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FAMILY LAW AND NONMARITAL FAMILIES

Clare Huntington*

As this special issue makes clear, nonmarital families are the new normal, particularly in some communities. Family law, however, has not caught up. Family law's legal rules still place marriage at the very foundation of legal regulation, with a deep dividing line between married and unmarried couples. Family law's legal institutions are designed for married families who have been formally recognized by the state. And family law still draws on and reinforces traditional gender norms, establishing economic support as the *sine qua non* of fatherhood and day-to-day caregiving as the hallmark of motherhood. Together, this amounts to what this article calls "marital family law."

Marital family law is hardly ideal for the married families it governs,¹ but it wreaks havoc on the nonmarital families it excludes. A fundamental mismatch between marital family law and nonmarital family life undermines relationships in nonmarital families, to the great detriment of nonmarital children. First, marital family law's legal rules foster what sociologists term maternal "gatekeeping,"² where mothers control fathers' access to shared children, making it harder for fathers to maintain a relationship with their children. Further, child support rules exacerbate existing acrimony between parents. Relatively effective for divorcing families, child support rules impose unrealistic obligations on unmarried fathers, many of whom have dismal economic prospects. The failure to satisfy child support requirements fuels animosity between unmarried parents, many of whom are already experiencing difficulty co-parenting.

Second, because only the state can dissolve a marriage, marital family law presumes that couples will go to court at the end of relationships. The court system is designed to establish co-parenting structures for a couple's post-divorce family life. But unmarried couples do not need

the state to end their relationships, and although they could seek a custody order, many do not do so. This means that in most states unmarried parents are left without an effective institution to help them transition from a family based on a romantic relationship to a family based on co-parenting.

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

It is essential to develop a more inclusive family law, better suited to the needs of both marital and nonmarital families. Accordingly, this article proposes a new theoretical framework for the regulation of nonmarital families. This new understanding begins with the premise that although we are increasingly witnessing the separation of *marriage* from parenthood, we cannot separate *relationships* from parenthood. Whether unmarried parents get along deeply affects how they parent their children. If they do get along, both parents are better able to provide their children with the relationships necessary for healthy child development. Family law should recognize that relationships between parents are critical to caregiving and child well-being, even if parents are not romantically involved, let alone married. Thus, the state's goal should be to nurture a functional relationship between parents to foster co-parenting.

This approach reflects two principles. First, children benefit when they can maintain a high-quality relationship with both parents. Second, the law should not assume that unmarried

parents, and especially unmarried fathers, are categorically different from married parents. In an age of declining marriage rates, the law should not use marriage to determine which fathers are committed to their children. Instead, the law should treat both married and unmarried families as a whole (two parents and a child), instead of its current approach to unmarried parents (mother and child with the father on the side).

To instantiate this new approach to nonmarital families, this article proposes critical reforms to family law's legal rules, institutions, and social norms. To be clear, this article is not proposing a complete dismantlement of marital family law. For those couples who do marry, the basic goals of marital family law—reinforcing relationships to prevent breakdown and helping parents transition to a co-parenting relationship if a marriage does end—are not inherently problematic, although perhaps imperfectly realized. The difficulty is the mismatch between marital family law's rules, institutions, and norms and the particular needs of nonmarital families.

The article proceeds in three parts. Part I explains the genesis and continuing pull of the deeply entrenched marriage-based paradigm for family law. Part II briefly summarizes the sea change in family form and then describes the multiple ways marital family law undermines relationships in nonmarital families. Part III begins by proposing a new theory of post marital family law that focuses on the relationship between the parents as a means of promoting child well-being and then offers several illustrative reforms that embody the new theoretical framework, focusing on the relationship between mothers and fathers.³

I. Marital Family Law

Marriage is so ubiquitous in family law that it is easy to overlook its presence. Our legal system, however, has always used marriage as the focus for the regulation of families and continues to do so today.⁴ With a few exceptions, the law no longer directly penalizes children born to unmarried parents—formerly, “illegitimate” children—but the marital family remains the paradigm. The legal rules governing the family draw a sharp line between married and unmarried couples, and this distinction carries over to doctrines governing parental rights. Legal institutions governing family dissolution are designed for, and primarily used by, marital families. And family law reinforces gender roles associated with traditional married families, with fathers as breadwinners and mothers as caregivers. In short, family law as it exists today should be understood fundamentally as *marital* family law.

A. *Legal Rules*

The central dividing line in family law is marriage. As the marriage equality movement highlights, legal marriage is a powerful institution that comes with a host of tangible benefits and deep emotional resonance. Moreover, family law insists on legal marriage, not its functional equivalent. Thus, couples who live together but are unmarried—cohabitants—are not treated the same as married couples. Individual states have different rules, but the dominant approach draws a clear distinction between married and cohabiting couples, with the latter receiving far fewer of the rights and obligations associated with marriage.⁵ If a marriage ends, for example, courts may grant spousal support to the less economically stable spouse and divide property equitably, without regard to who paid for it, thus imposing a strong norm of economic sharing. By contrast,

courts treat unmarried cohabitants as separate economic units, with claims for spousal support possible but rarely granted, and property typically retained by whomever paid for it.⁶

This privileging of marriage carries over to the context of parenting. The doctrine of parental rights is skewed strongly in favor of marital families. Most states have some version of the marital presumption,⁷ which provides that any child born to the wife of a married man is presumed to be the child of the husband as well as the wife; thus, the father does not need to take an additional step to establish parental rights over his child. Additionally, family law assumes that parents live together—as most married couples do—and thus there is no need to determine custody at birth. In most states, then, the law is silent as to the custody of newborns.

B. *Legal Institutions*

Family law's institutional response to conflict flows from the marital framework. Married couples need the state to dissolve their legal relationship, and the state uses one formal mechanism for this process: the court system. Even though most divorces do not proceed to trial and instead are resolved through mediation or negotiated settlements, the court still oversees this process. When a divorcing couple goes through the court system, they leave with custody and child support orders in place, and one of the state's central goals is to ensure that the couple will continue in their roles as co-parents. Often they will have a detailed, legally binding parenting plan that specifies how they will address myriad co-parenting issues. The significance of the custody order cannot be overstated. As a practical matter, it gives the nonresidential parent (overwhelmingly the father) the right to see the child at specified times, rather than leaving this to the discretion of the residential parent. On a symbolic level, the custody order reinforces the importance of the child's continued relationship with both parents. Additionally, the parenting

plan is an important mechanism for forestalling conflict, helping parents think through tricky issues before they arise.

There are also court-related resources to help divorced parents adjust to their new role as co-parents. Court-appointed parenting coordinators, for example, work with parents to develop a concrete plan for parenting and then help parents resolve the disputes that often arise. Similarly, some courts offer parenting programs to help divorcing parents learn how to work together after the divorce. These programs have been effective at decreasing conflict between divorced parents.⁸

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

C. Gender Norms

Finally, family law draws upon and reinforces traditional gender norms based on the marital family, with mothers as caregivers and fathers as breadwinners. Historically, one of the goals of marriage was to facilitate “specialization,” with wives caring for children and husbands earning a family wage.⁹ Today, even though married couples increasingly share the breadwinning and caregiving roles,¹⁰ family law still reinforces, or at the very least reflects, these norms.

The implementation of child custody rules is an example of the continuing force of gender norms. Although facially gender neutral, in practice mothers are far more likely than fathers to have either sole physical custody or a disproportionate share of physical custody.¹¹ This does not necessarily mean that the system is biased. The discrepancy could be explained by

an unequal division of labor before the divorce, with the custody order simply reflecting the pre-divorce division of labor. Alternatively, it could be explained by fewer men seeking sole or primary physical custody.¹² It is notable, however, that when states amend their custody laws directing courts to maximize the time a child spends with each parent,¹³ custody orders are far more likely to reflect equally shared custody.¹⁴

Similarly, child support rules are facially gender neutral, with both parents having a legal obligation to provide economically for children. But, in practice, it is overwhelmingly fathers who pay child support because the children are living primarily with their mothers. Even more fundamentally, child support laws focus only on the economic contributions of noncustodial parents, requiring that parent to provide money, but not time or attention, to a child.

A further separation of paternal breadwinning and caregiving is reflected in the structure of the child support system. The vast majority of states do not require a visitation order as a prerequisite or co-requisite to the imposition of a child support order.¹⁵ And in many states, an administrative agency, not a court, is empowered to issue a child support order, further bifurcating child support and custody. Consider, too, the extensive legal apparatus designed to enforce child support obligations, with federal incentives for states to collect payments. This system is not designed to ensure noncustodial parents have visitation orders in place, and, unlike the incentives to collect payments, there is no corresponding set of incentives for states to establish and enforce visitation orders. The child support system thus reinforces the idea that fathers' most important contribution is financial and that this alone is sufficient.

II. Marital Family Law and Nonmarital Family Life

Family law may be based on marriage, but family life increasingly is not. As Cynthia Osborne and Nora Ankrum explain in their contribution to this special issue, the American family is undergoing a seismic shift, with marriage rates sharply declining for large portions of the population. As the authors explain, unmarried parents generally have children in the context of a romantic relationship, and the men greet the news of impending fatherhood with excitement and anticipation. The fathers also tend to be highly involved with the children during the first few months of the child's life. Despite this early optimism and involvement, most couples do not stay together and even fewer get married. After the relationship ends, children almost always live with their mother, and the fathers' involvement dwindles over time. Both parents usually go on to find new partners, often bearing new children.

As Osborne and Ankrum explain, whether a father maintains an ongoing relationship with his child turns on the quality of the relationship between the parents. If they can get along and have a functioning co-parenting relationship, the father is more likely to see the child. Although children of unmarried parents tend to have worse outcomes than children of married parents as measured by a variety of metrics, a high quality relationship between a father and child can reduce the problems associated with nonmarital childbearing and improve outcomes for children.

The problem, however, is that a fundamental mismatch between marital family law and nonmarital family life destabilizes families, affecting the parenting of both fathers and mothers. Marital family law does not help unmarried parents develop a co-parenting relationship that would defuse conflict and enable both parents to provide children with the attentive, responsive relationships they need. Co-parenting outside of a committed relationship is challenging, but marital family law makes it particularly difficult for unmarried parents. This mismatch between

marital family law and nonmarital family life permeates family's law's legal rules, institutions, and gender norms.

A. Legal Rules

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

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

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

Even if a man is considered a legal father, this does not necessarily mean he has custody or a right to visitation. Marital family law assumes the child is living with both parents and, therefore, most states do not have a default rule allocating custody between parents at birth. If a state does have a default rule, it strongly favors the mother: In fifteen states, when a child is born

to unmarried parents, the mother automatically gets sole custody of the child, and the father must petition the court for custody or visitation.¹⁶ Sometimes this is done as part of a paternity action, but not always. Family law thus assumes that there are either two married (or cohabiting) parents or only one unmarried parent. There is no accommodation for two unmarried parents living apart but both invested in establishing a relationship with the child.

This lack of an automatic right to custody upon birth for fathers allows mothers to act as de facto gatekeepers, permitting a father to see his child only if the mother approves of the contact. This can be exceptionally difficult in light of family complexity. Mothers may have good reasons for limiting contact, such as domestic violence or substance abuse. However, some mothers may bar fathers from seeing their children for less sympathetic reasons, such as a desire to limit jealousy from a current partner. Unmarried fathers could go to court to secure a custody order, but most do not.¹⁷

The second way that marital family law's legal rules harm nonmarital families is by making it harder for parents to maintain a functioning co-parenting relationship. Consider the child support system, which plays an enormous role in family life today, affecting one in four children in the United States and half of all children living in poverty.¹⁸ Child support laws are relatively effective for divorcing families, with most custodial parents (typically mothers) receiving full or partial payment of the child support owed.¹⁹ These laws are also an important tool in fighting poverty, at least for the families receiving child support payments.²⁰ But never-married custodial parents are much less likely to receive full payment than divorced custodial parents, and they receive a lower percentage of the overall amount owed.²¹ This is not surprising given the distinct disadvantages facing unmarried fathers, described by Osborne and Ankrum.

Despite some promising reforms,²² child support laws largely fail to take into account the dismal economic circumstances of unmarried fathers and instead create unrealistic obligations. Mothers are understandably angry that they have little economic support, but child support rules make it seem like the fathers *should* be able to pay, when in fact many cannot. Fathers are understandably angry that they are saddled with unworkable expectations and little help in trying to fulfill them. As a result, each parent blames the other, making it much harder to cooperate in raising their shared child.

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

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

B. Legal Institutions

The second problem with marital family law is that it relies solely on the court system, leaving many unmarried couples without an effective mechanism to transition from a romantic relationship to a co-parenting relationship. As Part I described, when a married couple divorces,

the court-based process manages the family transition. Custody and visitation orders ensure both parents have a legally enforceable right to maintain a relationship with a child; detailed parenting plans provide parents an opportunity to think through tricky co-parenting issues before conflicts arise; parenting coordinators mediate conflicts; and co-parenting classes prepare parents for the new world of parenting after a divorce.

Although these services are accessible in theory, most unmarried couples do not have this support in practice. Unmarried couples have no need for a court order of dissolution because the state never sanctioned the relationship at its start. An unmarried couple *could* go to court at the end of the relationship and seek a custody or visitation order, and would thus have access to the court-based resources such as parenting programs and parenting coordinators. But in practice, court orders are difficult to come by for low-income families. Lawyers are expensive. Legal Services and Legal Aid cannot begin to meet the demand for representation in family law matters. And litigants are often unfamiliar with, or wary of, the court system. Indeed, family law is one of the top access-to-justice issues facing the legal system.

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

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

C. Gender Norms

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

In addition to fueling animosity between unmarried parents, another problem with the child support laws is that they reinforce the notion that men add value to the family primarily through their economic contributions, not their caregiving. Given the disparity between their abilities and the jobs available, unmarried fathers are unlikely to become meaningful breadwinners. By sending the message that the only “parenting” required of fathers is that they pay child support, marital family law underscores the economic failure of these fathers and devalues the caregiving that they try to offer. The continued application of these outdated norms, and the sense of failure they generate among unmarried fathers, leads many men to disengage from their children.²³

III. Family Law for all Families

It may be possible to separate marriage and parenthood, as the literature on nonmarital family life underscores, but it is simply not possible to separate relationships and parenthood. Married or not, the relationship between the mother and father affects the relationship between the parent and child. Thus, the goal of state regulation for all families should be to strengthen relationships between parents so that they can effectively co-parent the child and give the child

the time and attention needed for child development. For some families, marriage does and will continue to serve this purpose. If these parents divorce, marital family law will help them transition into a co-parenting relationship and will facilitate interaction between both parents and the child. But for those parents who never marry, legal regulation should serve the same goal. An effective co-parenting relationship will likely reduce the stress in a mother's life, enabling her to focus on the child's needs. And an effective co-parenting relationship will encourage involvement by a nonresidential father, which, in turn, can benefit the child.

It is thus essential to address those aspects of nonmarital family life that make it harder for parents to maintain a functional relationship with each other and, in turn, more difficult to provide children with time and attention. Recall the salient aspects of nonmarital family life outlined above: children are born to romantically involved parents, and fathers are excited about the birth of the child; despite this early optimism, relationships soon end; mothers become informal gatekeepers to children, and fathers can see children only if they can stay on good terms with the mothers; both parents often go on to find new partners and have other children, and these transitions can negatively influence mothers' parenting; fathers drift away over time. These features of nonmarital family life make it harder for parents to provide children with the relationships they need for healthy child development because fathers are often uninvolved and mothers are distracted by the stress of managing a complex family.

An initial step is helping parents delay childbearing until they have found a reliable partner and providing an alternative legal status that better suits the needs and interests of unmarried couples. I have elaborated both points elsewhere,²⁴ but the main relevance here is that in the age of no-fault divorce, marriage or a similar status will not keep a couple together and therefore is not a complete solution. To the extent legal status can help cement a relationship, the

state should provide nonmarital families with this option, but there is clearly a need for other approaches to nonmarital families.

In light of the current empirical reality that most nonmarital relationships end fairly quickly, the real focus should be on helping unmarried parents transition to a co-parenting relationship after their romantic relationship ends. This would encourage fathers to stay involved in their children's lives; it would likewise decrease maternal stress and distraction, enabling mothers to spend more crucial development time with their children and use more effective parenting strategies. This is not a panacea and can work only in tandem with other supports for nonmarital families.²⁵ But improving the adult-adult, co-parenting relationship is a crucial piece of the puzzle and should inform family law throughout.

To further these ends, family law should adopt changes to the legal rules that discourage maternal gatekeeping, defuse conflict, and encourage cooperation. Family law also should create new legal institutions to help parents negotiate co-parenting and nurture new social norms that embrace a broader notion of unmarried fatherhood.

A. Legal Rules: Encouraging Co-Parenting

There are numerous doctrinal changes that can and should be made, but four stand out in particular. First, to put married and unmarried parents on level playing ground, it is essential to disrupt the formal relationship between marriage and parental rights. The most direct way to do so is for states to eliminate the marital presumption and, instead, adopt other methods for the automatic conferral of parental rights, many of which are already in place, such as a voluntary acknowledgement of paternity. A decision to sign the birth certificate, for example, should be sufficient evidence of a parent's intention to claim the child as his or her own. When one parent

does not want to sign, then the legal system can use the mechanisms it already has in place for establishing parentage, but requiring all parents to take the affirmative step of signing the birth certificate is an important step towards treating mothers and fathers equally, as well as treating married and unmarried parents equally. In this way, marriage would no longer be the guarantor of parental rights. Although this step would not help unmarried parents directly, it would mean that the state is using the same rule for all families.

Second, once we eliminate marriage as the default category for parental rights, we need to think in more nuanced ways about legal recognition of families. Consistent with the goal of nurturing functional parental relationships, family law should grant all parents, regardless of marital status, a legally significant designation of “co-parent.”²⁶ An individual would thus be recognized as a parent in two ways: as a father or mother to a particular child and as a co-parent to another person. This designation would attach at the birth of a child and, like the legal designation of “parent,” it could not be dissolved until the child reached age eighteen, absent a decision to relinquish a child for adoption or a court’s order to terminate parental—including “co-parental”—rights.

This designation would have both expressive and practical value. As an expressive matter, the designation reflects the reality that even if a romantic relationship ends, a co-parenting relationship continues, and it underscores the relevance to child well-being of the relationship *between* the parents. The designation would indirectly help with gatekeeping by making clear that the father is as important to the child as the mother. Rather than reinforcing the idea that the mother is the real parent and the father is a visitor in the child’s life, the designation sends the message that the child has two parents. It also emphasizes the shared endeavor of raising children.

As a practical matter, the designation would have legal weight, giving each parent rights and responsibilities to each other concerning the child. This new legal category could, for example, give a parent something akin to a right of first refusal for time with the child. If the parents are living together, there may be little practical effect. But for parents who do not live together, as with many unmarried parents, it would mean that if the custodial parent took on a full-time job, or was going out of town without the child for an extended period of time, the custodial parent would have an obligation to check with the other parent to determine if that parent could spend the time with the child. Many divorcing couples write this kind of provision into custody agreements, and it could form the basis for a default rule through the co-parent designation for all parents.

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

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

Another aspect of the default custody rule should be an attempt to maximize the time a child spends with each parent through an “equal access” rule. For example, in 1999, Wisconsin amended its law to direct state courts to maximize the time a child spends with each parent, regardless of the marital status of the parents.²⁷ In practice, an equal access rule would either be a background rule, influencing the negotiations between the couple, on their own or through a non-court-based institution, or it would be the rule used by the court. For many unmarried couples, the result of the maximization rule would not be anything close to a 50-50 split. But the rule could help increase the amount of time the father spends with the child, allowing him greater opportunity to develop a high-quality relationship with the child and also sending the message that fathers can and should play an important role in their children’s lives.

Finally, it is critical to reform child support policies to decrease acrimony between unmarried parents. In a change from past policies, the federal Office of Child Support Enforcement (OCSE) has recognized the need to address the underlying reasons why low-income, noncustodial parents often do not pay child support.²⁸ In a multi-pronged effort, OCSE is starting to work *with* families rather than simply enforcing child support orders. Three such efforts are particularly relevant to the issues identified in this article: engaging fathers when a

child is first born, addressing the economic circumstances of fathers through work support programs, and improving family relationships.

To engage fathers early on, OCSE is funding state programs that recognize that unmarried fathers are typically involved in a child's life at birth. Programs include efforts to work specifically with fathers, not just mothers, so that both parents are treated as full parents. This idea is built on research documenting a virtuous cycle: when fathers are involved with their children's lives, they are more likely to pay child support, and when they pay child support, they are more likely to stay involved.²⁹

To improve the economic circumstances of fathers, OCSE is funding state programs that connect fathers with job training programs and case managers trained to help fathers find and keep work. Studies have found that even simple programs, such as job placement assistance, increase both earnings and child support payments.³⁰

To improve family relationships, OCSE is funding state efforts to provide mediation, relationship counseling, parenting programs, and, critically, visitation programs that help fathers see their children. These programs, especially the Access and Visitation Program, which secures parenting time for fathers, have been shown to increase child support payments and parental engagement and also improve the co-parenting relationship.³¹

The reach of these scattered programs, however, should not be overstated. Consider the critical Access and Visitation Program. In fiscal year 2008, the most recent year for which statistics are available, the Office of Child Support Enforcement had a caseload of 15.7 million,³² but the Access and Visitation Program served only 85,237 parents or guardians.³³ Thus, these programs should be understood as initial steps in the right direction, not sea changes in the approach to child support.

Family law should embrace these efforts by, for example, fully integrating access and visitation into the core mission of the OCSE. Indeed, a truly radical change to the child support system would be to link support orders to visitation orders, allowing the former only after evaluating whether the latter is appropriate. As Alicia Key explores in her contribution to this special issue, Texas provides an interesting model for this approach.

B. Institutions: Assistance for Family Transitions

In lieu of a court-only approach to family transitions, family law should create a new institution to help unmarried parents manage the change from romantic partners to co-parents. Parents will need assistance resolving both quotidian issues, such as where the child will be on particular days of the week, as well as larger issues, such as how to respond to a medical problem or whether one parent should move to a distant town or another state.

A promising example of reform comes from Australia and the introduction in 2006 of Family Relationship Centres (FRCs).³⁴ As readers of this journal will remember from the special issue of the *Family Court Review* in 2013 dedicated to the centers, the FRCs were part of a larger package of reforms adopted in 2006 that were intended to produce a “cultural shift” to encourage co-parenting following a separation.³⁵ The goals of the reforms were to keep parents together, increase involvement by both parents following a separation, and help separating parents work together to decide matters relating to shared children. There were a series of legislative reforms, including a presumption of shared parenting responsibility following a separation and the introduction of less adversarial court-based procedures, but the reform that is most relevant to the problem of court dominance in the United States is the development of the FRCs.

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

For separating parents, the goal is to help them develop a short-term workable plan to smooth the initial switch from one familial unit to two. By providing parents with free or nearly free mediation services, the centers help separating parents make “the transition from parenting together to parenting apart.”³⁶ The plans are not legally binding, but the idea is that by forging an agreement for the first year or two after the romantic relationship ends, a couple will get in the habit of working together and then, as their lives inevitably change, they will be better positioned to adapt and continue their co-parenting. There are now more than sixty-five centers throughout the country, in every region. For clients who cannot visit the centers in person, there is also a website and telephone hotlines that offer relationship services. The Australian government funds the centers, but they are run by nongovernmental organizations focused on counseling and mediation. A group in Colorado has developed a pilot program to bring the idea of FRCs to the United States.³⁷

One of the most intriguing ideas of these new institutions is that they are specifically designed to resolve issues at the relationship level, rather than resorting to the legal system. Most alternative dispute resolution systems are still legal in nature, either issuing legally binding agreements or established as a part of the court system. FRCs, however, are a community-based approach to family conflicts, not a court-based approach, and are designed to forestall court

involvement. In the words of Patrick Parkinson, the Australian academic who was the driving force behind the FRCs, “[t]he concept behind the . . . FRCs is that when parents are having difficulty agreeing on the post-separation parenting arrangements, they have a relationship problem, not necessarily a legal one.”³⁸ The courts are available if the FRC cannot help with the problem, but courts are only a back-up system.

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

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

C. Norms: Fathers as Breadwinners and Caregivers

Finally, it is important to update the traditional gender norm that fathers are valuable only as breadwinners.³⁹ Given the limited earning potential for most unmarried fathers, this norm renders unmarried fathers as failures because most do not, and likely cannot, support their children economically, and yet they still want to be involved in their children’s lives. The problem, then, is that we are in a period of flux, with the old model of breadwinning no longer applicable but no new model yet readily available. Indeed, there is no institutionalized role or

expectations for this group of men at all beyond the unrealistic expectation of paying child support in meaningful amounts.⁴⁰

Family law should help build new norms by encouraging fathers to be both caregivers *and* breadwinners, thus broadening the current script and giving parents clearer expectations of each other's roles. Beginning with breadwinning, family law should create a new wage-support program for noncustodial parents. Such a program, perhaps modeled on the Earned Income Tax Credit, could supplement a father's wages with the express purpose of paying the differential to the mother. This would increase the incentive for fathers to work, ensure mothers have greater financial support, and help decrease acrimony between parents because the parents would be less resentful of each other. At least one state is experimenting with a similar idea. In 2006, New York adopted a program known as the Noncustodial Parent EITC.⁴¹ Eligibility is limited to noncustodial parents who have paid their child support in full, and thus the program operates as an incentive to both work and pay child support; the additional money is then retained by the father. A study found that the program modestly increased child support payments and employment rates.

To be sure, a wage supplement would reinforce the social norm of fathers as economic providers, but it could be coupled with other reforms that encourage more hands-on fathering, such as default rules that share custody at birth and maximize the time a child spends with each parent. This package of reforms would reinforce the notion that, like mothers, fathers are both breadwinners and caregivers.

Conclusion

As we prepare for a future where marriage is largely absent, at least in some communities, the only question is whether the law will adequately respond to this challenge. Imposing marital family law on nonmarital families is not the answer because doing so undermines the already tenuous bonds in these families. Instead, it is important to develop a new legal structure to help unmarried parents make the transition from romantic relationships to effective co-parenting. This requires changes to family law's legal rules, institutions, and gender norms. Nonmarital families are here to stay. Family law needs to adapt.

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¹ CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* (2014).

² See KATHRYN EDIN & TIMOTHY J. NELSON, *DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY* 157, 169, 208, 214 (2013).

³ This article typically uses the terms mother and father to refer to the two parents, rather than a more gender neutral term. The reason is two-fold. First, the main focus of the article is on low-income, unmarried parents, who typically have a child without an explicit plan to become pregnant. By definition, this excludes same-sex couples. Second, the article highlights the many ways marital family law reinforces traditional gender norms. By talking explicitly about mothers and fathers, it is easier to identify and analyze this dynamic.

⁴ See HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 12-15 (2000).

⁵ CYNTHIA GRANT BOWMAN, *UNMARRIED COUPLES, LAW, AND PUBLIC POLICY* (2010).

⁶ Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1391-1402 (2001).

⁷ Leslie Joan Harris, *Reforming Paternity Law to Eliminate Gender, Status, and Class Inequality*, 2013 MICH. ST. L. REV. 1295, 1308-13. *But see In re J.W.T.*, 872 S.W.2d 189, 189-90 (Tex. 1994) (rejecting the marital presumption in Texas).

⁸ See Jeffrey T. Cookston et al., *Effects of the Dads for Life Intervention on Interparental Conflict and Coparenting in the Two Years After Divorce*, 46 FAM. PROCESS 123, 132-35 (2007) (describing how in a program designed for noncustodial fathers, participants had a significant increase in co-parenting with a corresponding decrease in parental conflict).

⁹ JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 161-63, 195 (2011).

¹⁰ See KIM PARKER & WENDY WANG, PEW RESEARCH CTR., *MODERN PARENTHOOD: ROLES OF MOMS AND DADS CONVERGE AS THEY BALANCE WORK AND FAMILY* (Mar. 14, 2013) [available at www.pewresearch.org](http://www.pewresearch.org); WENDY WANG ET AL., PEW RESEARCH CTR., *BREADWINNER MOMS: MOTHERS ARE THE SOLE OR PRIMARY PROVIDER IN FOUR-IN-TEN HOUSEHOLDS WITH CHILDREN; PUBLIC CONFLICTED ABOUT THE GROWING TREND* 20 (May 29, 2013) [available at www.pewresearch.org](http://www.pewresearch.org).

¹¹ See TIMOTHY S. GRALL, U.S. CENSUS BUREAU, *CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2007*, at 2 (2009) [available at https://www.census.gov/hhes/www/childsupport/cs07.html](https://www.census.gov/hhes/www/childsupport/cs07.html) (in 2008, of all children living with only one parent, 82.6% of the children lived with their mother as compared with only 17.4% living with their father); Suzanne Reynolds et al., *Back to the Future: An Empirical Study of Child Custody Outcomes*, 85 N.C. L. REV. 1629, 1667 (2007) (describing results of an empirical study of one jurisdiction and finding that “[t]he mother received primary physical custody in 71.9% of the cases The father received primary physical custody in 12.8% of the cases Joint physical custody, defined for the study as one involving at least 123 overnights, resulted in 15.3% of the cases”).

¹² See Reynolds et al., *supra* note 11, at 1666 (describing study findings that “[f]athers also usually sought primary physical custody when they were plaintiffs, but were less likely than mothers to do so”).

¹³ See, e.g., ARIZ. REV. STAT. ANN. § 25-403.02(B) (2013) (“Consistent with the child’s best interests . . . the court shall adopt a parenting plan that provides for both parents to share legal decision-making regarding their child and that maximizes their respective parenting time.”); WIS. STAT. § 767.41(4)(a)(2) (2014) (“The court shall set a placement schedule that allows the child to have regularly occurring, meaningful periods of physical placement with each parent and that maximizes the amount of time the child may spend with each parent, taking into account geographic separation and accommodations for different households.”).

¹⁴ See PATRICIA BROWN & STEVEN T. COOK, *CHILDREN’S PLACEMENT ARRANGEMENTS IN DIVORCE AND PATERNITY CASES IN WISCONSIN* 2, 9-12, 18-19 (rev. ed. 2012) (tracking cases from before and after Wisconsin changed its law, and finding that after the law took effect in 2000, fathers were still highly unlikely to have sole custody, but they were much more likely to have equally shared custody, with the percentage of such cases rising 14.6% to 30.5%; further noting that although this trend pre-dated the law, it appears the law accelerated the trend). In this study, equally shared custody was defined as a 50-50 split of the child’s time. See *id.* at 9.

¹⁵ Texas is the primary counter example.

¹⁶ Arkansas’s statutory scheme illustrates this approach. That state’s laws provide that, “[w]hen a child is born to an unmarried woman, legal custody of that child shall be in the woman giving birth to the child until the child reaches eighteen (18) years of age unless a court of competent jurisdiction enters an order placing the child in the custody of another party.” ARK. CODE ANN. § 9-10-113(a) (2007). After establishing paternity, an unmarried father “may

petition the circuit court in the county where the child resides for custody of the child,” *id.* § 9-10-113(b), but he does not get custody, or even visitation, without a court order, *see id.* § 9-10-113(d) (“When in the best interest of a child, visitation shall be awarded in a way that assures the frequent and continuing contact of the child with the mother and the biological father.”). For a list of the other statutory schemes, see Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. (forthcoming 2015).

¹⁷ OFFICE OF CHILD SUPPORT ENFORCEMENT, DEP’T OF HEALTH & HUMAN SERVS., CHILD SUPPORT AND PARENTING TIME: IMPROVING COORDINATION TO BENEFIT CHILDREN 1-2 (2013).

¹⁸ *See* OFFICE OF CHILD SUPPORT ENFORCEMENT, DEP’T OF HEALTH & HUMAN SERVS., FAMILY-CENTERED INNOVATIONS IMPROVE CHILD SUPPORT OUTCOMES 1 (2011).

¹⁹ *See* GRALL, *supra* note 11, at 7 tbl.2.

²⁰ *See* OFFICE OF CHILD SUPPORT ENFORCEMENT, *supra* note 18, at 2 (stating that child support payments lift one million people out of poverty each year, and that child support payments account for 10% of all income for families living in poverty and 40% of all income for families living in poverty who receive child support payments).

²¹ *See* GRALL, *supra* note 11, at 7 tbl.2.

²² Jane C. Venohr, *Child Support Guidelines and Guidelines Reviews: State Differences and Common Issues*, 47 FAM. L.Q. 327, 340-41 (2013) (describing state efforts to address problems facing low-income obligors, including some states ensuring that child support obligations do not accrue while the obligor is in prison and also setting very minimal payments, such as \$50 per month).

²³ EDIN & NELSON, *supra* note 2, at 104-29, 208-209.

²⁴ *See* HUNTINGTON, *supra* note 1, at 160 & 185-87 (discussing ways to encourage young men and women to delay childbearing), 177-80 (discussing alternatives to marriage).

²⁵ I focus on these at length in my book. *See* HUNTINGTON, *supra* note 1, at 145-63, 180-99.

²⁶ For another proposal that a legal status should attach to parents on the birth of a child, see MERLE H. WEINER, *THE PARENT-PARTNER STATUS IN AMERICAN FAMILY LAW* (Cambridge Univ. Press) (forthcoming 2015).

²⁷ Act of Oct. 27, 1999, No. 9, § 3054(cr), §3052cr, Reg. Sess., 1999 Wis. Advance Legis. Serv. 9 (codified as WIS. STAT. § 767.41(4)(a)(2) (2014)).

²⁸ *See* FAMILY-CENTERED INNOVATIONS IMPROVE CHILD-SUPPORT OUTCOMES, *supra* note 18, at 2-3.

²⁹ *See* U.S. DEP’T HEALTH & HUM. SERVS., OFF. CHILD SUPPORT ENFORCEMENT, ENGAGEMENT OF FATHERS FROM BIRTH 2-3 (2011).

³⁰ *See* U.S. DEP’T OF HEALTH & HUMAN SERVS., OFF. CHILD SUPPORT ENFORCEMENT, PROMOTING CHILD WELL-BEING & FAMILY SELF-SUFFICIENCY NO. 4, ECONOMIC STABILITY 1-4 (2011).

³¹ *See* U.S. DEP’T HEALTH & HUMAN SERVS., OFF. CHILD SUPPORT ENFORCEMENT, PROMOTING CHILD WELL-BEING & FAMILY SELF-SUFFICIENCY NO. 5, HEALTHY FAMILY RELATIONSHIPS 2 (2011).

³² U.S. DEP’T HEALTH & HUM. SERVS., OFF. CHILD SUPPORT ENFORCEMENT, FY2008 ANNUAL REPORT TO CONGRESS.

³³ U.S. DEP’T HEALTH & HUM. SERVS., OFF. CHILD SUPPORT ENFORCEMENT, CHILD ACCESS AND VISITATION GRANTS: STATE/JURISDICTION PROFILES FOR FY 2008 1 (2010).

³⁴ PATRICK PARKINSON, *FAMILY LAW AND THE INDISSOLUBILITY OF PARENTHOOD* 187 (2011).

³⁵ RAE KASPIEW ET AL., AUSTL. GOV’T, AUSTL. INST. FAMILY STUD., *EVALUATION OF THE 2006 FAMILY LAW REFORMS*, at E1 (Lan Wang et al. eds., 2009).

³⁶ Patrick Parkinson, *The Idea of Family Relationship Centres in Australia*, 51 FAM. CT. REV. 195, 195-96 (2013).

³⁷ *See About Us*, RES. CTR. FOR SEPARATING & DIVORCING FAMILIES AT THE UNIV. OF DENVER, <http://www.du.edu/rcsdf/about.html> (last visited Oct. 11, 2014).

³⁸ PARKINSON, *supra* note 36, at 197.

³⁹ For a thoughtful discussion of how to make caregiving a central feature of fatherhood for all fathers regardless of marital status, see NANCY E. DOWD, *REDEFINING FATHERHOOD* 157, 213-31 (2000).

⁴⁰ EDIN & NELSON, *supra* note 2, at 213-16.

⁴¹ *Noncustodial Parent New York State Earned Income Tax Credit (EITC)*, OFF. TEMPORARY & DISABILITY ASSISTANCE, <https://otda.ny.gov/workingfamilies/noncustodial.asp> (last visited Oct. 11, 2014).