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The Children of Nonmarriage: Towards a Child-First Family Law

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Although family law has traditionally focused on marriage as the framework for supporting children, the modern family is increasingly developing outside of marriage. As such, we must consider whether family law does enough to support the children of nonmarriage, who have less resources available to them, receiving less parenting time and less child support and suffer poorer outcomes on a range of well-being indicators. A wave of suggested reforms has posited that the way to customize family law to the context of nonmarriage is to focus on solidifying co-parent relationships through recognizing a co-parent legal status and awarding rights and imposing obligations as between biological parents more fairly, thereby placing "marriage-like" trappings on unmarried parents. In this Article, I argue that this approach misses the opportunity to focus on the needs of children first and directly instead of expecting benefits to trickle down from stronger relations between co-parents. Given the different circumstances involved, I caution against the impact of potential negative side effects of such reforms for children. Instead, I focus on how the law can do more to support children of nonmarriage directly, by state action focused directly on supporting children, and by legal recognition and facilitation of additional

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parental figures who provide care and support alongside traditional parents. The expanded parental web to benefit children of nonmarriage that I envision is made up of direct state benefits and support for children, as well as stepparents, birth parents, grandparents, and functional parents working alongside traditional parents to provide impactful care for children in an inclusive and stratified manner that preserves the dominance of the primary caregiver. This framework focuses on the way the law can support children directly and by facilitating cooperation among a variety of parental figures, perhaps idealistically, leaving aside concerns about fairness and equality in adult-centered disputes. Such idealism, however, better reflects the reality of how care is provided outside of marriage and is perhaps more practical than legal mechanisms that impose the trappings of marriage on those who are unmarried.

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INTRODUCTION: MULTIPLYING AND DIVIDING PARENTAL ROLES

Children are increasingly born and parented outside of marriage.[1] According to a 2020 Gallup poll, marriage is considered very important for

1. Nonmarriage in the United States is especially on the rise among non-white populations. *See* Julie A. Phillips & Megan M. Sweeney, *Premarital Cohabitation and Marital Disruption among White, Black, and Mexican American Women*, 67 J. MARRIAGE & FAM. 296, 298-99 (2005) (recounting increased rates of nonmarriage among Americans on the whole and especially for blacks). However, nonmarriage is increasingly relevant for white populations as well. *See* Helen M. Alvare, *Marriage and Family as the New Property: Obergefell, Marriage and the Hand of the State*, 28 REGENT U.L. Rev. 49, 70 (2015) (citing

parenthood by only 29% of Americans (down from 49% in 2006).[2] The shift in family formation is towards families that are created by vertical parenting relationships—not as a subset of the horizontal, sexual relationships between parents, but rather instead of those relationships.[3] These families may have involved coupledom at some point, but the parenting is not a by-product of a marriage or even of a committed long-term relationship outside the confines of marriage.[4]

Charles Murray, COMING APART: THE STATE OF WHITE AMERICA, 1960-2010, 155-57, 160-61, 163-66 (2012)) (remarking on decreased rates of marriage among less educated white Americans); Naomi Cahn, *The Changing Face of Family Law,* 52 FAM. L.Q. 57, 63 (2018) (majority of births for poor, non-college educated Americans take place outside of marriage); Marsha Garrison, *The Decline of Formal Marriage: Inevitable or Reversible,* 41 FAM. L.Q. 491, 491 (2007) ("All over the industrialized world, marriage is in decline."); Courtney G. Joslin, *Family Choices*, 51 ARIZ. ST. L.J. 1285, 1301-02 (2019) ("Marriage rates continue to be high among the most privileged. In contrast, nonmarriage is becoming the norm among individuals with lower levels of education and fewer financial resources."); Robin A. Lendhart, *Race Matters in Research on Nonmarital Unions: A Response to Amanda Jayne Miller's and Shannon Sassler's "Don't Force My Hand": Gender and Social Class Variation in Relationship Negotiation*, 51 ARIZ. ST. L.J. 1317, 1318 (2019) ("Rates of nonmarital unions have increased outside of African Americans as well. For example, the rate of nonmarriage among Whites has increased from to twenty-six percent in 1960 to approximately forty-five percent in 2010."); Maureen R. Waller & Allison Dwyer Emory, *Parents Apart: Differences Between Unmarried and Divorcing Parents in Separated Families,* 52 FAM. CT. REV. 686 (2014).

2. *See* Jeffrey M. Jones, *Is Marriage Becoming Irrelevant?* GALLUP (Dec. 28, 2020), https://news.gallup.com/poll/316223/fewer-say-important-parents-married.aspx?utm_source=alert&utm_medium=email&utm_content=morelink&utm_campaign=syndication [https://perma.cc/AJ2Y-RH4N].

3. Family law has already undergone a revolution from focus on the status of partners to the focus on parents. June Carbone calls this the "second revolution" in family law because family law increasingly focuses on the obligations of custody and child support, as opposed to the sexual partner obligations of marital fault and alimony. While this second revolution remained focused primarily on parenthood inside of marriage, it was a first step toward families built around parenthood entirely. *See generally* JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW (2000).

4. This is in contrast to nonmarriage prevalent in Israel, where marriage is exclusively governed by religious law and thus many secular couples live as reputed spouses in committed long-term relationships that mirror marriage

Yet, family law is still anchored in helping children through the permanence of marriage.[5] This disconnect between family law built around marriage and the reality of parenthood outside of marriage has been credited with potentially aggravating a series of concerns particular to the children of nonmarriage.[6] Children of nonmarriage fare worse in a range of indicators of well-being in relation to children of marriage, have fewer overall resources, receive less financial support and parenting time from biological fathers, and are more dependent on third-party, kin care.[7]

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but avoid religious frameworks. *See* Ayelet Blecher-Prigat, *Echoes of Nonmarriage,* 51 ARIZ. ST. L.J. 1213, 1217-20 (2019).

5. *See* Obergefell v. Hodges, 576 U.S. 644, 667 (2015) ("A third basis for protecting the right to marry is that it safeguards children and families . . . ."); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 954 (Mass. 2003) ("Simply put, the government creates marriage . . . . In a real sense, there are three partners to every civil marriage: two willing spouses and an approving State."); Naomi Cahn & June Carbone, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1016-17 (2003) ("Legislators have ordinarily sought to advance children's well-being not by providing for them directly but by encouraging their birth within marriage."); Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 505-12 (1992) (describing the "channeling function" of family law in creating or supporting social institutions—e.g., marriage—that it deems desirable).

6. *See, e.g.*, Clare Huntington, *Family Law and Nonmarital Families*, 53 FAM. CT. REV. 233, 235 (2015) ("The central dividing line in family law is marriage."); Kimberly Mutcherson, *Blood and Water in a Post Coital World,* 49 FAM. L.Q. 117, 134 (2015) ("At this moment, when family law faces continual challenges to the idea of one-size fits all families, the challenge for the law is to create family formation rules that serve real families and that respond to ways in which an overreliance on biology can work to the detriment of children and the adults who love and care for them."); *see generally* Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 350-86 (2011) (examining societal biases against and legal disapproval of nonmarital children); Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1279, 1284-1310 (2015) (considering the effects of illegitimacy on children of nonmarriage).

7. *See* Garrison, *supra* note 1, at 496-97 (summarizing studies of the benefits of marriage for children); Sara S. McLanahan & Irwin Garfinkel, *Fragile Families: Debates, Facts, and Solutions*, *in* MARRIAGE AT THE CROSSROADS 142, 144 (Marsha Garrison & Elizabeth S. Scott eds., 2012); Jane Waldfogel et al., *Fragile Families*

In light of this gap between family law and the reality of nonmarriage, parenting outside of marriage is receiving increased attention in caselaw and legal literature.[8] The primary approach to reorienting family law to the context of nonmarriage has been to seek to impose a legal status of joint parenthood on nonmarried co-parents.[9] This approach, discussed in various iterations in Part II, seeks to duplicate the benefits experienced by children of marriage for children of nonmarriage by recreating some marital structures between co-parenting adults in the context of nonmarriage. In order to strengthen co-parent relationships and increase investment in children by two legal parents, these reforms impose greater parity in the form of equal access and equal sharing of obligations in an effort to increase the perception of fairness between co-parenting adults.[10]

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and Child Wellbeing, FUTURE CHILD 87, 87-89 (2010); *see also* overview of the impact of nonmarriage on children *infra* Section I.A.

8. *See* Ayelet Blecher-Prigat, *The Costs of Raising Children: Toward a Theory of Financial Obligations Between Co-Parents*, 13 THEORETICAL INQUIRIES L. 179, 187-89 (2012); Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 240 (2015); Merle Weiner, *Caregiver Payments and the Obligation to Give Care or Share*, 59 VILL. L. REV. 135, 143-47 (2014); *see also* Cahn & Carbone, *supra* note 5 (arguing for paternity to be established based on genetic at birth); Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991, 991 (2006). For important discussions of nonmarriage focused primarily on rights and obligations between adults, see Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1, 30-51 (2017) (examining how the law regulates nonmarital relationships at dissolution); Courtney C. Joslin, *The Gay Rights Canon and the Right to Nonmarriage,* 97 B.U. L. REV. 425, 464-81 (2017) (arguing for a constitutional right to nonmarriage); Robin A. Lenhardt, *Marriage as Black Citizenship*, 66 HASTINGS L.J. 1317, 1353-62 (2015) (arguing for nonmarriage to advance black civil rights); Solangel Maldonado, *supra* note 6, at 386-93 (arguing that the law should abolish legal distinctions between marital and nonmarital children); Kaiponeanea T. Matsumura*, Beyond Property: The Other Legal Consequences of Informal Relationships,* 51 ARIZ. ST. L.J. 1326, 1354-67 (2019) (arguing that any legal scheme that seeks to regulate nonmarriage must consider legal incidents beyond property obligations); Melissa Murray, *Accommodating Nonmarriage*, 88 S. CAL. L. REV. 661, 685-700 (2015) (suggesting that the legal framework for religious accommodations could be applied to accommodate nonmarriage as an expression of sexual liberty).

9. *See infra* Part II.

10. Fairness is a complex concept that resists simple definition; however, in this context, fairness means two things: (i) the furthering of principles that relate

These approaches may also intend to benefit children, but they do so indirectly, focusing first on encouraging and cementing relationships and fair distribution of obligations between co-parenting adults and then expecting these benefits to "trickle-down" to children. To some extent—at least with regard to joint custody—these suggestions are beginning to have an impact.[11]

This Article reacts to reforms that promote the creation of a legal status of joint parenthood as an avenue toward making family law better suited to the context of nonmarriage. I argue that such an approach misses an opportunity for clarity by reverting to reforms targeting the horizontal relationship between adults, rather than remaining focused on the vertical

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to responsibility, what a person deserves and what is considered "equal" or same treatment; and (ii) an accounting process that considers concerns other than the party's well-being. *See* Louis Kaplow & Steven Shavell, *Fairness vs. Welfare,* 114 HARV. L. REV. 961, 1000 (2001) (discussing the tension between fairness and well-being arguments); Immanuel Kant, GROUNDWORK OF THE METAPHYSICS OF MORALS 21-22 (Mary Gregor trans. & ed., Cambridge Univ. Press 1997) (1785) (fairness as categorical principle to be used in framing ethical and legal rules). At first blush, treating both parents in the same manner will seem most impartial and thus be considered "fair" treatment as between legal parents. Although other conceptions of fairness based on substantive equality are possible, the initial focus was on engaging non-marital fathers by increasing parity (formal equality) in the form of joint parenthood and joint custody to make parenthood appear fairer as between coparents. *See* discussion *infra* notes 109-110 and accompanying text. Other approaches to framing parenthood outside of marriage focus on autonomy and liberal values, which are also fundamentally based on adult interests; if they improve the interests of children, they do so indirectly. *See* Naomi Cahn & June Carbone, *Nonmarriage*, 76 MD. L. REV. 55, 110-17 (2016) (pointing to autonomy as the central value in designing the law of nonmarried parenthood); Shahar Lifshitz, *Married Against Their Will? Toward A Pluralist Regulation of Spousal Relationships*, 66 WASH. & LEE L. REV. 1565, 1596-1601 (2009).

11. Typically, married fathers, unlike unmarried fathers, are presumed to have joint custody until a court orders otherwise. *See, e.g.*, Bernardo Cuadra, *Family Law—Maternal and Joint Custody Presumptions for Unmarried Parents: Constitutional and Policy Considerations in Massachusetts and Beyond*, 32 W. NEW ENG. L. REV. 599, 617 (2010). Some states are moving away from this differential treatment. *See, e.g.,* NEV. REV. STAT. § 125C.0015 (2015) (assuming joint custody even for unmarried parents until a court says otherwise). Unmarried fathers need a court order to gain custody and also meet legal hurdles to obtain paternity status. *See infra* Section I.B for a discussion of paternity law.

parent-child relationship. In the nonmarital family, it is the vertical relationship between adult and child that brings the family together legally. Nonmarital family law, therefore, provides a great wave of opportunity to focus *first* on children's interests and children's rights, without having to address fairness concerns in organizing legal structures between married adults. We can take this opportunity to start fresh in creating family law that focuses *directly* on the needs of children instead of filtering those interests through adult relationships, whether marriage or joint parenthood outside of marriage.

Accordingly, in this Article, I argue that despite the attraction of trying to improve outcomes for the children of nonmarriage by recreating some of the trappings of marital relationships between co-parents, this approach raises several concerns that should cause family law policymakers to hesitate. While reforms that focus on solidifying adult relationships outside of marriage would ideally benefit children and coincide with children's interests, Section II.2 offers a series of reasons why we cannot rely on this assumption. The children of nonmarriage are raised in different circumstances than the children of marriage; attempting to impose the trappings of marital relations on the non-marital families may not be effective and is likely to have unintended consequences. Attempts to solidify horizontal co-parent relationships in the context of nonmarriage may undermine the care that these children depend upon by undermining caregiver autonomy, increasing instability and uncertainty, and alienating potential caregivers, thereby making conditions for children of nonmarriage worse.[12]

Instead, I suggest that the law can seek to increase the levels of care and support received by children of nonmarriage by recognizing and enabling sources of support outside of the nuclear family— namely, functional caregivers and the state.[13] The lack of reliable support from biological (or intended) legal parents does not mean the law must impose marriage-like expectations on non-married joint parents or leave children with no additional legal support.[14] Rather, children born outside of marriage are

12. See discussion of potential negative consequences of the joint parenthood status *infra* Section II.B.

13. Supplemental caregivers may also involve biological parents that are not legal parents, due to caselaw, adoption, or assisted reproductive technologies ("ART") statutes that terminate their parenthood. Thus, individuals who are biologically related to the child may still act as additional functional caregivers.

14. Legal parents may be biological parents, presumptive parents, or intended parents who brought children into the world through gamete donations or

being raised under more varied and diverse conditions, and the law can reflect these conditions, legally recognizing larger webs of support that supplement—but do not replace—care provided by the nuclear family.[15] Children of nonmarriage are often raised by single parents who are assisted by multiple additional caregivers. These children may come to have stepparents, in addition to their birth parents, who significantly contribute to their care.[16] As stepparents live with children, the support they provide

surrogates together with biological parents. Such intended parents are distinct from functional parents as they intend to raise children ex ante, are present from the time of birth and can be expected to undertake responsibilities even if they do not develop a functional relationship with children. *See* Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 GEO. MASON L. REV. 419, 428-35 (2013) (distinguishing between intended and biological parents from functional, de facto parents). While this article's frame of reference is improving outcomes for children of nonmarriage who do not receive enough parental care, the framework it suggests can be applied to three-parent families in which more than two adults seek to care for a child together by design in an intentional manner. *See* discussion of the possibility of applying the child-first framework outside of nonmarriage where horizontal relationships are strong and children are created within three parent families by design, *infra* notes 200-201 & 263-265 and accompanying text; *see also* Pamela Laufer-Ukeles, *Parental Webs: Multiple and Disaggregated Family Forms in Israel*, *in* SYS. OF FAM. JUST. (Mavis Maclean & Rachel Treloar eds., forthcoming) (contrasting three-parent families that occur de facto and those that occur by design, ex ante).

15. *See, e.g.*, Melissa Ludtke, ON OUR OWN: UNMARRIED MOTHERHOOD IN AMERICA 422-23 (1997); Naomi Cahn, *Placing Children in Context: Parents, Foster Care, and Poverty*, *in* WHAT IS RIGHT FOR CHILDREN?: THE COMPETING PARADIGMS OF RELIGION AND HUMAN RIGHTS 1-4 (Martha Albertson Fineman & Karen Worthington eds., 2009); Ariel Kalil, Rebecca Ryan & Elise Chor, *Time Investments in Children Across Family Structures*, 654 ANNALS AM. ACAD. POL. SOC. SCI. 150, 150 (2014) (discussing the diverse parenting that occurs in nonmarriage); Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. DAVIS L. REV. 1005, 1026 (2001) (describing factors that result in single mothers' reliance on non-parental care); Wendy Sigle-Rushton & Sara McLanahan, *Father Absence and Child Well-Being: A Critical Review*, *in* THE FUTURE OF THE FAMILY 116, 124-25 (Daniel P. Moynihan et al. eds., 2004).

16. *See, e.g.*, Barbara Bennett Woodhouse, *Of Babies, Bonding, and Burning Buildings: Discerning Parenthood in Irrational Action*, 81 VA. L. REV. 2493, 2514 (1995) (discussing effects of children of nonmarriage being raised by non-parental kin); Josh Gupta-Kagan, *Children, Kin, and Court: Designing Third*

is often meaningful and continuous, but these relationships still may not necessarily supplant connections to formal legal parents. Moreover, single parents often rely on their own parents (the children's grandparents) to provide supplemental care and support; indeed, single parents choose to reside with their parents or other extended kin at much higher rates than married parents.[17] Children born of unmarried mothers are also more often adopted. Such adoptions are increasingly open, and thus birth mothers continue to have contact with and provide support to children, on top of the support they receive from their legal parents.[18] In all these varied family arrangements, the care provided by parent-like figures beyond married legal co-parents is significant and provides substantial support to children.

Accordingly, in Part III, I suggest a family law for children of nonmarriage that includes multiple "parent-like" caregivers in frameworks of care as opposed to imposing "marriage-like" obligations on joint parents.[19] Through legal recognition, the law can create real space for non-traditional "parental" figures, whether considered functional parents or third-party caregivers, to supplement legal parents.[20] I suggest a multiple

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Party Custody Policy to Protect Children, Third Parties, and Parents, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 43 (2008); Roberts, *supra* note 15, at 1026 (describing factors the result in single mothers reliance on non-parental care).

17. *See* John DeWitt Gregory, *Family Privacy and the Custody and Visitation Rights of Adult Outsiders*, 36 FAM. L.Q. 163, 168 (2002); Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After Troxel v. Granville*, 88 IOWA L. REV. 865, 899 (2003) (describing the importance of grandparents in a variety of settings).

18. *See infra* notes 99-100 and accompanying text.

19. Parent-like figures are those who act in parenting roles "raising children" and perform substantial parenting duties regardless of whether they are legally recognized as parents. Legal parental duties include support, custody, health, and education. *See, e.g.*, Haim Abraham, *A Family Is What You Make It? Legal Recognition and Regulation of Multiple Parents*, 25 AM. U. J. GENDER SOC. POL'Y & L. 405, 409 (2017); Jeffrey A. Parness & Matthew Timko*, De Facto Parent and Nonparent Child Support Orders*, 67 AM. U. L. REV. 769, 777-80 (2018).

20. *See* Parness & Timko, *supra* note 19, at 777-80 (distinguishing between two types of functional caregivers that may be awarded custody or child support—de facto parents and nonparents, describing them both as engaging in parent-like duties); Pamela Laufer-Ukeles, *Money, Caregiving and Kinship: Should Paid Caregivers Be Allowed to Obtain De Facto Parental Status?*, 74 MO. L. REV. 25, 35 (2009) (describing functional caregivers and then pointing out that they can be perceived as either de facto (quasi, psychological) parents or third-party caregivers). Either way, functional, de facto parents are often

and inclusive, but tiered and disaggregated, vision of parenthood rights and obligations, in which not every parental figure has the same level of rights and obligations. This model can allow more than two parental figures to have legal status, custody, and even pay child support, but preserves the elevated authority of the primary caregiver. The clear hierarchy can prevent power struggles between co-parents and minimize the likelihood of disputes and uncertainty that may threaten children's security. Although this model may not seem facially fair as between legal parents, in focusing on children's needs first, I argue that it can assist in ensuring that children of nonmarriage receive needed care. Legitimizing non-traditional multiple caregiver status can encourage the essential care they provide, making functional and third-party caregivers feel more secure in investing in ongoing relations with children and ideally allowing them the space to provide support without reliance on court interference, which should be reserved for extreme cases. I suggest clear formulas for defining and organizing multiple caregivers to minimize uncertainty and instability and encourage acceptance of functional caregivers as both legitimate and ongoing in a manner that does not risk overwhelming or threatening primary caregivers.

In addition, I stress in Section III.B the potential for the state to do more to support children directly through subsidies and support for health and education.[21] Family law can therefore become more public, reflecting a collective commitment to improve the well-being of children directly. Focus on direct state responsibility for children steps away from reliance on privatization of responsibility for children's interests within the nuclear family through the support of marriage or marriage-like structures between adults, which unsurprisingly provides less support to children outside of marriage.[22] President Biden's proposed "American Family Plan" is an

assigned fewer custodial obligations then formal legal parents, in a disaggregated manner. *See also* Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 GEO. MASON L. REV. 419, 421-23 (2013).

21. *See infra* Section III.B; MARTHA FINEMAN, NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 228 (1995); McLanahan & Garfinkel, *supra* note 7, at 156-58 (recommending direct subsidies to children); Catherine J. Ross & Naomi Cahn, *Subsidy for Caretaking in Families: Lessons from Foster Care*, 8 AM. U. J. GENDER. SOC. POL'Y & L. 55, 70-71 (1999) (describing the Temporary Assistance for Needy Families program and child welfare policy as focused on the child and not the caregiving unit).

22. *See, e.g.*, Erez Aloni, *The Marital Wealth Gap*, 93 WASH. L. REV. 1 (2018) (discussing how marriage benefits the wealthy).

important step in this direction, providing subsidies, paid family leave, and nutritional assistance directly to lower and middle-income families, demonstrating the timeliness and pressing nature of the need for a more public family law.[23] State support for children, whether through recognizing and legitimizing non-biological caregivers or through direct support, does not violate biological or intended parents' primary responsibility and discretion preserved in the constitutional doctrine of parental privacy. Rather, it allows the state to assist parents in furthering children's interests. Parental rights do not mean that parents must act in isolation from the state or others.[24]

This Article follows a wave of scholarship advocating for multiple parenthood[25] and contributes to that literature in two distinctive ways. First, this Article focuses on creating an organizational framework for parenting among multiple parents or third-party parental figures. It does not primarily focus on analyzing caselaw or crafting legislative reforms that determine formal parenthood at a child's birth in the context of assisted

23. *See* Press Release, The White House, Fact-Sheet: The American Families Plan (April 28, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/28/fact-sheet-the-american-families-plan [https://perma.cc/GX3C-EDCN].

24. *See infra* notes 222-231 and accompanying text. *See also* Pamela Laufer-Ukeles, *The Relational Rights of Children,* 48 CONN. L. REV. 741, 764-66 (2016) (discussing how children's relational rights involve children's right to have the state support their ongoing "good enough" caregiving relationships).

25. *See, e.g.*, Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 19-20 (2008) (examining the advantage of extending parental status recognition to those currently called third parties or legal strangers); Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309, 314-17 (2007) (comparing the legal rights of parents with those of third parties and arguing for the broadening of the category of those who qualify for parental recognition); Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 YALE J.L. & FEMINISM 83, 85-94 (2004) (addressing the American legal system's current view of a family and arguing for an expansion from the exclusive family system, which relies solely on the nuclear family for complete childcare); Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL'Y 47, 74 (2007) (discussing the recognition of community parenting); Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 455 (2008) (discussing a conscious attempt by scholars to address the changing composition of the American family in light of the current legal construction of caregiving, which treats nonparents as strangers).

reproductive technologies (ART) and gamete donations, same-sex couples, or other committed long-term relationships, and the multiplicity that these determinations can engender.[26] Rather, this Article welcomes such progress and provides a framework that organizes multiple parental figures who are functioning in parental caregiving roles, whether or not they are already recognized as formal legal parents. Second, while recognizing the difference between three recognized legal parents and the involvement of third parties with disaggregated parenting rights and obligations, such as visitation, this Article considers these innovations jointly. This Article is more focused on the ways they both can function cooperatively to provide a broader web of care and support for children of nonmarriage together with direct state support.

Moreover, in proposing a different kind of family law for children of nonmarriage, this Article weighs in on two other iconic debates. First, this Article reflects the tension between best interests and fairness,[27] arguing that we should reframe the law of nonmarriage in a manner that hesitates to rely on fairness in divvying up parenting rights and obligations as a conduit to promote children's interests. Instead, this Article argues for an approach that stubbornly prioritizes the interests of children as its own end, as a separate and tangible inquiry. While fairness in organizing adult relationships and the interests of children may coincide, they also may not. To prioritize children means to look to children's interests first as a separate—and primary—inquiry.[28] In the context of the child-centered

26. *See infra* notes 37-39, 85-92 and accompanying text (discussing de facto parenthood in the context of same-sex couples); Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L.J. 1223, 1251-59 (2014). There is substantial literature, caselaw, and support for parentage reform initiatives allowing for same-sex partners to establish parenthood without a biological connection. *See, e.g.*, Julie Moreau, *New Connecticut Parenting Bill Gives LGBTQ Families a Sigh of Relief*, NBC NEWS (June 2, 2021), https://www.nbcnews.com/feature/nbc-out/new-connecticut-parenting-bill-gives-lgbtq-families-sigh-relief-n1269282 [https://perma.cc/Z9P6-3HMS]; Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261 (2020).

27. *See* Kaplow & Shavell, *supra* note 10, at 1000.

28. When referring to children's interests or "best interests" in this Article, I do not contend directly with the substantial controversy surrounding who is best poised to determine children's interests—the state or parents—or whether the child's own voice must be heeded. *See* Laufer-Ukeles, *supra* note 24, at 753-57 (describing competing perspectives on children's best interests). Moreover, as I have argued previously, "best interests" is a normative goal but not a practical standard that can be achieved given the range of factors and

issues of custody and support, adult interests should be protected in a manner that is secondary to a framework that looks to children's needs first and foremost. Indeed, one of the primary reasons to reinvent family laws for nonmarriage is to protect children of nonmarriage who fare worse than children of marriage based on indicators of well-being.

Second, this Article attempts to reimagine family law for children in the wake of the sea change that has occurred throughout the world in taking children's rights seriously. In line with the Convention on the Rights of the Child ("CRC"), children must be treated as subjects and not objects, and in legal cases, their interests must be a primary consideration.[29] The United States is committed to furthering children's interests, emphasizing their best interests in custody disputes between parents and in its approach to children's protective services and juvenile justice reform,[30] despite its being the only country not to sign the CRC.[31] In family law and beyond, children's rights are now front and center. A family law truly focused on children's interests as a primary consideration must make room for children-first policies, putting aside, or at least moderating, emphasis on adult relationships, the implications of private choices regarding marriage, and the myopic emphasis on the values of fairness and equality as between adults.

This Article proceeds in three parts, followed by a conclusion. In Part I, I provide a closer account of the outcomes and characteristics of children born outside of marriage and then consider how modern family law

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opinions regarding children's interests. *See id.* at 747-48. However, regardless of who determines children's interests or what factors are included, in this Article I argue that in determining custody and support issues concerning children, the needs and well-being of children should be considered directly as the primary inquiry and before considering fairness between parenting adults.

29. *See* United Nations Convention on the Rights of the Child art. III, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989) [hereinafter CRC].

30. *See, e.g.*, Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1395-98 (2020) (discussing the United States' legal commitment to children's wellbeing); Viviana I. Vasiu, *In Good We Trust: The Court's Strategic Use of the Eighth Amendment to Revise the Criminal Landscape for Juveniles*, 53 No. 6 CRIM. L. BULLETIN art. 2 (2017) (discussing juvenile justice reform in the United States).

31. *See* Martha Albertson Fineman, *What Is Right for Children?*, *in* WHAT IS RIGHT FOR CHILDREN?: THE COMPETING PARADIGMS OF RELIGION AND HUMAN RIGHTS 7-8 (Martha Albertson Fineman & Karen Worthington eds., 2009) (discussing reasons the United States has not signed CRC).

insufficiently addresses the needs of these children. In the remainder of the Article, I analyze two different ways the law can be reformed to account for the difference that nonmarriage makes. In Part II, I consider and then critique attempts to address these shortcomings by strengthening the co-parenting relationship through focusing on fairness between them. In Part III, I offer an alternate child-first vision for reforming the law of nonmarriage by recognizing the lived reality of children born outside of marriage through a vision of multiple, disaggregated, and hierarchical parenthood. In addition, Part III suggests the need to supplement private parent-like care with state-provided support. Finally, I suggest that the fairness concerns discussed in Part II be given an outlet for building social norms in torts and not family law, where children's interests should be more central.

I. CURRENT FAMILY LAW INSUFFICIENTLY SUPPORTS CHILDREN OF NONMARRIAGE

In this Part, I discuss how current family law fails to meet the needs of children of nonmarriage—the crisis that provides the context for needed reforms. In Section I.A, I take a closer look at the poorer outcomes of children of nonmarriage when compared to the children of marriage and what factors may lie behind those outcomes. In Section I.B, I outline the way current family law supports children primarily through the frame of marriage, without enough support directly to children.

A. Taking a Closer Look at Children of Nonmarriage: Poorer Outcomes and Different Circumstances

Nonmarriage is of increasing importance in the United States,[32] even despite landmark cases that expand and support marriage, such as *Obergefell*, and even despite steady rates of marriage among some populations and declining divorce rates.[33] The stigma of illegitimacy has receded significantly, and as a result, unmarried parenthood is increasingly accepted as a legitimate path to family-making.[34] Recent polls suggest that

32. *See supra* note 1 and accompanying text.

33. *See e.g.,* June Carbone & Naomi Cahn, *Is Marriage for Rich Men?* 13 NEV. L.J. 386, 389-91 (2013) (describing findings that for wealthier and more educated populations marriage rates are high and divorce rates low despite overall decline in marriage rates across all populations).

34. Cahn & Carbone, *supra* note 5, at 1024.

marriage is no longer considered essential for parenthood.[35] The latest demographics indicate that 37.1% of custodial mothers have never been married, and 40% of children are born outside of marriage.[36] These numbers are far too substantial to ignore.

By nonmarriage, in this Article I am referring primarily to children born outside of marriage and outside of committed, long-term sexual relationships between parents. The prototype for this Article is not children of "reputed spouses" or couples that are all but married, except in name.[37] Thus, I am not primarily directing my attention towards children of non-married homosexual (or heterosexual) families, who have formed families using the assistance of gamete donors, surrogacy, or adoption, where two parents raise children within nuclear families in a committed and intentional manner, perhaps with additional parental figures involved as well. Parenthood in nonmarriage that is similar to and reflective of the commitment of marriage is arguably less in need of particular attention; it is the worse outcomes of children born outside of marriage or marriage-like relationships—who receive less parental care—that are of particular concern. Still, the way that homosexual families have facilitated an expansion of family forms, and expanded the way parentage is recognized, is an important part of the discussion around multiplying parenthood that I

35. *See supra* note 2 and accompanying text.

36. Elizabeth Wildsmith, Jennifer Manlove & Elizabeth Cook, *Dramatic Increase in the Proportion of Births Outside of Marriage in the United States from 1990 to 2016*, CHILD TRENDS (Aug. 8, 2018), https://www.childtrends.org/publications/dramatic-increase-in-percentage-of-births-outside-marriage-among-whites-hispanics-and-women-with-higher-education-levels#:~:text=Recent%20estimates%20show%20that%20about,(Child%20Trends%2C%202016) [https://perma.cc/4DKU-9RCP]; Timothy Grall, *Custodial Mothers and Fathers and Their Child support 2015*, U.S. CENSUS BUREAU: CURRENT POPULATION REP. 8-9 (rev. January 2020), https://www.census.gov/library/publications/2018/demo/p60-262.html [https://perma.cc/5W5N-W4LV]; *see also* cites *supra* note 1 and accompanying text.

37. For a discussion of reputed spouses, *see* Macarena Saez, *Same-Sex Marriage, Same-Sex Cohabitation, and Same-Sex Families Around the World: Why "Same" Is So Different*, 19 AM. U. J. GENDER, SOC. POL'Y & L. 1, 25 (2010). Most jurisdictions in the United States have developed equitable analogues to the putative spouse doctrine to provide equitable relief to those who are substantively married, but due to a mistake in law or fact, are formally still unmarried. *See* Christopher L. Blakesley, *The Putative Marriage Doctrine*, 60 TUL. L. REV. 1, 2-3 (1985).

recommend.[38] Indeed, homosexual families have had the most success in gaining legal recognition for functional parents and third-party parents, potentially paving the way for broader application.[39]

The children that this Article focuses on are usually born of sexual relationships that may or may not have been ongoing before their birth, but are not raised by a stable ongoing couple who intended to have children together. They may have been conceived from a single sexual encounter or a longer relationship that did not survive to provide a relationship within which to raise the child. Parenting by such couples is often strained, involving biological fathers who feel alienated from the child, and sometimes even involving fathers who do not know they are parents. Children of nonmarriage may also be born of assisted reproductive technologies by single parents by choice. Children of nonmarriage are typically raised by a biological or other formal legal parent who is a primary caregiver (usually, but not always, the mother) with the help of the other biological parents and other extended kin, sexual partners, grandparents, friends, or other co-parents. Yet, children of nonmarriage can also be raised primarily by any person who functionally acts as a primary parent—such as a grandmother, godparent, or uncle. Such families are diverse and often unwieldy, with multiple parental figures who typically have differing levels of commitment.[40]

Indeed, a series of impactful differences between children of marriage and children of nonmarriage are unaddressed or even exacerbated by the disconnect between traditional family law built around marriage and its application to parenthood outside of marriage. Generally, children of married, two-parent households fare much better than children of single parents on a range of well-being markers regarding outcomes for children.[41] The Fragile Families and Child Wellbeing Study (FFCW), a comprehensive study which was updated in its sixth wave in 2020, studies child outcomes over a range for family forms of nearly 5000 children born between 1998-2000 in U.S. cities, tracking their progress over time.[42] Poor outcomes

38. *See infra* Section I.B.1.

39. *See infra* notes 91-96 and accompanying text.

40. *See supra* notes 14-17 and accompanying text.

41. *See supra* note 7; s*ee also* Huntington, *supra* note 8, at 196-98 (summarizing studies that indicate the children born outside of marriage fare worse educationally, in health and in economic success, among other indicators).

42. For a summary of outcomes, see Waldfogel et al., *supra* note 7, at 89-93 (2010). Raw data from the study is available on the website for the Fragile

include lower levels of cognitive development, higher incidence of behavior problems, and poorer health for children of nonmarriage.[43]

To make sense of these overall poorer outcomes, researchers point to a number of factors associated with these outcomes that could have a causal impact.[44] In particular, researchers point to studies that demonstrate that children of nonmarriage are less parented by two parents, stressing in particular that fathers of children born outside of marriage are largely non-residential and are much less engaged with their children's lives.[45] Engagement in parenting plans, a good marker of when fathers will remain engaged with their children, is minimal for never-married fathers.[46] Parental-time investment in children is an important factor for child well-being, and the lack of father involvement reduces the amount of parenting time that children receive drastically, as one parent must shoulder the work of raising and providing for the child.[47] Studies indicate that lack of parenting time from fathers not only impacts children but also affects the quality of the mother's parenting as she is under more stress.[48]

Family and Child Wellbeing Study. FRAGILE FAMILIES AND CHILD WELLBEING STUDY, https://fragilefamilies.princeton.edu/about [https://perma.cc/T4DS-QZDH].

43. *See* Waldfogel et al., *supra* note 7 at 97-99.

44. *See* McLanahan & Garfinkel, *supra* note 7, at 148, 149-50 ("[S]ociety should be concerned about families formed by unmarried parents for at least four reasons: (1) parental resources are much lower; (2) parental relationships are less stable; (3) parental investments in children are lower; and (4) child outcomes are poorer.").

45. *See id.* at 148 (arguing that there is a fairly steep decline in non-resident parenting over time); Waldfogel et al., *supra* note 7, at 92; Nicholas Zill, *The New Fatherhood is Not Benefiting Children Who Need It Most*, INSTITUTE FOR FAMILY STUDIES, Dec. 4, 2019, https://ifstudies.org/blog/the-new-fatherhood-is-not-benefiting-children-who-need-it-most [https://perma.cc/QDN3-HV2M].

46. *See* Zill, *supra* note 45, at 2-3.

47. *See* Waldfogel, et al., *supra* note 7, at 90. ("A Single mother, particularly if she is working, will not have as much time to give to her children as would two parents in a married-couple family.")

48. *See* McLanahan & Garfinkel, *supra* note 7, at 153; *cf.* Shelagh J. Larkin and Melanie Otis, *The Relationship of Child Temperament, Maternal Parenting Stress, Maternal Child Interaction and Child Health Rating*, 36 CHILD AND ADOLESCENT SOCIAL WORK JOURNAL, 631-40 (2019) (demonstrating a correlation between levels of parental stress and poorer child health outcomes).

Additionally, children of nonmarriage experience a significant lack of information about their birth fathers. It has been increasingly argued that children have a right to biological identity, a right that has been incorporated explicitly in the CRC,[49] and the lack of such information has a negative impact on children.[50] In the U.S. Census, more than half of children of nonmarriage did not have parenting plans in place, and on giving a reason for why no parenting agreement is in place, a primary reason (20.7%) was the desire not to have the other parent involved or could not even locate the parent (15%) or did not establish paternity (7.3%).[51] More than 40% of the time, the reason there is no parenting plan between biological parents is based upon complete estrangement from the father or non-recognition of the paternity of the father.[52] Laws addressing parenthood and care for children of nonmarriage should account for children's rights to such information and relationships with biological parents, as well as the negative impact not having such information can cause.

Moreover, children of nonmarriage are raised in less financially resilient and resourceful homes as compared to children of marriage. [53]

49. *See* CRC, at Art. 8. *See generally* Helen M. Alvare, *The Case for Regulating Collaborative Reproduction: A Children's Rights Perspective*, 40 HARV. J. ON LEGIS. 1 (2003) (discussing biological identity); Naomi Cahn, *No Secrets: Openness and Donor-Conceived "Half Siblings,"* 39 CAP. U. L. REV. 313 (2011) (same); Naomi Cahn, *The New Kinship*, 100 GEO. L.J. 367, 416 (2012) (same); Janet L. Dolgin, *Suffer the Children: Nostalgia, Contradiction and the New Reproductive Technologies*, 28 ARIZ. ST. L.J. 473 (1996) (same); Michael Freeman, *The New Birth Right: Identity and the Child of the Reproduction Revolution*, 4 INT'L J. CHILD. RTS. 273 (1996) (same).

50. *See, e.g.*, Harold D. Grotevant & Ruth G. McRoy, OPENNESS IN ADOPTION: EXPLORING FAMILY CONNECTIONS 91-92 (1998) (detailing the importance of knowing genetic parents in the context of adoption), Nina Burleigh, *Are You My Father? Donor-Inseminated Children,* REDBOOK 192 (Mar. 1999) (discussing identity issues for children conceived through donor sperm); Freeman, *supra* note 50; A.J. Turner & A. Coyle, *What Does it Mean to be a Donor Offspring*? *The Identity Experience of Adults Conceived by Donor Insemination and the Implication for Counseling Therapy*, 15 HUM. REP. 2041, 2050 (2000) (contrasting their study that found psychological concerns in donor offspring with others that do not).

51. *See* Grall, *supra* note 36, at 7-8.

52. *See id.* (adding together the following reasons for not having parenting plans: Did not have Contact with the other Parent 20.7%; could not locate other parent 15.8% of time; and did not legally establish paternity 7.3%).

53. *See* Woldfogel, *supra* note 7, at 89.

Children of nonmarriage receive less child support.[54] Indeed, a shocking 73% of never-married mothers receive no child support at all, as compared to 59% of divorced mothers.[55] Both numbers are high, but there is a meaningful difference between children of divorce and children of the never-married regarding the likelihood of involved fathers. The proportion of single-parent families due to nonmarriage has risen significantly in proportion to those caused by divorce; 43% are never-married fathers in 2015 (a rate up from 34% in 2007).[56] During this same period, never-married mothers were much less likely to receive regular child support as compared to divorced mothers (27% compared to 41% of divorced mothers).[57] Never-married mothers and their children are much more likely to be surviving on incomes below the poverty line—in 2015, 40% of never-married mothers had poverty-level incomes, versus 19% of divorced mothers.[58] As indicated above, fathers of never-married children are much less engaged in their children's lives, and studies demonstrate that the less visitation involved, the less child support that is paid.[59]

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54. *See, e.g.*, Margaret F. Brinig & Marsha Garrison, *Getting Blood From Stones: Results and Policy Implications of an Empirical Investigation of Child Support Practice in St. Joseph County, Indiana Paternity Actions*, 56 FAM. CT. REV. 521 (2018) (finding that nonmarital children are less likely to have support orders established than marital children, and they are much less likely to experience full payment); Grall, *supra* note 39, at 11-13; Lenna Nepomnyaschy & Irwin Garfinkel, *Child Support Enforcement and Fathers' Contributions to Their Nonmarital Children*, 84 SOC SERV REV. 341-80 (2010) (analyzing the Fragile Families data to demonstrate how children born out of wedlock receive less child support); Wendy Sigle-Rushton & Sara McLanahan, *Father Absence and Child Well-Being: A Critical Review*, *in* THE FUTURE OF THE FAMILY 116, 124-25 (Daniel P. Moynihan et al. eds., 2004); Zill, *supra* note 45, at 3-9.

55. *See* Zill, *supra* note 45, at 4; Grall, *supra* note 36, at 4.

56. Zill, *supra* note 45, at 4-5.

57. *Id.*

58. *Id.*

59. *See* Jed H. Abraham, *"The Divorce Revolution" Revisited: A Counter-Revolutionary Critique*, 9 N. ILL. U. L. REV. 251, 292-93, 293 n.149 (1989) (reviewing and citing several studies supporting the proposition that there is a statistically significant relationship between joint custody and child-support payment compliance); Karen Czapanskiy, *Child Support and Visitation: Rethinking the Connections*, 20 RUTGERS L.J. 619, 643-44 (1989) (noting that parents who perceive that their desires have been met in custody decisions are likely to comply with such decisions); Jane W. Ellis, *Plans, Protections, and Professional Intervention: Innovations in Divorce Custody Reform and the Role*

In addition, although not necessarily contributing to poor outcomes—but certainly associated with them—children born outside of marriage are more dependent on third-party caregivers who are not biological or formal legal parents.[60] Children of nonmarriage are more likely to be born into multi-generational households, be raised in part by grandparents or other kin caregivers, and spend more time with other third-party caregivers outside of school hours.[61] These third-party (non-parent) caregivers contribute essential care to the child, despite having no formal legal parental responsibilities for children. According to the FFCW study, 17% of cohabiting mothers and 45% of single mothers lived in a three-generation family household at the time of the child's birth.[62] Moreover, 60% of children born of nonmarriage lived in three-generation households over the course of their childhood.[63] Kin support enabled by co-residence is an important avenue of support for parenting outside of marriage.[64] Third-party caregivers either take primary responsibility for children, share caregiving responsibility with parents, or provide supplementary support systems.[65] Studies and statistical accounts demonstrate that all such categories are most prevalent with children of nonmarriage.[66]

This analysis is not meant to be an exhaustive account of differences between children of marriage and children of nonmarriage or in any way essentialize such differences. Instead, I seek to bring these differences into focus by considering the circumstances that contribute to different social outcomes. I also identify descriptive differences in the way they are raised in order to facilitate consideration of how to develop policy changes and

of Legal Professionals, 24 U. MICH. J.L. REFORM 65, 85-86, 86 n.69 (1990) (discussing the debate over the validity of empirical work testing the hypothesis that increasing paternal contact increases compliance with child-support orders); Robert H. Mnookin & Eleanor Maccoby, *Facing the Dilemmas of Child Custody*, 10 VA. J. SOC. POL'Y & L. 54, 75-76 (2002) (noting that studies provide "clear [evidence] . . . that there is better compliance with support obligations by fathers who maintain contact with their children")

60. *See supra* notes 15-17 and accompanying text.

61. *See id.*; *see also* Natasha V. Pikausakas, *Three-Generation Family Households: Differences by Family Structure at Birth*, 74 J. MARRIAGE & FAM. 931, 931 (2012).

62. *See* Pikausakas, *supra* note 61, at 931.

63. *See id.*

64. *See id.*

65. *See* Gupta-Kagan, *supra* note 16, at 56.

66. *See* Pikausakas, *supra* note 61, at 936.

legal reforms that better address children's interests and improve the well-being of children of nonmarriage.

In Parts II and III of the Article, I analyze two different ways the law can be reformed to account for the difference that nonmarriage makes: Part II analyzes the trappings created by the discriminatory status of marriage by focusing on relational fairness between adult unmarried co-parents. Part III advocates for legal status for non-formal, multiple kin-caregivers to improve children's lived experiences. Before considering these two different avenues of reform, I will sharpen the ways current family law fails to account for these differences in framing legal support for children.

B. How Modern Family Law Contributes to Worse Outcomes for Children of Nonmarriage

The previous Section describes how parenthood outside of marriage is very different from parenthood within marriage. Yet, family law in general, and parent law in particular, has been fundamentally rooted in marriage.[67] In marital family law, there is a marriage during which time children are raised within a two-parent household. If there is then a divorce, a court intervenes and issues orders that will govern a post-marriage period of parenthood. If parents never marry, there is no formal spousal commitment, and therefore, there is no spousal separation requiring court interference. Legally, there is only parenthood and thus only child law.[68] In the absence of the need for a divorce, the family law applied to nonmarriage is essentially composed of paternity law, which is needed to establish fatherhood as the basis for legal obligations in lieu of marriage, and then custody and support laws developed originally within a framework of marriage law and focused on the notion of the best interests of the child. If paternity is not established, a court may not be involved at all. Child support may be issued upon parental request, but an overall separation agreement is not involved, and general court supervision based on the existence of parenting plans is significantly less relevant.[69] Without marriage, court interference is less necessary and court supervision less consistent.

The growing tide of nonmarital parenthood leads us to ask: Is modern family law sufficient to deal with the growing percentage of children that

67. *See* sources cited *supra* note 5 and accompanying text.

68. *Cf.* Katharine Silbaugh, *Distinguishing Households from Families*, 43 FORDHAM URB. L.J. 1071, 1086 (2016) (remarking that parents and children are the two pillars of family law).

69. *See* Grall, *supra* note 36, at 8.

are born out of marriage?[70] Married family law does not focus specifically on how to maintain security, stability, and the well-being of children who are born outside of marriage. What instead could be an appropriate framework for supporting the children of nonmarriage?

In order to develop answers to these questions, below I outline three aspects of modern family law that fundamentally pivot around marriage in a manner that negatively impacts the well-being of children of nonmarriage. In the context of nonmarriage, modern family law makes it harder for biological fathers to engage in their children's lives, does not facilitate support for third-party kin caregivers who provide much support to single mothers, and largely privatizes the responsibility for raising children.[71] In light of these laws, I will posit that the law does little to help fill the gaps in parenting and resources created by the predominance of the marital frame. More legal support is possible.

1. Paternity Laws Hesitate Before Embracing Nonmarried Fathers

In the context of nonmarriage, before considering custody and child support, the very fact of parenthood—usually, but not always, just fatherhood—needs to be established through a paternity action.[72] Unlike for married fathers, in the context of nonmarriage, fatherhood does not apply automatically—it must be adjudicated.

The normative underpinnings of paternity laws derive from an unwieldy mix of fairness and children's interests considerations.[73] While

70. *See* Carbone & Cahn, *supra* note 5, at 1016-17, 1021-22 ("Legislators have ordinarily sought to advance children's well-being not by providing for them directly but by encouraging their birth within marriage.").

71. I am not attempting to provide a comprehensive overview of the law in each instance, but rather broadly point to the ways that modern family law may exacerbate the plight of the children of nonmarriage, or, at the least, fails to squarely address or support their different lived experiences.

72. The exception being some cases of surrogate motherhood where a parentage order is required for the mother. *See e.g.*, Culliton v. Beth Israel Deaconess Med. Ctr., 756 N.E.2d 1133, 1141 (Mass. 2001) (entering a parentage order deeming the genetic parents the legal parents of twins carried by a gestational surrogate); Emily Stark, Comment, *Born to No Mother: In Re Roberto D.B. and Equal Protection for Gestational Surrogates Rebutting Maternity*, 16 AM. U. J. OF GENDER, SOC. POL'Y. & L. 283 (2007).

73. *See* Lehr v. Robertson, 463 U.S. 248 (1983) (explaining how biology alone does not confer paternity but rather provides an opportunity to develop a parent-

biological fathers have a right to exert parental rights, parentage doctrine requires that they also function as parental caregivers as soon as possible for the good of the child in order to have the equitable right to be a parent established.[74] This constitutional paternity standard is called "biology plus," and I would argue that "biology" refers to a fairness right based on genetics; the "plus" refers to the need to also take into account the interests of the child.[75] Thus, in essence, because the interests of the children also come into play, not all biological fathers have the right to father even if they did not know they were biological fathers—a result that may seem patently unfair.[76] While there are those that may want parenthood law to be more or

child relationship); Kevin Noble Mallard, *Rethinking Children as Property: The Transitive Family*, 32 CARDOZO L. REV. 225 (2010) (discussing how paternity laws focus on rights to children as opposed to their interests); Sarah McGinnis, Note, *You are Not the Father: How State Paternity Laws Protect (and Fail to Protect) the Best Interests of Children*, 16 AM. U. J. GENDER SOC. POL'Y & L. 311 (2007) .

74. *See Lehr*, 463 U.S. at 261 (more than mere biology necessary for unmarried man to establish personal relationship claim); Caban v. Mohammed, 441 U.S. 380, 381-82 (1979) (addressing the issue of stepfather adoption); Quilloin v. Walcott, 434 U.S. 246, 247 (1978); Stanley v. Illinois, 405 U.S. 645, 647 (1972) (addressing the presumption of unfitness of an unmarried father). *But see* Michael H. v. Gerald D., 491 U.S. 110, 123-24 (1989) (holding that biology plus insufficient to give standing to biological father of child with a presumed marital father).

75. On the judicial development of the "biology plus" doctrine, see Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637 (1993); *see also* Jennifer S. Hendricks, *Essentially a Mother*, 13 WM. & MARY J. WOMEN & L. 429, 433 (2007) (contending that the Supreme Court used the attributes and rights of motherhood as the model for the "biology plus" test for unmarried fathers); David D. Meyer, *The Constitutionalizing of Family Law*, 42 FAM. L. Q. 529, 566 (2008) (referring to "the murky 'biology-plus' standard for determining unwed-father parentage"); Daniel C. Zinman, Note, *Father Knows Best: The Unwed Father's Right to Raise His Infant Surrendered for Adoption,* 60 FORDHAM L. REV. 971, 975, 980 (1992) (using the term "biology plus" to describe the criteria for constitutionally protected paternal rights in the Supreme Court's case law).

76. For a discussion of paternity registries, see Melinda L. Seymore, *Grasping Fatherhood in Abortion and Adoption*, 68 HAST. L. J. 817, 856 (2017). *See also infra* Section III.C (discussing the possibility of torts in the context of fathers who are not informed they have a child).

even entirely based on children's interests,[77] and others who are more focused on the right to parent one's own biological child,[78] state law takes both principles into account in establishing applicable standards in paternity. Thus, if a father does not succeed in parenting a child within the first two years, even if such failures are due in part to the mother's actions, he may not be entitled to fatherhood rights.[79] A father must succeed in parenting his child to be considered a father in contested circumstances, and responsibility for such success may not rest fairly, at least not entirely, on a father's shoulders.

A number of influential scholars have made a compelling case that paternity law as currently constructed alienates fathers, thereby impacting nonmarried fathers' engagement with children and their payment of child support.[80] In sum, family law demands unmarried fathers to fulfill a high bar of obligations in order to be deemed fathers and to have the benefits of fatherhood. This may have an alienating effect on father care, which in turn negatively impacts children.

2. Family Law Prioritizes the Centrality and Exclusivity of Two Biological Parents

Biological fathers of nonmarriage provide less care and support to children.[81] Informal caregivers, third-parties, kin, and additional parental figures may step in to fill such gaps,[82] but the law strongly favors the nuclear

77. *See, e.g.*, James G. Dwyer, *No Place for Children: Addressing Urban Blight and Its Impact on Children Through Child Protection Law, Domestic Relations Law, and "Adult-Only" Residential Zoning*, 62 ALA. L. REV. 887 (2011); James G. Dwyer, *A Child-Centered Approach to Parentage Law*, 14 WM. & MARY BILL RTS. J. 843, 846-50 (2006).

78. *See, e.g.*, Carbone & Cahn, *supra* note 5, at 1066-67 (suggesting paternity be established at birth); Huntington, *supra* note 8, at 225 (same); Karen C. Wehner, Comment, *Daddy Wants Rights Too: A Perspective on Adoption Law*, 31 HOUSTON L. REV. 691, 716 (1994).

79. *See supra* notes 73-75 and accompanying text.

80. *See infra* Section II.A.2 for a discussion of how modern paternity law alienates fathers.

81. *See supra* notes 44-59 and accompanying text.

82. *See supra* notes 15-17 and accompanying text.

marital frame with legal rights and recognition.[83] Thus, children of nonmarriage usually receive less legal support and recognized care.

In the context of nonmarriage, biological parental care could be supplemented by expanding definitions of parenthood or by disaggregating parenthood and allowing third parties to have legally recognized parent-like duties and responsibilities towards children.[84] Modern family law is slowly, in limited circumstances, recognizing the possibility of more than two parental figures, including functional de facto parents and parents by estoppel, at least for the sake of imparting standing to request visitation, if not for full parental recognition.[85] The prospect of three parents is most often raised, and three parents are occasionally recognized, in the context of marital presumptions coupled with a different biological father,[86] or in

83. *See* Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 912-19 (1984); Murray, *supra* note 25, at 400-05.

84. These two options for expanding legal recognition of functional caregivers are distinct, but they can also coexist in expanding recognition of care, as I propose in Part III. *See supra* note 20 and accompanying text. *See generally* Janet L. Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 COLUM L. REV. 337, 396-401 (2002); Cynthia Grant Bowman, *The Legal Relationship Between Cohabitants and Their Partners' Children, 13* THEORETICAL INQUIRIES L. 127 (2012) (discussing distinctions between third parties with parenting roles and functional parents.

85. *See* Abraham, *supra* note 19, at 416-20 (describing a system of multiple parentage that could apply to different contexts and looking to diverse legal systems); Naomi Cahn & June Carbone, *Custody and Visitation in Families with Three (or More) Parents*, 56 FAM. CT. REV. 399, 403 (2018) (discussing some state recognition through statute and caselaw for the possibility of multiple parents but also noting limited application); Robin Fretwell Wilson, *Limiting the Prerogatives of Legal Parents: Judicial Skepticism of the American Law Institute's Treatment of De Facto Parents*, 25 J. AM. ACAD. MATRIM. LAW. 477, 478-89 (2013); Michelle E. Kelly, *De Facto Parents in Maryland: When Will the Law Recognize Their Rights?,* 46 U. BALT. L.F. 116, 127 (2016).

86. *See, e.g.*, C.A. v. C.P., 29 Cal. App. 5th 27, 31-33 (2018) (recognizing three parents in the case of a biological father and biological mother's husband); *In re* Donovan L.*,* 244 Cal. App. 4th 1075, 1090-91 (2016) (allowing for the possibility of a third parent where the child has a relationship with the biological father and the putative father). *But see* Hammer v. Rasmussen, 399 P.3d 333 (Nev. 2017) (vacating district court award ordering three parents to be listed on the birth certificate due to lack of clarity on whether Nevada law allows three parents).

the context of children of same-sex couples,[87] and is still altogether rare.[88] Although it is possible to recognize three parents in several jurisdictions,[89] in practice, it is only applied with any regularity in California.[90] On the whole, multiple parentage remains more of a conceptual idea than a concrete legal option.

Moreover, the American Law Institute Principles of Family Dissolution, which created model rules that embraced functional parents who provided significant care for children, or parenthood by estoppel, were intended to be broadly applicable.[91] However, in practice, de facto parenthood has mostly been applied to cases of same-sex couples, whose relationships largely mirror the coupledom of marriage but may not have had access or the desire to marry.[92] Parentage reform that recognizes intentional co-

87. *See, e.g.*, Elisa B. v. Superior Court, 37 Cal. 4th 108, 108 (2005).

88. *See, e.g.*, CAL. FAM. CODE § 7612(c); *In re* M.Z., 5 Cal. App. 5th 53, 53 (Cal. App. 4th Dist. 2016) (holding that a court is allowed to recognize three parents only in rare cases where a child truly has more than two parents); Laura Nicole Althouse, *Three's Company? How American Law Can Recognize a Third Social Parent in Same-Sex Headed Families*, 19 HASTINGS WOMEN'S L.J. 171, 173 (2008); Serena Mayeri, *Foundling Fathers: (Non-)marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292, 2390 n.503 (2016); Nancy D. Polikoff, *Response: And Baby Makes . . . How Many? Using In Re M.C. to Consider Parentage of a Child Conceived Through Sexual Intercourse and Born to A Lesbian Couple*, 100 GEO. L.J. 2015, 2026 (2012).

89. It is possible to award a third "de facto parent" in some jurisdictions such as the District of Columbia and Delaware that allow the possibility. *See e.g.,* D.C. Code Ann. § 16-831.01 (West). Pennsylvania, New Jersey and New York have recognized three parents for purposes of visitation in a few cases. *See* New York, Raymond T. v. Samantha G., 74 N.Y.S.3d 730, 735 (N.Y. Fam. Ct. 2018) (awarding visitation to a third parent designated as such by a parenting agreement alone); Jacob v. Shultz-Jacob, A.2d 473, 477 (Pa. Super. Ct. 2007).

90. A database search for "three parents" demonstrates that the issue is almost exclusively discussed, and their parents recognized by statute in California. CAL. FAM. CODE § 7612 (West) ("In an appropriate action, a court may find that more than two persons with a claim to parentage under this division are parents if the court finds that recognizing only two parents would be detrimental to the child.")

91. *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03, (Ira M. Ellman et al. eds., 2002).

92. *See* Jessica Feinberg, *Whither the Functional Parent? Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents' Increased Access to Obtaining Formal Legal Parent Status*, 83 BROOK. L. REV. 55, 68-69 (2017); Leslie Joan Harris, *Obergefell's Ambiguous Impact on Legal Parentage*, 92 CHI.-

parents is making the need for such reliance on de facto parenthood less necessary.[93]

Although it is argued that the expansion of the doctrine of functional parenthood in the context of same-sex couples could have a wider impact in the future,[94] this may also be threatened by same-sex marriage recognition.[95] Recognizing third-party non-parental care has been met with even greater resistance than recognizing the rights of same-sex couples.[96] If grandparents and step-parents receive anything, it is usually third-party status rather than parental rights.[97] In the wake of *Troxel v. Granville*, which prioritized parental discretion as a matter of constitutional law, even

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KENT L. REV. 55, 80 (2017) (arguing that functional parenthood is legally protected to a limited extent for children born outside marriage).

93. *See, e.g.*, Greg Strauss, *What Role Remains for De Facto Parenthood?*, 46 FLA. ST. U. L. REV. 909, 937 (2019).

94. *See* Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1252-56 (2016) (discussing the way functional parenthood was primarily developed to recognize parenthood for same-sex couples but may impact the law for heterosexuals as well).

95. Indeed, it is argued by some scholars that marriage equality for same-sex couples could lead to reversion to a more traditional parenting framework. *See, e.g.*, Katherine Franke, *Dignifying Rights: A Comment on Jeremy Waldron's* Dignity, Rights, and Responsibilities, 43 ARIZ. ST. L.J. 1177, 1197 (2011). Some states only recognize functional parenthood for people who cannot marry. This suggests they intend it only for same-sex couples, who were unable to marry by law, rather than other caregivers and extended family. For example, see *Ramey v. Sutton*, 362 P.3d 217, 221 (Okla. 2015); and Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CAL. L. REV. 1207, 1255 (2016) ("In doing so, some courts placed special emphasis on the fact that for same-sex couples in this situation, marriage was unavailable as a means of formalizing the parent-child relationship.").

96. *See* Troxel v. Granville, 530 U.S. 57, 65 (2000) (third-party visitation cannot be ordered based on best interests of the child over parental objection). For discussion of the application of *Troxel*, see, for example, Huntington & Scott, *supra* note 30, at 1422-25 (comparing the success of de facto parenthood arguments in same-sex marriage with severe limitations on third-party visitation); Solangel Maldonado, *supra* note 17, at 930; and Laufer-Ukeles, *supra* note 20, at 42. *See also infra* notes 280-287 and accompanying text (discussing cases involving grandparent requests for visitation).

97. *See* Parness & Timko, *supra* note 19, at 771.

grandparents, who had garnered significant legislative support for the right to see grandchildren, have struggled for any legal recognition.[98]

Only in adoption, where multiple parenthood usually involves a marital couple (or marriage-like couple) together with a single parent, have the laws significantly changed to include multiple parents.[99] Closed adoption has largely transformed to allow the recognition of birth parents together with adoptive parents in an open adoptive framework. But even in the closely related context of stepparent adoption, such flexibility does not necessarily apply. When stepparents want to adopt children, courts usually first require the biological parent to waive his parental status or for that status to be terminated, preventing the stepparent from taking on legal responsibility despite his close relationship with a child's custodial parent, co-residence with the child, and presumably the affection and care that has developed between the stepparent and his partner's children.[100]

Thus, more flexible parental structures, which could help fill the gaps left by absent fathers for the children of nonmarriage, have remained largely out of reach for the flexible, free-range families of nonmarriage. As a result, when biological fathers are absent or minimally engaged in the context of nonmarriage, there is usually no one else obligated to act on behalf of children or supported in their efforts to do so. When they do occasionally and rarely occur, expansions of parenthood and parent-like rights or obligations occur on a case-by-case basis upon court order and not through a well-theorized, holistic framework that is inclusive of the range of functional care that is provided by different formal and functional caregivers in different contexts.[101] Formal, ex-ante recognition and

98. *See supra* note 96 and accompanying text.

99. *See, e.g.*, Annette R. Appell, *Controlling for Kin: Ghosts in the Postmodern Family*, 25 WIS. J.L. GENDER & SOC'Y 73, 89-91 (2010) (discussing the increasingly commonality of open adoption); EVAN P. DONALDSON ADOPTION INSTITUTE, OPENNESS IN ADOPTION: FROM SECRECY AND STIGMA TO KNOWLEDGE AND CONNECTIONS 5-6 (2012), https://njarch.org/wpress/wpcontent/uploads/2015/11/2012_03_OpennessInAdoption.pdf [https://perma.cc/D34Y-BNC9] ("As the stigma gradually evaporated over the ensuing decades, the number of agencies offering open adoptions grew rapidly and, by 1999, close to 80 percent offered that option.").

100. See *infra* notes 270-69 for discussion of *Matter of Adoption of M.R.M.*, No. 2017-Ohio-7710, 2017 WL 4174836 (Ohio Ct. App. Sept. 15, 2017) (applying this legal doctrine).

101. *See, e.g.*, Ilana Sharan, *The New York Court of Appeals' Expansion of the Definition of the Term "Parent" Leaves Future Questions Unanswered*, 25 J. L. & POL'Y 757, 761 (2017); Katharine K. Baker, *Quacking Like a Duck? Functional*

codification of multiple and tiered parenthood could further support and encourage kin caregivers to step in and care for children, as will be discussed at length in Part III.

3. Single Parents are Not Getting Enough Support from the State, as Family Law is Primarily Based on Private Law

By definition, unmarried caregivers are less supported by private law mechanisms. Marriage, a private ordering between couples that is registered and supported by the state through a variety of benefits, is the primary legal mechanism intended to support the act of shared parenthood.[102] As a policy matter, the United States has largely assumed that such private ordering would cradle co-parent obligations and provide an ideal framework within which to raise children. Thus, it should come as no surprise that children of nonmarriage have less support, overall, despite the legal assistance provided by child support and custody, and as a consequence, that children born outside of marriage fare worse.

The question is whether the law should intervene in the family to provide support directly to children beyond facilitating private ordering between adults. President Joseph Biden's call for a brand new approach to public support for families in The American Families Plan is an important step in that direction.[103] It makes the needs of all children, and low-income children especially, a much more public concern, providing direct financial support, more child-care assistance, and more educational and nutritional assistance.[104] Indeed, it is estimated that the American Families Plan will relieve poverty for five million children, cutting the number of children living in poverty—who are disproportionately children of nonmarriage—in half.[105] Single parents, insufficiently supported by marital benefits, biological fathers, or other intended parents, clearly need more support in raising children. The state can do much more to affirmatively support families, financially and otherwise, helping single parents to raise children

Parenthood Doctrine and Same-Sex Parents, 92 CHI.-KENT L. REV. 135, 175 (2017). For a discussion of exemplary cases in which third-parties are recognized in the context of non-marriage, *see infra* notes 265-290 and accompanying text.

102. *See* sources cited *supra* note 5.

103. *See supra* note 23 and accompanying text.

104. *See id.*

105. *See id.*

by making family law more focused on state support and less focused on supporting marriage.[106] The state can put children first by creating policies that try to meet children's needs not through organizing adult relationships, but by providing resources to children and caregiving families directly regardless of marriage.

In sum, while the law promotes parenthood within marriage, whether due to the social benefits of the channeling function of marriage or because married adults are thought to provide the best framework for raising children, and such policies find support in empirical studies,[107] policymakers should also consider how to support children outside of marriage. It is well settled that children should not be punished for the bad or "non-conformist" behavior of their parents. One could argue by extension that children should not be left to suffer simply because their parents did not channel into the desired family form. Additionally, arguments that poorer outcomes and diminished well-being are based on private choices and thus not the concern of the state fail to meet the children's rights mandate—that children's interests should be a primary interest in the laws that concern them.[108]

II. RECREATING THE "MARITAL FRAME" IN THE CONTEXT OF UNMARRIED PARENTS—REFORM POLICIES FOCUSED ON RELATIONSHIPS BETWEEN ADULTS: FAIRNESS TO MOTHERS, FAIRNESS TO FATHERS, AND THE EQUALITY BETWEEN THEM

In this part, I describe the initial wave of response to the increasing rates of nonmarriage, parenthood outside of marriage, and the results of the FFCW study. This initial wave consists of attempts to organize and solidify adult co-parent relationships outside of marriage and thereby recreate some of the trappings of the marital frame that has been associated with better child outcomes. These proposed reforms are intended to encourage or impose more involvement by both parents, more closely mirroring the parental engagement of the marital family.

106. *See* sources cited *supra* note 21; discussion *infra* Section III.B.

107. *See* sources cited *supra* note 7 and sources cited *infra* Section I.A for a discussion of the impact of nonmarriage on children.

108. *See* CRC, at Art. 3 ("In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.")

I characterize all three reforms I discuss in this Section as focused on "fairness" between co-parenting adults because they seek to establish more equal parenting roles between co-parents outside of marriage. They do this by providing equal access to children and equal sharing of the burdens and responsibilities of caring for them. The greater parity between legal parents is promoted by reformers in order to make parenting appear more fairly apportioned as between co-parenting adults and thus facilitate and reinforce parental ties and commitments, especially by fathers who appear to be more absent based on empirical studies.[109] The first version of the fairness between adults approach highlights equally allocating responsibilities and burdens between mothers and fathers, while the second and third versions highlight equal division of access and custody rights to children.[110]

All three versions focus on reframing the law surrounding the children of nonmarriage by focusing first and primarily on equality and the appearance of fairness in organizing legal parent relationships. These approaches assume that such reforms will align with or improve children's interests. As such, children's interests are taken into account indirectly, as a "trickle down" from improved relationships between adults. Since parents are those primarily responsible for children, this may indeed be an effective strategy. It may be hoped that more equal sharing of burdens and rights between parents will coincide with children's interests in mutually beneficial ways. Trickle-down theories may work in some cases and to some extent, but they also may be less effective than direct-impact, child-first policies. At the very least, we should hesitate before taking such indirect paths or before assuming they are the best policies when child-first policy alternatives exist, and we must explore whether these reforms may have unintended consequences and whether they will be effective.

As such, after first presenting three distinct versions of co-parenting reforms, I detail two categories of reasons we should hesitate to apply these reforms. First, I point out how attempting to improve children's well-being

109. While "fairness" is a more complex concept than "sameness" or "equal allocations of rights and responsibilities," complex calculations of fairness based on past actions or attempts to achieve substantive equality are too complex and controversial to create an impression of fairness—sameness of treatment is the most instinctive way to understand fairness between biological parents.

110. These approaches are not intended to represent all possible fairness approaches; rather, they characterize three specific attempts to contend with the problems faced by children of nonmarriage through focus on fairness as between adults in organizing adult co-parent relationships.

by promoting equal rights and responsibilities between parents may have unintended consequences that do not align with children's interests. I describe how imposing aspects of the marital frame on non-married sexual partners, who may be good friends or essentially strangers, may harm children's interests by causing reduced primary caregiver autonomy, greater family instability, improper valuation of family care, and relaxed child support in the context of nonmarriage where such support is needed most. Second, I argue that imposing such a marriage-like framework in the context of nonmarriage is not realistic and will only cause greater levels of instability and alienation of parental care by demanding too high a burden, potentially leaving the child worse off than under the current framework. Moreover, treating parents of marriage the same as parents of nonmarriage, while it is argued by many to be fair and may appear to be facially fair, is not constitutionally required or practical because married parents are meaningfully different from nonmarried parents. Therefore, treating them similarly will not lead to similar results.

A. Three "Fairness" Approaches

1. "Fairness to Mothers Approach": Parity in Sharing the Caregiving Burden

One approach to reframing family law around nonmarriage is to argue that instead of being centered around adults in a marriage, family law obligations and responsibilities should be centered around the co-parenting relationship. It is argued that the act of having children together creates a legal bond between co-parents, and not just between parents and children. The goal is to centralize parenthood within family law regardless of marriage and thereby reframe family law in a manner more appropriate for nonmarriage. Merle Weiner calls the status "parent-partners,"[111] and Ayelet Blecher-Prigat refers to co-parents as "joint parenthood."[112]

This approach reacts to the reality of parenthood outside of marriage by reframing family law around a different adult relationship—co-parents instead of married spouses. In these iterations of reframing the nonmarital family, it is argued that the legal status of joint parenthood should create horizontal obligations between unmarried co-parents. Although both

111. MERLE WEINER, A PARENT-PARTNER STATUS FOR AMERICAN FAMILY LAW (2015).

112. Blecher-Prigat, *supra* note 8, at 180.

Wiener[113] and Blecher-Prigat[114] provide a variety of family law obligations and legal commitments that they feel should follow from the horizontal parental relationship in a manner that often mirrors marital obligations, the major suggestion both provide is to create financial support obligations from the secondary caregiver to the primary caregiver—a form of alimony between non-spouses—in order to offset the extra caregiving sacrifice of primary caregivers in unmarried parenthood.[115] Weiner and Blecher-Prigat both argue that child support payments (vertical obligations between parents and children) do not sufficiently cover the "costs of raising children" by single parents.[116] Because this approach focuses on the need to more fairly share the traditional female role of caregiver, which remains disproportionately borne by women, I also refer to it as the fairness to mothers approach.

The co-parenting status conceived in the context of nonmarriage is grounded on the concept of "fair distribution" of obligations between co-parenting adults. In her introduction, Weiner explains that:

[P]arents should have a legal obligation to share fairly the caregiving responsibility for their children, regardless of whether the parents are married, unmarried, separated, or divorced. Every parent should be obligated to "give care or share," i.e., to pay compensation to the other parent for any disproportionate and unfair caregiving that occurs.[117]

Recognizing the different behavior of unmarried fathers and married fathers, and the way single mothers bear an outsized share of child-raising responsibilities outside of marriage, it is argued that unmarried fathers should either fairly share in caregiving or pay co-parents additional support payments to compensate for the care they do not provide. In determining

113. *See* Ayelet Blecher-Prigat, *Conceiving Parents*, 41 HARV. J. L. & GENDER 179, 199-207 (2018) (discussing the obligations of joint parenthood).

114. *See* WEINER, *supra* note 111, at 319-42 (discussing provisions such as duty to aid and ease of gaining civil protection orders that should be part of legal status of co-parents.).

115. *See* Weiner, supra note 8, at 136, 155-56 ("[C]ourts should assess "unfairness" by examining the relevant facts and then use the full range of available theories from the alimony context to craft the most appropriate remedy for each case.").

116. *See* Blecher-Prigat, *supra* note 8, at 179-80 ("The Article suggests that when co-parents do not share a relationship, either because they have separated or because they never had one, there are good reasons to be concerned about the way the costs of raising children are allocated between them.").

117. Weiner, *supra* note 8, at 135.

the appropriate obligations between co-parents, fairness is the focus of her analysis:

A broad mandate that a court make 'fair' a breach of the obligation to give care or share will allow courts to determine immediately, on a case by case basis, the appropriate remedy . . . . The claimants' awards and judicial assessments of "unfairness" can inform the development of future adjudication guidelines.[118]

To justify payments between co-parents, Weiner points to secondary parents freeloading off of the primary caregiver's caregiving in a manner that harms her market work and argues that this unfairness is most common with children born out of marriage.[119] Weiner describes different degrees of unfairness, at times describing certain cases as repugnant, but states that generally, disproportionate caregiving is common.[120] As she explains, freeloading and "mooching" is wrong regardless of marriage, and the non-married should have recourse.[121]

Similarly, Blecher-Prigat asks reformers to impose horizontal obligations between co-parenting adults by considering what co-parents "owe one another" as a separate inquiry from children's interests.[122] She bases the need for co-parent obligations beyond child support on fairness:

[B]esides the perspective of children's interests, an additional perspective should be taken into account in determining the obligations arising from parenthood, namely the parents': What price do they pay for childrearing? Instead of asking only what children need, we should also consider the costs that childrearing entails for parents and the way these costs are allocated between joint parents.[123]

Thus, the goal is to distribute the costs of raising children more fairly between adult co-parents as a concern separate from children's interests,

118. *Id*.

119. *See id.* at 136-39 (describing freeloading behavior of one parent off of the caregiving providing by the other and arguing that this "freeloading" is widespread among parents and must be remedied).

120. *See id.* at 137.

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

122. *See* Blecher-Prigat, *supra* note 8, at 179, 191 ("This Article sets out to initiate the development of a theory about the financial obligations that joint parenthood imposes. It considers what joint parents owe one another, separate and apart from any obligation they may or may not have as former spouses or partners.").

123. *Id.* at 198.

with the expectation that such fairness would not conflict with the best interests of the child. Indeed, the joint parenthood and parent-partner approaches are intended to organize co-parents more fairly in a manner that ultimately aligns with children's interests, as increased parental care or increased financial support for the primary caregiver will—by extension—help children.[124] Specifically, it is hoped that the joint parenthood framework will either promote more father caregiving or more support payments. However, such benefits are secondary to the driving fairness justification for these reforms.

The co-parent approach has much to commend in its refocusing of family law around the institution of parenthood, regardless of marriage. The two primary important insights it stresses are that child support is insufficient to cover the costs of raising children, and that such insufficiency applies regardless of marriage. The only question is, who should bear the overage? It is not only unfair, but also impractical in most instances, for the single mother to bear them herself. Thus, she must look to either the father, the state, or other third parties to help share that burden. However, despite the conceptual acuity of this insight, the practical ramifications and potential unintended consequences for children need to be unpacked carefully.

2. The Fairness to Fathers Approach to Joint Parenthood

The second approach to reframing nonmarital family law is what I term the "fairness to fathers" approach. This approach meaningfully furthers the discussion of how to best advance the children of nonmarriage but still focuses primarily on organizing adult relationships as opposed to directly supporting children. Incorporating the insights of the FFCW study, scholars argue that children will benefit from more stable, ongoing relationships with fathers in a manner that more closely mirrors marital fatherhood.[125] The claim is that the primary problem with modern family law is that it

124. It is worth noting that Blecher-Prigat's argument is informed by the different context of Israeli law, in which child support is paid based on estimation of a child's needs as opposed to percentage of parental income. Accordingly, the Israeli child support system is generally less expansive regarding child support, and thus her proposal might have a greater financial benefit for children in that context as compared to in the United States. *See e.g.*, Karin Carmit Yefet, *Born to Be a Mother: Anatomy, Autonomy, and Substantive Citizenship for Women in Israel*, 39 HARV. J.L. & GENDER 257, 291 n.214 (2016).

125. *See e.g.,* Huntington, *supra* note 8, at 170.

alienates fathers from children.[126] Accordingly, Huntington and Maldonado, among others, suggest reforms to family law that are more sensitive to the different nature of unmarried parental relationships and provide unmarried fathers with more equal access to children, facilitating their involvement.[127]

To this end, Huntington focuses on fairness to fathers as a means of cementing relationships between co-parents and, by extension, with children. Based on psychological studies and empirical evidence, Huntington argues that the extent to which unmarried parents get along deeply affects how they parent their children.[128] If co-parents can coexist without excessive tension, both parents are better able to provide their children with the relationships necessary for healthy child development.[129] Therefore, she argues that nonmarital family law should consider how relationships between unmarried co-parents can be improved to facilitate good co-parent relationships that keep fathers involved.[130] If fathers feel better treated by the law and more fairly allocated access to children, she claims that they will invest more in caring for children.

Practically, Huntington is concerned with the ways that "marital family law's legal rules encourage maternal gatekeeping and increase acrimony between parents."[131] She argues that because nonmarital family law gives custody automatically or by presumption to mothers, and fathers only get custody or visitation by court order, the legal impact is to exclude fathers

126. *See id.*

127. *See id.* at 225-31; *see also* Maldonado, *supra* note 8, at 1013-22.

128. *See* Huntington, *supra* note 8, at 170, 173 ("Postmarital family law, then, recognizes that relationships between parents are critical to caregiving and child well-being even if parents are not romantically involved, let alone married. Thus, the state's goal should be to strengthen functional parental relationships in order to foster co-parenting. This, in turn, would help fathers remain engaged with their children and would enable mothers to better meet their children's needs.").

129. *See, e.g.*, McLanahan & Garfinkel, *supra* note 7, at 151-52 (associating relational instability with poor outcomes for children).

130. *See* Huntington, *supra* note 8, at 223 ("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.").

131. *Id.* at 202.

from children's lives.[132] And, she argues, because child support obligations are difficult for unmarried fathers to pay, and mothers are often resentful for such non-payment, the maternal gatekeepers often feel angry and unhappy with non-paying fathers.[133] Thus, she argues that the way family law sets up the paternal relationship with children is essentially unfair to unmarried fathers who thus become upset and alienated by the system, which in turn causes a harmful lack of involvement with children.[134] Instead, Huntington argues for nonmarried family laws that are more accommodating to fathers and thus will be more encouraging of their relationships with children. Huntington advances laws that are more flexible in accepting in-kind child support and more generous to fathers with regard to custody and visitation.[135] Almost at a polar opposite to Weiner and Blecher-Prigat, who argue for increased obligations upon unmarried fathers to fairly share with nonmarried mothers, Huntington and Maldonado seek to be more inclusive and less hard on alienated fathers so as to facilitate their participation in family life without making them feel like "dead beat" dads.[136]

This vision for the nonmarital family focuses on children's well-being in the context of nonmarriage, and in that way, pulls family law into the twenty-first century.[137] Moreover, Huntington's argument that the horizontal relationship affects the vertical relationship is compelling, and the need to keep fathers involved in their children's lives in a realistic way regardless of marriage demands consideration. However, despite these crucial insights, ultimately the primary goal in children's law should be to promote children's interests. While Huntington's argument is a mirror image of Weiner and Blecher-Prigat's proposals, both focus primarily on

132. *See id.* at 225 ("By focusing on the relationship between parents and the importance of co-parenting, the new theoretical framework for postmarital family law demonstrates the need for rules that will give fathers clear rights to see their children and decrease acrimony between parents so that both parents can better meet the challenges of complex families.").

133. *See id.* at 171 ("The failure to satisfy child support requirements fuels animosity between unmarried parents, many of whom are already experiencing difficulty co-parenting.").

134. *See id.* at 227-28.

135. *See id.* at 225-30.

136. *See id.* at 194 (describing empirical studies regarding unmarried fathers' disengagement from families).

137. *See generally* Huntington & Scott, *supra* note 30; Clare Huntington, *The Empirical Turn in Family Law,* 118 COLUM. L. REV. 227 (2018).

creating the perception of fairness in the horizontal relationship between co-parents as a way to promote the vertical parent-child relationship, raising concerns that should make us hesitate.

3. Formal Equality in Determining Paternity

The final approach to reforming family law for the nonmarital family, which is also focused on fairness, is the formal equality approach to paternity regardless of marriage. While Huntington includes formal equality in paternity as part of the fairness to fathers approach, I address it separately because it is much less comprehensive, advocated by some who have rejected the broader framework proposed by advocates of the fairness to fathers approach,[138] and can have different implications when applied on its own.[139] It is deemed unfair that, on the one hand, married fathers are given an automatic presumption of paternity, and in many states, even proof that the husband is not the biological father does not in and of itself rebut the presumption.[140] On the other hand, unmarried fathers must bring a paternity action and demonstrate the assumption of a paternal role over a period of time to enforce paternity, even if genetic affiliation is proved.[141] It is argued that this asymmetry is unfair to unmarried fathers and not good for children born out of marriage as it alienates them from their fathers and from their biological origins.[142] Rather, it is argued, all fathers should be awarded paternity based on genetic markers, adoption, or other "marriage neutral" indicators.[143]

Noting the historical asymmetry between paternity within and outside of marriage, Serena Mayeri explains that feminists struggled with the tension between seeking autonomy by denying unmarried men automatic

138. *Compare* Carbone & Cahn, *supra* note 8, at 87-88 (advocating for formal equality), *with* Cahn & Carbone, supra note 10, at 114-15 (arguing against joint custody presumptions).

139. *See* Huntington, *supra* note 8, at 225 (stressing the importance of placing non-married and married fathers on a level playing ground).

140. *See* Carbone & Cahn, *supra* note 10, at 87-88.

141. *See supra* notes 73-75 and accompanying text (discussing the "biology plus" test).

142. *See* Nancy E. Dowd, *Parentage at Birth: Birthfathers and Social Fatherhood*, 14 WM. & MARY BILL RTS. J. 909, 926, 929 (2006); Huntington *supra* note 8, at 225; Carbone & Cahn, *supra* note 5, at 1011, 1067-68;.

143. *See* Dowd, *supra* note 141, at 929-30; Mayeri, *supra* note 88, at 2374-76.

paternity rights and seeking formal equality that would equate fatherhood with motherhood and thereby curtail traditionalist gender roles.[144] Formal-equality feminists such as Ruth Bader Ginsburg worried about stereotypes from the dissimilar treatment of mothers and fathers, while others, such as Mary Becker, Karen Czapanskiy, and Martha Fineman, were more focused on achieving substantive equality and autonomy.[145] At the same time, the courts advanced a different set of interests by focusing decisions on promoting the institutions of marriage, enforcing marital presumptions, and maintaining the integrity of the adoption system without deciding between these two competing feminist visions for gender equality.[146]

Sex neutrality or formal equality is the prevailing approach to achieving constitutionally-mandated equal protection in the United States and is increasingly dominant in the law of marriage and divorce.[147] Unmarried fathers have for decades pressed their desire in the courts to be treated like married fathers.[148] Nonmarital fathers and their supporters claim discrimination in parenthood.[149] As such, fathers argue for automatic parental status as opposed to the need to prove the "biology plus" elements of unmarried paternity under current law (and the rights to custody or visitation that accompanies such status). Moreover, they argue for automatic rights to object to adoptions. Such an argument is facially fair, assuming parenthood is initially based on genetic affinity, intent, or adoption in sex-neutral ways, but it is not clear whether it is best for children or practical to implement. The focus of such arguments is first and foremost on facial fairness between adult parents.

B. Non-Alignment with Children's Interests

Despite the conceptual attractiveness of these co-parent, joint parent, or parent-partner reforms that attempt to improve the application of family law to the increasingly widespread context of nonmarriage, there is reason to hesitate before adopting them. These approaches attempt to make

144. *See* Mayeri, *supra* note 88, at 2324.

145. *See id.* at 2383-85.

146. *See id.* at 2384.

147. *See* Pamela Laufer-Ukeles, *Selective Recognition of Gender Difference in the Law: Revaluing the Caretaker Role*, 31 HARV. J.L. & GENDER 1, 8 (2008).

148. *See* Mayeri, *supra* note 88, at 2374-76.

149. *See id.; see also* Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 VA. L. REV. 79, 80 (2016).

nonmarriage more like marriage by conferring on co-parenting adults outside of marriage benefits and obligations that are closer to the marital frame. Fairness as a standard to resolve disputes between mothers and fathers is compelling and may be used to frame co-parenthood in ways that look more like marriage, but for the children of nonmarriage, such reforms may not significantly help and may even be harmful. While all the joint parenthood approaches described above are intended to align with children's interests, there are four primary ways that such reforms may have unintended detrimental effects that should cause hesitation before policy reforms derived from these approaches are suggested. First, in all three iterations, the parent-partner status and joint custody can burden the primary custodian's autonomy, negatively affecting her ability to care. Second, and related, this lack of autonomy can create high tension and instability for the primary caregiver. Third, these fairness approaches, in particular the fairness to mothers' approach, likely undervalue the benefits of family-provided care, creating a financial trade-off with care that will not further children's interests. Fourth, the joint parenthood and fairness to fathers approaches may reduce child support for already needy children in a manner that is not sufficiently nuanced.

1. Undermining Autonomy for Primary Caregivers

First, a parent-partner status or joint legal custody from the time of birth, essential elements of all three fairness approaches I describe, could threaten caregiver autonomy in ways that are harmful to children.[150] Parents trying to create more fair and proportionate allocations of care in order to avoid "alimony-like" caregiver payments to the other parent will strategically push for court orders that provide a more equal share of caregiving time, a phenomenon we already see to avoid child support upon divorce.[151] Thus, the act of joint parenthood, which is considered

150. *See* Cahn & Carbone, *supra* note 10, at 108-12 (discussing the importance of parental autonomy in nonmarriage); *id.* at 114-15 (discussing how legal enforcement of equal custodial rights in joint parenthood threatens autonomy).

151. *See, e.g.*, Margaret F. Brinig, *Chickens and Eggs: Does Custody Move Support, or Vice-Versa*?, 29 J. AM. ACAD. MATRIM. L. 269, 293 (2017) (finding that "having to pay child support increased fathers' demands for custody and that strategically they would ask for more time with their children than they actually wanted in order to reduce child support obligations"); Emma J. Cone-Roddy, *Payments to Not Parent? Noncustodial Parents as the Recipients of Child Support,* 81 U. CHI. L. REV. 1749, 1784 (2014) (discussing ways to avoid

proportionate and fair under Weiner's and Blecher-Prigat's vision, is likely to result in more shared custody arrangements, which demand more parental coordination and limit caregiver flexibility. Similarly, an automatic status of co-parents for biological parents outside of marriage will affect the autonomy of primary caregivers, almost always the mother. Legal fathers are more likely to attempt to assert control over the whereabouts and actions of single mothers.

Proponents argue that, under any formulation, legal reforms and policies that encourage equal, joint custody and more engaged involvement of both parents (even if not equal) are always good for children, as children benefit from having both parents deeply involved in their upbringing.[152] Although increasingly common upon divorce, it should not be taken for granted that equal joint parenthood is necessarily good for children.[153] The push to joint parenthood can make nonmarried parenthood even more difficult for single mothers than it already is.[154] Single mothers are almost always the primary caregivers and are usually also the sole caregivers. They

strategic attempts by parents to avoid child support by insisting on more custody); Karen Syma Czapanskiy, *The Shared Custody Child Support Adjustment: Not Worth the Candle*, 49 FAM. L.Q. 409, 424 (2015) (stating that some parents may seek shared custody strategically to reduce their child support obligations, an approach common enough to gain a name: "trading dollars for days").

152. *See* Naomi Cahn & June Carbone, *Custody & Visitation in Families with Three (or More) Parents,* 56 FAM. CT. REV. 399, 400 (2018) ("[I]n dismantling the gendered assignment of parental roles, custody law has enshrined the idea of parental equality."); J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy,* 52 FAM. CT. REV. 213, 216 (2014) (referring to presumption by state laws that continued care by both parents is good for children).

153. *See* Cahn & Carbone, *supra* note 10, at 77 n.140 ("Shared parenting has become more common both globally and in the United States, but jurisdictions continue to vary widely in the strength of their support for such an award."); *see generally* Linda Nielsen, *Shared Physical Custody: Does It Benefit Most Children?,* 28 J. AM. ACAD. MATRIM. L. 79 (2015) (describing the debate but coming down on the side that shared parenting is beneficial).

154. *See, e.g.*, Anne L. Alstott, *Work vs. Freedom: A Liberal Challenge to Employment Subsidies*, 108 YALE L.J. 967, 990-94, 998-1003 (1999) (describing some of the difficulties faced by single women); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1243-45 (1991) (describing the range of difficulties faced by minority and poor single mothers).

will have to negotiate the details of their lives with non-married co-parents, providing them with a potentially troubling amount of power over the primary caretaker's life choices. A casual sexual encounter may not justify the interference in autonomy that joint parenthood would entail over the parent who is more able and willing to provide needed care.

Indeed, the FFCW study points to high rates of drug use and involvement in the criminal justice system as reasons that out-of-wedlock fathers drift away from their children.[155] In addition, unmarried fathers are generally younger than married fathers, less likely to be employed, and more likely to have children by other partners.[156] Huntington herself paints a picture of unmarried fathers as less educated, less stable, less employed, and more engaged in criminal behavior than married fathers.[157] Such fathers may want to be involved with children, but they also often lead unstable lives, which may lead to high tension relationships with the mothers of their children. In fact, the lack of functional relationships between unmarried parents and their suitability as stable fathers can also be extrapolated from lower levels of parenting agreements between unmarried parents and significantly less contact with children by non-residential fathers.[158] The argument that they should be treated the same as married fathers as a matter of fairness[159] fails to account for the different realities in which many of these children are born. Nonmarriage is different than marriage, and caregiver autonomy may be fundamental in allowing vulnerable mothers to provide needed care.

When the primary caregiver's autonomy is threatened and the potential for disputes and tension runs high, the quality of care that the child receives is likely to be threatened as well. Studies indicate that the parenting quality for caregivers under stress suffers.[160] In order to raise her child, the primary caregiver may need mobility to relocate even if the legal father objects. Indeed, as co-parents may be essentially strangers or distant friends, they

155. McLanahan & Garfinkle, *supra* note 7, at 147; *see also* Huntington, *supra* note 8, at 193-94.

156. *See* McLanahan & Garfinkle, *supra* note 155, at 147.

157. *See id.* at 186-89.

158. *See supra* notes 46-52 and accompanying text.

159. *See* Huntington, *supra* note 8, at 225 ("First, to put married and unmarried parents on level playing ground, it is essential to disrupt the formal relationship between marriage and parental rights. The most direct way to do so is to eliminate the marital presumption.").

160. *See* sources cited *supra* note 48.

may never have lived near each other or have a shared life in any location. In the context of nonmarriage, where relationships are varied and coupledom may be fleeting, a demand for higher levels of co-parenting, which seems to work for children born of marriage, may not be good for children of nonmarriage in the same way.

Indeed, even for divorced couples, those who have shared custody usually drift towards a primary caregiver/secondary caregiver model over time due to the greater ease both logistically and financially of maintaining one primary household.[161] The drift factor is likely to be even more concerning for the never married. Although one could return to court to get compensation for not acting according to agreements under the joint parenthood/ parent-partner regime, the need to turn to court to resolve conflicts is expensive both financially and emotionally. Moreover, unlike most married couples, many co-parents do not have a history of a shared life, conflict resolution, or collaboration enabling co-equal parenthood.[162]

2. Increasing Instability and Uncertainty

Closely connected to the impact of the loss of autonomy on the ability of the primary caretaker to provide care is the increased tension and conflict this loss of autonomy can create. By removing automatic custody rules that favor mothers and by granting automatic parental status to nonmarried fathers, as well as by legally encouraging more joint custody based on "take care or share" incentives, family law may make primary parents' lives more conflictual and less secure. As joint custodians, primary caregivers must

161. *See* ELEANOR MACCOBY & ROBERT MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 112, 149-53, 270-78 (1992); Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent,* 153 U. PENN. L. REV., 921, 998-99 (2005) ("Given all these benefits of joint physical custody, why do I instead recommend joint legal custody? . . . Even with a joint physical custody decree, most parents reverted to maternal residential custody after a short period of time. How can the law enforce joint physical custody if both parents ignore the decree and, in effect, choose maternal residential custody?").

162. *See, e.g.*, Cahn & Carbone, *supra* note 10, at 115 ("Given the factors that undermine relationship stability in poorer communities, a norm that counsels hesitation about marriage and about truly shared parenting makes sense."); *id.* at 79 ("[S]tudies show that those who do not marry tend to have different characteristics from those who do in ways that affect the likelihood of violence, the ability to cooperate, and the level of communication—all factors that affect children.").

navigate custody arrangements with children's fathers, go to court to get custody orders (which may be more contested as fathers seek to avoid child support by sharing custody), and fight co-parenting presumptions and orders when the secondary parent may not be meeting his or her parenting obligations.[163] The co-parenting status is liable to create high-stress situations for the custodial parent due to contentious co-parenting negotiations that do not provide clear, navigable rules between parties that are often not on the best of terms.[164] Rather, "[c]hildren's interests are best served through family stability, regardless of family structure, and mandating two-parent involvement in the face of violence, conflict or unpredictability undermines that stability."[165] Stable relationships, Cahn and Carbone remark, are a hallmark of the privileged, and statistically, unmarried fathers suffer from many of the characteristics of unstable, unreliable partners.[166]

Studies demonstrate that minimizing conflict within a child's home and within a child's overall environment is an important indicator of child well-being.[167] Scholars and social scientists have repeatedly taken note of the

163. This concern about high-tension environments is related to the concern regarding caregiver autonomy addressed above, *supra* notes 150-154 and accompanying text, because autonomy is hindered when parents need to negotiate arrangements in high conflict environments. Huntington also responds to concerns about autonomy and conflict in her article. Huntington, *supra* note 8, at 237. Huntington's main counterargument to the threat to caregiver autonomy and potentially increased conflict is that nonmarriage should not be treated different from marriage in which co-equal parenting is the norm. However, this argument is weakened by the vast data Huntington provides about how nonmarriage is indeed different than marriage, thus requiring different legal regulations.

164. *See* Cahn & Carbone, *supra* note 10, at 114-15 (arguing that the fact that co-parents chose not to marry counsels hesitation about whether shared parenting makes sense).

165. *Id.*

166. *See* JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 19, 50-75 (2014).

167. *See* Paul R. Amato & Bruce Keith, *Parental Divorce and the Well-Being of Children: A Meta-Analysis*, 110 PSYCHOL. BULL. 26, 38 (1991) (comparing children in intact, high-conflict families with children in divorced families and concluding that those in intact, high-conflict families exhibited lower levels of well-being); E. Mavis Hetherington, *Should We Stay Together for the Sake of the Children?*, *in* COPING WITH DIVORCE, SINGLE PARENTING, AND REMARRIAGE: A RISK AND RESILIENCY PERSPECTIVE 93, 101 (E. Mavis Hetherington ed., 1999)

way high tension and exposure to conflict can negatively affect children.[168] The negative effects of exposure to violence and high levels of tension, whether due to divorce or high-conflict parental relationships, have been well documented.[169] When parents have high levels of stress between them, such tension and conflict affect children, whether after divorce or between caregivers who have never been married.[170] Accordingly, potential levels of

(concluding children of low-conflict families are more adjusted than those of high-conflict families); Daniel G. Saunders, *Child Custody and Visitation Decisions in Domestic Violence Cases*, NAT'L ONLINE RES. CTR. ON VIOLENCE AGAINST WOMEN (2007), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_CustodyREVISED.pdf [https://perma.cc/9543-KY58] (describing that "[e]nthusiasm for joint custody in the early 1980s was fueled by studies of couples who were highly motivated to 'make it work.' This enthusiasm has waned in recent years, in part because of social science findings. . . . [For example,] Johnston concluded from her [most recent] review of research that 'highly conflictual parents' (not necessarily violent) had a poor prognosis for becoming cooperative parents," and that "[t]here is increasing evidence, however, that children of divorce have more problems because of the conflict between the parents *before* the divorce and not because of the divorce itself." (citations omitted)).

168. *See, e.g.*, David Finkelhor, *The Victimization of Children: A Developmental Perspective,* 65 AM. J. ORTHOPSYCHIATRY 177, 188-89 (1995) (discussing the field of childhood victimization); Janet R. Johnston, High-Conflict *Divorce*, 4 FUTURE CHILD. 165, 171-76 (1994) (studying the effects of parental conflict on children); Daniel Siegel & Jennifer McIntosh, *Family Law and the Neuroscience of Attachment, Part II*, 49 FAM. CT. REV. 513, 514-17 (2011) (describing the effect of high-conflict relationships between parents on children).

169. *See, e.g.*, Robin M. Deutsch, Christine A. Coates & Linda Fieldstone, *Parenting Coordination: An Emerging Role to Assist High Conflict Families*, *in* INNOVATIONS IN INTERVENTIONS WITH HIGH CONFLICT FAMILIES, *supra*, at 187, 192 (describing an intervention designed to reduce parental conflict as a way to improve child well-being); Rhonda Freeman, *Children and Absent Parents: A Model for Reconnection*, *in* INNOVATIONS IN INTERVENTIONS WITH HIGH CONFLICT FAMILIES 41, 43 (Linda B. Fieldstone & Christine A. Coates eds., 2008) (stating that the level of conflict between parents is a crucial variable for child well-being in the context of parent-child reconnections).

170. *See* Gregory Acs, *Can We Promote Child Well-Being by Promoting Marriage?*, 69 J. MARRIAGE & FAM. 1326, 1327 (2007) ("[R]esearch shows that parental relationship quality affects parenting practices and that children whose parents have high-conflict marriages exhibit lower levels of well-being than those whose parents have low-conflict marriages."); Marion Gindes, *The Psychological Effects of Relocation for Children of Divorce*, 15 J. AM. ACAD. MATRIMONIAL L. 119, 134 (1998) ("The research provides mixed results

conflict between joint caregivers need to be factored into family law regulations. While keeping nonmarried fathers involved may be an important goal, co-equal status with mothers may threaten women's ability to give needed care and raise conflict levels in detrimental ways. Deadlock and conflict are particularly likely in the context of joint parenthood and co-equal status between parents, where one parent or custodian does not clearly have greater discretionary authority.

3. Undervaluing Family Provided Care

Moreover, efforts to push joint parenthood in the image of marriage, especially within the "take care or share" framework suggested in the fairness to mothers approach, may undermine family provided-care (as opposed to daycare or hired care), which is increasingly shown to be important for all children, especially children of nonmarriage.[171] Although one goal of the joint parenthood "fairness to mothers" approach is to value care by providing monetary consideration for such care,[172] the joint parenthood framework threatens to devalue or wrongly value family-provided care. Indeed, optimal arrangements for children, based on children's well-being, are often unfair as between co-parents.

For instance, if one parent voluntarily compromises market work in order to spend more time caring for a young child by working part-time or taking leave, and a court therefore imposes a financial obligation on the other fully employed parent, the working parent may object on the grounds that this inequality in care time unilaterally and unfairly imposes upon him or her an extra financial burden despite their own desire to provide equal care. Co-parents could argue that both parents need to be fully employed as a matter of fairness so as to equally split financial and caregiving

regarding the effect of contact with the nonresidential parent. For some children, contact with their noncustodial parent was associated with greater well-being, whereas, for others, it was associated with poorer adjustment. . . . Frequency of contact alone is not associated with positive effects for the child. Where low conflict exists between the parents, contact with the noncustodial father appears to have a positive impact on children." (footnotes omitted)).

171. *See, e.g.*, Hyejoon Park, Siying Guo, Shinwoo Choi & Keeyoon Noh, *Interrelations Between After-School Settings and the Delinquency and Emotional-Behavioral Problems of Elementary School Children: Findings from Fragile Families and Child Wellbeing Study*, 9 SOC. SCI. 161 (2020) (finding that children in parental care were reported to commit less delinquency).

172. *See, e.g.*, Blecher-Prigat, *supra* note 8, at 187-88.

obligations. Family-provided care is a benefit to children, yet under this framework, co-parents are likely to be skeptical of allowing one parent to spend more time caregiving as it would result in extra co-parent support payments. We know from the context of divorce law that parents can go to great lengths to avoid making payments to co-parents.[173] Alternately, a co-parent could argue that the decision to do more care work is voluntary and unilateral and thus not disproportionate because the fully employed parent would also like to be less employed and provide more care or at least equal care. Therefore, it could be argued that caregiver payments would not be warranted despite the valuable care that is provided. Unequal divisions of market and care labor may be both desired and good for children but would ultimately be discouraged under this framework.

This dynamic as between co-parents does not reflect a proper valuing of family-provided care. It may not be fair that one parent's choice to earn less money results in extra financial burdens upon the support-paying parent. And it is unclear how a court that orders more caregiving to one party over another who desires more caregiving time could justify, as a matter of fairness, also imposing caretaker support on the losing party. However, even if it is the primary caretaker's voluntary choice to provide more care and limit his workforce participation, that is care that is still valuable and should be compensated.[174]

Instead, direct caretaker support payments should provide extra compensation for those who are willing and able to provide valuable care for young children and thereby limit their market work based on valuing the care provided.[175] Making such payments dependent on disproportionate caregiving as a violation of "fairness" understood as equal treatment threatens to devalue care where it is needed.

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173. *See, e.g.*, Pietros v. Pietros, 638 A.2d 545 (R.I. Sup. Ct. 1994) (using the doctrine of equitable estoppel to prevent man from challenging paternity to avoid support payments); Doornboos v. Doornboos, No. 545.14981 (Ill. Super. Ct. Cook County Dec. 13, 1954) (claiming adultery in consensual AID in order to avoid paying child support and alimony); Ottielie Bello, *Bankruptcy and Divorce: The Courts Send a Message to Congress*, 13 PACE L. REV. 643, 645 (1993) (discussing the use of bankruptcy to avoid divorce payments).

174. *See* FINEMAN, *supra* note 21, at 226-36 (1995) (discussing the importance of valuing care); Martha Fineman, *Dominant Discourse, Professional Language and Legal Change in Child Custody and Decisionmaking*, 101 HARV. L. REV. 727, 728, 765-66 (1988); Laufer-Ukeles, *supra* note 147, at 56 (discussing the need to value caregiving at divorce).

175. *See id.*

Moreover, the fairness standard for caregiver-support payments also perhaps goes too far in valuing family care. Many parents, particularly if they work full-time, are extremely eager to have time with their children in the after-work evening hours. They would perhaps even be willing to pay money to get such time. But, according to Weiner's tabulations, the person with more time would still have to pay the other co-parent.[176] Having more time after work may be unfair as compared to having to pay more money in support. Such negotiations and arrangements are very individual as between co-parents, and determining what is disproportionate would be extremely fact-specific and litigious or based on false presumptions regarding what is fair.

4. Reducing Child Support

Although reducing child support and allowing in-kind support could ingratiate fathers otherwise maligned as "dead-beat dads," thereby facilitating co-parent relationships as outlined in the fairness to fathers approach, it is hard to justify providing less support for children of nonmarriage as opposed to children of marriage, even if in most cases this happens in any event due to lack of payment. For those from whom collection is possible, support obligations should not be lesser because of nonmarriage. Ultimately, while two-parent involvement is important and ways of encouraging it need to be devised, low tension and sufficient income are the two most important and well-established markers of child welfare.[177] Children of nonmarriage already suffer from financial insecurity at significantly higher rates than children of marriage.[178] We should hesitate before undermining these two pillars of children's well-being in order to encourage father involvement.

However, Solangel Maldonado has made a compelling argument that many men who are considered deadbeat dads are really "deadbroke."[179] These fathers, she argues, still have resources to provide in-kind support and care and should not be completely maligned and alienated by a litigious court system that would have them punished and even incarcerated for failure to pay.[180] As Maldonado describes it, despite bad decisions that led

176. Weiner, *supra* note 8, at 135-37.

177. *See* Laufer-Ukeles, supra note 24, at 762-65.

178. *See supra* notes 53-58 and accompanying text.

179. *See* Maldonado, *supra* note 8, at 1013.

180. *See id.*

to their reality, many fathers are in arrears for far more money than they can pay and although they are employable, they struggle to find stable jobs. It is bad enough that these fathers cannot pay child support. It does not make the situation better for children for these fathers to also not be able to be present or provide in-kind care because of a legal system that prosecutes them with increasing vigor.[181]

Very poor fathers are legally obligated to pay only minimal child support, and very little is actually paid.[182] Poor children, who often have poor fathers, must seek welfare benefits from the state. The state then becomes the entity that sues for child support collection so as to be reimbursed for benefits paid. Thus, for these children, child support collection and the level of child support awarded will not significantly improve their lives. In such circumstances, suggestions that mothers be given a choice as to whether or not to pursue child-support actions can advance children's interests since collection will not improve their income, and the pursuit of the father may alienate him from the child.[183] Thus, when child support is collected by the state, in-kind contributions should be preferred to aggressive pursual of fathers, and the courts should take into account such in-kind contributions in assessing support awards.

C. Joint Parenthood Approaches May Not Be Effective or Feasible in Practice

In addition to the aforementioned negative implications of applying a status of joint parenthood, joint parenthood approaches may not be effective or feasible in practice. Such approaches can demand too much of fathers—alienating them completely— and may not be suitable given that unmarried fathers are differently situated vis-a-vis married fathers and unmarried mothers.

1. Alienating Fathers Completely

The reform approaches that push for more engaged co-parent relationships based on fairness reforms may simply not work in

181. *See id.*

182. *See id.*

183. African-American, never-married mothers receiving public assistance are less likely than mothers of other races to identify their children's father or to provide the child support enforcement agency with necessary information for them to pursue fathers for child support. *See id.* at 1004-05 n.107.

incentivizing such parenthood in the context of nonmarriage. The push for more involved or more financially responsible co-parents, especially in the context of care or share formulations that demand more support for unmarried fathers who are already unlikely to be paying child support in steady and reliable ways,[184] may alienate unmarried parents from parental roles completely. Studies indicate that there is a real benefit to children of knowing both biological parents.[185] Demanding that such parents provide equal care or else increase already high support in order to act as a parent may unwittingly create a disappearance of parents, in particular fathers. Indeed, in Blecher-Prigat's proposal, she argues that if fathers do not want to step up to their full caregiving and caretaker support responsibilities, they can renounce their fatherhood and simply pay minimal child support as "progenitors."[186] But high demands of parenthood may make renunciation too frequent, depriving children of the needed presence and emotional support of low-income fathers. Alienation decreases rates of child support as visitation and child support payment is often linked.[187] Making financial obligations even greater may worsen feelings of alienation.

2. Unmarried Fathers Not Similarly Situated

It is important to recognize and contend with the overt unfairness of discriminating against unmarried fathers both in relation to unmarried mothers and married fathers. Still, the problem with applying formal equality in paternity cases, as well as more globally trying to recreate the benefits of marriage in the context of nonmarriage, is the lack of similarity between unwed fathers and married fathers, as well as the dissimilarity between unwed mothers and unwed fathers regarding empirical realities of caregiving behavior.[188] Women may have significant reasons not to inform men of their pregnancies, including fear of violence, drug abuse, and uncertainty.[189] And providing unmarried men with joint custody may

184. *See* Huntington, *supra* note 8, at 240.

185. *See supra* notes 41-60 and accompanying text.

186. Blecher-Prigat, *supra* note 113, at 166.

187. *See* sources cited *supra* note 59.

188. *See* Carbone and Cahn, *supra* note 10, at 71; *supra* notes 155-159 and accompanying text.

189. *See* Lyn Turney, *Paternity Secrets: Why Women Don't Tell*, 11 J. OF FAM. STUD. 227, 227-29 (2005) (discussing the various reasons women have for keeping paternity secrets, including fear of violence, uncertainty about father's

saddle mothers with too great a burden to bear in raising children in already hard circumstances.[190] Generally, assuming it is applied evenly, the "biology plus" constitutional standard, coupled with voluntary paternity orders and/or putative registries, allows biological fathers an opportunity to intentionally engage in fatherhood, thus providing them with parental rights.[191] Marriage is a similarly intentional act. Intentionality requirements in paternity cases balance the needs of mothers who provide the vast majority of care and the interests of children who need to be given such care in a stable manner or else be freed for adoption to be cared for by others.[192] Formal equality is therefore not a simple resolution of the asymmetry in paternal standing, despite the lack of stigma attached to illegitimacy in modern times.[193]

Paternity actions are most contested in two contexts: (1) when a single woman wants to put her child up for adoption and (2) when an unmarried father wants to assert paternity claims against another man.[194] While I have argued that coequal status may create too much tension and instability in care arrangements,[195] when prioritizing care for children, it is hard to justify excluding a father who wants to care for a child in either of these scenarios. However, in both instances, the nonmarried father's care, while valuable, often needs to be supplemented by a significant amount of care by other important caregivers—adoptive families or the mother's family, including

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identity and desire to protect children); *see also* Susan Ayres, *Paternity Un(Certainty): How the Law Surrounding Paternity Challenges Negatively Impacts Family Relationships and Women's Sexuality*, 20 J. GENDER, RACE & JUST. 237, 254-55 (2017) (arguing that reasons that paternity secrets are kept must be taken into account when determining tortious conduct).

190. *See supra* notes 150-154 and accompanying text (discussing the burden on caregiver autonomy); and *supra* notes 168-170 (discussing negative potential impact of high tension environments).

191. *See supra* notes 73-78 (discussing the biology plus standard).

192. *See* Carbone & Cahn, *supra* note 10, at 115. For a discussion of the greater instability and tension in nonmarriage, see supra notes 163-166 and accompanying text.

193. *See* Huntington, *supra* note 8, at 225 (describing how the lack of stigma justifies formally equal treatment in and outside of marriage).

194. *See supra* note 74 (listing paternity cases that arose in the context of adoption); *see also* Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology "Plus" Defines Relationships; Biology Alone Safeguards the Public Fisc*, 11 WM. & MARY J. WOMEN & L. 47, 47-48 (2004).

195. *See* supra notes 150-154, 155-62 and accompanying text.

her new husband. The resolution of this feminist dilemma must be to make room for multiple and varying kinds of legally recognized caregivers in complex families.[196] While it may be most facially "fair" to treat genetic fathers the same as biological mothers, parental relationships should not be based solely on what is fair but on what will allow a variety of caregiving adults, including genetic fathers, to provide needed care to children. Laws should therefore not focus on the sameness of treatment but on building legal frameworks that allow multiple caregivers to function for the good of children, which I address in the next Part.

III. FROM RELATIONAL FAIRNESS TO A CHILD-FIRST NONMARITAL FAMILY LAW

Important insights can be gleaned from approaches to reorienting family law in the context of nonmarriage in a way that recreates some of the trappings of marriage. Children of nonmarriage appear to fare worse than children of marriage and need supplemental care—policies and reforms that aim to solidify adult co-parent relationships and thereby engage parental caregivers to provide more care is a worthy goal. However, in this Part, I argue for a nonmarital family law that stubbornly focuses on how the law can directly serve the needs of children and the relationships that support children as a first principle. While it is desirable to believe that the values of promoting children's interests and promoting formal equality between biological parents in adult relationships that encourage joint parenthood will coincide, I have demonstrated that there is reason to hesitate before making such assumptions and focusing on promoting perceptions of fairness between parents first when working toward improving the plight of children of nonmarriage. In other contexts of family law, particularly the allocation of property and alimony, prioritizing perceptions of fairness in the form of the same treatment between adults may make more sense because the interests involved are primarily adults' interests. But, in the context of parentage, where raising children and meeting their needs is the primary concern, this paper questions an approach that begins with fairness as between and among parental figures.[197] Fairness might be a secondary value but should not start and control the inquiry.

196. *See* Mayeri, *supra* note 88, at 2354.

197. *See, e.g.*, Shahar Lifshitz, *The Best Interests of the Child and Spousal Laws*, *in* THE CASE FOR THE CHILD: TOWARD A NEW AGENDA 45, 64-66 (Ya'ir Ronen & Charles W. Greenbaum eds., 2008) (discussing the distinction between spousal laws and child-centered laws).

Thus, in this Part, I develop a child-first approach to improving the well-being of children born of nonmarriage. First, I will discuss the private obligations of parentage, custody, and support, arguing for an inclusive vision of parenthood and a tiered vision of custody and support. Second, I will discuss how the state can provide more direct benefits to children as a matter of public responsibility. Third, I will argue that the fairness arguments made in Part II are better resolved in the context of torts.

A. Improving Care by Creating an Inclusive Vision of Parenthood but a Stratified Vision of Custody

How can family law policies attempt to meet children's needs without filtering them through adult relationships? Well-regarded studies stress two important guideposts in improving care for children, regardless of marriage: 1) multiple engaged parental figures provide needed emotional and financial support while distanced, alienated parents do not provide optimal levels of support or parenting;[198] and 2) primary caregivers need to be able to provide care without feeling controlled, burdened, and enmeshed in high-conflict and unstable circumstances.[199] Accordingly, I argue that the key to reframing (private) nonmarital family around children's interests is finding a balance between these guideposts: supporting multiple caregivers for children without destabilizing the caregiving efforts of primary parents through multiple, tiered parenthood that is inclusive of multiple caregivers and creates hierarchy to minimize conflict. I describe an inclusive vision of parenthood and a stratified vision of legal and physical custody that includes legal recognition of both parents and third parties engaged in the parenting and care of children. While the vision I propose may not be as facially fair as one between legal co-parents, it may better support children's needs in the context of nonmarriage. Those interests should be considered first.

This parental vision is focused primarily on supporting legal parents with supplemental functional care in the context of nonmarriage, as opposed to formal markers of determining legal parenthood ex-ante (biology, intent, marriage), often applied in the context of same-sex couples

198. *See supra* notes 44-48 and accompanying text (discussing the benefits of multiple engaged parental figures for children of marriage).

199. For a discussion of the importance of caregiver autonomy, see *supra* notes 150-154 and accompanying text. For discussion of the importance of controlling tension and disputes between coparents, see *supra* notes 159-163 and accompanying text.

and assisted reproductive technologies.[200] It applies in organizing formal legal parents, in addition to including supplemental intentional, functional caregivers that are parental figures in children's lives and provide much-needed care.[201] Because the context I am exploring involves care directed towards children born outside of marriage, I focus specifically on single primary formal parents providing care together with biological co-parents, grandparents (and potentially other kin), step-parents, adoptive parents, gamete donors, or other functional caregivers. The goal is to supplement, rather than replace, legal parental care, which studies demonstrate is, on the whole, less impactful in the context of nonmarriage.[202]

In this Section, I will elaborate on this vision of multiple-tiered parenthood to improve the plight of children in five areas. First, I will discuss and outline the benefits and framework for multiple parenthood. Second, I will explain why multiple parenthood should be tiered. Third, I will provide a formulaic outline for how these tiers should work in practice. Fourth, I will provide a categorical assessment of how multiple parenthood works in practice through case analysis in distinct contexts, such as stepfather care along with biological father care, and birth father care together with adoptive parent and grandparent care. Fifth, I will discuss child support.

1. Multiple Parenthood: Two is Just a Number

A primary focus of attempts to reform nonmarital family law involves securing multiple, engaged, parental caregiving relationships, which empirical studies have strongly associated with positive outcomes for children when compared to unmarried and single-parent households.[203] All three "fairness between co-parent" approaches I have described above attempt to promote more nonmarital parental involvement in caring for and supporting children either through mandated care or financial penalties, by making caregiving more accessible and by giving automatic parental status to biological parents outside of marriage.[204]

200. *See supra* notes 14, 39-41, 91-95 and accompanying text.

201. *See* sources cited *supra* note 19-20 and accompanying text.

202. *See* sources cited *supra* note 7 and discussion, notes 45-48 and accompanying text.

203. *See supra* notes 41-60 and accompanying text; *see also* Kalia et al., *supra* note 15, at 150.

204. *See supra* Section II.A.

An alternative way to increase parental (or parent-like) care is to allow more than two parental figures to have parental or guardian-like status towards children. Unmarried fathers should be encouraged to engage with children, but their care can be supplemented by others as well––others who may be more suited to provide such care given their potentially more robust relationships with mothers and their overall emotional and financial stability.[205] These additional caregivers can be alternatively described as functional parents or third-party caregivers, depending on the amount of care they provide and their level of involvement.[206] Multiplicity in parenthood is beginning to become relevant as a legal option in complex families, although this is typically in the context of same-sex couples using ART and not in the context of nonmarriage.[207] The potential for multiple parenthood to increase resources and care for children of nonmarriage is significant.

In fact, studies suggest that it is time invested in children across different family structures and not specifically biological father care that improves children's overall well-being.[208] In their article, Kalia et al. seek to unpack the significantly better outcomes for children of marriage as compared to children of nonmarriage by assessing child outcomes not by family structure but by the total amount of parenting time children receive across family forms.[209] "Parenting time" includes time spent with biological parents as well as step-parents, grandparents, and other third-parties or functional parents who act in parenting roles.

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205. *See supra* notes 84-99 and accompanying text (discussing the ways multiple caregivers can be awarded legal status); *see also* Nancy E. Dowd, *Multiple Parents/Multiple Fathers*, 9 J. L. & FAM. STUD. 231, 250 (2007).

206. *See supra* note 20.

207. *See, e.g.*, C.A. v. C.P., 240 Cal. Rptr. 3d 38 (2018), *reh'g denied* (Dec. 13, 2018), review denied (Jan. 23, 2019), *cert. denied*, 140 S. Ct. 97 (2019) (granting, under California statute allowing granting parental status to three parents, third-parent status to biological father); Cerwonka v. Baker, 942 So. 2d 747 (La. Ct. App. 2006) (recognizing the existence of three parents); Cahn & Carbone, *supra* note 85, at 401 ("In accordance with these practices, states have begun to grant standing to three or more adults to seek custody or visitation. In some states, this allows three or more individuals to gain legal recognition as parents while in other states the same circumstances produce only a limited ability to seek third-party visitation."); *see also* discussion *supra* Section I.B.2.

208. *See* Kalil, Ryan & Chor, *supra* note 15, at 163-66.

209. *See id.*

The study's results indicate that "[C]hildren in two biological married parent families receive more total caregiving time than those living with mothers and cohabiting boyfriends or single mothers."[210] Cohabiting boyfriends and non-resident biological fathers, unsurprisingly, provide much less caregiving than biological, resident fathers. Moreover, joint caregiving—by more than one parental figure at the same time—was markedly greater among marital children than non-marital children.

However, this gap could be filled by caregivers other than biological fathers: "The total caregiving time that children receive was equivalent between children living in two biological married parent families and those living in multigenerational families."[211] The authors explain:

Children in multigenerational households benefit from substantial time investments from their grandparents, whereas those in stepfamilies benefit from substantial time investments from their nonresident biological fathers. These contributions from other biological relatives help to minimize the differences in total time investment across family structures. In contrast, children in mother/boyfriend households and single mother households receive lower time investments not only because of the absence of a second resident biological caregiver but also because nonresident biological fathers invest very little in children in these family types.[212]

The co-authors note that "in complex families, this time [time with caregivers other than biological parents] could balance out low parental time. In single-mother multigenerational families, for instance, resident grandmothers' time with children could offset a loss in mothers (and fathers) time compared to married parent households."[213] Indeed, studies suggest positive outcomes for grandmaternal co-residence on children in single-mother households.[214]

Moreover, the authors point to the theoretical potential for positive outcomes for children who benefit from significant shared parenting time, where more than one parental figure parents at the same time. [215] Shared parenting responsibilities between and among those with positive

210. Notably, the total caregiving time that children receive is comparable among children living in two biological married parent families, cohabiting biological parent families, stepfamilies, and multigenerational families. *Id.* at 161.

211. *Id.*

212. *Id*.

213. *Id.* at 153. Time investment is assessed through child-kept diaries.

214. *See id.*

215. *See id.*

relationships might have their own significant benefits for the child regardless of whether such parenting is offered by biological parents or by other parental figures, including grandparents.[216] Scholars speculate that such shared parenting time ensures that primary caregivers are less stressed, which might lead to better caregiving.[217] Shared parenting time is easier for parental figures to do if they have good relations with each other. Accordingly, it may be easier for mothers to do with grandparents or stepparents than with biological dads. If the amount of care correlates with better outcomes for children, especially shared parenting time, more than two parental figures can readily contribute to such care.

In order to promote and increase beneficial caregiving time, alone or shared, by caregiving adults, multiple "parental" figures can be legally recognized and supported through functional parenthood doctrines by awarding third-party visitation or guardianship status.[218] Consistency, authority, and responsibility are likely to impact the quality and longevity of care. Therefore, in appropriate situations, legal recognition and legitimization of multiple caregivers can facilitate and foster such care.[219] Legal recognition can include court-ordered visitation, custody, or guardianship in the case that the primary caregiver becomes unable to care for a child. Such order might also entail obligations for support and authority to assist in healthcare and educational decision-making, among other parental responsibilities that attach to parentage. In the context of nonmarriage, such multiple parents typically include a legal father and mother in addition to a third functional parent such as a stepparent, cohabiting partner, grandparent, or other kin cohabiting or having a close, ongoing relationship with the primary caretaker. Or, in the context of adoption or ART, birth parents, or gamete donors, can be recognized as third parental figures.

Unless we are relating to de facto parents who themselves enjoy the protections of parental privacy, it can be argued that the parental rights doctrine limits allowing multiple parental figures to have standing in children's lives by allowing three parents, allowing grandparents to act in parental roles or receive court-ordered visitation, or allowing other third

216. *See id.*

217. *See id.* at 166.

218. *See supra* notes 84-92 and accompanying text.

219. *See, e.g.*, Laufer-Ukeles & Blecher-Prigat, *supra* note 20, at 440 (explaining how functional parents need status to act on behalf of children).

parties to provide sustained, supported and protected care.[220] This doctrine is often understood to prevent recognition of legally-enforceable rights or obligations for any persons that are not legally defined parents because such "state interference" would violate parental rights.[221]

But the doctrine of parental rights should be reframed in light of the modern emphasis on children's rights and the state's obligation to protect children's well-being.[222] Parental rights are intended to give parents the right to raise their children with discretion; nobody has a monopoly on "good" parenting, and it was deemed a fundamental right of families to be able to raise children without state interference. [223] Children's interests are varied and flexible and are impossible to be reduced to a single set of parenting choices; thus, "best interests" is arguably a misnomer.[224] Therefore, it makes sense to give parents authority and discretion in raising children.

However, the doctrine of parental privacy should be understood as part of the overall goal of promoting children's interests and was never intended to conflict with those interests.[225] In other words, parental rights involve

220. *See* Parham v. J. R., 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations."); Wisconsin v. Yoder, 406 U.S. 205 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

221. *See* Laufer-Ukeles & Blecher-Prigat, *supra* note 20, at 461-62.

222. *See* Huntington & Scott, *supra* note 30, at 1414.

223. *See* Troxel v. Granville, 530 U.S. 57 (2000).

224. *See* Katherine Hunt Federle, *Children's Rights and the Need for Protection*, 34 FAM. L.Q. 421, 426-27 (2000); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS. 226, 229 (1975) ("[D]etermination of what is 'best' or 'least detrimental' for a particular child is usually indeterminate and speculative. . . . our society today lacks any clear-cut consensus about the values to be used in determining what is 'best' or 'least detrimental.'").

225. Cynthia Godsoe, *Redefining Parental Rights: The Case of Corporal Punishment,* 32 CONST. COMMENT. 281, 285 (2017) ("Indeed, state and children's interests render parental rights more flexible and context-specific than other family constitutional rights.").

the right to discretion in determining how to promote a child's interests, not to prevent children's interests from being met. Indeed, each of the founding cases allowed parents to act as they saw fit in order to promote their children's well-being.[226] *Troxel v. Granville* reinforces the state's reliance on parental discretion for determining what is good for children.[227] As I have argued previously under a relational rights framework for understanding children's rights and advancing children's interests, if the parental relationship is supporting children's well-being, it should be protected from intrusion unless there is a threat of significant harm.[228] However, if the parental caregiving relationship is less essential for a child's well-being, as when an older child becomes more independent, or a child is being functionally raised by another parent-like caregiver, intrusion can be warranted for advancing that child's interests.[229] Parental rights should not be understood to overcome the more general focus on children's well-being.

As such, reliance on parental discretion does not mean that the state cannot seek additional avenues to promote children's interests, including supporting other parental figures—like third parties or grandparents, or stepparents or birth parents in addition to formal legal parents.[230] The state, the law, and parents can work together as partners in this fundamental endeavor of caring for children and advancing children's interests.[231]

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226. *See* Troxel v. Granville, 530 U.S. 57, 86 (2000) ("The presumption that parental decisions generally serve the best interests of their children is sound."); Parham v. J.R., 442 U.S. 584, 602-03 (1979) ("[N]atural bonds of affection lead parents to act in the best interests of their children."); Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage,* 113 HARV. L. REV. 835, 864 (2000) (arguing that parents' rights derive from children's interests).

227. *See Troxel*, 530 U.S. 57.

228. *See* Laufer-Ukeles, *supra* note 24, at 799 (discussing the suitability of parental presumptions in light of children's reliance on good enough caregiving relationships).

229. *See id.* at 806-15 (introducing a framework within which to balance children's individual rights with parental rights, arguing that interference should be reserved for cases of serious harm (female genital mutilation) or when relationships are less important to a child's well-being).

230. *See* Maldonado, *supra* note 17, at 930 ("Where there is a high likelihood that a parent's decision to deny visitation with a quasi-parent is based on reasons unrelated to the child's best interests, there is little justification for deferring to the parent's decision.").

231. *See, e.g.*, Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L.

When there are disputes about how to best meet children's interests, parents' beliefs take priority under the constitutional holding in *Troxel*. However, it is not the disputed context that I am primarily concerned about, which I believe is too often the focus in determining whether to create legal recognition of multiple parents or third-party caregivers. Judicial intervention that actually undermines ongoing parental care, which furthers a child's interests, should be saved for extreme circumstances. Yet, the lack of status for additional caregivers creates uncertainty and lack of authority and legitimacy, discouraging investment by non-formalized parental figures. Interference with the primary caregiver is not the goal of the law of children of nonmarriage I describe; the goal is to supplement the care provided by the primary caregiver. Status should primarily be used to cement and bolster the roles of multiple parental caregivers, making them more accepted and acceptable, and to provide them with the security and sense of longevity, as well as authority, to encourage investment in children. It is well-settled that attaching and investing in children is made difficult by uncertainty of relationships and that standing and status can facilitate care, which has been particularly influential in discussions surrounding how to improve satisfaction for foster parents.[232] While legitimating or awarding such status may require court decisions that recognize status or legislative changes at the outset, such interference should be done in a manner that aims at supplementing and not interfering with ongoing parental care. The long-term goal would be to make such status accepted and obtainable, legitimating and integrating multiple parental figures in children's lives by consent for the sake of children and not by court intervention.

Perhaps this vision is idealistic, but arguably not more idealistic than attempts to impose marriage-like obligations on non-married parents. Indeed, similar to the ways the law may seek to encourage and cement parenting for biological fathers, cementing relationships with secondary kin caregivers who are not fathers should not be focused on how such status will create disputes, but rather how such status can improve care for children.

13, 26-27 (1999) (arguing that caretaking is a societal debt that faces inadequate economic and structural support). *But see* Anne L. Alstott, *Is the Family at Odds with Equality? The Legal Implications of Equality for Children*, 82 S. CAL. L. REV. 1, 5 (2008) (describing how family law privileges parental privacy rights over children's rights).

232. *See* Laufer-Ukeles, *supra* note 20, at 58-66 (discussing how providing foster parents with status can improve their satisfaction as they will not fear losing contact with children they grow to love).

2. Tiers of Parental Custodial Arrangements: Preserving Elevated Status of Primary Caregivers in Custody Determinations

Still, the recognition of multiple parents can be threatening to the primary caregiver. One might ask, if we are trying to preserve the autonomy and well-being of the primary caregiver who is engaged in providing the most childcare, how does adding additional potential parents and third-parties with status and rights help her plight?[233] Indeed, the de facto parenthood doctrine that allows functional parents to gain parental rights may be a direct threat to the primary caregiver's status, especially if the limits of *Troxel* are held not to apply in such cases because the de facto parent is considered to be legally equivalent to a legal parent.[234]

First, multiple parenthood beyond formal parents should be authorized primarily to facilitate and assist primary caregivers in providing care and encourage additional caregivers, not to threaten primary caregivers.[235] For instance, additional caregivers need authority to provide health and educational assistance. Multiple parenthood need not create conflict if primary parents are happy to have the support.

Second, multiple parenthood is a significant threat to caretaker autonomy, mostly if multiple parenthood is deemed to be co-equal parenthood.[236] Such a vision of joint physical custody, promoted by father's rights movements,[237] has been influential in many U.S. states upon

233. Some argue the greater the number of parental figures, the greater potential for conflict. *See* Appleton, *supra* note 25, at 41.

234. *See* Clark v. Wade, 544 S.E.2d 99, 106 (Ga. 2001); Rideout v. Riendeau, 761 A.2d 291, 303 (Me. 2000); Rubano v. DiCenzo, 759 A.2d 959, 969 (R.I. 2000); Sally F. Goldfarb, *Visitation for Nonparents After Troxel v. Granville: Where Should States Draw the Line?*, 32 RUTGERS L.J. 784, 791 (2001); Maldonado, *supra* note 17, at 896-97 (2003) (arguing that Troxel limits do not apply against functional parents); Nancy D. Polikoff, *The Impact of Troxel v. Granville on Lesbian and Gay Parents*, 32 RUTGERS L. J. 825, 851 (2001).

235. *See, e.g.*, Laufer-Ukeles & Blecher-Prigat, *supra* note 20, at 440.

236. June Carbone & Naomi Cahn, *Parents, Babies, and More Parents*, 92 CHICAGO-KENT L. REV. 9, 12 (2017) ("What they fail to acknowledge is that the difficulties come not from recognition of more than two parents *per se*, but from insistence on equal status for the larger number of adults. In this Article, we argue that equal status does not automatically follow from parental recognition. In fact, where three or more adults share parenting, they rarely have--or can or should--assume equal roles in the child's life.")

237. *See* Dinner, *supra* note 149, at 80.

divorce.[238] But coequal parenthood with as close to possible equal physical and legal custody is neither necessarily what is good for children upon divorce when there are only two co-parents,[239] nor is it necessarily applicable when there are three parents––or for children of nonmarriage.[240] The idea of equal parenthood after divorce is itself recent, and even if adopted as a presumption upon divorce, it should not necessarily apply in all cases of assigning parental rights, especially in the different circumstances of nonmarriage.[241] Recognizing functional parenthood in courts for caregivers who are not biological parents has, for the most part, been an unequal endeavor as well.[242] In the context of multiple parents specifically, unequal parenthood is the norm, usually involving a primary parent and several other parental figures who provide valuable supplemental care.[243]

If such categorical "tiers" of parenthood governed ex ante, parentage law could facilitate recognizing the legal status of multiple caregivers in a manner that minizines the threat to primary caregivers.[244] When parents

238. *See id.* at 121.

239. *See* Laufer-Ukeles, *supra* note 147, at 37-44 (arguing for a primary caretaker presumption at divorce unless co-parents can come to an agreement about co-parenting).

240. *See* Cahn and Carbone, *supra* note 236, at 12-13 (arguing that with multiple parenthood, equal parenthood should not be presumed); Katharine Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 655 (2008) (suggesting there would be "greater and lesser degrees of parenthood" in the context of multiple parenthood).

241. *See supra* notes 33-66 and accompanying text.

242. *See e.g.,* V.C. v. M.J.B., 748 A.2d 539, 554 (N.J. 2000) (for functional parents, visitation is the presumptive remedy, not custody); Baker, *supra* note 240, at 707 (arguing that recognizing functional parenthood involves recognizing different tiers of parenthood).

243. *See* Cahn & Carbone, *supra* note 236, at 12 ("Instead, such families are more likely to involve one primary parent and other parents with varying degrees of involvement. This is true whether the multiple adults consist of a marital couple and a sperm donor or surrogate, a stepparent and two biological parents, or any number of other relationships.").

244. I have introduced versions of tiered, disaggregated parental frameworks in different contexts previously in Laufer-Ukeles & Blecher-Prigat, *supra* note 20, at 421-23 (discussing differentiating parenthood based on functional parenthood and formal parenthood); Laufer-Ukeles, *supra* note 24, at 795-97 (arguing for the recognition "varying degrees of intimacy"); Laufer-Ukeles, *supra* note 24, at 762-68 (tiered parenthood as a framework to fulfill

are able to actively co-parent in an equal manner through agreement, parenting plans, or practice, then their equality can be recognized. However, in other cases, clear, differentiated rules between multiple caregivers can allow varied caregivers to help raise children without threatening the autonomy and security of the primary caregiver, promoting stability and certainty for the caregiving framework.[245] As Harvey-Young explains, in expanding parenthood beyond two primary parents, "[i]t is unnecessary for our notion of 'legal parent' to be a win-lose, winner-take-all proposition."[246] As such, these tiers can facilitate an inclusive form of parenthood where it is less threatening to keep fathers engaged.

But, under current law, the "inequality" in parenthood is something that happens de facto, by court order, and as a matter of practice, but is not emphasized ex ante due to concerns about fairness between co-parents and equality. On its face, parenthood is "natural and equal" as between mother and father, even if in practice this is rarely true. It is claimed that such categorical custodial "tiers" are not "fair" and that joint custody should be aggressively pursued.[247] It is argued that parenthood is all or nothing and

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children's relational rights). Unlike other authors who have written in support of tiers of parenthood, *see e.g.,* Cahn and Carbone, *supra* note 85, I suggest that these tiers should apply in a variety of contexts, although here I point out how the context of nonmarriage is particularly appropriate for tiered parenthood. *See also* Bartlett, *supra* note 83, at 912-19; Alison Harvey-Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 AM. UNIV. J. GENDER & L. 505, 517-18 (1998) (recognizing the need for multiple parenthood, but arguing that "it is necessary to identify "parents" or a "core unit" in order to identify family members with support obligations, testamentary issues and decision-making authority").

245. *See* Nancy E. Dowd, *From Genes, Marriage and Money to Nurture: Redefining Fatherhood*, 10 CARDOZO WOMEN'S L. J. 132, 135, 142-43 (2003) (recognizing different levels of fatherhood based on amounts of time nurturing children); Harvey-Young, *supra* note 244, at 517-18.

246. Harvey-Young, *supra* note 244, at 518.

247. *See* Baker, *supra* note 240, at 708-09 (arguing that adding a third parent will undermine the basic the equality of parenthood); Gary Crippen, *Stumbling Beyond the Best Interests of the Child,* 75 MINN. L. REV. 427, 494 n.227 (1990) (explaining that a key reason the primary caretaker standard was eliminated in Minnesota was due to the unfairness to fathers); Dinner, *supra* note 149, at 124-35; Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168, 180-81 (1984) (positing that the unequal effect on fathers is justifiable because mothers are often in an unfair economic position).

that it should not be disaggregated or differentiated, especially not in a hierarchical manner.[248] However, putting fairness aside, recognizing this inequality upfront can have benefits for children by limiting litigation and disputes between co-parents and promoting stability by giving primary caretakers the discretion they need.

3. Formulas for Identifying Multiple, Tiered Parenthood

These formulas for tiered, multiple parenthood could apply to biological parents, intended parents, and non-biological parental figures who seek de facto parental status or third-party visitation rights. Nonmarried families are diverse, and the multiplicity and tiers I recommend can provide a framework for an inclusive and structured law of parentage. In particular, I set out the formula for tiers based on the rights and status of biological unmarried fathers in relation to primary parents and other kin and functional caregivers because it is typically father care that needs supplementing by others and who appear, at least facially, as having what to lose from a tiered system, which treats them differently.[249] However, as I explain, the framework is likely to help them more than hurt them by giving them clear roles that need not be terminated even if they fall beneath certain benchmarks.[250] This framework can be readily expanded to any set of multiple parental figures, including those created by design by three intentional parents or biological parents parenting together with same-sex partners, known donors, or surrogates.[251]

If unmarried fathers are fully sharing in actively raising and supporting children, they should be considered formal primary parents who enjoy the greatest levels of discretion and full custodial rights to be apportioned with the mother if she is also providing a significant share of support and care.

248. *See* Blecher-Prigat, *supra* note 113, at 132-33 ("[P]arceling out of parental rights and duties dilutes and undermines the meaning of parenthood as an indissoluble commitment, to the detriment of children."): Murray supra note 25, at 398-99 (discussing the all or nothing nature of parenthood in United States law).

249. This is especially the case in light of and in contrast to the fairness approaches that recommend joint parenthood discussed in the previous part II. *See* Dowd, *supra* note 205, at 250 (explaining how multiplicity in parenthood can alienate fathers).

250. *See id*. (discussing how multiple parenthood can make room for less engaged fathers, suggesting a system of shared but equal coparenting).

251. *See supra* note 14 and accompanying text.

Such parents live with children or provide close to 50% of their daily care and needs.[252] This should be the case regardless of marriage.

However, if parents are neither living with a child nor providing close to 50% of care, whether from their own choice, due to court order, or because primary caregivers act as barriers to full participation, they should be deemed secondary custodians.[253] Secondary custodians who are biological fathers are still "parents" and still have rights, as reflected in current laws of custody, but we should be clear and definitive about these "tiers." I intend for the term "secondary custodian" to be a descriptive term that reflects reality and that also has legal implications within family law, as opposed to denigrating the importance of the father —or undermining his legal status as a father. Secondary custodians have the right to partial custody, also called visitation, and full discretion of care during these periods, but are not entitled to joint custody or to challenge the primary caretaker's primary custody unless the primary custodian's role changes and care is abrogated by their own actions.[254] This security, coupled with the acceptance of unequal parenting time, are the main attributes of such a secondary status.[255] Secondary custodians should have the right to continue significant ongoing relationships with children that cannot be set aside by primary custodians without substantial and significant justification for doing so,[256] as opposed to a more amorphous best interests' analysis. Such

252. *Cf.* AMERICAN LAW INSTITUTE, *supra* note 91 (defining a child's de facto parent as a person who lives with that child and, for reasons other than financial compensation, "regularly performed a majority of the caretaking functions for the child" or performed a share of caretaking functions "as great as that of the parent with whom the child primarily lived").

253. *See* Cahn & Carbone, *supra* note 236, at 12; Dowd, *supra* note 205, at 250; Laufer-Ukeles, *supra* note 24, at 800-01 (stating that secondary custodians have a protected interest in relationships with children).

254. *See* Cahn & Carbone, *supra* note 236, at 12 ("We maintain further that, in determining the child's interests, the courts should apply a primary caretaker presumption; that is, a presumption that the child's interests lie with the strength of the child's relationship to the primary parent and that the other parents' custodial rights should be structured to avoid interference with the strength of that bond.")

255. *See* Cahn & Carbone, *supra* note 85, at 405 ("The recognition of a primary custodian should ordinarily mean that there need be no effort to equalize the child's time with the other parents and that in the event of a dispute, the primary caretaker's preference should receive special deference.")

256. For instance, unless an older child does not want visitation, or a finding that continued contact will significantly harm the primary caregiver's ability to

parents do not have *mere* visitation, they have *significant* visitation, during which time they act as custodial parents, and their visitation cannot be readily discarded. More than two adults could have secondary parental custodial status to children, in addition to a primary caregiver, and two primary caregivers could be assisted by a secondary custodian—maximizing parenting time for children, although limits (if there is *"too"* much interest in parenting) would have to be set. Biological fathers who are secondary custodians would also have a constitutionally protected interest in their relationship with children based on constitutional doctrine.[257]

Some unmarried fathers may not meet the standard of secondary custodians because their relationship with the child is intermittent and undependable, associated with a lack of child support payment, and thus does not meet the standard of "significant."[258] Sometimes the lack of relationship is the fault of the father, sometimes it is due to circumstances and geographic distance, and sometimes it is due to the mother's actions and little blame can be placed on the father.[259] Still, despite the reasons involved, the nonmarried father need not be made into a legal stranger and parental status terminated. A status of "tertiary kin" can allow unmarried fathers to seek some visitation with a child, as long as such visitation is found not to harm the child, and can provide them with some legal recognition and relevance, as well as identity information for children.[260] Such a status can be retained even after adoption, which is particularly relevant for unmarried fathers whose children are placed for adoption without their consent due to the father's failure to meet the biology plus test. This status can allow biological fathers to be involved, giving children access to their biological identities, even if they provide minimal care or

care for the child. *See, e.g.*, Moore v. Moore, 547 N.Y.S.2d 794, 794 (N.Y. App. Div. 1989) (holding that absent a showing of harm, a court cannot resist a non-custodial parent's discretion and authority regarding appropriate child activities during visitation); Margaret Tortorella, *When Supervised Visitation is in the Best interests of the Child*, 30 FAM. L. Q. 199, 200-01 (describing supervised visitation as appropriate to protect a parent's right to meaningful interaction with a child even when such visitation raises concerns about best interests).

257. *See supra* notes 73-77 and accompanying text.

258. *See* Laufer-Ukeles, *supra* note 24, at 804.

259. *See e.g.,* Lehr v. Robertson, 463 U.S. 248, 269 (1983) (despite putative father's constant attempts, mother refused to allow father to have relationship with the child).

260. Laufer-Ukeles, *supra* note 24, at 804-05.

support.[261] Unmarried fathers who are not co-equal or secondary co-parents, birth parents after adoption, grandparents, and step-parents no longer living with a child are all potential caregivers who could fall into the category of tertiary kin—caregivers in "parental roles" with limited access to children. Such tertiary kin can have standing to assert visitation, contact a child, or obtain legal authority to act on behalf of the child with the consent of a primary custodian. However, any such visitation or contact must be subordinate to the primary and secondary custodians' needs and concerns, who will retain greater discretion regarding children's activities.[262] Such a status could facilitate informing children about birth parents because the fear birth parents will impose in primary care relationships could be mollified.

These tiers are reflective of reality and create legal status alongside stability for primary caregivers. Indeed, the ex-ante, formulaic nature of these categories can help create guidelines and stability in parenting roles. These tiers allow fathers who do not live with their children to stay involved and to feel engaged, without threatening primary caregivers, even if they are not able to provide significant care and without feeling that their status as fathers may be terminated or threatened by other engaged caregivers. The status of "tertiary kin" would be less impactful than primary or secondary custodians, but nonetheless, some status could work to keep multiple figures invested and engaged in children's lives.

The goal is for the ex-ante formulaic statuses I outline to encourage primary parents to include such figures in children's lives without the need for court orders, which would be reserved for extreme circumstances. Supporting such relationships ex ante could create a broader basis for child caregiving and financial support beyond just biological parents, particularly in the context of nonmarriage. However, if secondary custodians are not interested in obtaining this legal status, they cannot be coerced to do so—there is no forced visitation. Biological parents could be respected and maintained in addition to adoptive parents, grandparents, and stepparents without having to sever biological ties. Moreover, one can hope that functional parents would be more respected because they would have valid legal status to bring a claim if necessary to become secondary or tertiary kin with rights to visitation. Grandparents, extended kin, and stepparents who provide substantial care could not simply be eliminated from children's lives, leaving them to fight for status in courts; parents would have advance

261. *See supra* notes 49-52 and accompanying text (discussing children's rights to biological identities).

262. *See* Laufer-Ukeles, *supra* note 24, at 805.

warning that such functional parents could readily be awarded access to children. Moreover, defined and well-regimented status would likewise facilitate less discretionary and more easily resolvable custody disputes. Indeed, it is the lack of clarity in the law that causes lengthy and invasive litigation; when the law is clear, parties can bargain around the law and come to understandings without judicial intervention.[263]

The formal, legal parents in the context of nonmarriage will benefit from the same structures as the unmarried father described above. Moreover, while married or divorced parents may more readily be considered primary parents, they can also be supplemented by other functional caregivers and third-party kin within this tiered system in a manner that provides status without threatening primary caregiving roles.[264] While kin or step-parents may act as primary caretakers, in order to assure a child will not later be removed by formal parents, formalizing their legal status through adoption or other parental recognition procedures is likely necessary to secure and maintain their primary status, although they could continue to act as secondary or tertiary caregivers under the system I propose. In the following Section, I broaden the discussion of how this system can organize multiple parental caregivers around the tiers I suggest in the context of children being raised by primary caregivers along with biological parents, stepparents, grandparents, and adoptive parents.

4. Case Studies of the Importance of Multiple Parenthood and Tiered Custodial Arrangements to Support Care of Children of Nonmarriage: Stepparents, Bio-Parents, and Grandparents

a) Stepparents: Biological Parents + Stepparents

Consider the case of *Matter of Adoption of M.R.M.*[265] A mother and stepfather raised a child together in their home for over three years. The stepfather had been a constant presence in the child's life and sought to adopt him.[266] The never-married biological father had regular, supervised visitation twice per week for two hours each visit, which he exercised

263. *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950, 969-71 (1979).

264. *See* Laufer-Ukeles, *supra* note 24, at 799-800.

265. *See In re* Adoption of M.R.M., No. 17MA0088 2017 WL 4174836 (Ohio Ct. App. Sept. 15, 2017).

266. *See id.*

sporadically and then stopped.[267] He complained to the court about the mother and stepfather denying him access to the child, and she complained about his failure to exercise visitation.[268] The biological father had also not paid child support for one year before the petition, which the stepfather argues makes it unnecessary to secure his consent to the adoption.[269] In short, this case demonstrates a typical engagement by biological fathers in the context of nonmarriage.

Ultimately, in the case of M.R.M., a best interests hearing was held to determine whether or not to allow the adoption to go forward where the need for consent was rejected based on applicable law.[270] Yet, in this case, the court hesitated to approve the adoption, which would reflect modern law's preference for the two-parent nuclear family model because "denying the adoption means that Birth Dad can still have a relationship with the child. It keeps three individuals acting as parents in the child's life, instead of two."[271] The court analyzed the connection the birth father had with the child and decided that it would be best to deny an adoption that would cut off the biological father and instead allow the three parents to continue to parent the child.[272] The biological father said he accepted the role that the stepfather played in his child's life and only desired regular visitation, not custody. In the end, the court decided that maintaining such a situation was the most secure and stable arrangement for all involved, especially the child.[273] As the probate court declared, "having three (3) people in this child's life will not hurt this child but will help her develop into a well-rounded mature individual with all their cooperation and guidance."[274] The biological father was at most a secondary custodian of the child—if not tertiary—and in any event did not threaten the primary custodial relationship of the mother and stepfather. Clearly defined "tiers" could have eliminated the need to litigate as the biological father posed no threat to the stepfather and could be recognized as a secondary custodian if three parental figures were allowed.

267. *See id.* at 1.

268. *See id.*

269. *See id.* at 2.

270. *See id*.

271. *Id.* at 4.

272. *See id.*

273. *See id.*

274. *Id.* at 5.

b) Adoption: Adoptive Parents + Biological Parents

Second, consider the plight of an unmarried father in the case of Baby Vanessa, whose child was transferred for adoption without his knowledge despite his best efforts to assert his paternity by registering as a putative father.[275] In the heavily disputed case, the litigants fought for nearly three years without resolution before finally settling.[276] The foster mother in California was eager to adopt the child as she had been raising the child since birth.[277] The biological father also wanted to be part of his daughter's life despite his struggle with drugs and a criminal history.[278] Children's rights advocates contended that Baby Vanessa had a right to continue being raised by her foster mother, but the father's parental rights had clearly been violated. In the end, through settlement negotiations, the adoptive mother gave up her adoption petition in exchange for permanent legal guardianship, and the father was allowed to visit his daughter under her mother's supervision.[279] This outcome benefited all sides as the status provided to the biological father did not threaten the primary custody of the mother. But this certainly could have been resolved intuitively, without three-plus years of disputes, if there were more clear categories of parenthood.

c) Grandparents: Grandparents, Extended Kin, and Biological Parents

Third, consider the facts of two disputes regarding grandparents' visitation rights.[280] In *Taverna*, grandparents sought visitation with their granddaughter, born to unmarried parents. The unmarried mother lived

275. *See* Mary McCarty, *Baby Vanessa Custody Case Could Improve Children's Rights*, DAYTON DAILY NEWS (March 19, 2011), https://www.daytondailynews.com/news/local/baby-vanessa-custody-case-could-improve-children-rights/SYTtsjqcFKFKA4S3K5sukL [https://perma.cc/7529-C8ZV].

276. *See id.*

277. *See id.*

278. *See id.*

279. *See id.*

280. *Compare* Taverna v. Taverna, 159 N.E.3d 1079, 1099 Mass. App. Ct. 1103 (2020) (denying visitation despite co-residence and substantial caregiving relationship), *with* Chamberlain v. Brown, No. E201501658COAR3CV, 2016 WL 7340428 (Tenn. Ct. App. Dec. 19, 2016).

with the child in the grandparents' home for four years (from the time the child was seven months old on), during which time it is undisputed that the grandparents cared for the child on a daily and continuing basis. The mother moved out after four years and resided for three years with her fiancée, during which time the grandparents visited weekly (without a court order).[281] After those three years, the daughter and granddaughter moved back in with the grandparents and then to another location. The grandparents maintained regular visits with and provided ongoing supportive care for their granddaughter. The mother then terminated all contact after a dispute. The court in Massachusetts, following its interpretation of the holding in *Troxel*, gave presumptive validity to parental discretion, acknowledging that the litigation of grandparent visitation "can itself be so disruptive of the parent-child relationships" as to implicate the parent's constitutional rights.[282] The Court held that although the relationship was "meaningful and nurturing," it was not uncommon, and more recently, contact had been sporadic (due to the mother's refusal to allow access).[283]

In a similar case in Tennessee, visitation was awarded, but the facts involve more criminal activity by the parents, making it appear that parental misbehavior is requisite for allowing interference.[284] In *Chamberlain*, the grandchild and both unmarried parents had lived with the grandmother for two and a half years when they moved out and were soon after arrested. The child was put into the custody of the grandmother. A year later, the mother regained custody, and both the father and grandmother were denied access. In this case, the grandmother was awarded visitation, but the fact that the grandmother was a full-time caretaker for a period of at least six months when the mother was arrested was an important factor as per the relevant grandparent visitation statute.[285]

Comparing these cases, it appears that multiple parental figures are viewed with skepticism, and visitation is awarded only when a grandparent comes to replace a parent who is unfit or absent. [286] It seems that courts—

281. *See Taverna*, 159 N.E.3d at 1.

282. *See id*. at 1 (citing Troxel v. Granville, 530 U.S. 57, 75 (2000); Blixt v. Blixt, 437 Mass. 649, 665-66 (2002)).

283. *Id*. at 2.

284. *See Chamberlain*, 2016 WL 7340428.

285. *See id.* at 7.

286. *See* In re Addalyne S., 556 S.W.3d 774 (Tenn. Ct. App. 2018); Flynn v. Bland, 213 So.3d 85 (Miss. Ct. App. 2016), *cert. denied*, 209 So.3d 433 (2017); C.B. v.

and the laws they are applying—are awarding visitation based on the weakness of parental care as opposed to the benefits of supplemental grandparent care. In the context of nonmarriage especially (but not exclusively), where co-residence with non-biological parental figures is much more common, children need supplemental parental care, whether provided by grandparents or biological parents, in addition to primary parental care.[287] Legal recognition of such "tertiary caregivers" can help facilitate, encourage, and cement that care for the sake of children, removing the whims of familial disputes. Indeed, having such status can discourage disputes as the formalization will make visitation something that a parent will have to accept, making litigation unnecessary.

These cases demonstrate strong and continuous attachments that third parties have with children and their willingness to fight for access. While these cases required litigation to resolve and acknowledge such connections, it is the hope that a formalized tiered system that is settled within caselaw or legislation would signal the law's recognition of multiple and tiered parental figures, warranting respect for such attachments ex-ante without having to resort to litigation.[288]

d) Child Support and In-Kind Support

In every discussion of parenthood, one must first identify the parental figures and then account for custodial and monetary obligations. The emphasis on care in this Article is in no way intended to diminish the importance of financial support separated from such care, although it is ideally also provided directly to children in the context of custody. Having sufficient monetary resources is still one of the most important indicators

F.W., No. 1268 MDA 2015, 2016 WL 716329 (Pa. Super. Ct. Feb. 23, 2016); Sher v. Desmond, 874 N.E.2d 408, 416 (Mass. App. Ct. 2007); Peters v. Costello, 891 A.2d 705 (Pa. 2005).

287. There is precedent for special treatment of grandparent requests for visitation in circumstances involving co-residence and nonmarriage. Some states have special provisions for third-party visitation under circumstances of nonmarriage and/or co-residence. *See e.g.,* Custody and Grandparent's Visitation Act, 23 PA. CONS. STAT. § 5311 et seq. (2010); SooHoo v. Johnson, 731 N.W.2d 815 (Minn. 2007); In re Washington, No.04AP-429, 2004 WL 2944166 (Ohio Ct. App. 10th Dec. 21, 2004) (holding that the visitation statute allowing special standing to grandparents of unmarried children was not unconstitutional).

288. *See* discussion of the way clear categorical frameworks can minimize tension and disputes *supra* notes 263- 263 and accompanying text.

of a child's well-being.[289] A greater percentage of children born outside of marriage struggle with financial insecurity.[290] Having sufficient funds for a healthy diet, a stable home, consistent education, and parental figures who are not constantly in financial crises or medical distress is a baseline for promoting children's interests.[291] The need for sufficient resources cannot be overlooked.

Child support should be applied in full where nonmarried fathers can pay the necessary funds, whether a parent is a primary or secondary custodian. And, as I have discussed above, in-kind support from secondary or tertiary custodians can be provided when the state is assisting primary caregivers directly and poor fathers do not have the financial resources available to pay support, especially when there is already a large arrearage.[292]

Moreover, any parental and custodial figures—even tertiary kin—can be obligated to pay child support when other parental figures are not available to pay basic support. [293] Biological fathers, with their protected constitutional rights, may be appropriate as a first resort, but when absent, others can be required to step in. While support obligations from family members who are not biological parents or primary custodians are rare, they are usually still part of state family laws, and with expanded notions of

289. *See supra* notes 44-59 and accompanying text.

290. *See id.*; *see also* Paul R. Amato, *Research on Divorce: Continuing Trends and New Developments,* 72 J. MARRIAGE & FAM. L., 650, 656-57 (2010) (discussing children of divorce whose outcomes are impacted by reduced household income); Carey E. Cooper, Cynthia A, Osborne, Audrey N. Beck, & Sara S. McLanahan, *Partnership Instability, School Readiness, and Gender Disparities*, 84 SOCIO. EDUC., 246, 246-59 (2011) (same). Non-payment of child support is also associated with worse indicators for children. *See* Drew A. Swank, *The National Child Non-Support Epidemic*, 2003 MICH. ST. DCL. L. REV. 357, 362 (2003).

291. *See e.g.,* Laufer-Ukeles, *supra* note 24, at 762.

292. *See supra* notes 177-182 and accompanying text.

293. Financial support should be primarily the role of primary and secondary custodians but can be supplemented by tertiary custodians by court order if primary custodians are not able to meet their obligation. *See* Cahn & Carbone, *supra* note 236, at 52 ("Where three or more parents have never assumed equal responsibility for the child, their financial obligations should also not be presumed equal or calculated in the same manner as classic two-parent obligations that assume an equal assumption of responsibility for the child. Instead, the financial obligations should reflect a combination of custodial time and ability to pay.")

parentage, they can be further emphasized.[294] Thereby, public support from the state should expand, coupled with additional parental figures, creating greater availability of resources for the children of nonmarriage.

B. Direct Subsidies

The state can also do more to step in directly and help primary custodians, beyond covering child support for low-income families, by providing subsidized services, daycare, education, and healthcare, as well as by direct subsidies for those engaged in caregiving.[295] Martha Fineman, among others, has pointed to the need to make family law more focused on state support, a practice common in many social welfare countries.[296] Such direct state support would take some of the pressure off fathers who are struggling to meet the needs of children. State involvement should not threaten already overburdened custodial, unmarried parents; social welfare oversight, mandatory parenting classes, and the threat of termination create stress, not support.[297] Rather, the state can do more to affirmatively support families, financially and otherwise, by helping single parents raise children.

State support could come in the form of stipends for children, tax breaks, or state-subsidized services, such as daycare, health care, subsidized meal programs, and post-high school education. Such supports can ease the burden on all parents, and on single parents especially, as they rely less on private arrangements between two parents and more on direct state responsibility for children.

The CRC recognizes "the right over every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development."[298] Although parents have primary responsibility for providing for children, states are instructed to take appropriate measures

294. *See e.g.,* Parness & Timko, *supra* note 20, at 777-80.

295. *See supra* notes 102-104 and accompanying text.

296. *See* sources cited *supra* note 21.

297. *See, e.g.*, Dorothy E. Roberts, *The Community Dimension of State Child Protection*, 34 HOFSTRA L. REV. 23, 36 (2005) (emphasizing the need to support at-risk families in a non-coercive manner); Jane M. Spinak, *Reforming Family Court: Getting It Right Between Rhetoric and Reality*, 31 WASH. U. J.L. & POL'Y 11, 18 (2009) (stating that intervening in family matters through the coercive power of a court should be an option of last resort).

298. CRC, at Art. 24.

to assist them.[299] Signatories provide significant social welfare reforms to support children, such as Canada's enactment of the Universal Child Care Benefit, which provides children with $100 per month for each child under six.[300] In Israel, children are supported directly by the government through child subsidies, birth stipends, and extra benefits and tax deductions for single mothers.[301] Social welfare programs that take pressure off of families in general and single-parents in particular, like high quality, subsidized daycare, pre-school public education, and low-cost after-school programs, allow the state to support children directly.[302] Sweden, in particular, is known for prioritizing family support, having excellent low-cost early childcare, generous support for single mothers, and family leave policies.[303] All developed countries except the United States provide paid maternity and paternity leaves, some of which are very generous.[304] Critics of stipends, in particular, argue that such policies encourage reckless and irresponsible reproduction, burdening the state with the costs.[305] Others argue that such policies create unwieldy and ineffective bureaucratic, big government and that such policies infringe upon the private realm of the family.[306] But it is hard to believe that meager subsidies incentivize baby-making as opposed

299. *See* U.N. CRC Committee*, General Comment No. 21 on Children in Street Situations*, U.N. Docs. CRC/C/GC/21 (June 21, 2017).

300. *See* Universal Child Care Benefit Act, S.C. 2006, c 4, art 168, §§ 3-4 (Can.).

301. *See* Hila Shamir, *The State of Care: Rethinking the Distributive Effects of Familial Care Policies in Liberal Welfare States*, 58 AM. J. COMP. L. 953, 961-62 (2010)

302. *See, e.g.,* Nancy E. Dowd, *Bringing the Margin to the Center: Comprehensive Strategies for Work/family Policies*, 73 U. CIN. L. REV. 433, 447-49 (2004) (discussing policies that support single parent families).

303. *See* Kerry O'Halloran, *Chapter 12: Sweden*, *in* 86 IUS GENTIUM 541, 542 (2021).

304. *See* Amy Raub, et al., WORLD POL'Y ANALYSIS CTR., PAID LEAVE FOR FAMILY ILLNESS: A DETAILED LOOK AT APPROACHES ACROSS OECD COUNTRIES (2018); Deborah A. Widiss, *Equalizing Parental Leave*, 105 MINN. L. REV. 2175, 2246 (2021) (discussing how new mothers in developed countries receive on average more than one year of paid leave).

305. *See generally* Femke Roosma, Wim van Oorschot & John Gelissen, *The Achilles' Heel of Welfare State Legitimacy: Perceptions of Overuse and Underuse of Social Benefits in Europe*, 23 J. EUROPEAN PUB. POL'Y 177, 177-96.

306. *See e.g.,* McCusker v. W.C.A.B. (Rushton Min. Co.), 639 A.2d 776, 780-81 (Pa. Sup. Ct. 1994) (remarking how social welfare policies may provide an exception to the constitutional family privacy doctrine that curbs state interference).

to supporting those who want big families. And such benefits are not compulsory, making the concern of infringements seem beside the point. Ultimately, such policies have been impactful in contending with child poverty and improving child outcomes.[307] Such direct state support of children provides benefits to children directly regardless of marriage.

A substantial policy shift is needed in the United States in order to expect a significantly more active state that helps parents shoulder the obligations of parenthood as opposed to perceiving childcare as a private concern. Current policy measures in the United States are limited in scope and while providing safety nets do so while still prioritizing private self-sustenance. As one author describes modern U.S. child welfare policy, "[I]t is residual in nature, it encourages and assumes individual responsibility for care needs, and it encourages the creation of market alternatives to familial care, while creating disincentives for intra-familial care solutions."[308] Programs such as Temporary Assistance for Needy Families Grant (TANF) have onerous and strict means tests that make welfare assistance available only for the very poor who also have means and sufficient education to comply with bureaucratic requirements.[309] And TANF itself even includes measures that incentivize marriage—resisting hard reconciliation with the reality of nonmarriage.[310] Such measures do not begin to go deep enough or far enough to help children of nonmarriage to achieve better outcomes for children whose well-being is affected.[311]

307. *See* Barabara Stark, *Family Obligations, and Socio-Economic Rights Under the Convention on the Rights of the Child*, *in* GLOBAL REFLECTIONS ON CHILDREN'S RIGHTS AND THE LAW 73, 75-76 (Ellen Marrus & Pamela Laufer-Ukeles eds. 2021); Antonia Layard, *Researching Urban Law*, 21 GERMAN L.J. 1446, 1453 (2020)

308. *See* Shamir, *supra* note 301, at 962.

309. *See* OFF. OF FAM. ASSISTANCE, *Temporary Assistance for Needy Families 12th Report to Congress: Fiscal Years* 2014-2015, U.S. DEP'T OF HEALTH & HUMAN SERVS. (2018), https://www.acf.hhs.gov/sites/default/files/documents/ofa/12th_annual_tanf_report_to_congress_final.pdf [https://perma.cc/Z3SX-US5N]

310. *Id.* at 97-98 (stating that the program includes a 'Healthy Marriage Initiative,' which aims to assist couples in raising children within marriage).

311. Stark, *supra* note 307, at 76-79 (discussing how the United States' failure to provide direct benefits to children harms children's wellbeing).

While a general tax credit for childcare reaches further,[312] it is only a meager beginning compared to the wide range of support available in social welfare societies for children outside of the framework of marriage.

C. Fairness Belongs in Torts

The focus of this Article is on family law that aims to better support the children of nonmarriage. However, it is worth pointing out that the fairness concerns that have been raised in Part II should not be ignored entirely. Realistically, feelings of injustice do not disappear. And it is appropriate for the legal system to provide redress for injustice in a manner the reflects societal values and may help to evolve social norms.[313] However, such redress should not taint the custody and support elements of family law, which should be focused, primarily, on supporting children's interests.[314]

312. *Internal Revenue Service Child and Dependent Care Tax Credit*, INTERNAL REVENUE SERV. https://www.irs.gov/taxtopics/tc602 [https://perma.cc/2UYX-X7D3].

313. *See, e.g.,* Elizabeth Scott, *Social Norms and the Legal Regulation of Marriage,* 86 VA. L. REV. 1901, 1923, 1925 (2000) ("Changes in the level of legal sanctions can strengthen a weak norm, and even influence norm change. Imposing stronger or different legal sanctions reinforces informal enforcement mechanisms and may clarify an emerging norm consensus where behavioral expectations may have previously been uncertain.").

314. *See* FINEMAN, *supra* note 21, at 25-26 ("The presence of children creates dependency not only because children are themselves dependent, but also because the person who assumes primary care for them becomes dependent on social and other institutions . . . ."); Pamela Laufer-Ukeles, *Reconstructing Fault; The Case for Spousal Torts*, 79 CIN. L. REV. 207, 229 (2010) ("[T]he primary regulatory role for the state in marriage and divorce has shifted—and should continue to shift—from regulating entrance into marriage and preserving the continuity of the marital status toward protecting caregiving, dependency, and the welfare of children."); SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 139 (1989) (discussing the vulnerability of women in primary caretaking roles both economically and socially); c*f*. Harry Krause, *On the Danger of Allowing Marital Fault Torts to Re-Emerge in the Guise of Torts*, 73 NOTRE DAME L. REV. 1355, 1361-62 (2003) (discussing movement of divorce law towards protecting children's welfare as opposed to resolving disputes among spouses).

Rather, such redress should be in the context of torts built to provide compensation for civil wrongs.[315]

There are three kinds of torts that can be used to address fairness claims in the context of nonmarriage. First, when fathers unfairly rely on a disproportionate amount of caregiving provided by single mothers, paying insufficient support based on broken promises of shared caregiving,[316] claims of unjust enrichment may be possible.[317] Additionally, when mothers unfairly prevent fathers from having access to children, a claim of tortious interference and alienation of affections may be possible.[318] Finally, when fathers are sidelined and do not have an opportunity to assert parental status due to no fault of their own, new torts remedies have been proposed to punish (and discourage) interference with parenthood status.[319]

These torts are likely to be reserved for use in extreme cases, both because torts for non-physical damages are used to redress extreme and outrageous wrongdoings and because smaller suits are hard to justify financially.[320] Indeed many nonmarital families are already strapped for

315. *Cf.* Laufer-Ukeles, *supra* note 314, at 248 (discussing the advantages of torts over family law in the context of spousal torts).

316. *See* Coles v. Pinn-Wilson, No. FD-04-1115-92, 2008 WL 782808, at *2 (N.J. Super. Ct. App. Div., Mar. 26, 2008).

317. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. d (AM. LAW. INST.2011) ("Restitution is concerned with the receipt of benefits that yield a measurable increase in the recipient's wealth. Subject to that limitation, the benefit that is the basis of a restitution claim may take any form, direct or indirect. It may consist of services as well as property. A saved expenditure or a discharged obligation is no less beneficial to the recipient than a direct transfer."); Emily Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants,* 77 U. COLO. L. REV. 711, 712 (2006); *Chapter Three Restitution at Home: Unjust Compensation for Unmarried Cohabitants' Domestic Labor*, 133 HARV. L. REV. 2124 (2020).

318. *See* C. David Bargamian, Note*, Intentional Infliction of Emotional Distress in the Child Custody Context: Proposed Guidelines*, 36 WAYNE L. REV. 125, 142 (1989); Joy M. Feinberg & Lori S. Loeb, *Custody and Visitation Interference: Alternative Remedies*, 12 J. AM. ACAD. MATRIMONIAL L. 271, 284 (1994).

319. *See* Seymore, *supra* note 76 at 850-56; *see also infra* part IV.C (discussing the possibility of torts in the context of fathers who are not informed they have a child).

320. *See* RESTATEMENT (SECOND) OF TORTS § 46 (listing four requirements for an intentional tort where damages are based on emotional distress, including that action is extreme and outrageous); John H. Bauman, *Damages for Legal Malpractice: An Appraisal of the Crumbling Dike and the Threatening Flood,* 61

money, and big tort cases and awards may seem far out of reach. Moreover, just as heart balm torts have fallen out of favor for being overly moralistic, torts in the domestic realm are often viewed with suspicion. [321] Indeed, insofar as such litigation could impact children, it should be rare and reserved for more extreme cases.

Still, torts that enforce social norms and treat victims who are wronged as potential tortfeasors, regardless of the romantic context of the disputes, are important.[322] Simply because wrongs occur within romantic frameworks does not make them unworthy of redress. It is appropriate that an outlet be given to redress overt unfairness in the law. The benefit of social norm building outside of family law is allowing family law to prioritize the welfare of children—leaving the less common civil redress for extreme infractions—and to provide redress and relief in a manner that informs the social norms of all parents. Perhaps fear of such torts and the heavy monetary redress they provide, even if not regularly used, can change unfair behaviors that affect children in nonmarital families.

TEMPLE L. REV., 1127, 1164-65 (1988) ("[E]motional distress damages are not awarded unless the lawyer commits some more aggravated misconduct than negligence: the cases require "egregious conduct," "intentional wrongdoing," "extreme or outrageous conduct," "willful or wanton" misconduct, or occurrences of an inflammatory nature. When the "independent tort" requirement gets imported into this combined tort/contract situation, therefore, it is transformed into the requirement of additional misconduct beyond the ordinary professional negligence that entitles the client to recover for economic loss."); Laufer-Ukeles, *supra* note 314 at 237 (discussing the limited use of torts to address domestic wrongs); Ira Mark Ellman & Stephen D. Sugarman, *Spousal Emotion Abuse As a Tort?,* 5 MD. L. REV. 1268, 1280 (discussing extreme and outrageous requirements for torts based on emotional distress in the domestic sphere).

321. *See generally* Lynda Wray Black, *The Long-Arm's Inappropriate Embrace*, 91 ST. JOHN'S L. REV. 1 (2017); Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct,* 61 S. CALIF. L. REV. 777, 810-11 (1988).

322. *Cf.* Sarah H. Buel, *Access to Meaningful Remedy: Overcoming Doctrinal Obstacles in Tort Litigation Against Domestic Violence Offenders*, 83 OR. L. REV. 945, 950 (2004) (discussing various reasons the domestic violence torts are underused and arguing for a new tort of domestic violence to cure judicial failure to provide proper recourse); Michele Goodwin, *A View from the Cradle: Tort Law and the Private Regulation of Assisted Reproduction*, 59 EMORY L.J. 1039 (2010).

IV. CONCLUSION: TOWARDS A CHILD-FIRST FAMILY LAW

These suggestions could apply to children of marriage and nonmarriage. But they are made more pressing by distinct characteristics of nonmarriage and the poorer outcomes that children of nonmarriage experience. No single solution or suggestion will improve the plight of all children; however, the goal of this Article is to review reforms that have been offered and explore the possibility of additional reforms that can help close the gap for children of nonmarriage.

Moreover, this Article seeks to push prioritizing and centralizing children's interests within family law. The "best interests" principle is already deeply ingrained within family law, mostly in disputes between legal parents, but the impact of putting children first has not yet met its full potential. This potential has been impeded by a commitment to parental privacy that has limited state involvement, even if for the purpose of improving conditions for children. In the context of heterosexual parenting outside of marriage, biological parents are usually the sole source of legally authorized parenting, and biological fathers outside of marriage have proven less engaged and less reliable. While the law can try to facilitate and impose more parenting by biological fathers, other parental figures may prove more beneficial. Moreover, increasing direct state support is necessary to fill the lack of marital laws to provide for children of nonmarriage.

Fairness and equality are sacred principles for disputes between adults. However, family law can do better in focusing on vertical, parent-child relationships first without filtering them through reforms of parenthood outside of marriage that focus on horizontal, parental relationships.