARKINSON, *FAMILY LAW AND THE INDISSOLUBILITY OF PARENTHOOD* 187–94 (2011) (describing the creation of such centers in order to help separating parents overcome barriers to shared parenting and reach agreements acceptable to both parents.). See also DALE BAGSHAW ET AL., *FAMILY VIOLENCE AND FAMILY LAW IN AUSTRALIA: THE EXPERIENCES AND VIEWS OF CHILDREN AND ADULTS FROM FAMILIES WHO SEPARATED POST-1995 AND POST-2006* at 51,

Such centers should be available not just to couples terminating a relationship, but to any couples attempting to manage conflict.¹⁸³ In short, family law's agreement-producing role could be extended to a larger part of the population. Whether or not the agreements are legally enforceable, the mere process of clarifying expectations can be valuable to a relationship.¹⁸⁴

The principal problem with these solutions (and a major reason why they have not already occurred) is that they require additional resources,¹⁸⁵ and because the agreements may be at odds with mainstream norms.¹⁸⁶ Yet, traditional family law, which often involves

58–59, 120 (2010) (describing the widespread use of Family Relationship Centres and the findings that participants find them helpful); THE CENTRE FOR INTERNATIONAL ECONOMICS, FAMILY AND RELATIONSHIP SERVICES ECONOMIC EVALUATION: USING COST-BENEFIT ANALYSIS TO ASSESS THE VALUE OF SERVICES 84 tbl.7.3, 94 tbl.8.2 (2023) (finding that Family Relationship Centres are cost effective and show high levels of satisfaction among participants); Lawrie Moloney, Lixia Qu, Ruth Weston & Kelly Hand, *Evaluating the Work of Australia's Family Relationship Centres: Evidence from the First 5 Years*, 51 FAM. CT. REV. 234, 235–36, 243–44 (2013) (finding that the introduction of centers increased families' access to counselling and mediation services; most separating families who used the centers' family dispute resolution services came to a parenting agreement that worked for both parents and children; and such agreements "tend to hold up in the medium term").

¹⁸³ See, e.g., Mary S. Marczak, Emily H. Becher, Alisha M. Hardman, Dylan L. Galos & Ebony Ruhland, *Strengthening the Role of Unmarried Fathers: Findings from the Co-Parent Court Project*, 54 FAM. PROCESS 630, 637 (2015) (observing that "[i]t is often more difficult to co-parent together when one is experiencing major stressors such as joblessness, homelessness, domestic violence, and substance abuse issues" and arguing that community-based centers need to tailor services to the needs of parents).

¹⁸⁴ See, e.g., LENORE J. WEITZMAN, *THE MARRIAGE CONTRACT* (1981); Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204 (1982).

¹⁸⁵ While the Australian Family Centres required an initial outlay, however, they have proved cost-effective once established. THE CENTRE FOR INTERNATIONAL ECONOMICS, *supra* note 182, at 84 tbl.7.3, 94 tbl.8.2 (finding that Family Relationship Centres are cost effective). In contrast, status-based child support systems are not considered to be cost-effective, particularly when taking into account the costs of imprisonment and the counterproductive effects on father involvement.

¹⁸⁶ The biggest clash comes with the child support enforcement system, with its single-minded focus on collections, even when mothers and fathers have reached their own resolutions. See Carbone & Huntington, *supra* note 26, at Section III.C.

judges rubber-stamping lawyer-drafted agreements, or the use of third parties (such as custody coordinators) to cloak the terms of parental settlements from judicial scrutiny, has available mechanisms to accomplish similar results.¹⁸⁷ We propose incorporating these solutions into new procedures – procedures that bring the unmarried back within the ambit of the more effective parts of the family law system.

In considering the problem of one group's norms diverging from the standards underlying the public legal standard, the structure of the question is very similar to what is faced by adherents to certain religions, who want their family (or commercial) disputes resolved according to religious principles and by judges or arbitrators from that religious community, but where those norms vary from those set by the legislature and enforced by the civil courts.¹⁸⁸ We want to affirm and respect religious belief and community norms, but this can sometimes be in tension with strongly held public policies.¹⁸⁹ The secret has been to cloak the determinations from view. Premarital agreements can incorporate arbitration or mediation services before a religious tribunal, even when the religious norms diverge from the norms expressed by family law doctrine. Courts are (as ordered by the Federal Arbitration Act, state arbitration acts, and Supreme Court precedent¹⁹⁰) generally deferential to the decisions of arbitrators, although states currently differ on whether and when arbitration of *parenting matters* is allowed and what sort of review it will invoke.¹⁹¹ Low-income couples are unlikely to seek the formality of an arbitration; they are likely

¹⁸⁷ Mnookin & Kornhauser, *supra* note 4, at 955 (observing that “available evidence on how the legal system processes undisputed divorce cases involving minor children suggests that parents actually have broad powers to make their own deals” and that “separation agreements are rubber stamped even in cases involving children.”).

¹⁸⁸ See, e.g., Michael A. Helfand, *Arbitration's Counter-Narrative: The Religious Arbitration Paradigm*, 124 YALE L.J. 2994 (2015).

¹⁸⁹ See, e.g., Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9(2) THEORETICAL INQUIRIES L., art. 11 (2008).

¹⁹⁰ See Federal Arbitration Act, 9 U.S.C. §§ 1-16; see also, e.g., AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (holding that the Federal Arbitration Act prohibits states from conditioning the enforceability of arbitration agreements on the availability of class-wide arbitration procedures).

¹⁹¹ Compare Fawzy v. Fawzy, 973 A.2d 347 (N.J. 2009) (allowing the arbitration of family matters but with altered procedures for issues involving children), with Kelm v. Kelm, 749 N.E.2d 299 (Ohio 2001) (disallowing arbitration of child custody or parental visitation).

to prefer mediation. And, if the state is not involved in attempting to collect child support, the parties are free to agree to whatever resolution they like without going to court. The advantage of such voluntary resolutions is that it provides a mechanism to get beyond disputes that obstruct the noncustodial parent's involvement in the family – and a mechanism that allows the parties to set levels of support adapted to their circumstances. Studies show that such community-based centers can increase the involvement of non-custodial parents without short-changing the custodial parents' concerns about their physical security, and couples who reach voluntary agreements generally enjoy more shared custody and greater support than those subject to the formal system. The lack of court involvement is a feature, not a drawback, of these centers.

Conclusion

The United States today is characterized by high and increasing levels of economic inequality. With women's greater economic independence, marriage changed from a patriarchal institution premised on coercion – women needed to marry to be able to have a family¹⁹² – to choice. Nonetheless, the available choices reflect differences in class, race, and the impact of gendered norms, and the variety of understandings underlying them counsel hesitation in the impositions of mainstream norms on couples who may not share them. These differences, however, do not necessarily mean that agreement-producing procedures cannot be adapted to different types of relationships. The legal system should find procedures and mechanisms to encourage agreement among unmarried couples. Those agreements and agreement-producing mechanisms may well reflect local community norms, norms that sometimes vary from those now enforced by the family courts. Most status-based reforms, in contrast, are all-or-nothing remedies: either the parties share assets on a fifty-fifty basis or they have no remedies; either cohabitants are parents with a full set of rights and duties or they are not. Instead, the parties' understanding of their own relationships may be somewhere in-between, and agreements can reflect that different understanding.

¹⁹² Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS 631 (1980).