

THE CONTRACTUAL FAMILY: THE ROLE OF THE MARKET IN SHAPING FAMILY FORMATIONS AND RIGHTS

Deborah Zalesne[†]

Even with federal recognition of marriage equality and the increasing number of states that allow same-sex marriage, marriage is not available or not desirable to everyone. Yet marriage remains a prerequisite to many legal protections. Despite the popularity and prevalence of alternative reproductive technologies (ART) as a means of having a child when natural childbirth is not feasible, biology similarly remains a prerequisite to many legal protections and rights over one's children. Within this paradigm, the ever-growing number of families and couples not fitting the traditional mold are forced to search other areas of the law, such as contract law, for legal protections. By utilizing contract law, modern families should be able to achieve the protections that are currently awarded to "traditional" families by law upon marriage and through biology.

Non-traditional families in the United States are more commonplace than ever before and the numbers continue to increase exponentially based on census data over the last 50 years. Yet despite this growth, alternative family forms are still marginalized economically, politically, and socially, as the creation of family law and policy is still widely governed by traditional family ideologies. This Article discusses how non-traditional families can utilize contract law to create and protect their families, as well as to obtain many of the rights and benefits automatically conferred upon their married and biological counterparts. Specifically, the Article looks at the law surrounding cohabitation agreements and co-parenting agreements. Although these types of agreements are between private parties and do not

[†] Professor of Law, City University of New York School of Law. B.A., Williams College; J.D., University of Denver College of Law; LL.M., Temple University School of Law. Earlier variations of this Article were presented at the Ninth International Conference on Contracts and the 2013 Northeast People of Color Conference—I would like to thank the conference organizers and participants of those conferences for their thoughtful remarks about issues presented in the paper. Special thanks to Professors Rachel Arnow-Richman, Andrea McArdle, David Nadvorney, Ruthann Robson, and Richard Storrow for their detailed and thoughtful comments on an earlier draft. I would also like to thank my fabulous research assistants John Guyette, Miranda Junge, Catherine Austin, Steve Succop, Frank Chou, and Tana Forrester for their invaluable research assistance.

require third-party consent, these agreements continue to be unenforceable in some states and in some cases.

Cohabitation agreements should be recognized as a valid and necessary alternative to marriage. Freedom of contract and the right to privacy should prevent the State from restricting the ability of families to structure their own private relationships. Marriage is, in effect, a choice to be bound to a status relationship that, for some couples, is undesirable because of the traditional norms and trappings of the marital institution, the heteronormative implications, and the general government control over family. Also, state-provided rights and responsibilities do not fit all “family” types. People in non-marital unions often seek to order their affairs in ways that are not possible under state-based options. Contracts, at least written ones, can serve the same evidentiary function that marriage does. Both marriage and formal contracts are ways of showing intent to be legally bound.

Similarly, co-parenting agreements should be recognized as a necessary way to harmonize the rights of legal (biological or adoptive) and non-legal (non-biological and non-adoptive) intended parents. Co-parenting agreements can co-exist with family law’s best interest of the child standard. This Article proposes that an otherwise valid co-parenting agreement between intended parents supplies the presumption that biological parents automatically get through their genetic connection to their children—the presumption that it is in the best interest of the child to be raised by her intended parents. From there, custody determinations would still be made based on the best interest of the child, as with custody determinations involving biological parents where a contract exists, but with the understanding that the intended parent, whose intent is expressed and validated through contract, is the presumed best parent.

TABLE OF CONTENTS

INTRODUCTION.....	1029
I. THE USE AND LIMITATIONS OF CONTRACTS TO PROVIDE NON-TRADITIONAL FAMILIES WITH BENEFITS AWARDED BY MARRIAGE AND BIOLOGY	1034
A. Cohabitation Agreements	1036
B. Co-Parenting Agreements	1044
1. Implied Co-Parenting Agreements for Financial Support.....	1048
2. Express or Implied Co-Parenting Agreements for Custody and Visitation	1050
II. THE CONTRACTUAL FAMILY: THE ROLE THE MARKET SHOULD PLAY IN SHAPING FAMILY FORMATIONS AND RIGHTS	1057
A. <i>The Inflated Importance of Commercial Promises</i>	1059

B. <i>Giving Family Promises the Same Weight and Protection as Commercial Promises</i>	1065
1. Cohabitation Agreements.....	1066
a. The Primacy of Marriage.....	1066
b. Critiques and Limitations of Marriage.....	1068
i. Historical Critiques of Marriage.....	1069
ii. Current Critiques of Marriage.....	1072
c. Marriage – An Ineffective Means to an End	1076
d. The Contractual Alternative	1079
2. Co-Parenting Agreements	1080
a. Co-Parenting Agreements and the Best Interest of the Child.....	1083
b. Co-Parenting Agreements and the Market.....	1088
III. EXISTING MODELS FOR ENFORCING FAMILY-BASED CONTRACTS.....	1093
CONCLUSION.....	1096

INTRODUCTION

Non-traditional families in the United States are more commonplace than ever and the numbers continue to increase exponentially based on census data over the last fifty years. Yet despite this growth, alternative family forms are still marginalized economically, politically, and socially, as the creation of family law and policy is still widely governed by traditional family ideologies.¹ Of course, presumptions about family, and particularly motherhood, are deeply rooted in our collective psyche. While law has helped define the boundaries of the American family, the law has moved at a pace that has failed to keep up with cultural realities.

Even with federal recognition of marriage equality² and the increasing number of states that allow same-sex marriage, marriage is not available or desirable to everyone, yet remains a prerequisite to many legal protections. And even with the popularity and prevalence of alternative reproductive technologies (ART) as a means of having a child when natural childbirth is not feasible, biology remains a prerequisite to many legal protections and rights over one's children. Many laws that regulate marriage, adoptions, and parental and children's rights still fail to recognize the rights of same-sex couples, non-married heterosexual partners, single parents, children born

¹ Jason M. Merrill, Note, *Two Steps Behind: The Law's Struggle to Keep Pace with the Changing Dynamics of the American Family*, 11 J.L. & FAM. STUD. 509, 510–11 (2009).

² See *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013) (striking down the federal government's definition of marriage as union of one man and one woman under the Defense of Marriage Act (DOMA)).

through alternative methods, and caretakers who do not fit into the traditional family model. Within this paradigm, the ever-growing number of families and couples not fitting the traditional mold are forced to search other areas of the law, such as contract law, for legal protections. By utilizing contract law, modern families should be able to achieve the protections that are currently awarded to “traditional” families by law upon marriage and through biology.

However, when parties attempt to define the contours of their families and secure rights through contract, they are often met with legal hostility. Despite the fact that their contracts are between private parties who have given full consent, such contracts continue to be either unevenly enforced or unenforceable altogether. Courts do not enforce family contracts in the same ways they enforce contracts outside the family context, as principles of freedom of contract are not applied in the same ways and to the same degree in the family context.

These differences stem from the fact that family law and contract law generally see themselves as having different goals. While the central idea of family law is to protect families—that is, to reinforce and protect marriage, and to protect children—the central idea of contract law is to protect the autonomy of contracting parties and the marketplace generally. When these two principles and goals come up against each other, family law inevitably wins—indeed, how can market rights ever successfully compete against the rights of children? This Article suggests, however, that the clash between family law and contract law is falsely described as a battle between protecting the social interests in children and families against protecting the private interests of individuals seeking to further their individual rights.

I propose two more logical and accurate ways to reframe the question. First, the goals of contract and family law are not always in conflict. The clash can more aptly be seen as one between protecting traditional versus modern views of family. If we view contract law as a means of expanding the notion of family and protecting the interests of parties who are unable to (or choose not to) create their families the traditional way, then instead of being at odds with family law, contract law becomes an avenue for reinforcing and advancing the goal of family law to protect family relationships. Contracts can empower vulnerable groups and provide procreating liberty to individuals. Further, contracts between intimate partners can foster each partner’s independence, particularly when the relationship is untraditional and falls outside the heterosexual marriage structure. Also, allowing intended parents to secure their rights to their intended children through contract is, in most cases, best for the intended children as well, who, oftentimes, have already begun to be raised by these intended parents.

The second way in which the issue can be reframed is by holding up family contracts against commercial contracts, rather than against family law ideology. The dominant bargain theory of contracts privileges commercial promises over family promises. The law has long refused and continues to refuse to enforce many agreements in the family context. Often unenforceable are agreements between spouses because of pre-existing duty and lack of consideration (both domestic work and sex are generally considered marital obligations); their similarity to “meretricious” agreements (agreements governing non-marital sexual relationships), which tend to be viewed as against public policy; and their possible inclusion of agreements regarding parental rights, where monetary exchanges are often “resented” and “conventionally deplored”³ because they offend the dignity of the parent-child relationship. When courts fail to give the same legal weight to promises in intimate settings, it signals the lack of importance of such promises.

In a legal sense, this suggests that courts consider family as less important than commerce when it comes to keeping your word. Where the law privileges rational arms-length market promises, family and women’s issues are relegated to a secondary status. Family promises are at best enforceable only under the alternate “softer” theory of promissory estoppel, further elevating the importance of the “harder” rules of the bargain principle. Why should commercial parties acting at arms-length receive more legal protection than vulnerable parties in intimate relationships? Contracts should be a failsafe for these parties trying to secure rights for themselves. At a minimum, parties to contracts in the family context should have the same baseline rights that commercial parties have.

People should be their own lawmakers when it comes to their personal relationships. Because family and intimate relationships are highly unique and individual, they often do not fit within the limitations of government regulations, and may be more functionally structured through contracts. Families that do not fit the traditional mold should not have to wait for government approval to attain status equivalent to their married counterparts, or, in the case of intended parents who are not biologically related to their intended children, their biological counterparts. Instead, such partners and intended parents should be able to secure their rights through private contract. Contracts can better protect the legal interests of non-married couples and non-legal parents⁴

³ MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 97 (1983).

⁴ I use the term “non-legal parents” to refer to parents who are not biologically related to their children and have not legally adopted them.

in many cases because contracts affirm autonomy rather than reinforce government as the arbiter of what “family” means.

This Article critiques traditional limitations on private ordering in family-based areas of private concern, making the argument for the enforcement of all validly entered private contracts. The argument is not a new one, but one that requires deeper examination because of demographic and legal developments. The Article proposes more expansive family-based areas that are appropriately governed by private ordering. These proposals are consistent with cultural and legal momentum, as the significance of biology has lessened, and the Supreme Court has recognized broader definitions of marriage. This Article makes the case for such expansion of private contracting by focusing on two particular types of contracts: cohabitation agreements and co-parenting agreements. Despite the fact that cohabitation and co-parenting agreements are between private parties and do not require third-party consent, these agreements continue to be unenforceable in some states and in some cases.⁵ The arguments I make for enforcement in these two problematic areas can be applied to enforcement of other types of private contracts that similarly do not affect third-party interests. I have chosen these two types of family-based contracts because of their inconsistent application in the law. Furthermore, the issue of child rearing and parental rights is often coupled with the issue of marriage; oftentimes, rights that flow from marital status and rights that flow from parental status are intricately connected.⁶

Part II discusses the extent to which, under current law, cohabitation agreements can provide marriage benefits to family formulations that do not meet the traditional requirements of family, and the extent to which co-parenting agreements can secure custody rights to non-legal intended parents that their biological counterparts would get through their genetic connection to their children. This Part focuses specifically on the inconsistency of current law surrounding cohabitation agreements and co-parenting agreements.

While co-parenting contracts that structure parental rights and responsibilities are increasingly enforceable, they are still not

⁵ I submit that these issues have continued relevance and importance even after the Supreme Court invalidated DOMA in *United States v. Windsor*, in part because same-sex marriage is still unrecognized in many states, but also because these problems reach far beyond just those concerns facing same-sex couples.

⁶ See, e.g., Nancy D. Polikoff, *Recognizing Partners but not Parents / Recognizing Parents but not Partners: Gay and Lesbian Family Law in Europe and the United States*, 17 N.Y.L. SCH. J. HUM. RTS. 711, 738 (2000) (describing the “intertwining of marriage and parenting” as seen in cases like *Baehr v. Lewin*, wherein courts equate same-sex couples with negative parenting); Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMP. L. REV. 709, 712 (2002) (discussing the ways in which issues of parenting and child rearing are “often coupled with marriage”).

enforceable in the ways that other contracts are, since the best interest of the child standard generally trumps the individual desires of the contracting parties. Cohabitation agreements are enforced with more frequency than co-parenting agreements, but still with a persistent inconsistency. Where the parties to a contract are a gay or lesbian couple, or an unmarried, cohabitating heterosexual couple, moral and social judgments about sex and sexuality historically influenced the analysis of the contractual issue at hand, sometimes resulting in a contract being held to be against public policy.⁷ While public policy concerns are less of an issue today, parties continue to face the hurdle of showing that a contract exists between non-traditional partners (or even married parties), which, in some states, requires proof of an express, written, and signed agreement.⁸ Courts are otherwise reluctant to enforce implied agreements, considering marriage the ultimate proof of intent to be bound.

Part III discusses the burgeoning debate about the complex ethical and social issues that arise when people try to decide for themselves how to create and structure their own families through contract. In this Part, I make the argument for more consistent and rigorous enforcement of cohabitation and co-parenting agreements, proposing that courts treat such contracts as equivalent to marriage and biology—a seal for demonstrating intent to be bound.

Cohabitation agreements should be recognized as a valid and necessary alternative to marriage. Freedom of contract and the right to privacy should prevent the State from restricting the ability of families to structure their own private relationships. Marriage is, in effect, a choice to be bound to a status relationship that, for some couples, is undesirable because of the traditional norms and trappings of that institution, the hetero-normative implications, and the general government control over family.⁹ Requiring marriage as a means of receiving government benefits and protections artificially restricts private decisions and behavior regarding intimate relations, making marriage effectively “compulsory.”¹⁰ Contracts, at least written ones, can serve the same evidentiary function that marriage does. Both marriage and formal contracts are ways of showing intent to be legally bound.

Similarly, co-parenting agreements should be recognized as a necessary way to harmonize the rights of legal (biological or adoptive)

⁷ See *infra* note 27 and accompanying text.

⁸ See *infra* notes 43–50 and accompanying text.

⁹ Robson, *supra* note 6 (noting that “marriage implicates serious and insoluble problems of equality”).

¹⁰ RUTHANN ROBSON, FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS 313, 324 (Martha Albertson Fineman et al. eds., 2009) (arguing that marriage is a political institution and that the desire or choice to marry should be “open to question”).

and non-legal (non-biological and non-adoptive) intended parents. Co-parenting agreements can co-exist with family law's best interest of the child standard. I propose that an otherwise valid co-parenting agreement between intended parents supplies the presumption that biological parents automatically get through their genetic connection to their children—the presumption that it is in the best interest of the child to be raised by her intended parents. From there, custody determinations would still be made based on the best interests of the child, as with custody determinations involving biological parents where a contract exists, but with the understanding that the intended parent—whose intent is expressed and validated through contract—is the presumed best parent.

I. THE USE AND LIMITATIONS OF CONTRACTS TO PROVIDE NON-TRADITIONAL FAMILIES WITH BENEFITS AWARDED BY MARRIAGE AND BIOLOGY

The traditional family is no longer a reality for many Americans. Today, fewer than a quarter of families consist of married parents and their biological children, and a majority of U.S. families can now be considered what historically has been “non-traditional,” including unmarried cohabitating couples,¹¹ same-sex couples,¹² single-parent households,¹³ extended-family households,¹⁴ as well as older parents.¹⁵

¹¹ The number of non-married heterosexual couples has been increasing rapidly, and the numbers are predicted to continue escalating. Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 J.L. & FAM. STUD. 1, 34 (2007). While the increase in unmarried cohabitation is not restricted to any social or economic groups, the trend is more popular among “lower-income people, African Americans, Latinos (especially Puerto Ricans), and divorced persons.” *Id.*

¹² With growing social acceptance, more and more same-sex couples are openly living together and starting families. In 2000, same-sex couples comprised 594,000 households. Merrill, *supra* note 1, at 510. In 2004, 75,000 or more same-sex couples in the United States were raising children in their homes. Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 YALE J.L. & FEMINISM 83, 90 (2004).

¹³ Single-parent families are the quickest growing family form in America, tripling since 1960. Single-parent families constitute approximately thirty percent of all families with children under age eighteen. CHILD TRENDS DATABANK, FAMILY STRUCTURE: INDICATORS ON CHILDREN AND YOUTH (2014), available at http://www.childtrends.org/wp-content/uploads/2014/07/59_Family_Structure.pdf (highlighting the statistic, but noting that until recently there was no distinction between single-parent families living with only the single parent, and those living with a single parent *and* that parent's partner). Approximately sixty percent of all children will live in a single-parent home before age eighteen. Karl Zinsmeister, *Parental Responsibility and the Future of the American Family*, 77 CORNELL L. REV. 1005, 1005–06 (1992). Additionally, in 2004, one-third of all women giving birth were unmarried. See Kavanagh, *supra* note 12, at 91. Single-parent families can be the result of death, divorce, failed relationships, or decisions to conceive, raise, or adopt a child solo.

¹⁴ An assumption in the United States is that “outsiders’ are . . . peripheral to the family.” See Kavanagh, *supra* note 12, at 95. However, families with multiple caregivers can form a “family

Many couples today are not marrying because the law does not permit it,¹⁶ or are deciding not to marry, perhaps because marriage is no longer a prerequisite to sexual intimacy, cohabitation, or parenthood. Similarly, with the advent of ART providing many artificial methods for people to have children when it is otherwise impossible or infeasible for them to do so naturally, many intended parents are not actually biologically related to their children. Accordingly, married couples with biological children do not necessarily reflect the traditional family form.

Although alternative families are on the rise, lawmaking bodies are struggling to keep up.¹⁷ Despite recent strides in the law's recognition of the rights of same-sex couples,¹⁸ same-sex couples continue to be marginalized in most parts of the country, and opposite-sex cohabitating couples often get treated as friends or acquaintances. Similarly, intended parents with no biological connection to their children often have no legal rights to the custody and care of those children. Despite the increase in divorce and remarriage rates, as well as the prevalence of strong familial bonds between stepparents and stepchildren, the legal status of stepparents is not entirely clear or consistent.¹⁹ Generally, both society and the law, by default, interpret the word "family" to mean people connected by marriage, blood, or adoption. Under this rigidly narrow definition, adults that play important parenting roles often go unacknowledged if they fall outside the "immediate family," even if they provide a degree and level of care that one would normally expect from a parent.²⁰

network" that may include stepparents, grandparents, and a variety of other caregivers such as blood relatives, neighbors, or family friends, either as primary or in addition to primary caregivers. *Id.* at 84–85. Such extended families often offer children a community of adults that they can consistently rely on for care and support. *Id.* at 92.

¹⁵ M. Elliott Neal, Note, *Protecting Women: Preserving Autonomy in the Commodification of Motherhood*, 17 WM. & MARY J. WOMEN & L. 611, 613 (2011).

¹⁶ Currently, thirty-six states and Washington D.C. issue marriage licenses to same-sex couples: California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, and Washington. See *Marriage Center*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/campaigns/marriage-center> (last visited Jan. 6, 2015). California once again allows same-sex couples to wed following the U.S. Supreme Court's decision in the Proposition 8 case, *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013). Additionally, *United States v. Windsor* struck down the federal government's definition of marriage as union of one man and one woman under DOMA. 133 S. Ct. 2675, 2696 (2013).

¹⁷ Merrill, *supra* note 1, at 511–12.

¹⁸ In 2000, Vermont became the first state to grant full benefits of marriage by civil unions to same-sex couples. See VT. STAT. ANN. tit. 15, § 1204 (2014). In 2003, the Massachusetts Supreme Judicial Court held that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violated the Massachusetts Constitution. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003); see also *Windsor*, 133 S. Ct. at 2695; *Hollingsworth*, 133 S. Ct. at 2668.

¹⁹ Margaret M. Mahoney, *Stepparents as Third Parties in Relation to Their Stepchildren*, 40 FAM. L.Q. 81, 82 (2006).

²⁰ Kavanagh, *supra* note 12, at 92.

This Part considers the various ways in which these alternative family formations can achieve parity with their married and biological counterparts through contract. Specifically, this Part examines the success of legal attempts to define family relationships through private contracting, focusing on cohabitation and co-parenting agreements. In these two areas, contracts do not require third-party consent. However, based generally on the notion that the market is not the appropriate mechanism for controlling family formations, courts, to varying degrees, remain hesitant to enforce them.

A. Cohabitation Agreements

There are approximately 1,049 federal laws in the United States Code that consider marital status as a factor.²¹ Most of the legal protections and economic benefits awarded to married couples are not available to non-married couples through contract. This is primarily because “non-parties,” such as the government and private employers, are not bound by the privately established terms.²² On the other hand, some status-based marital benefits can or should be able to be contracted for privately. Parties should be able to contract privately for benefits that involve only the private distribution of property or the private personal lives of members of a family. However, in many cases, the historical emphasis on marriage has trumped or limited private decisionmaking in these areas. Indeed, historically, the law has treated non-married partners as strangers or third parties.²³ This Section

²¹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/OGC-97-16, DEFENSE OF MARRIAGE ACT (1997).

²² Sam Castic, *The Irrationality of a Rational Basis: Denying Benefits to the Children of Same-Sex Couples*, 3 MOD. AM. 3, 6 (2007). Thus, rights regarding tax-filing status and liability, health care coverage, family or medical leave, bankruptcy, social security, immigration, testimonial and other marital privileges, or standing for wrongful death claims cannot be conferred through private contract law. *Id.*

²³ See Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 349 (2002) (explaining that “[l]ike other third parties, when a lesbian coparent seeks ongoing custody and visitation with the biological child of her same-sex partner, she is often unsuccessful in overcoming the constitutional principles of parental autonomy and privacy” (footnote omitted)). For example, rights of inheritance can typically be achieved through a will; however, a will may not completely protect the surviving partner if there is a will contest. If a partner in a non-marital relationship is not included in the will, the survivor has no statutory right to any assets and lacks standing to contest the will. But even if the partner was included in the will, it may be, and often is, challenged by the partner's intestate heirs. E. Gary Spitko, *An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners*, 81 OR. L. REV. 255, 257 (2002). On the other hand, spouses are totally protected—even if there is a will that cuts them out of the inheritance they still get a statutory share. Marital status also plays an important role in guardianship and hospital visitation. Death benefits, power of attorney, succession rights, and medical decisionmaking authority can be protected through private contract in some states. Kathy

specifically addresses the enforceability of cohabitation agreements. Although the law is rapidly changing, some courts still will not enforce a contract between unmarried partners on its face because of the primacy of regulatory law about property distribution and support. These courts are more likely to consider the contract as one factor in determining what is an appropriate property distribution upon a break up.

People enter cohabitation agreements to establish a variety of rights in a relationship, typically those concerning allocation of property, income, dispute resolution, and medical care.²⁴ Rights to property and rights relating to medical decisions are typically granted by law when a couple marries, but must be contracted for when two partners do not have the legal imprimatur of the State.

One of the greatest economic and legal benefits afforded to married couples is equitable division of property upon dissolution of marriage. Under the theory that spouses' monetary and non-monetary contributions are of equal importance to the marriage, spouses share an equitable claim to property and earnings acquired during marriage.²⁵ The equitable division of property guarantees homemakers will be compensated for non-wage labor that they provided in the course of the marriage, and recognizes that marriage is a joint venture of "effort, sacrifice, and mutual support."²⁶ Married couples that divorce are also entitled to an award of maintenance, while an unmarried couple has no such protection upon separating.

Traditionally, contracts between non-married, intimate, cohabitating partners attempting to secure such benefits upon dissolution of the relationship were used with limited success. Courts have historically disfavored private contractual alternatives to marriage, finding them contrary to public policy regardless of the parties' sexual orientation.²⁷ The "whore stigma" perpetuates the taboo of non-marital contracts. Specifically, the whore stigma is not just about loose sexual behavior, but also about women who articulate a monetary worth to

T. Graham, *Same-Sex Unions and Conflicts of Law: When "I Do" May Be Interpreted as "No, You Didn't!"*, 3 WHITTIER J. CHILD & FAM. ADVOC. 231, 232-33 (2004). However, many states do not provide these rights, or if they do, the benefits are extended only to those who register and not to all non-marital couples. Yishai Blank & Issi Rosen-Zvi, *The Geography of Sexuality*, 90 N.C. L. REV. 955, 972-75 (2012); Kimberly Menashe Glassman, Note, *Balancing the Demands of the Workplace with the Needs of the Modern Family: Expanding Family and Medical Leave to Protect Domestic Partners*, 37 U. MICH. J.L. REFORM 837, 868-69 (2004).

²⁴ Brooke Oliver, *Contracting for Cohabitation: Adapting the California Statutory Marital Contract to Life Partnership Agreements Between Lesbian, Gay or Unmarried Heterosexual Couples*, 23 GOLDEN GATE U. L. REV. 899, 913-16 (1993).

²⁵ Shari Motro, *Labor, Luck, and Love: Reconsidering the Sanctity of Separate Property*, 102 NW. U. L. REV. 1623, 1624 (2008).

²⁶ *Id.*

²⁷ 2 HOWARD O. HUNTER & KEITH A. ROWLEY, *Cases Rejecting Marvin Approach*, in MODERN LAW OF CONTRACTS § 24:8 (rev. ed. 2011) (citing *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979)).

their work and companionship. Although contemporary sexual “moral hurdles” are lower than in the past, the taboo of women negotiating their worth is still pervasive. Research shows that women who negotiate job acceptances or salaries fare worse than their female counterparts that do not negotiate.²⁸ The taboo of women who display financial ambition in negotiation could play a significant part in the perception of non-marital contracts as “illicit.”

However, with dramatic changes to societal norms and attitudes regarding cohabitation over the past half-century have come changing attitudes toward cohabitation agreements.²⁹ In the past few decades, the numbers of unmarried cohabitating couples have dramatically risen. In 1960, there were fewer than 500,000 opposite-sex cohabitating couples.³⁰ The total number of cohabitating couples as of 2010 (including both opposite and same-sex couples) was 7,744,711—more than 15 million individuals.³¹ From 2000 to 2010 the number increased by more than 2.2 million households, an increase of roughly forty-one percent.³² Unmarried, opposite-sex couples living together increased by roughly forty percent.³³ Meanwhile, over the same decade, the number of unmarried same-sex couples living together more than doubled, even with the addition of states legalizing same-sex marriage.³⁴ What at one time may have been viewed as different, or even deviant, behavior, cohabitation “is now the normal way to initiate unions.”³⁵

As a result of these changing attitudes, cohabitation contracts have come to be recognized by most courts.³⁶ Since the landmark 1976 *Marvin v. Marvin* decision, courts have begun focusing on the cohabitating parties’ agreements instead of the parties’ status as

²⁸ See Hannah Riley Bowles et al., *Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes It Does Hurt to Ask*, 103 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 84, 98–99 (2007).

²⁹ Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309 (2008). Garrison calls it the “Cohabitation Revolution.” During the Cohabitation Revolution, shifting attitudes toward pre-marital sex combined with advances in technology, including contraceptive devices, resulted in markedly different societal views about traditional marital living arrangements. *Id.* at 312–14.

³⁰ Bowman, *supra* note 11, at 7.

³¹ U.S. CENSUS BUREAU, HOUSEHOLDS AND FAMILIES: 2010, at 5 (2012), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf>.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ Bowman, *supra* note 11, at 8 (footnote omitted).

³⁶ See, e.g., *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976). *Marvin* was one of the first cases to uphold such a contract, finding that “a contract between nonmarital partners is unenforceable only to the extent that it explicitly rests upon the immoral and illicit consideration of meretricious sexual services.” *Id.* at 112. The *Marvin* case began to unravel a long-standing principle that public policy prevents enforcement of contracts between intimate partners engaged in a sexual relationship outside of marriage. WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 690 (3d ed. 2011).

cohabitants.³⁷ In *Marvin*, the court upheld an oral agreement made by an unmarried, cohabitating couple that, upon dissolution of their relationship, they would share all property accumulated during the cohabitation equally.³⁸

However, while post-*Marvin* contracts between cohabitants are now often enforceable,³⁹ there are still some states that refuse to enforce them, and in other states, there are still some hurdles that must be overcome for enforcement. First, even today, Illinois, Georgia, and Louisiana still do not recognize cohabitation contracts between either opposite-sex or same-sex couples.⁴⁰ In other states, cohabitation agreements among opposite sex couples may be routinely enforced, but cases involving same-sex couples are at risk.⁴¹ In many states, cohabitation agreements can give same-sex couples legal protection in the event of dissolution of their relationship,⁴² but couples must carefully draft the contract to ensure the consideration is valid and not meretricious, and thus void.⁴³

Arguably, the greatest hurdle to enforcement of cohabitation agreements is showing that a contract actually exists. Many of the non-enforcement cases stem from the reluctance of some courts to find intent to be bound in these situations, the same thing that underlies a lot of the chestnut contracts cases involving family members. In some cases, the parties only get full contractual rights if they have a formal written contract with all the bells and whistles, and certain jurisdictions will only enforce express, signed, and written agreements.⁴⁴ The implied contract idea is fraught, and to the extent courts divine them, it looks a

³⁷ 2 HOWARD O. HUNTER & KEITH A. ROWLEY, *Developing Recognition of Agreements Between Unmarried Cohabitants—Watershed Case of Marvin v. Marvin*, in MODERN LAW OF CONTRACTS, *supra* note 27, § 24:5; *see also Marvin*, 557 P.2d 106.

³⁸ *Marvin*, 557 P.2d at 115–16.

³⁹ Elizabeth Hodges, Comment, *Will You “Contractually” Marry Me?*, 23 J. AM. ACAD. MATRIMONIAL LAW. 385, 391–92 (2010).

⁴⁰ Long v. Marino, 441 S.E.2d 475, 476 (Ga. Ct. App. 1994); Hewitt v. Hewitt, 394 N.E.2d 1204, 1211 (Ill. 1979); Schwegmann v. Schwegmann, 441 So. 2d 316, 326 (La. Ct. App. 1983).

⁴¹ Historically, cases upholding such contracts did not automatically apply to same-sex couples. *See, e.g.*, Jones v. Daly, 176 Cal. Rptr. 130 (Ct. App. 1981) (refusing to enforce an express cohabitor’s agreement between two men).

⁴² *See generally* Ruthann Robson & S.E. Valentine, *Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 TEMP. L. REV. 511, 521–29 (1990).

⁴³ *See, e.g.*, Croke v. Gilden, 414 S.E.2d 645 (Ga. 1992). In *Croke*, the Georgia Supreme Court upheld a contract between lesbian partners that included a merger clause in their cohabitation contract, “that prohibited the court from considering parol evidence relating to the ‘illegal and immoral’ nature of the relationship.” Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 94 (2001) (footnote omitted). The court upheld the contract, despite the state’s sodomy statute, holding that “even if parol evidence were permissible, any ‘alleged illegal activity was at most incidental to the contract rather than required by it.’” *Id.* (footnote omitted) (quoting *Croke*, 414 S.E.2d at 646).

⁴⁴ Hodges, *supra* note 39, at 391, 401 (“Intent is the most important part of the contract, [and] a written agreement allows for the court to clearly determine intent.”).

lot more like government regulation than private ordering anyway.⁴⁵ Ultimately marriage is akin to the ultimate “seal” in terms of demonstrating intent to be bound.

For example, under Minnesota, Texas, and Michigan law, cohabitation agreements between opposite sex couples regarding property and financial interests are only enforced where there is a signed writing, and where enforcement is sought after the relationship has ended.⁴⁶ New York is similarly reluctant to enforce implied cohabitation agreements because of the difficulty in determining each party’s actual intentions.⁴⁷ For example, in *Morone v. Morone*, an opposite-sex couple held themselves out to the community as husband and wife for over twenty years, had two children together, and allegedly entered into an oral partnership agreement for plaintiff’s furnishing of domestic services in return for defendant’s financial support.⁴⁸ The *Morone* court held that it was unreasonable to infer a paid agreement for services where the relationship of the parties “makes it natural that the services were rendered gratuitously.”⁴⁹ Further, the *Morone* court expressed concern that recognizing an implied agreement between the cohabitating parties would be tantamount to restoring common law marriage, which has been abolished in New York.⁵⁰ The court further held that determination of the true intention of each party in hindsight runs the risk of “emotion-laden afterthought” and potential fraud.⁵¹

Not only do cohabitation agreements have to be in writing in many states, but also, the parties typically have to overcome a presumption that their agreements were based on illicit sex.⁵² To do so, parties generally must show adequate consideration, such as when one party renders services that would otherwise be paid for (e.g., housekeeping, companion services, or cooking) in exchange for financial support.⁵³ Thus, cohabitation agreements that involve language that does not focus on the emotional or romantic aspects of the relationship, but instead, uses language more typically found in business agreements, are more

⁴⁵ *Id.* at 392.

⁴⁶ MINN. STAT. ANN § 513.075 (West 2012). This statute uses the language “man and woman” and has not been successfully challenged on equal protection grounds. See *Rodlund v. Gibson*, No. A06-2255, 2008 WL 73548, at *3 (Minn. Ct. App. Jan. 3, 2008); see also TEX. FAM. CODE ANN. § 1.108 (West 2011).

⁴⁷ *Morone v. Morone*, 413 N.E.2d 1154, 1157 (N.Y. 1980).

⁴⁸ *Id.* at 1155.

⁴⁹ *Id.* at 1157 (citations omitted).

⁵⁰ *Id.* at 1157–58.

⁵¹ *Id.* at 1157.

⁵² 2 HOWARD O. HUNTER & KEITH A. ROWLEY, *Common-Law Rule: Agreements Void and Unenforceable*, in MODERN LAW OF CONTRACTS, *supra* note 27, § 24:2.

⁵³ Martha M. Ertman, *Contractual Purgatory for Sexual Minorities: Not Heaven, But Not Hell Either*, 73 DENV. U. L. REV. 1107, 1137–38 (1996).

likely to be enforceable.⁵⁴ For example, if the cohabitation agreement focuses on business-related services furnished by one partner in exchange for financial support by the other partner, it is more likely to be upheld than if the agreement focused on a promise to provide love and companionship in exchange for financial support.⁵⁵

This economic bargain analysis is often difficult for cohabiting couples to satisfy because cohabiting couples, especially those of the same sex, are less gender-orientated and more likely to equally divide household tasks than married couples.⁵⁶ Of course, gender roles within the marriage are also less rigid than they once were.⁵⁷ Additionally, such lines of inquiry are often invasive of privacy because parties are typically required to expose intimate details in order to prove the existence of an implied contract or its nature. In the bigger picture, women in equitable households are less likely to be recognized as being in a socially viable relationship worth legal protections. The “standards” to be met have conservative undercurrents, including who “needs” or is “worth” the court’s protection and what kind of relationships are “real” (a trope that has also discouraged immigrants from forming legally recognized partnerships).

In effect, another limitation to the enforcement of cohabitation agreements is that the parties thereto generally cannot be married. While unmarried cohabiting couples can get away with framing their relationship as an economic one, married couples usually cannot. Where married people provide services for each other, there is a well-established presumption that the services are provided gratuitously and, therefore, such contracts between spouses are often not enforceable.⁵⁸ The unwillingness of many courts to enforce inter-spousal contracts can be explained by the need to maintain the separation between economic exchange and intimacy. This “anti-commodification” position is another way in which courts seek to protect intimate relations from the market, which, some believe, could undermine the dignity of marriage,

⁵⁴ *Id.* at 1137; Robson & Valentine, *supra* note 42, at 541 (“[W]hile contracts may . . . benefit individual lesbians, the origins and assumptions of contract ideology render relationship contracts questionable.”).

⁵⁵ Ertman, *supra* note 53, at 1138.

⁵⁶ Katharine K. Baker, *The Stories of Marriage*, 12 J.L. & FAM. STUD. 1, 27 (2010); Bowman, *supra* note 11, at 35.

⁵⁷ Bowman, *supra* note 11, at 35.

⁵⁸ *Miller v. Miller*, 35 N.W. 464, 464 (1887) (refusing to enforce a husband’s promise to pay his wife for housework and other domestic duties, holding that there was no consideration because the wife already owed those duties to her husband—“the plaintiff merely agreed to do what by law she was bound to do”); *Brooks v. Steffes*, 290 N.W.2d 697, 702 (Wis. 1980) (stating “[w]here there is a close family or marriage relationship, the law presumes the services are performed gratuitously, and the law will not imply from the mere rendition of services by one family member to another a promise to pay”).

“denigrate[] the emotional significance of home labor,”⁵⁹ and “violate the norms of love that are supposed to govern marital relations.”⁶⁰ As a result, one unintended consequence of such rules seems to be that courts may uphold economic arrangements among unmarried cohabitating partners where the same arrangement between married couples would not be upheld.⁶¹

While the cases reward unmarried cohabitants, giving household work a monetary value, they implicitly foreclose the possibility of stay-at-home spouses—usually wives—from receiving compensation for similar household work, reinforcing the belief that such services are part of the presumed gratuitous duties of a marital relationship. The presumption undervalues the labor associated with the marital relationship, when courts are less willing to enforce promises in that arena.

At the same time, the rules require courts to treat same-sex couples or other unmarried couples in a committed intimate relationship as friends or co-workers in order to justify enforcement of a contract between them. Characterizing the relationship as simply a contractual one—without acknowledging any sexual and personal relationship between the parties—reflects the discomfort of some courts with addressing sexuality. Also, with parameters that distinguish married couples from unmarried couples, the presumption fails to recognize the value of love and commitment between unmarried couples. Unmarried couples should not have to downplay or ignore their intimate relationship to have their contracts enforced.

When the court does actually acknowledge the sexuality or sexual relationship of unmarried parties, such acknowledgment may pose an additional hurdle for the enforcement of a contract between two people

⁵⁹ Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 81, 95 (1997).

⁶⁰ Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 500 (2005). But this argument for the regulation of economic exchanges in the household reinforces the gendered nature of home labor and disproportionately harms poorer people and usually poor women. Failure to enforce inter-spousal contracts undervalues the labor associated with the marital relationship.

⁶¹ Compare *Miller*, 35 N.W. at 464 (refusing to enforce a husband's promise to pay his wife for housework and other domestic duties based on lack of consideration) with *Brooks*, 290 N.W.2d 697 (finding that a contract implied in fact existed between two people who were in a sexual relationship and who lived together, but who were married to other people, for the household chores and services one provided to the other before his death), and *Van Brunt v. Rauschenberg*, 799 F. Supp. 1467, 1471 (S.D.N.Y. 1992) (enforcing an oral contract between an unmarried same-sex couple, wherein one partner promised to “devote his life, both personally and professionally” to the other—a well-known artist with whom he had a twenty-two-year relationship but to whom he was not married—in return for the second partner's payment of his taxes and copies of artwork produced). In upholding the contract, the *Van Brunt* court barely mentioned the decades-long sexual relationship between Van Brunt and Rauschenberg, instead saying, “[t]his is not a case involving an illicit sexual relationship. Nor is it a case where the services provided were of the type usually rendered gratuitously.” *Id.*

of the same sex because of moral and social judgments about sexuality and sexual orientation—though these cases have become more and more rare. For example, in *Jones v. Daly*,⁶² the court refused to enforce an express cohabitation agreement between two men. The gay couple had an agreement almost identical to one recognized and enforced in *Marvin v. Marvin*, a case involving cohabitants of the opposite sex.⁶³ The court, however, found that the contract in *Jones* rested upon meretricious consideration.⁶⁴ The couple had agreed that during the time they lived and cohabited together, they would hold themselves out to the public at large as “cohabitating mates” and one partner, Jones, would abandon his career so that he could render his services to the other, Daly, as “a lover, companion, homemaker, traveling companion, housekeeper and cook.”⁶⁵ The court found that because Jones “allowed himself to be known to the general public as the ‘lover and cohabitation mate’ of Daly,” one could conclude that Jones’s “rendition of sexual services to Daly was an inseparable part of the consideration for the ‘cohabitators agreement,’ and indeed was the predominant consideration.”⁶⁶ The court determined that the terms “lover” and “cohabitation mate” in the context of the cohabitation agreement between Daly and Jones are not innocuous, but instead, “can pertain only to [Jones’s] rendition of sexual services to Daly.”⁶⁷ This is because, the court reasoned, “lover” can have many meanings; “while one meaning of the word ‘lover’ is paramour, it also may mean a person in love or an affectionate or benevolent friend.”⁶⁸

The number of unmarried same-sex and opposite-sex cohabiting couples has dramatically risen over the last fifty years and the growth in these types of living arrangements does not appear to be slowing down anytime soon. Although more common today than ever, cohabitants cannot be sure of their rights, which may depend on where they live and the exact contours of their contracts. While the recent trend favors enforcement of both express and implied cohabitation agreements, some states will only enforce specific written agreements, and a few remaining states will not enforce any form of cohabitation agreement. Ultimately, putting agreements in writing, and thus showing each parties’ intent to be bound by the terms of the agreement, provides the best protection to unmarried cohabitating couples.

⁶² 176 Cal. Rptr. 130 (Ct. App. 1981).

⁶³ See *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976) (finding a cohabitation agreement between unmarried, opposite-sex cohabitants was enforceable unless it explicitly rested on meretricious consideration).

⁶⁴ *Jones*, 176 Cal. Rptr. at 133.

⁶⁵ *Id.* (internal quotation marks omitted).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* (citation omitted).

B. *Co-Parenting Agreements*

There are a variety of scenarios under which a party might be seeking to uphold a co-parenting agreement. Parenting contracts can be made pre-conception or post-break up, and they can be express or implied. These contracts can exist between same- or opposite-sex cohabitating, or married couples, or between two people who are not a couple at all. In some cases the two parents conceive the child with the intent to be co-parents from the beginning, while in other cases, one parent might have had the child before the second caregiver gets involved.⁶⁹ In addition, some contracts may involve more than two parties.⁷⁰ Finally, plaintiffs in lawsuits involving parenting contracts may be in pursuit of custody, visitation, or economic support from a non-legal parent.

This Section examines the extent to which contracts are likely to be enforceable in each of these circumstances. As with cohabitation agreements, courts do not agree on the legality of co-parenting agreements. But the trend, as compared to cohabitation agreements, tilts more strongly toward non-enforcement. Generally, when courts are willing to consider parenting agreements, they tend to be more willing to impose financial obligations on non-legal co-parents than they are to award non-legal co-parents custody or visitation. This is especially true where the non-legal parent is the same sex as the biological parent. Paradoxically, express co-parenting agreements between parties of the same sex are often found unenforceable for policy reasons surrounding fitness to parent, while implied contracts are often enforced to prevent a same-sex partner from avoiding financial responsibility for a child.

Because family law demands that custody determinations be made according to the best interest of the child, private contracts seeking to establish custody arrangements have historically been disfavored, with the leanest protection for private contracts where a non-legal, same-sex parent seeks custody of a child.⁷¹ Various presumptions in favor of biological parents affect the best interest of the child analysis, leaving non-legal parents more vulnerable. Heterosexual couples, wherein both the woman and man are biologically related to their children, automatically enjoy a constitutional right to the care and custody of

⁶⁹ See, e.g., *Buness v. Gillen*, 781 P.2d 985, 988 (Alaska 1989) (involving a contract with a person “who has a significant connection with the child”); *In re J.W.F.*, 799 P.2d 710 (Utah 1990) (involving a parenting contract with a stepparent).

⁷⁰ See generally Melanie B. Jacobs, *More Parents, More Money: Reflections on the Financial Implications of Multiple Parentage*, 16 *CARDOZO J.L. & GENDER* 217, 218 (2010).

⁷¹ Katherine M. Swift, *Parenting Agreements, The Potential Power of Contract, and the Limits of Family Law*, 34 *FLA. ST. U. L. REV.* 913, 915–16 (2007).

their children.⁷² This is true even where the parents are not married.⁷³ Further, children born within marriage are presumed to be a product of that marriage even if the child is not the biological child of one of the parents,⁷⁴ whereas unmarried couples, domestic partners, or couples who are not both “natural” parents do not benefit from this presumption.⁷⁵ Where there is a constitutional right to care and custody of a child, the presumption is that it is in the best interest of the child for such “parents” to raise and care for their children, without regard to other factors. Where there is no constitutional right to care and custody of the child, the best interest of the child analysis demands more rigorous consideration of a variety of factors.

In the traditional model, a man and woman fall in love, get married, make a plan to have children, prepare a secure home in which their children will be safe, supported, and loved, and proceed as best they can with this plan. If this couple does not separate, and the man and woman are not found to be unfit parents (i.e., through abuse or neglect), they can raise their child as they choose, and they need not contract for any rights related to their child.⁷⁶ If they are both fit parents, even if they separate, they will both have a right to visitation and/or custody of their children.⁷⁷

⁷² *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (noting that “[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court”).

⁷³ *Stanley v. Illinois*, 405 U.S. 645 (1972); *see also Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (discussing “[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child” (emphasis added)).

⁷⁴ *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (upholding conclusive presumption that a child born into marriage is the legal child of the mother’s husband).

⁷⁵ States vary on whether the due process rights of the biological parent prevent the non-biological parent’s pursuit of custody or visitation. *Compare Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991) (holding that former lesbian partner lacked standing as either de facto parent or parent by estoppel to seek visitation of a child she helped raise for two years because she was neither biological nor adoptive parent), *with In Re Parentage of L.B.*, 122 P.3d 161, 163 (Wash. 2005) (en banc) (holding that Washington’s common law recognized former partner’s de facto parentage claim and granted standing to petition for a determination of rights of legal parentage).

⁷⁶ *See, e.g., Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (stating that “[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder” (citation omitted)); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (establishing the right of parents “to direct the upbringing and education of children under their control” and stating that “[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations”); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (recognizing the right of parents to “establish a home and bring up children” as well as to control their children’s education).

⁷⁷ *See Stanley v. Illinois*, 405 U.S. 645, 649 (1972) (holding that due process entitles parents to a hearing on their fitness as parents before their children are taken from them). *But see Quilloin v. Walcott*, 434 U.S. 246 (1978) (holding that an unwed father who never sought custody or a relationship with his natural child did not have a right to object to the child’s adoption by the child’s stepfather).

In partnerships that cannot result in a child who is biologically related to both parents (i.e., where one or both members of a heterosexual partnership cannot reproduce, or in a same-sex partnership), the couple may follow many of the same steps as the first couple, but these steps will not yield the same rights. For a couple that has a “non-biological” child, the two parents may fall in love, get married, make a plan to have children, prepare a secure home in which their children will be safe, supported, and loved, and the couple may proceed with this plan as best they can.

However, unlike the first couple, this second couple will produce a child that is not biologically related to one or both parents. The second couple may require the donation of an egg, or sperm, or both, and may also require that a woman outside of the partnership carry the child in some form of surrogacy arrangement. The members of this second couple may be no less committed to nurturing and loving their child. They may be just as thoughtful about their family planning as the first couple. In fact, they will likely devote more time and resources to family planning because it requires more complex arrangements and reproductive technology.

However, depending on the state she lives in, a member of the second couple who is not biologically related to her child will *not* have an automatic right to the care and custody of the resulting child.⁷⁸ Rather, courts may be forced to look at the relationship of the parties in order to ascertain to what extent they are responsible for a child.⁷⁹ Even in California, for example, which permits a same-sex partner to become the legal parent of a non-birth, non-genetic child through second-parent adoption (without terminating the legal status of the original parent),

⁷⁸ See *DeBoer by Darrow v. DeBoer*, 509 U.S. 1301, 1302 (1993) (holding that neither the state law in question nor federal law “authorizes unrelated persons to retain custody of a child whose natural parents have not been found to be unfit”); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (discussing the fundamental constitutional right of *natural* parents to the care and custody of their children and emphasizing this right in the context of “blood relationships”); *Windsor v. United States*, 699 F.3d 169, 207 (2d Cir. 2012) (Straub, J., dissenting in part and concurring in part) (“The Court has indicated repeatedly that history and tradition are the source for supplying . . . content to th[e] Constitutional concept that biological family units are afforded additional protections under our nation’s laws.”) (alterations in original) (internal quotation marks omitted) (citing *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (Powell, J., plurality opinion)).

⁷⁹ In traditional surrogacy agreements where a married woman is genetically unrelated to the child the marital presumption may not be recognized. See *In Re Parentage of a Child*, 16 A.3d 386, 397 (N.J. Super. Ct. App. Div. 2011). However, with gestational surrogacy agreements, where a third party gives birth to a child genetically related to the wife and husband, the marital presumption is more likely to be recognized. *E.g.*, *Johnson v. Calvert*, 851 P.2d 776, 777–78 (Cal. 1993) (finding the gestational surrogate had no legal rights to the child); *cf.* *Doe v. Attorney General*, 487 N.W.2d 484, 489 (Mich. Ct. App. 1992) (voiding gestational surrogacy agreement banned by state statute). See generally James Healy, Comment, *Band-Aid Solutions: New York’s Piecemeal Attempt to Address Legal Issues Created by DOMA in Conjunction with Advances in Surrogacy*, 31 PACE L. REV. 691, 694, 696 (2011).

the right to care and custody of a “non-genetic” child is not automatic. Two same-sex parents must affirmatively show that they intended to parent together, a requirement not asked of two “biological” parents.⁸⁰ Since “obvious parenting behaviors” are not always enough to convince a court that a child has two parents of the same sex, many same-sex co-parents rely on private contract law to demonstrate their parental intent.⁸¹

In some states, if the child is biologically related to someone outside of the partnership, that person may have equal or even superior rights to the child.⁸² It has been noted:

Third parties who have become “psychological” parents are faced with an obstacle not faced by biological or adoptive parents: they may be precluded from even petitioning for custody of a child with whom they have had a parent-child relationship because of the difficulty of establishing their standing to do so. Standing requirements were incorporated into child custody law as a means of maintaining the “superior rights” doctrine, a presumption of long standing in most states . . . that unless found in some broad sense “unfit,” a biological or adoptive parent is the best person to raise and nurture a child.⁸³

⁸⁰ Raftopol v. Ramey, 12 A.3d 783, 785–86 (Conn. 2011) (requiring a same-sex domestic partner of a biologically related father to show intent to parent through proof of a valid gestational agreement); Della Corte v. Ramirez, 961 N.E.2d 601, 603 (Mass. App. Ct. 2012) (stating that “[w]hen there is a marriage between same-sex couples, the need for that second-parent adoption to, at the very least, confer legal parentage on the non-biological parent is eliminated when the child is born of the marriage”).

⁸¹ Monica K. Miller, *How Judges Decide Whether Social Parents Have Parental Rights: A Five-Factor Typology*, 49 FAM. CT. REV. 72 (2011).

⁸² See *In re Baby M*, 537 A.2d 1227, 1253 (N.J. 1988) (refusing to terminate the biological (surrogate) mother’s right to the child although the biological father and his wife had a surrogacy contract with her); see also LINDA ELROD, CHILD CUSTODY PRACTICE AND PROCEDURE § 1:3 (2012). Even where a child is born within a heterosexual marriage, but is not the husband’s child (i.e., the child is the result of an extra-marital affair), courts will look at public policy and the child’s best interests to determine which man is the legal father. See, e.g., *Brian C. v. Ginger K.*, 92 Cal. Rptr. 2d 294, 313 (Ct. App. 2000) (denying wife’s motion for summary judgment in an action by biological father to establish a parent-child relationship with child born within the wife’s marriage to another man); *Boone v. Ballinger*, 228 S.W.3d 1, 13 (Ky. Ct. App. 2007) (allowing biological father to petition for custody or visitation of children born within their mother’s marriage to another man, even where biological father potentially waived his superior custodial right to the children as against the husband); see also *Lehr v. Robertson*, 463 U.S. 248, 262 (1983) (noting that “[t]he significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring”).

⁸³ Lawrence Schlam, *Children “Not in the Physical Custody of One of [Their] Parents:” The Superior Rights Doctrine and Third-Party Standing Under the Uniform Marriage and Dissolution of Marriage Act*, 24 S. ILL. U. L.J. 405, 406–07 (2000) (footnotes omitted); see also Kathy T. Graham, *Same-Sex Couples: Their Rights as Parents, and Their Children’s Rights as Children*, 48 SANTA CLARA L. REV. 999, 1012 (2008) (pointing out that “[i]n [the] rare cases where a natural parent either consents to or is forced to give another person custody rights to his or her child, the natural parent continues to have legal rights to the child unless parental rights are terminated. In these situations, the natural parent shares his or her rights with others who have provided care for

In addition, if one member of the second couple is biologically related to the child, her rights relating to the child will be superior to her partner's rights.⁸⁴

Ultimately, the only way for a non-biological parent (who has not adopted her intended child) to gain standing to sue for custody is through contract, and, as with cohabitation agreements, the enforceability of the contract may hinge on whether it is express or implied. If the non-biological parent succeeds in gaining standing through the contract, she must still make an affirmative showing that custody or visitation will be in the child's best interest before gaining any custodial rights. Because there is no presumption in favor of the non-biological parent, the contract becomes, at best, one factor in the determination of the best interests of the child. Whereas marriage is the ultimate seal of intent to be bound with respect to rights between unmarried cohabiting couples, biology is the ultimate seal of intent to be bound with respect to parenting.

1. Implied Co-Parenting Agreements for Financial Support

Co-parenting agreements seem most often to be enforced in the context of a biological parent trying to get financial support from a non-biological/non-adoptive co-parent. In these cases, typically the court will find an implied contract for support, even where the parties did not expressly articulate the terms.⁸⁵ Some courts have used the doctrine of equitable estoppel in conjunction with an implied contract to hold parties responsible for paying child support, "not only in the absence of a biological or adoptive connection to the subject child, but in the

the child. But the natural parent is presumed to have the superior right to care for and have custody of the child. If the natural parent no longer is willing to share the child with the adult who has assumed the role of parent, the natural parent is entitled to make that choice"). *But see* Michael H. v. Gerald D., 491 U.S. 110, 119–20 (1991) (holding that a biological father's constitutional rights were not violated by a state statute creating a conclusive presumption that children born during marriage were the children of the husband, although not biologically related to him).

⁸⁴ Graham, *supra* note 83, at 1001, 1017. Graham notes that whether in the case of a heterosexual stepparent or a non-biological parent in a same-sex partnership, the law favors the "natural" or biological parents:

Not surprisingly, a natural parent who has custody would lose custodial rights only if proven to be unfit or it is proven that it will be detrimental to the child's interests to give custody to the natural parent. And even then the noncustodial parent would likely have rights superior to the rights of the gay or lesbian partner.

Id. at 1017 (footnote omitted). Outside of formal adoption, "the law does not protect the relationship between the child and the non-birth parent in a same-sex relationship." *Id.* at 1001.

⁸⁵ See, e.g., *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005); *H.M. v. E.T.*, 906 N.Y.S.2d 85 (App. Div. 2010); *Laura WW. v. Peter WW.*, 856 N.Y.S.2d 258 (App. Div. 2008); *In Re Baby Doe*, 353 S.E.2d 877 (S.C. 1987).

absence of an established parent-child relationship, where those parties agreed either to adopt the child or to cause the child's conception through [artificial insemination by donor (AID)].⁸⁶ Courts have reasoned that if an unmarried person "who biologically causes conception through sexual relations without the premeditated intent of birth is legally obligated to support a child, then the equivalent resulting birth of a child caused by the deliberate conduct of artificial insemination should receive the same treatment in the eyes of the law."⁸⁷

In the case of opposite-sex couples, equitable estoppel is often utilized as a preventative measure against supposed fathers who foster a relationship with the child and later deny paternity in an attempt to avoid paying child support.⁸⁸ For example, in *Wener v. Wener*, the court held "that a husband could be required, under the 'dual foundation' of equitable estoppel and implied contract, to support a child whom he had neither fathered nor adopted."⁸⁹

The "implied promise-equitable estoppel approach" was recently applied to a lesbian couple in New York. In *Matter of H.M. v. E.T.*, the lesbian couple had a child conceived through AID while they were together.⁹⁰ After the dissolution of the relationship, H.M., the biological mother of the child, filed a petition seeking child support from E.T., "predicated upon a determination, through the application of the doctrines of equitable estoppel and implied contract, that E.T. is chargeable with the support of the subject child, and is not entitled to disclaim that obligation."⁹¹ H.M. asserted that she agreed to conceive the child through AID, and she allegedly relied upon E.T.'s promise of support when she conceived the child.⁹² The court found in favor of H.M., stating that:

By parity of reasoning [from *Wener*], we hold that where the same-sex partner of a child's biological mother consciously chooses, together with the biological mother, to bring that child into the world through AID, and where the child is conceived in reliance upon the

⁸⁶ See, e.g., *H.M.*, 906 N.Y.S.2d at 87 (citing *Laura WW.*, 856 N.Y.S.2d 258; *Wener v. Wener*, 312 N.Y.S.2d 815, 818 (App. Div. 1970); *Karin T. v. Michael T.*, 484 N.Y.S.2d 780 (Fam. Ct. 1985); *Gursky v. Gursky*, 242 N.Y.S.2d 406, 411 (Sup. Ct. 1963)).

⁸⁷ *In re Parentage of M.J.*, 787 N.E.2d 144, 152 (Ill. 2003).

⁸⁸ See, e.g., *H.M.*, 906 N.Y.S.2d at 86-87.

⁸⁹ *Id.* at 87 (citing *Wener*, 312 N.Y.S.2d at 818). This approach was later sanctioned by the Court of Appeals, New York's highest court, in *In re Baby Boy C.*, 638 N.E.2d 963, 967-68 (N.Y. 1994).

⁹⁰ *H.M.*, 906 N.Y.S.2d 85.

⁹¹ *Id.* at 86-87.

⁹² *Id.*

partner's implied promise to support the child, a cause of action for child support . . . has been sufficiently alleged.⁹³

However, even implied parenting contracts for child support are not always enforced for public policy reasons. For instance, in *T.F. v. B.L.*, two women lived together for four years and during that time plaintiff became pregnant through artificial insemination. The couple then separated and after giving birth to the child, the plaintiff brought a claim for child support against defendant asserting theories of promissory estoppel and breach of contract. Despite evidence that an implied co-parenting contract existed between the child's biological mother and same-sex partner, and evidence that the co-parent functioned as a parent, the court held that "parenthood by contract" is not the law of Massachusetts. Whether implied or express, the agreement was unenforceable as a matter of "public policy" and thus defendant had no obligation to pay child support.⁹⁴ The court reasoned that prior agreements about entering into family relationships including marriage and parenthood are deeply personal matters not for the court's enforcement.⁹⁵

Nonetheless, it is not difficult to see why most courts are willing to imply contracts for support in the types of cases discussed above, in light of concerns for the best interests of the child. There is little controversy over the idea that an intended parent should provide economic support for a child, and that such support will generally be in the best interests of that child. Co-parenting contracts are much trickier, however, when the terms go beyond financial support and move into the realm of visitation and custody.

2. Express or Implied Co-Parenting Agreements for Custody and Visitation

Co-parenting agreements for custody are less frequently enforced. Such contracts have been enforced in a few states, including Ohio,

⁹³ *Id.* at 88 (citations omitted).

⁹⁴ *T.F. v. B.L.*, 813 N.E.2d 1244, 1250–51 (Mass. 2004).

⁹⁵ *Id.* (citing *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1059 (Mass. 2000)); *see also* *Wakeman v. Dixon*, 921 So. 2d 669 (Fla. Dist. Ct. App. 2006) (holding that sperm donation and co-parenting agreements between former lesbian partner and biological mother of two children were unenforceable, despite the partner's support of the children and being the de facto parent); *Sporleder v. Hermes*, 471 N.W.2d 202 (Wis. 1991) (holding in part that plaintiff, a woman seeking custody and visitation of minor adopted son of former partner of eight years, did not have standing under *loco parentis* doctrine and the co-parenting agreement between the parties was not enforceable with regard to physical custody or visitation rights to the child); Brian H. Bix, *Private Ordering and Family Law*, 23 J. AM. ACAD. MATRIMONIAL LAW. 249, 273 n.83 (2010).

North Carolina, and most recently Kansas.⁹⁶ In these states, a parent's right to care, custody, and control can be shared by consenting to a co-parenting agreement. Courts in these states generally view the biological parent's consent to the co-parenting agreement as equivalent to the consent surrounding the creation of de facto parentage or second-parent adoption.⁹⁷ For example, in *Frazier v. Goudschaal*,⁹⁸ two women had signed a co-parenting agreement in which one of the women would give birth to two children through use of assisted reproductive technology and the other woman would be a "de facto parent." The court upheld the contract, holding that, although the biological mother's rights were initially paramount, after the biological mother exercised her "parental preference" by entering into the co-parenting agreement, her parental preference was waived.⁹⁹ The court noted that it "should not be required to assign to a mother any more rights than that mother has claimed for herself."¹⁰⁰ The court went on to state:

If a parent has a constitutional right to make the decisions regarding the care, custody, and control of his or her children, free of government interference, then that parent should have the right to enter into a coparenting agreement to share custody with another without having the government interfere by nullifying that agreement, so long as it is in the best interests of the children.¹⁰¹

However, courts have generally been reluctant to enforce co-parenting agreements that specify custody and visitation arrangements because of the extent to which they are able to circumvent an analysis of the best interest of the child.¹⁰² To the extent courts are willing to consider co-parenting agreements for custody, the agreements are almost never dispositive in granting custody or visitation rights. Rather, these agreements are only one of many factors in determining the best interests of the child. For example, in *Mason v. Dwinnell*,¹⁰³ the court held that a non-biological partner had standing to bring a custody

⁹⁶ See, e.g., *Frazier v. Goudschaal*, 295 P.3d 542 (Kan. 2013); *Mason v. Dwinnell*, 660 S.E.2d 58, 67 (N.C. Ct. App. 2008); *In re J.D.M.*, Nos. CA2003-11-113, CA2004-04-035, CA2004-04-040, 2004 WL 2272063 (Ohio Ct. App. Oct. 11, 2004).

⁹⁷ See Joanna L. Grossman, *Parenthood by Contract: The Kansas Supreme Court Enforces a Lesbian Co-Parenting Agreement*, JUSTIA (Apr. 16, 2013), <http://verdict.justia.com/2013/04/16/parenthood-by-contract>.

⁹⁸ 295 P.3d 542.

⁹⁹ *Id.* at 556 (citing *In re Marriage of Nelson*, 125 P.3d 1081, 1086–88 (Kan. Ct. App. 2006)).

¹⁰⁰ *Id.* at 557.

¹⁰¹ *Id.* See generally Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 FAM. L.Q. 1 (2013).

¹⁰² See, e.g., *Alison D. v. Virginia M.*, 572 N.E.2d 27, 32 (N.Y. 1991) (noting that "when there is a conflict, the best interest of the child has always been regarded as superior to the right of parental custody" (quoting *Bennett v. Jeffreys*, 356 N.E.2d 277 (N.Y. 1976)) (internal quotation mark omitted)).

¹⁰³ *Mason v. Dwinnell*, 660 S.E.2d 58 (N.C. Ct. App. 2008).

action based on an express co-parenting agreement acknowledging the partner as a de facto parent. However, the court held that the custody dispute should not be determined solely by the co-parenting agreement, but rather by the best interests of the child.¹⁰⁴ The court found that the biological legal parent's actions, including the execution of a co-parenting agreement, manifested intent to jointly create a family with her partner and identify her partner as an equal co-parent.¹⁰⁵

Although some courts have begun enforcing co-parenting contracts as described above, non-legal, same-sex co-parents still generally face "incredible hurdles" and no real legal protection in most states.¹⁰⁶ Some states that view same-sex unions as immoral are hesitant to enforce a contract that would allow same-sex couples to "opt in to state recognition of their status as 'co-parents.'"¹⁰⁷ Some states have other established methods, such as second-parent adoption, or legislative solutions that recognize "the validity of a bond between a same-sex coparent and his/her child,"¹⁰⁸ but will not enforce contracts outside that scope. In such cases, families headed by same-sex co-

¹⁰⁴ *Id.*; see also *J.A.L. v. E.P.H.*, 682 A.2d 1314, 1321 (Pa. Super. Ct. 1996) (holding that mother's former domestic partner had standing to bring partial custody action based on evidence, including a co-parenting agreement, that former domestic partner and child were co-members of non-traditional family).

¹⁰⁵ *Mason*, 660 S.E.2d 58; see also *In re Bonfield*, 780 N.E.2d 241 (Ohio 2002) (upholding a parenting agreement between two women, one of whom was a biological parent, but still making the non-biological parent's rights contingent on the best interest of the child). Likewise, in *Holtzman v. Knott*, 533 N.W.2d 419, 434-35, 37 (Wis. 1995), where there was no express co-parenting agreement, but presumably an implied one, the court determined visitation rights based on the best interests of the child, not based on the implied agreement. The best interests of the child, in turn, were determined by the party's past parental function. *Id.*

¹⁰⁶ *Lewis v. Harris*, 908 A.2d 196, 217 (N.J. 2006) (noting that "committed same-sex couples and their children are not afforded the benefits and protections available to similar heterosexual households"); Joyce Kauffman, *Protecting Parentage with Legal Connections*, 32 FAM. ADVOC. 24 (2010); Marissa Wiley, Note, *Redefining the Legal Family: Protecting the Rights of Coparents and the Best Interests of Their Children*, 38 HOFSTRA L. REV. 319, 319-20 (2009) (recognizing numerous ways same-sex couples can protect their family interests, but explaining that "[d]espite the coparents' intent to conceive and raise a child together, and despite long-standing, nurturing, supporting, and loving parental roles, a same-sex coparent is often a third party in the eyes of the law" (footnote omitted)).

¹⁰⁷ *Bix*, *supra* note 95, at 274 n.86 (noting that about forty states "expressly refuse to recognize same-sex marriage of other jurisdictions, and some of those more broadly refer to other same-sex relationships" (quoting Matthew J. Eickman, *Same-Sex Marriage: DOMA and the States' Approaches*, Fam. L. Rep. (BNA) No. 122, at 1383, 1385 (June 22, 2010)) (internal quotation marks omitted)).

¹⁰⁸ Wiley, *supra* note 106, at 320; see also Deborah L. Forman, *Same-Sex Partners: Strangers, Third Parties, or Parents? The Changing Legal Landscape and the Struggle for Parental Equality*, 40 FAM. L.Q. 23, 43 n.105 (2006) (noting that "[t]he National Gay and Lesbian Task Force has identified twenty-five states authorizing second-parent adoption either by statute or by appellate or trial court decisions" (citation omitted)).

parents typically remain less protected and more vulnerable than those headed by heterosexual parents.¹⁰⁹

For example, in *Wakeman v. Dixon*,¹¹⁰ same-sex partners agreed to “jointly parent the child” and to make equal financial support contributions.¹¹¹ After the second child’s birth, both partners executed an affidavit of domestic partnership to allow Dixon and the two children to receive health insurance coverage under Wakeman’s medical plan.¹¹² A few months after, the same-sex partners’ relationship dissolved and Dixon relocated with the two children.¹¹³ Consequently, Wakeman turned to the judicial system seeking a declaration of parental rights to the children.¹¹⁴ However, the trial court ruled that it had no authority to compel visitation, despite evidence of two co-parenting agreements.¹¹⁵ On appeal, the court determined the agreements were unenforceable because Florida law “does not allow non-parents to seek custody or visitation.”¹¹⁶ The concurring opinion recognized the gap in coverage for the “needs of the children born into or raised in these non-traditional households when a break-up occurs” and urged the Florida Legislature to provide a remedy for these situations.¹¹⁷

Implied co-parenting agreements are even more at risk. Some courts may find an implied parenting contract if one party assumes the role of a parent in a child’s life. A party might be considered a *de facto* parent (“a person who is not a parent, but is treated as if she were a parent”¹¹⁸) if, on a day to day basis, she “assumes the role of parent,

¹⁰⁹ Wiley, *supra* note 106, at 320–21. On the other hand, with respect to children born of artificial insemination, not all courts will bar common law contract and promissory estoppel causes of action for custody and visitation brought by the non-biological parent. *See, e.g., In re T.P.S.*, 978 N.E.2d 1070, 1075 (Ill. App. Ct. 2012).

¹¹⁰ 921 So. 2d 669, 670–71 (Fla. Dist. Ct. App. 2006).

¹¹¹ *Id.* at 670.

¹¹² *Id.* at 670–71.

¹¹³ *Id.* at 671.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 673.

¹¹⁷ *Id.* at 674 (Van Nortwick, J., concurring).

¹¹⁸ Rena M. Lindevaldsen, *Sacrificing Motherhood on the Altar Of Political Correctness: Declaring a Legal Stranger to Be a Parent over the Objections of the Child’s Biological Parent*, 21 REGENT U. L. REV. 1, 21 (2009). Courts often use various terms such as “*in loco parentis*,” “psychological parenthood,” “*de facto* parenthood,” and “*parens patriae*” interchangeably. *See V.C. v. M.J.B.*, 748 A.2d 539, 546 n.3 (N.J. 2000) (noting that “[t]he terms psychological parent, *de facto* parent, and functional parent are used interchangeably in this opinion to reflect their use in the various cases, statutes, and articles cited”); *In re Parentage of L.B.*, 122 P.3d 161, 167 n.7 (Wash. 2005) (en banc) (explaining “[o]ur cases, and cases from other jurisdictions, interchangeably and inconsistently apply the related yet distinct terms of *in loco parentis*, psychological parent, and *de facto* parent”). However, when determining whether a third party is a parent, there can be important differences between these labels. Lindevaldsen, *supra*, at 18. *In loco parentis* is applied when “someone who is not a legal parent nevertheless assumes the role of a parent in a child’s life,” or, in essence, acts as a surrogate parent. Lindevaldsen, *supra*, at 18–19. The termination of this status varies substantially between states, *id.* at 19, and application of state

seeking to fulfill both the child's physical needs and his psychological need for affection and care...acquires an interest in the companionship, care, custody and management of the child...deserving of legal protection."¹¹⁹ For a non-biological parent to have standing as a *de facto* parent she must generally show that the biological parent fostered a parent-like relationship between her and the child, she and the child lived together in the same household, she assumed parental obligations without expectation of payment, and that this period of time was sufficient to forge a bonded, dependent, parental relationship with the child.¹²⁰

While there is no uniform test, courts often cite the Wisconsin Supreme Court's 1995 decision in *In re the Custody of H.S.H.-K.* to demonstrate that a parent-like relationship with the child existed:

- 1) whether the legal parent consented to or fostered the relationship between the *de facto* parent and the child; 2) whether the *de facto* parent lived with the child; 3) whether the *de facto* parent assumed the obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and 4) whether a parent-child bond was formed.¹²¹

Some of the courts that have adopted this test include New Jersey, South Carolina, and Washington.¹²² Courts in other states such as

parentage statutes differs widely across the United States. Kelly M. O'Bryan, Comment, *Mommy or Daddy and Me: A Contract Solution to a Child's Loss of the Lesbian or Transgender Nonbiological Parent*, 60 DEPAUL L. REV. 1115, 1141 (2011). In particular, states disagree on whether the parent-like rights and obligations continue after a legal parent has terminated the loco parentis relationship. Lindevaldsen, *supra*, at 19. Psychological parenthood is commonly described as a "parent-like relationship which is 'based on [the] day-to-day interaction, companionship, and shared experiences' of the child and adult. As such, it may define a biological parent, stepparent, or other person unrelated to the child." Lindevaldsen, *supra*, at 21 (alteration in original) (quoting *In re Parentage of L.B.*, 122 P.3d at 167 n.7). Finally, "parens patriae literally means 'parent of his or her country' and refers traditionally to the role of the state 'as a sovereign [and] in its capacity as provider of protection to those unable to care for themselves.'" Lindevaldsen, *supra*, at 23-24 (alteration in original) (quoting BLACK'S LAW DICTIONARY 1144 (8th ed. 2004)).

¹¹⁹ Jennifer L. Rosato, *Children of Same-Sex Parents Deserve the Security Blanket of the Parentage Presumption*, 44 FAM. CT. REV. 74, 81 n.79 (2006) (quoting *In re Crystal J.*, 111 Cal. Rptr. 2d 646, 648-49 (Ct. App. 2001)) (internal quotation marks omitted).

¹²⁰ *In re Parentage of L.B.*, 122 P.3d at 176-77.

¹²¹ COURTNEY G. JOSLIN ET AL., *Judicial Protections for Psychological Parents, Persons in Loco Parentis, and Parents by Estoppel*, in LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 7:5 (2014) (citing *In re Custody of H.S.H.-K.*, 533 N.W.2d 419, 435-36 (Wis. 1995)); see also V.C., 748 A.2d at 551 (applying the following test to determine the existence of psychological parenthood: "the legal parent must consent to and foster the relationship between the third party and the child; the third party must have lived with the child; the third party must perform parental functions for the child to a significant degree; and most important, a parent-child bond must be forged").

¹²² V.C., 748 A.2d at 551; *Marquez v. Caudill*, 656 S.E.2d 737, 743-44 (S.C. 2008); *In re Parentage of L.B.*, 122 P.3d at 176-77.

Colorado, Massachusetts, Pennsylvania, and West Virginia apply similar variations of this test.¹²³ Other more practical factors that courts may consider include whether: (1) the parties jointly planned for the child's birth; (2) the child has the de facto parent's surname or a combination of both parties; (3) the de facto parent was present at the child's birth; (4) the parties described themselves as co-parents in birth announcements, school forms, medical records, and other records; (5) the parties and the child lived together; (6) the parties shared the child's caretaking and financial responsibilities; (7) both parties were involved in decisionmaking about the child; (8) the child sent mother's day or father's day cards to the de facto parent and other evidence that the child viewed the person as a parent; and (9) any relevant legal documents exist such as wills, powers of attorney, or parental agreements.¹²⁴

The doctrines of de facto parents, psychological parents, people who stand in loco parentis to the child, etc. vary in application from state to state.¹²⁵ Part of the reason for the different approaches is because the U.S. Supreme Court in 2000 left the scope of third-party visitation rights undefined and the justices issued a splintered decision with one plurality, two concurring, and three dissenting opinions.¹²⁶ There are states that consider non-biological and non-adoptive parents as legal parents pursuant to the state's parentage statutes based on civil unions and domestic partnerships.¹²⁷ The states that apply these doctrines "effectively redefine the term 'parent' to go beyond biological and adoptive parents, thus permitting third parties to petition for visitation."¹²⁸ For example, the Supreme Court of Rhode Island held that the biological mother's same-sex partner had standing to determine parental status and whether the visitation terms were violated even though the child was born out of wedlock.¹²⁹ In Colorado, the non-

¹²³ See, e.g., *In re E.L.M.C.*, 100 P.3d 546, 561 (Colo. App. 2004); *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 891 (Mass. 1999); *J.A.L. v. E.P.H.*, 682 A.2d 1314, 1319–20 (Pa. Super. Ct. 1996); *In re Jonathan G.*, 482 S.E.2d 893, 911–12 (W. Va. 1996).

¹²⁴ JOSLIN ET AL., *supra* note 121 (citing *Mason v. Dwinnell*, 660 S.E.2d 58, 67–68 (N.C. Ct. App. 2008)).

¹²⁵ Lindevaldsen, *supra* note 118, at 16–18.

¹²⁶ Lindsay J. Rohlfs, Note, *The Psychological-Parent and De Facto-Parent Doctrines: How Should the Uniform Parentage Act Define "Parent"?*, 94 IOWA L. REV. 691, 711–12 (2009) (citing *Troxel v. Granville*, 530 U.S. 57 (2000)).

¹²⁷ COURTNEY G. JOSLIN ET AL., *De Facto Parents Given Full Parental Rights*, in LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW, *supra* note 121, § 7:7; see, e.g., *Della Corte v. Ramirez*, 961 N.E.2d 601, 602–03 (Mass. App. Ct. 2012) (concluding that a same-sex couple does not need to seek a second-parent adoption to confer legal parentage on the non-biological parent when the child is born of the marriage).

¹²⁸ Rohlfs, *supra* note 126, at 694.

¹²⁹ *Rubano v. DiCenzo*, 759 A.2d 959, 971 (R.I. 2000).

parent is not even required to present proof of psychological parenthood as a condition precedent to standing.¹³⁰

However, in New York, a court denied standing to a non-legal, non-biological parent and stated any extension of visitation rights must be from the state legislature or the Court of Appeals.¹³¹ In *Matter of Alison D. v. Virginia M.*, the Court of Appeals rejected the petitioner's argument that she was a de facto parent or parent by estoppel, and thus was not entitled to seek visitation rights.¹³²

Of the states that recognize these doctrines, several grant certain constitutional rights to de facto parents even over the objection of the child's biological or adoptive parent,¹³³ though many other states reject such rights for visitation or parentage purposes.¹³⁴ Other states have a stance on this issue that falls somewhere in the middle of the two extremes, such as North Carolina with contradictory holdings from its intermediate appellate court.¹³⁵ In Maryland, a judge may conclude that a person is indeed a de facto parent, but may not be treated as a parent.¹³⁶

Generally, a person establishes a de facto parent-child relationship with the consent of the child's legal parent, either express or implied.¹³⁷ There are courts that have held that a de facto parent seeking custody or visitation rights is "constitutionally permissible because it is consistent with the legal parent's own decision to treat the *de facto* parent as a second parent to her child."¹³⁸ For example, in *T.B. v. L.R.M.*, the Supreme Court of Pennsylvania stated, "a biological parent's rights 'do not extend to erasing a relationship between her partner and her child which she voluntarily created and actively fostered simply because after

¹³⁰ *In re Custody of A.D.C.*, 969 P.2d 708, 710 (Colo. App. 1998) (citing COLO. REV. STAT. ANN. §§ 14-10-123(1)(b), (c) (West 1997)).

¹³¹ *Janis C. v. Christine T.*, 742 N.Y.S.2d 381, 381-83 (App. Div. 2002).

¹³² 572 N.E.2d 27, 29 (N.Y. 1991). The Court of Appeals reaffirmed its holding in *Alison D.* that parentage is derived from biology or adoption and any change to parenting rights is subject to legislative action. *Debra H. v. Janice R.*, 930 N.E.2d 184, 194 (N.Y. 2010).

¹³³ Lindevaldsen, *supra* note 118, at 16. The states that recognize such doctrines include Arizona, Arkansas, California, Colorado, Indiana, Maine, Massachusetts, Minnesota, New Jersey, New Mexico, North Carolina, Rhode Island, Vermont, Washington, West Virginia, and Wisconsin. *Id.*

¹³⁴ Lindevaldsen, *supra* note 118, at 17. The states that reject such doctrines include Florida, Georgia, Illinois, Iowa, Michigan, New Hampshire, New York, Ohio, Tennessee, Texas, Utah, and Virginia. *Id.*

¹³⁵ Lindevaldsen, *supra* note 118, at 17-18.

¹³⁶ Lindevaldsen, *supra* note 118, at 18; *see also* *Janice M. v. Margaret K.*, 948 A.2d 73, 93 (Md. 2008) (holding that "while the psychological bond between a child and a third party is a *factor* in finding exceptional circumstances, it is not determinative").

¹³⁷ COURTNEY G. JOSLIN ET AL., *Constitutional Considerations, in* LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW, *supra* note 121, § 7:15.

¹³⁸ *Id.*

the parties' separation she regretted having done so."¹³⁹ However, the Ninth Circuit gave de facto parents only the "right to be present, to be represented and to present evidence in a dependency proceeding" without any other constitutional interests.¹⁴⁰

The bottom line is that in most states, the best interest of the child standard continues to be viewed as being at odds with co-parenting contracts when both parents are not biologically related to the child. So even states that might be inclined to enforce a co-parenting agreement will typically require evidence beyond the agreement. Parties must typically show not only that the biological parent consented to the parent-child relationship, but also that they fostered and nurtured the relationship over time. Biology continues to be the sole or predominant factor in determining custody, resulting in the erratic and unreliable enforcement of co-parenting agreements.

II. THE CONTRACTUAL FAMILY: THE ROLE THE MARKET SHOULD PLAY IN SHAPING FAMILY FORMATIONS AND RIGHTS

People should have the right to make their own decisions regarding their personal relationships. With the right to privacy comes individual liberty and freedom to make personal choices, such as the choice to use contraception or the right to abortion. It is not a stretch to extend personal freedom to the right to decide how to organize one's family finances and parenting. Contracts can help family members make more enforceable agreements that clarify many more specifics than statutes are able to. Further, family members can use contracts to plan for changes in their relationship, or changes in the law, as well as for other contingencies in order to negotiate around uncertainty. Some argue that certain contracts in the family context even promote family harmony.¹⁴¹

The arguments against contracting in the family context are wide-ranging and diverse. To begin with, many view family law as being "local," while contract law is more "universal."¹⁴² Contract law has its origins in "individual will, private pleasures, selfish intentions and hard

¹³⁹ 786 A.2d 913, 919 (Pa. 2001) (quoting *J.A.L. v. E.P.H.*, 682 A.2d 1314, 1322 (Pa. Super. Ct. 1996)); see also *V.C. v. M.J.B.*, 748 A.2d 539, 552 (N.J. 2000) (stating "a psychological parent-child relationship that is voluntarily created by the legally recognized parent may not be unilaterally terminated after the relationship between the adults ends" because the bond between the psychological parent and the child does not get erased with the end of the adult relationship).

¹⁴⁰ *Miller v. California*, 355 F.3d 1172, 1176 (9th Cir. 2004) (quoting *In re Crystal J.*, 111 Cal. Rptr. 2d 646, 650 (Ct. App. 2001)).

¹⁴¹ E. Gary Spitko, *Reclaiming the "Creatures of the State": Contracting for Child Custody Decisionmaking in the Best Interests of the Family*, 57 WASH. & LEE L. REV. 1139 (2000).

¹⁴² Janet Halley, *What is Family Law?: A Genealogy Part II*, 23 YALE J.L. & HUMAN. 189, 190 (2011).

bargains.”¹⁴³ On the contrary, family law is largely viewed as being based on emotion, generosity, and morality, meaning that contract law is out of place in the family context.¹⁴⁴ In this way, applying contracts to family may be seen as “sterilizing” the family and imposing the concepts of “self-interest,” “profit,” and “investment” onto an institution in which they do not belong.¹⁴⁵

Furthermore, there is great potential for inequality in bargaining power between the parties in family relationships.¹⁴⁶ Within families, this disparity arises from different education levels, varied emotional investment in the family, and disparity in family members’ ability to earn money.¹⁴⁷ Intimate partners, the argument goes, cannot easily be regulated and structured by contracts because contract doctrine assumes equal bargaining power and the impersonal negotiation of independent parties.¹⁴⁸ Where contracts are applied to symbiotic relationships, particularly ones where there is income disparity, the lower-earning party may be left unprotected by a contract where she has not “bargained for any legally cognizable benefit.”¹⁴⁹ Also, many contracts in the family are not entered freely, but are the product of necessity or obligation.¹⁵⁰ Indeed, as one scholar puts it:

[t]o suppose that a mother faced with the prospect of losing her children or her means of sustenance can contract freely is to discredit the most fundamental of human bonds and to recognize the full extent of modernity’s power to alienate, sever, and exclude. Contract has become the dominant mode of rationalizing inequality. People are simply free, the argument goes, to make bad choices.¹⁵¹

Perhaps in part for these reasons, contracts between family members are often questioned, as courts may find that the parties did not intend to be legally bound, and that adequate consideration in a traditional contract sense cannot be established between family members.¹⁵² This supports a general approach of many courts to stay out of family life by claiming a lack of competency.¹⁵³

¹⁴³ Amy J. Cohen, *The Family, the Market, and ADR*, 2011 J. DISP. RESOL. 91, 96–97 (2011).

¹⁴⁴ *Id.*

¹⁴⁵ Laura Weinrib, Note, *Reconstructing Family: Constructive Trust at Relational Dissolution*, 37 HARV. C.R.-C.L. L. REV. 207, 209 (2002).

¹⁴⁶ Howard Fink & June Carbone, *Between Private Ordering and Public Fiat: A New Paradigm for Family Law Decision-Making*, 5 J.L. & FAM. STUD. 1, 3 (2003).

¹⁴⁷ Weinrib, *supra* note 145, at 208.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Fink & Carbone, *supra* note 146, at 7.

¹⁵³ *Id.*

Despite these thoughtful and reasonable critiques, this Part argues that contracts between and among family members should be enforced in the same ways that commercial contracts are enforced. Contracts are an efficient and necessary tool for arranging family relationships. Rather than being at odds with family law, contract law can further the goals of family law in protecting parents and children. Courts are already recognizing a broader concept of family in a variety of areas as described above. Validly entered contracts can and should provide the same evidence of intent to be bound as marriage and biology. My proposals herein, supporting the enforceability of cohabitation and co-parenting agreements, give unmarried couples and non-legal intended and psychological parents equal status and rights as their married and biologically related counterparts. At the same time, my proposals give contracting parties in these areas the same right to rely on their foreseeable and legitimate expectations under their contracts and as commercial parties.

A. *The Inflated Importance of Commercial Promises*

Courts have typically been enthusiastic about upholding private exchanges to protect commerce, the business community, and the efficiency of the marketplace.¹⁵⁴ Underlying this practice is the belief that legal enforcement of voluntary exchanges is “essential to the smooth functioning of the economic system,”¹⁵⁵ in that “a legal system that enforces contracts reliably and efficiently plays an important role in economic growth.”¹⁵⁶ Commercial contracts have taken on particular importance, especially since the development of the Uniform

¹⁵⁴ See JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* 8–9 (3d ed. 1987) (putting forth the theory that “contract law is based upon the needs of trade, sometimes stated in terms of the mutual advantage of the contracting parties, but more often of late in terms of a tool of the economic and social order”); Gillian K. Hadfield, *Contract Law Is Not Enough: The Many Legal Institutions that Support Contractual Commitments*, in *HANDBOOK OF NEW INSTITUTIONAL ECONOMICS* (Claude Menard & Mary Shirley eds., Kluwer Press 2004), available at <http://ssrn.com/abstract=537303> (stating that “[t]he problem of enforcing agreements in exchange is at the heart of economic life”).

¹⁵⁵ Paul G. Mahoney, *Contract Law and Macroeconomics*, 6 VA. J. 72, 81 (2003); see also Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 558 (2003) (explaining that “[s]ociety is . . . better off when it adopts laws that improve market functioning”).

¹⁵⁶ Mahoney, *supra* note 155, at 80; see also Hadfield, *supra* note 154, at 2 (stating that “the effectiveness of contract law is critical to the growth of economic activity”); Schwartz & Scott, *supra* note 155, at 548 (stating that “a good contract law is a necessary condition for a modern commercial economy”). Contract enforcement affects the larger economy, in that “countries that enforce property rights and contracts experience more rapid economic growth than those that do not.” Mahoney, *supra* note 155, at 77 (footnote omitted). Furthermore, enforcement of contracts has “regularly accompanied the rise of long-distance trade among relative strangers.” *Id.* at 78 (footnote omitted).

Commercial Code, which identifies a primary goal of fostering the “continued expansion of commercial practices.”¹⁵⁷ Market efficiency and the protection of industry have also been used to justify the enforcement of standard adhesion contracts, including shrink-wrap, click-wrap, web-wrap, and browse-wrap license agreements.¹⁵⁸ In this Section, I do not take issue with the question of whether mass market license agreements should be enforceable. Rather, I simply consider the courts’ willingness to enforce commercial contracts as a meter against which to evaluate how courts should handle family contracts.

The common law has always been associated with limited government in general and specifically with few government restrictions on individual economic autonomy.¹⁵⁹ “English common law developed as it did because landed aristocrats and merchants wanted a system of law that would provide strong protections for property and contract rights and limit the Crown’s ability to interfere in markets.”¹⁶⁰ It follows that common law systems are typically viewed as “productive of greater economic growth.”¹⁶¹

In the common law tradition, modern contract law has shown primary concern for protection of contract rights and economic freedom,¹⁶² with less attention typically given to social institutions and non-traditional subject areas such as protection of employees, the environment, or public health and welfare.¹⁶³ Modern contract law

¹⁵⁷ U.C.C. § 1-102(2)(b) (1977). With the advent of the U.C.C. in the 1960s, the law saw a shift away from the old “I-sell-my-horse-or-manner-to-you” paradigm toward greater emphasis on commerce.

¹⁵⁸ As explained in comment a of the Restatement (Second) of Contracts, section 211, “[s]tandardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution. Scarce and costly time and skill can be devoted to a class of transactions rather than to details of individual transactions.” RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a (1981); see also Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1221 (1983) (noting that standardization of terms “reduces transaction costs... [and] stabilize[s] the incidents of doing business”); Batya Goodman, Note, *Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract*, 21 CARDOZO L. REV. 319, 325 (1999) (noting that “[s]ince the forms can be customized, operations are simplified and costs reduced to the advantage of all concerned” (footnote omitted)); Sierra David Sterkin, Comment, *Challenging Adhesion Contracts in California: A Consumer’s Guide*, 34 GOLDEN GATE U. L. REV. 285, 292 (2004) (noting that “[b]y treating all its customers with the same ‘standard and fixed’ manner, a company can act with greater ‘efficiency, simplicity, and stability’” (footnote omitted)).

¹⁵⁹ Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503, 504 (2001).

¹⁶⁰ *Id.* at 504.

¹⁶¹ Hadfield, *supra* note 154, at 5.

¹⁶² Mahoney, *supra* note 159, at 508.

¹⁶³ Friedrich Hayek argued that “English and French concepts of law stemmed from English and French models of liberty, the first (derived from Locke and Hume) emphasizing the individual’s freedom to pursue individual ends and the second (derived from Hobbes and Rousseau) emphasizing the government’s freedom to pursue collective ends.” *Id.* at 511 (citing FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 54–70 (1960)); see also Daniel R. Ernst,

reflects a sea of change in the courts—notably, the abandonment of equity as a fundamental component in analyzing contract claims in favor of the enforcement of business contracts based solely on a promise for a promise and sufficient consideration.¹⁶⁴ The drive for free contracting did not come in the sixteenth century when the Crown’s power was at its zenith or at the point when the powers of the nobility and the gentry were at their peak in the eighteenth century. Rather, the push came in the nineteenth century, when the commercial classes began to take a powerful role in society.¹⁶⁵ Whereas contract law in the eighteenth century expressed hostility “to the interests of commercial classes,”¹⁶⁶ by inquiring into the fairness of the exchange, modern contract law, spurred by the fluctuating nature of the modern market economy, rejected the premise that fairness could be objectively measured.¹⁶⁷ At the same time, courts moved away from reflecting the legal and ethical mores of small businesspeople and farmers and came to represent the interests of larger commercial interests.¹⁶⁸

Nineteenth century courts embraced the “will theory” of contract, which relied on offer, acceptance, and consideration to find a valid contract. Will theory was readily used to the advantage of employers in labor contract cases, where courts frequently acquiesced to unjust terms in labor contracts based on the myth that they were freely bargained.¹⁶⁹

The Critical Tradition in the Writing of American Legal History, 102 YALE L.J. 1019, 1020 (1993) (reviewing MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* (1992)) (describing the “Lochner era” as the era surrounding “the 1905 decision of the United States Supreme Court that most notably defended ‘liberty of contract’ from the intrusions of social legislation” (footnote omitted)). J. Willard Hurst and his followers “stressed the economic forces influencing American legal policy in the nineteenth century” and recognized a changed attitude in the twentieth century based on the notion that “unchecked economic aggrandizement had produced many social costs that needed to be paid and that the expansion of some men’s liberty had come at the expense of others’ oppression.” Michael E. Parrish, *Friedman’s Law*, 112 YALE L.J. 925, 932 (2003) (reviewing LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE TWENTIETH CENTURY* (2002)) (citing JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 33–108 (1956)).

¹⁶⁴ Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 917–19 (1974).

¹⁶⁵ *Id.* Horwitz has been much criticized, even vilified, by other legal scholars. See Robert W. Gordon, *Morton Horwitz and His Critics: A Conflict of Narratives*, 37 TULSA L. REV. 915, 918–19 (2002). A.W.B. Simpson’s seminal article, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533, 600 (1979), challenged Horwitz’s claim that the will theory was a product of the nineteenth century and that the judiciary had been guided by equitable concerns. However, Patrick Atiyah’s book, *The Rise and Fall of Freedom of Contract*, supported much of Horwitz’s scholarship. See, e.g., P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 671–72, 674 (1979). See Gordon, *supra*, at 915–27 for an interesting and concise discussion of the philosophical clash between Horwitz and his peers.

¹⁶⁶ MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960*, at 167 (1997).

¹⁶⁷ See Horwitz, *supra* note 164, at 949.

¹⁶⁸ HORWITZ, *supra* note 166.

¹⁶⁹ See *id.* at 186–87. For example, in *Coolidge v. Puaaiki*, 3 Haw. 810, 813–14 (1877), rather than inquire into the unjust terms of a plantation worker’s contract, the court assumed it was

However, the dogmatic approach to will theory was not applied with equal force to building contracts, for which the courts allowed recovery on a quantum meruit theory, despite the existence of a contract with express terms.¹⁷⁰ This bifurcation illustrates the fledgling class bias of the courts in favor of commercial players.¹⁷¹ Morton Horwitz argues forcefully that courts continue to apply the old equitable principles when they intentionally choose the parties who will receive their beneficence.¹⁷²

Courts will rarely consider the inherent fairness of a transaction and will enforce one-sided bargains if evidence shows they were freely entered, particularly in the commercial context where true assent is not always requisite to enforcement.

Indeed, courts are typically willing to forego formalistic rules of contracting to enforce contracts in the commercial context, particularly in the context of adhesion contracts involving disparities in bargaining power and limited assent to boilerplate terms, such as with end user license agreements. Article 2 of the Uniform Commercial Code (UCC or Code) offers additional flexibility when it comes to commercial contracts. Despite the frequent lack of true assent to vital terms in adhesion contracts, these contracts have become the backbone of modern contracting because of their perceived efficiency and predictability. Adhesion contracts are beneficial to both businesses and consumers. Standardization of terms “reduces transaction costs . . . and stabilize[s] the incidents of doing business,”¹⁷³ thereby saving both the buyer and seller money.¹⁷⁴ Businesses prefer uniformity in transactions and a quick and smooth flow of business.¹⁷⁵ Consumers are also unlikely to benefit from having to negotiate each and every consumer transaction in the marketplace, as a close reading of standard form contracts at the time of purchase “seems grossly arduous.”¹⁷⁶ As

freely bargained for, based on the parties’ signatures. The court, in willfully ignoring the realities of plantation laborers’ bargaining power, stated, “[i]f they wished to confine themselves to any particular kind of labor, they should have themselves caused it to have been designated in their contract . . .” *Id.* The court upheld the contract, although it was the plantation owner’s wife who had signed the instrument. *Id.*

¹⁷⁰ Horwitz, *supra* note 164, at 954.

¹⁷¹ Horwitz, *supra* note 164, at 955.

¹⁷² Horwitz, *supra* note 164, at 955–56.

¹⁷³ Rakoff, *supra* note 158.

¹⁷⁴ *Id.* at 1222. Professor Rakoff explains that standardization “promote[s] efficiency” and “make[s] it possible to process transactions as a matter of routine.” *Id.*; see also Goodman, *supra* note 158 (noting that “[s]ince the forms can be customized, operations are simplified and costs reduced to the advantage of all concerned” (footnote omitted)).

¹⁷⁵ Sterkin, *supra* note 158 (noting that “[b]y treating all its customers with the same ‘standard and fixed’ manner, a company can act with greater ‘efficiency, simplicity, and stability’” (footnote omitted)).

¹⁷⁶ Rakoff, *supra* note 158, at 1226; see also Robert Prentice, *Contract-Based Defenses in Securities Fraud Litigation: A Behavioral Analysis*, 2003 U. ILL. L. REV. 337, 379 (2003) (noting

explained in comment a of the Restatement (Second) of Contracts, section 211, “[s]tandardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution. Scarce and costly time and skill can be devoted to a class of transactions rather than to details of individual transactions.”¹⁷⁷ Over the years, there has been extensive scholarly debate regarding the fairness of holding a consumer to terms she likely has not read,¹⁷⁸ but generally, courts will enforce adhesion contracts unless they are unconscionable or violate public policy.¹⁷⁹

economists argue that “adhesion contracts are generally necessary in that it is logistically impossible in our commercial world for both parties to negotiate the terms of each individual contract” (footnote omitted); Sterkin, *supra* note 158, at 287 (noting that “[i]n many situations, negotiating individual contracts with each consumer would be impractical, for both cost and time considerations” (footnote omitted)).

¹⁷⁷ RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a (1981). In his book, Karl Llewellyn explained the utility of “form-pad” agreements as follows:

[B]y standardizing terms, and by standardizing even the spot on the form where any individually dickered term appears, one saves all the time and skill otherwise needed to dig out and record the meaning of variant language; one makes check-up, totaling, follow-through, etc., into routine operations; one has duplicates (in many colors) available for the administration of a multidepartment business; and so on more. The content of the standardized terms accumulates experience, it avoids or reduces legal risks and also confers all kinds of operating leeways and advantages, all without need of either consulting counsel from instance to instance or of bargaining with the other parties.

KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 362 (1960).

¹⁷⁸ See, e.g., Prentice, *supra* note 176, at 380 (noting that “[i]t is difficult to argue plausibly that the parties are negotiating to an efficient end when one side does not negotiate nor, typically, even read the contract before signing it” (footnote omitted)); Rakoff, *supra* note 158, at 1190, 1197 (arguing that, with respect to adhesion contracts, “if the presumption of enforceability is retained, it threatens to continue to generate undesirable results”); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 531 (1971) (arguing that with form adhesion contracts business parties are tempted to impose one-sided and unfair provisions); Sterkin, *supra* note 158, at 323 (arguing that “[c]onsumers need judicial protection from oppressive contractual terms” often found in adhesion contracts).

¹⁷⁹ See, e.g., *Cooper v. MRM Inv. Co.*, 367 F.3d 493 (6th Cir. 2004) (holding that adhesion contracts are enforceable under Tennessee law unless they are unconscionable); *Ticknor v. Choice Hotels Int’l, Inc.*, 265 F.3d 931, 939 (9th Cir. 2001) (holding that adhesion contracts are enforceable unless they are “unduly oppressive, unconscionable, or against public policy”); *Bull HN Info. Sys. v. Hutson*, 229 F.3d 321, 331 (1st Cir. 2000) (stating that adhesion contracts are enforceable under Massachusetts law unless they are unconscionable, unfair, or offend public policy); *Smith, Bucklin & Assocs., Inc. v. Sonntag*, 83 F.3d 476, 480 (D.C. Cir. 1996) (holding that adhesion contracts are enforceable unless they are unconscionable or violate public policy). See generally 8 SAMUEL WILLISTON & RICHARD A. LORD, *A TREATISE ON THE LAW OF CONTRACTS* § 18:5 (4th ed. 1998) (stating that adhesion contracts are generally enforceable absent unconscionability or violation of public policy); Rakoff, *supra* note 158, at 1176 (setting forth the general presumption in contract law that “contracts of adhesion, like negotiated contracts, are prima facie enforceable as written”); Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL’Y REV. 233, 250–51 (2002) (explaining that “the judiciary’s response to adhesion contracts . . . still is to assume manifestation of assent and to apply the ‘you signed it, you’re bound’ rule,” subject only to “the enforceability defenses of unconscionability, fraud, and public policy”).

Another example of prioritizing the enforcement of commercial contracts over the need for assent is found in the underlying principles and rules of the UCC itself. The UCC, a realist code,¹⁸⁰ operates largely under the broad premise that “courts should enforce private ordering arrangements.”¹⁸¹ Drafted by Karl Llewellyn, the UCC is “specifically designed to give greater legal recognition and enforcement to sales contracts”¹⁸² In particular, Article 2 was meant to alleviate “the apparent rigidity and incompatibility [of pre-Code law] with commercial norms”¹⁸³ by “adopting pragmatic rules that reflect the commercial practices that business people actually employ.”¹⁸⁴ Accordingly, the drafters assured that if contracting parties intended to create a contract, courts would find an enforceable contract even if one or more crucial terms were omitted,¹⁸⁵ or where the terms in the acknowledgement were different from or added to the terms in the purchase order.¹⁸⁶ Under Article 2, it is not necessary to identify the precise moment a contract was formed in order for it to be enforceable,¹⁸⁷ and the acceptance need not be a mirror image of the offer.¹⁸⁸

Additionally, although applicable to all sales of goods, Article 2 has carved out a series of special rules for merchants, many of which protect actual business practices by recognizing and enforcing contracts, despite

¹⁸⁰ See John M. Breen, *Statutory Interpretation and the Lessons of Llewellyn*, 33 LOY. L.A. L. REV. 263, 268–69 (2000). Karl Llewellyn, the principal drafter, believed that “the meaning of a sales contract depends upon the commercial and historical context within which it is made and executed.” *Id.*

¹⁸¹ Michael L. Rustad, *Making UCITA More Consumer-Friendly*, 18 J. MARSHALL J. COMPUTER & INFO. L. 547, 556 (1999).

¹⁸² John P. Esser, *Institutionalizing Industry: The Changing Forms of Contract*, 21 LAW & SOC. INQUIRY 593, 596 (1996); Jane M. Rolling, *The UCC Under Wraps: Exposing the Need for More Notice to Consumers of Computer Software with Shrinkwrapped Licenses*, 104 COM. L.J. 197, 204 (1999) (noting that “[i]n general, contracts are easier to form under the UCC”).

¹⁸³ Larry T. Garvin, *Credit, Information, and Trust in the Law of Sales: The Credit Seller’s Right of Reclamation*, 44 UCLA L. REV. 247, 263 (1996).

¹⁸⁴ Edward L. Rubin, *The Code, the Consumer, and the Institutional Structure of the Common Law*, 75 WASH. U. L.Q. 11, 18 (1997); see also Courtney Lytle Perry, *My Kingdom for a Horse: Reining in Runaway Legislation from Software to Spam*, 11 TEX. WESLEYAN L. REV. 523, 545 (2005). These default rules “promot[e] predictability in order to facilitate transactions” and “save[] everybody time and money.” Rolling, *supra* note 182, at 200 (footnotes omitted).

¹⁸⁵ U.C.C. § 2-204(3) (1994).

¹⁸⁶ U.C.C. § 2-207 (1994).

¹⁸⁷ U.C.C. § 2-204(2).

¹⁸⁸ U.C.C. § 2-207; see also Rubin, *supra* note 184 (noting that “[i]n drafting Article 2, Llewellyn dispensed with the rule of title, perfect tender, and the mirror image rule for offer and acceptance, replacing them with flexible provisions for allocating loss, curing defects, and enabling the transaction to go forward despite minor disagreements” (footnote omitted)). Another example can be found in section 2-202, the U.C.C.’s “quite relaxed version of the parol evidence rule,” which permits the introduction of all evidence of trade usage, course of dealing, and course of performance to explain or supplement the contract, as long as it does not directly contradict the written agreement, and any consistent additional terms that do not contradict, as long as the contract is not fully integrated. See Breen, *supra* note 180, at 269.

some informality or flaws in the bargaining process or the execution of the contract.¹⁸⁹ For example, section 2-201(2) broadens the type and content of writings required between merchants to satisfy the statute of frauds,¹⁹⁰ and section 2-205, which deals with firm offers, allows merchants to create an option that is binding for up to three months and that only requires a signed writing.¹⁹¹ Informality and flexibility protect commercial parties from facing unenforceable contracts when, contrary to their intentions, it is in the interest of market efficiency.

Default rules with such flexibility generally protect the business community,¹⁹² and “stimulate[] and structure[] future commercial growth . . .”¹⁹³ The UCC has displayed little sympathy for consumer concerns, focusing its efforts primarily on commercial interests, which have been said to “dominate the . . . UCC drafting process.”¹⁹⁴

B. *Giving Family Promises the Same Weight and Protection as Commercial Promises*

This Section advocates for greater and more consistent enforceability of cohabitation and co-parenting agreements. Enforcement of such contracts gives unmarried couples and non-legal intended and psychological parents equal status and rights as their married and biologically related counterparts. At the same time, enforcing these contracts also maintains necessary consistency with commercial promises, while keeping pace with our changing culture.

¹⁸⁹ See, e.g., U.C.C. §§ 2-103(1)(b), 2-209, 2-312, 2-314, 2-316(2), 2-327(1)(c), 2-402(2), 2-403(2), 2-509(3), 2-603, 2-605, 2-609 (1994). See generally Rustad, *supra* note 181, at 557 n.72.

¹⁹⁰ U.C.C. § 2-201(2) (1994). Under the merchant’s exception, a writing between merchants satisfies the statute of frauds:

[I]f within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents . . . unless written notice of objection to its contents is given within 10 days after it is received.

Id.

¹⁹¹ U.C.C. § 2-205 (1994).

¹⁹² Rustad, *supra* note 181, at 557.

¹⁹³ Rolling, *supra* note 182, at 202; see also Michael H. Dessent, *Digital Handshakes in Cyberspace Under E-Sign: “There’s a New Sheriff in Town!”*, 35 U. RICH. L. REV. 943, 950 (2002) (explaining that the U.C.C. is meant “to do away with many of the old common law conventions that plagued contract law and impeded efficient business transactions” (footnote omitted)).

¹⁹⁴ Rubin, *supra* note 184, at 13; see also Rolling, *supra* note 182, at 225 (noting that “although the UCC was designed for both commercial parties and consumers, in practice the UCC may protect commercial parties more efficiently because business people are often more likely to be more familiar with the provisions of the UCC” (footnote omitted)).

1. Cohabitation Agreements

Non-married cohabiting couples should be able to choose through private contract to subject themselves to all or some of the government protections granted to married couples that do not implicate the right of the government or other third parties.¹⁹⁵ They should also be able to agree to any additional or different arrangements between themselves as they see necessary or convenient to their personal relationship.

When courts choose not to enforce contracts between non-married partners it is often based on policies that seek to promote marriage. However, with the rise of unmarried cohabitation—which corresponds to “greater societal acceptance, advances in contraception, and changed views regarding the morality of cohabiting women”¹⁹⁶—this goal is no longer appropriate. This Section argues that the State’s interest in promoting marriage is misplaced and that contracts can and should provide an acceptable alternative to marriage. In this Section I argue that cohabitation agreements between consenting adults about private matters relating to their relationship and finances should be enforced as written. Contracts can be a useful alternative to marriage for couples that do not want legal intrusion into their relationship. Along with state recognition comes the imposition of a bundle of rights and responsibilities that the couple might not otherwise agree to. State-provided rights and responsibilities do not fit all “family” types. People in non-marital unions often seek to order their affairs in ways that are not possible under state-based options. Couples should not have to subscribe to those rights and responsibilities in order to receive the state-sponsored economic benefits that come with marriage.

a. The Primacy of Marriage

Despite wide ranging critiques of marriage,¹⁹⁷ the State has always had an interest in marriage. This interest is apparent from the benefits granted upon marriage. The significant financial rewards that come to married couples, such as health, life, and disability benefits, not only provide greater economic stability to the married couple,¹⁹⁸ but also alleviate a potential cost burden on the State. Additionally, married couples receive important tax benefits. As Professor Ruthann Robson points out, “the entire federal tax scheme fosters and subsidizes the

¹⁹⁵ See *supra* Part II.A.

¹⁹⁶ Merrill, *supra* note 1, at 510.

¹⁹⁷ See *infra* Part II.B.1.b.

¹⁹⁸ David B. Cruz, “Just Don’t Call It Marriage”: *The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 931 (2001).

economics of marriage.”¹⁹⁹ As a result, “those who do not participate in the ‘economic partnership’ of matrimony may suffer financially.”²⁰⁰

Setting economic benefits within the construct of marriage elevates the status of marriage and herds couples into marriage, thereby promoting that interest in marriage. In Professor Robson’s seminal article on the subject, she discusses the primacy of marriage and the “zeal of elected federal officials to exalt marriage.”²⁰¹ This Section examines which values are promoted with marriage and why they are promoted.

Presumably the primary values that are promoted through marriage relate to sexual behavior. Marriage can be seen as promoting abstinence from sex outside marriage, and in particular, abstinence from premarital sex by teenagers and young adults. Marriage also promotes monogamy and opposite-sex relationships, and is often regarded as “the expected standard of human sexual activity.”²⁰² As Professor Robson notes, the government message fostered by sex education is that marriage is the “only acceptable condition for sexual expression.”²⁰³

In addition to promoting sexual behavioral norms, marriage is thought to be the best environment for raising healthy and successful children. The State considers marriage an “essential institution of a successful society” and the optimal environment for successful child rearing.²⁰⁴ The current rationale, at least in part, is based on legislative findings from “welfare reform” legislation, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996. Among other things, Congress found that children born out of wedlock, specifically to unwed mothers age seventeen and under, are more likely to experience abuse and neglect, have lower cognitive scores and educational aspirations, become teenage parents themselves, and be on welfare when they grow up.²⁰⁵

The State’s concerns with family values dovetails seamlessly with the economic interest in preventing unwed motherhood. Congress

¹⁹⁹ Robson, *supra* note 6, at 786.

²⁰⁰ *Id.* at 783.

²⁰¹ *Id.* at 795. Robson notes that “The PRWORA, passed in [the 104th Congressional] session, is replete with hortatory claims for marriage, including its finding that ‘marriage is the foundation of a successful society.’” *Id.* at 795 (quoting Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, Title I § 101(1), 110 Stat. 2105 (codified at 42 U.S.C. § 601 (notes))). Similarly, Congressional discussions about DOMA were “replete with the image of marriage as the elemental building block of society, whether that be a rock, a foundation, a pillar, or a keystone.” *Id.* (internal quotation marks omitted).

²⁰² 42 U.S.C. § 710(b)(2)(D) (2014).

²⁰³ Robson, *supra* note 6, at 798.

²⁰⁴ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, Title I §§ 101(2)–(3), 110 Stat. 2105 (codified at 42 U.S.C. § 601 (notes)).

²⁰⁵ *Id.* §§ 101(8)(B)–(F) (statement of congressional findings found in PRWORA).

found that young, unwed mothers are not only more likely to go on public assistance, but also more likely to remain on public assistance for longer periods. “These combined effects of ‘younger and longer’ increase total AFDC [aid to families with dependent children] costs per household by twenty to thirty-five percent for 17-year-olds.”²⁰⁶ Notably, Congress also found that an “increase in the number of children receiving public assistance is closely related to the increase in births to unmarried women.”²⁰⁷

Although welfare reforms of the 1990s present our most salient example of the State’s economic interest in the family, examples are certainly not limited to current public policy. The State has always had a hand in shaping the institution of marriage for the best economic outcomes. The capitalist logic underlying the regulation of marriage is a deeply situated phenomenon that lacks a clear trajectory within a historical analysis.²⁰⁸ However, a quick survey of the family throughout U.S. history would demonstrate how the institution of marriage is recreated and reframed with the changing economic landscape. For example, the 1990s concern with single mothers was framed as an issue of family values, but the objective of welfare reform was to insist women work at low-paying jobs if they wanted to receive government entitlements and assistance. This is in stark contrast to the post-Civil War development of the welfare system for the purposes of supporting widowed and non-working women in a “male breadwinner” economy that was considered the optimum economic family model by the State. Though a survey of historical family structures and policy is beyond the scope of this Article, it is not reaching to assert that marriage is one of the State’s primary political and economic institutions.

b. Critiques and Limitations of Marriage

Despite recent celebrations of marriage, and despite the State’s clear interest in its elevated status, there are many reasons that couples may not marry. Some couples face legal impediments to marriage, while others have social or political reasons for choosing not to marry.

There are various laws that prevent some couples from legally marrying. Same-sex couples in many states still do not have the legal right to marry. While *United States v. Windsor* struck down the federal government’s definition of marriage as the union of one man and one woman under the Defense of Marriage Act (DOMA),²⁰⁹ currently, only seventeen states and Washington D.C. issue marriage licenses to same-

²⁰⁶ *Id.* § 101(8)(A) (statement of congressional findings found in PRWORA).

²⁰⁷ *Id.* § 101(5)(C) (statement of congressional findings found in PRWORA).

²⁰⁸ THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 40 (1992).

²⁰⁹ *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013).

sex couples.²¹⁰ Same-sex couples should be able to contract around legislatures' conservative classifications of family and make agreements that are appropriate to their relationships, despite the lasting influence of patriarchy on family law.²¹¹ Contracts may help overthrow family law's conservatism and patriarchal history by "habituat[ing] heterosexuals to the notion of gay rights, setting the stage for public rights for gay people."²¹² In addition, laws prevent a couple from marrying where one partner is still legally married to someone else.²¹³ Marriage between relatives is also legally barred, as are polygamous marriages.²¹⁴

In addition, some couples that have the legal right to marry may choose not to marry for a variety of reasons. Some couples may oppose the institution of marriage itself, for social, political, or economic reasons, or based on disparities historically perpetuated by the institution of marriage.²¹⁵ For other couples, marriage simply may not be a deal worth making. Both men and women on the lower rungs of the economic ladder have far fewer choices when it comes to marriage. While higher-earning adults tend to marry other educated high-income adults, low-income, less-educated adults tend either not to marry or to marry other similarly situated adults. With fewer marriageable prospects, the costs of the marital bargain may exceed the benefits.²¹⁶

i. Historical Critiques of Marriage

Historically, "[m]arriage was the principal institution that maintained the patriarchy."²¹⁷ A free woman's legal rights depended on her marital status;²¹⁸ single women had more rights than married women at common law. As long as a woman remained unmarried she could enter into contracts, buy and sell real estate, and accumulate personal property, which included cash, stocks, and livestock. An

²¹⁰ See *supra* note 16.

²¹¹ Fink and Carbone, *supra* note 146, at 6.

²¹² See Ertman, *supra* note 53, at 1137–42, 1154 (1996).

²¹³ See, e.g., N.Y. DOM. REL. LAW § 6 (McKinney 2014).

²¹⁴ See, e.g., *id.* § 5; see also *Reynolds v. United States*, 98 U.S. 145 (1878) (remarking that the United States' restriction of polygamous marriage outweighed a Mormon's right to his religious practice).

²¹⁵ See *infra* Part II.B.1.b.i. See generally SIMONE DE BEAUVOIR, *THE SECOND SEX*, at xvi (H.M. Parshley ed. & trans., First Vintage Books 1974) (1949) (discussing the marginalization of women as "other" in male-created culture).

²¹⁶ See JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* (2014).

²¹⁷ Nancy D. Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 AM. U. J. GENDER SOC. POL'Y & L. 167, 170 (1999).

²¹⁸ Enslaved black women were not allowed to marry, have custody of children, own property, control their bodies, or earn money from their labor. Darlene C. Goring, *The History of Slave Marriage in the United States*, 39 J. MARSHALL L. REV. 299, 307–11 (2006).

unmarried woman could also sue or be sued, write wills, and act as an executor of an estate.²¹⁹

Under the common law system, once married, a woman lost her autonomy and was subsumed under her husband's identity.²²⁰ As the English jurist William Blackstone stated in his influential treatise *Commentaries on English Law* (1765–1769):

By marriage, the husband and wife are one person in the law: that is the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything.²²¹

Until the middle of the nineteenth century Blackstone's description of coverture described the legal status of married women at common law.²²² Under coverture a married woman could not own property independently of her husband unless they had signed a marriage settlement prior to getting married.²²³ Marriage settlements were rare and illegal in many states.²²⁴ The husband acquired an estate in the wife's real property for the duration of the marriage and he was entitled to sole possession and control of any property that the wife owned.²²⁵ When a woman married, all personal property a woman brought to her marriage, earned or acquired during marriage, became the property of her husband to dispose of as he saw fit.²²⁶

When a woman married, she retained ownership and legal title to her land, but she relinquished all rights to control it. Her husband gained the right to manage the land and rent the property, and all

²¹⁹ Yvette Joy Liebesman, *No Guarantees: Lessons from the Property Rights Gained and Lost by Married Women in Two American Colonies*, 27 WOMEN'S RTS. L. REP. 181, 183 (2006).

²²⁰ Norma Basch, *Invisible Women: The Legal Fiction of Marital Unity in Nineteenth-Century America*, 5 FEMINIST STUD. 346, 347 (1979); see also *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) ("It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule.").

²²¹ Sarah Miller Little, *A Woman of Property: From Being It to Controlling It. A Bicentennial Perspective on Women and Ohio Property Law, 1803 to 2003*, 16 HASTINGS WOMEN'S L.J. 177, 178 (2005).

²²² D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW: CASES AND MATERIALS* 224 (4th ed. 2009).

²²³ See generally Richard H. Chused, *Married Women's Property Law: 1800–1850*, 71 GEO. L.J. 1359 (1983); Marylynn Salmon, *Women and Property in South Carolina: The Evidence from Marriage Settlements, 1730 to 1830*, 39 WM. & MARY Q. 655 (1982).

²²⁴ See Chused, *supra* note 223, at 1366 (noting that most jurisdictions "did not pass statutes granting married women contractual or testamentary control over property held at law until well into the nineteenth century" (footnote omitted)); Salmon, *supra* note 223, at 684 (explaining how marriage settlements were permitted but rarely used in South Carolina, and either not permitted or rarely used in most other jurisdictions).

²²⁵ Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1661 (2003).

²²⁶ Little, *supra* note 221, at 179.

profits from rent or the sale of crops became the husband's personal property.²²⁷ The common law system prevented the husband from selling her real estate without the written consent of the wife. In order to ensure that the wife was not being coerced into selling her property, the wife and the judge would go into a separate room where the wife could give consent free of coercion.²²⁸ Many critics noted that the transaction could not truly be free of coercion, due to the fact that the woman was powerless in all other aspects of her marital relation.²²⁹

The common law also stipulated that the wife had no right to her husband's property. All of his personal property (and her "property") could be disposed of by the husband and was subject to the reach of the husband's creditors.²³⁰ If creditors pursued a husband for debts, the wife was entitled to keep only the bare necessities of life.²³¹ Additionally, under common law, married women were not allowed to enter into contracts except as their husband's agent.²³²

At common law the husband also enjoyed substantial rights over the body of his wife. Husbands were allowed to punish their wives physically as long as the corporal punishment did not cause permanent injury.²³³ Husbands were also legally permitted to restrict their wives movements; rape their wives; physically restrain wives from leaving the household; force her to come back to the household if she left; and conclusively determine where the couple would reside.²³⁴ Historically, marriage left women without legal rights or legal personhood.²³⁵

Until the late 20th century, marital rape exemption laws—laws that allowed husbands to brutally beat their wives without fear of

²²⁷ Little, *supra* note 221, at 179–80.

²²⁸ Little, *supra* note 221, at 180.

²²⁹ Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1389 (2000).

²³⁰ Joan C. Williams, *Married Women and Property*, 1 VA. J. SOC. POL'Y & L. 383, 385–86 (1994).

²³¹ WEISBERG & APPLETON, *supra* note 222, at 225.

²³² Marie T. Reilly, *In Good Times and in Debt: The Evolution of Marital Agency and the Meaning of Marriage*, 87 NEB. L. REV. 373, 376–77 (2008). The main protection that a wife had from her husband's conveyances was her right of dower. Dower is a property interest of a married woman which she could only possess when she became a widow. This right was conceived as a legal safeguard against the destitution of widows and goes back to at least the twelfth century. Little, *supra* note 221, at 181. A married woman was entitled to one-third of the husband's real property if they had children and one-half if the couple was childless. The dower is the widow's only entitlement. A widow was not entitled to the property that she brought into the marriage and could only receive the property if her husband stipulated that she should receive it after his death. If a husband died without a will, the wife would only receive the dower and the remaining property would be divided up among the husband's other descendants. *Id.* at 180–81.

²³³ Hasday, *supra* note 229.

²³⁴ *Id.* at 1390–92.

²³⁵ Polikoff, *supra* note 217, at 169.

prosecution²³⁶—existed under the statutory law of every state and the common law.²³⁷ These laws were justified by the idea that: (1) a husband has a “marital right” to sexual intercourse with his wife since “marriage constitutes a contract” and the terms of such contract include “a wife’s irrevocable consent to have sexual intercourse with her husband whenever he wants;”²³⁸ (2) a woman’s identity “merge[s] into that of her husband[’s] upon their marriage,” and thus “a husband [can] not be charged with raping his wife, as that would equate to raping himself;”²³⁹ (3) women are the property of their husbands, and thus “rape [is] not a crime against a woman; rather, it [is] a crime against a man’s property interest;”²⁴⁰ and (4) “the preservation of marital privacy and domestic harmony require[s] that the law stay out of the relationship between husband and wife.”²⁴¹

Furthermore, for the majority of our country’s history, “a husband’s use of physical violence to exert power and control over his wife was not conceptualized as domestic violence.”²⁴² In fact, before “1970, the term ‘domestic violence’ referred to ghetto riots and urban terrorism, not the abuse of women by their intimate partners.”²⁴³ Many of the same beliefs that supported the justification for marital rape exemption laws discussed above also justified: (1) a husband’s “entitle[ment] to correct [his wife’s] behavior as he would that of a servant or child;”²⁴⁴ and (2) official policies that directed law enforcement officials to treat “domestic” incidents as non-criminal matters and to refrain from arresting the perpetrator.²⁴⁵

ii. Current Critiques of Marriage

Today marriage continues to be an institution that can disadvantage women; many feminists argue that the historical nature of the institution of marriage is “preserved in the present social

²³⁶ Jessica Klarfeld, *A Striking Disconnect: Marital Rape Law’s Failure to Keep Up with Domestic Violence Law*, 48 AM. CRIM. L. REV. 1819, 1825 (2011).

²³⁷ *See id.* at 1819.

²³⁸ *Id.* at 1825.

²³⁹ *Id.* at 1826.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² Emily J. Sack, *From the Right of Chastisement to the Criminalization of Domestic Violence: A Study in Resistance to Effective Policy Reform*, 32 T. JEFFERSON L. REV. 31, 32 (2009).

²⁴³ Kit Kinports, *So Much Activity, So Little Change: A Reply to the Critics of Battered Women’s Self-Defense*, 23 ST. LOUIS U. PUB. L. REV. 155, 155 (2004) (citing Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285, 1290 n.42 (2000)).

²⁴⁴ Sack, *supra* note 242, at 33.

²⁴⁵ *Id.* at 34 (citing Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970–1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 47–48 (1992)).

institution.”²⁴⁶ Their concern is not without basis. Marriage continues to be a “venue in which . . . domestic violence often occurs;” continues to “perpetuate[] the gendered division of labor roles;” and continues to be “a central instrument in the denial of women’s status as full citizens.”²⁴⁷ For instance, many people still equate a marriage license with a “hitting license.”²⁴⁸ Statistics show that “marriages that include violence against the woman represent a relatively widespread phenomenon in our society,”²⁴⁹ and “community-based research indicates that almost one out of every four married women will be struck by their husbands at some time during their marriage.”²⁵⁰

The institution of marriage is still harmful to many women because marriage remains a “key site” for the “intimacy discount”—the American Criminal Justice System’s tendency to treat “crimes within ‘the family’ as less serious than crimes outside the family.”²⁵¹ As a result, many victims of rape or other sexual offenses do not receive the justice they deserve, or have to work harder for it, simply because the offender was their spouse.²⁵² The way the criminal justice system treats sex offenses committed within marriages is one example of the “long-lasting” marks that the historical nature of marriage has left.²⁵³

Although laws prohibiting violence within marriage have clearly seen great statutory strides over the last few decades,²⁵⁴ the “link

²⁴⁶ See Candice A. Garcia-Rodrigo, *An Analysis of and Alternative to the Radical Feminist Position on the Institution of Marriage*, 11 J.L. & FAM. STUD. 113, 115 (2008); see also Robson, *supra* note 6 (noting that “marriage implicates serious and insoluble problems of equality”).

²⁴⁷ Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 619–20 n.210 (2013).

²⁴⁸ *I Married A Monster: The Horrors of Domestic Violence*, 51 R.I. B.J. 29, 30 (2003) [hereinafter *Speaking Out*] (quoting Murray A. Straus, *Sexual Inequality, Cultural Norms, and Wife-Beating*, in *WOMEN INTO WIVES: THE LEGAL AND ECONOMIC IMPACT OF MARRIAGE* 59 (Jane R. Chapman & Margaret Gates eds., 1977) (internal quotation marks omitted)).

²⁴⁹ Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 11 (1991); see also *Speaking Out*, *supra* note 248 (noting that “[v]iolence is a common occurrence in ten (10%) to twenty-five (25%) per cent of all marriages in the United States and cuts across all racial, age and economic lines” (citing TAMARA L. ROLEFF, *DOMESTIC VIOLENCE* 16–17 (2000))).

²⁵⁰ Sana Loue, *Intimate Partner Violence Bridging the Gap Between Law and Science*, 21 J. LEGAL MED. 1, 1 (2000) (citing MURRAY A. STRAUS ET AL., *BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY* (1980)).

²⁵¹ Angela P. Harris, *Loving Before and After the Law*, 76 FORDHAM L. REV. 2821, 2843–44 (2008).

²⁵² See *id.* at 2843; see also Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses By Intimates*, 54 HASTINGS L.J. 1465, 1472–73 (2003); Klarfeld, *supra* note 236, at 1819–20 (2011).

²⁵³ See Garcia-Rodrigo, *supra* note 246, at 117.

²⁵⁴ In the mid 1970s, state legislatures and courts finally began to realize that there was no place for marital rape exemptions in “modern American law and society.” Klarfeld, *supra* note 236, at 1819 (quoting *People v. M.D.*, 595 N.E.2d 702, 711 (Ill. App. Ct. 1992)). During this period, marital rape exemption laws began to dissolve. *Id.* at 1826; Sack, *supra* note 242, at 35. In fact by 1993, all fifty states and the District of Columbia recognized marital rape as a crime. Klarfeld, *supra* note 236, at 1819.

between marriage and a reluctance to challenge family violence” is still believed to remain.²⁵⁵ These traditional beliefs that once supported marital rape exemption laws and were perpetrated throughout society, continue to impact the way that states treat sex crimes committed within marriage. For instance, even in jurisdictions that criminalize marital rape, “the penalties for marital rape remain lower than for non-marital rape.”²⁵⁶

Furthermore, as of 2003, spousal immunity still remains a defense to certain sexual offenses in twenty-six states.²⁵⁷ For instance, in twenty states, a husband cannot be prosecuted for having non-consensual intercourse with his wife if she was unable to consent due to unconsciousness or incapacitation.²⁵⁸ Additionally, in fifteen states, a husband cannot be prosecuted for sexual offenses committed against his wife unless (1) his wife promptly complains; (2) his wife shows that “extra force” was used; or (3) he and his wife are separated or divorced.²⁵⁹

In these jurisdictions, the mere status of being married to their offenders makes the crime more difficult to prosecute and consequently puts these women at a disadvantage to their unmarried counterparts.²⁶⁰ This is ironic considering that “numerous studies have shown that marital rape is frequently quite violent and generally has *more* severe, traumatic effects on the victim than other rape” outside the marriage.²⁶¹ By affording husbands who commit sexual offenses against their wives’ “unwarranted status preference,” these states continue to degrade married victims all over again.²⁶²

The way that the American Criminal Justice system treats domestic violence today is another example of the “long-lasting” marks that the historical nature of marriage has left.²⁶³ Despite great advances in the legal treatment of domestic violence,²⁶⁴ “the criminal law system still

²⁵⁵ Harris, *supra* note 251, at 2843.

²⁵⁶ *Id.*

²⁵⁷ Anderson, *supra* note 252, at 1468–71.

²⁵⁸ *Id.* at 1471.

²⁵⁹ *Id.* at 1471–72.

²⁶⁰ See Anderson, *supra* note 252; Klarfeld, *supra* note 236, at 1819–20.

²⁶¹ See *People v. Liberta*, 474 N.E.2d 567, 575 (N.Y. 1984) (citations omitted).

²⁶² Anderson, *supra* note 252.

²⁶³ See Garcia-Rodrigo, *supra* note 246, at 117.

²⁶⁴ By the mid 1970s, state legislatures began enacting domestic violence reform statutes. Kinports, *supra* note 243, at 156. By the mid 1980s, “mandatory and pro-arrest laws” were beginning to be seen in State’s statutory schemes governing domestic violence. Sack, *supra* note 242, at 35. This “profound shift in domestic violence policy” led Congress to pass the Violence Against Women Act (VAWA), which was “the first comprehensive federal response to the problem of domestic violence.” Kinports, *supra* note 243, at 156 (footnote omitted); Sack, *supra* note 242, at 36 (footnote omitted). The VAWA is believed to be both a culmination of the “profound shift in domestic violence policy” and “the beginning of its institutionalization.” *Id.* (footnotes omitted). Today, every state, including the District of Columbia, has domestic violence

exhibits a great reluctance to interfere in the private life of the family.”²⁶⁵ This reluctance likely stems from the historical view that “the preservation of marital privacy and domestic harmony require[s] that the law stay out of the relationship between husband and wife.”²⁶⁶ Feminist scholars routinely criticize this “overwhelming respect for families [still] afforded by our law,” and “express discomfort that the state subsidizes a domain in which women and children are routinely dominated.”²⁶⁷ The criminal justice system’s continued deference to families is believed to, at the very least, “facilitate the perpetuation of gender hierarchy and domestic violence.”²⁶⁸

Although it is not clear whether domestic violence is more prevalent among married couples than non-married cohabitants, domestic violence may nonetheless be harder on married women. Married women are more likely than their unmarried counterparts to be financially dependent on their abusers: “Cohabitants are less likely than married couples to support their partners. They are much more likely to split expenses instead of pooling their resources. They are more likely than married couples to value independence.”²⁶⁹ Domestic violence victims who are financially dependent on their abusive spouses are more likely to stay in the marriage out of fear that they will be unable to support themselves financially if they leave.²⁷⁰ This effect of marriage on domestic violence is thus multi-layered: first, the institution of marriage continues to subordinate women²⁷¹ by reinforcing traditional gender roles,²⁷² which contribute to inequality in marriage and fortify women’s financial dependency on their husbands;²⁷³ second, this cycle of

reform statutes that—at the very least—offer victims the opportunity to get a temporary order of protection against their abuser on an ex parte basis, and which authorize longer-term protective orders “with far-reaching remedies.” Kinports, *supra* note 243, at 156 (citing CLARE DALTON & ELIZABETH M. SCHNEIDER, *BATTERED WOMEN AND THE LAW* 498 (2001)). In addition to prohibiting the abuser from committing further acts of violence, an order of protection may bar him from having any contact with the victim whatsoever and may also grant her other remedies—including possession of the residence or other property, custody, child support, or other economic relief. See generally Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 910–1030 (1993).

²⁶⁵ Dan Markel, Jennifer M. Collins & Ethan J. Leib, *Criminal Justice and the Challenge of Family Ties*, 2007 U. ILL. L. REV. 1147, 1192 (2007).

²⁶⁶ See Klarfeld, *supra* note 236, at 1826; Sack, *supra* note 242.

²⁶⁷ Markel, Collins & Leib, *supra* note 265, at 1193.

²⁶⁸ *Id.*

²⁶⁹ Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309, 323 (2008).

²⁷⁰ Sharon Cammack & Patrice Pujol, *Domestic Violence: A National Epidemic*, 42 HOUS. LAW. 10 (2004).

²⁷¹ See Garcia-Rodrigo, *supra* note 246, at 113.

²⁷² *Id.*

²⁷³ See Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901 (2000).

financial dependency of wives on their husbands is then believed to be the “key ingredient of continued power disparity in marriage.”²⁷⁴ Because people who “should divorce” often “preserve emotionally disastrous unions” for economic reasons,²⁷⁵ many married domestic abuse victims will not leave their abusers.

As a result of the gendered division of labor roles, women still “fare more poorly in the employment market and thus are more dependent on their spouses.”²⁷⁶ Simone de Beauvoir, along with her epigones, was a staunch critic of marriage, maintaining that it was an absurd institution that oppressed both men and women.²⁷⁷ De Beauvoir described how women are particularly burdened by marriage due to the division of labor:

Few tasks are more like the torture of Sisyphus than housework, with its endless repetition: the clean becomes soiled, the soiled made clean, over and over, day after day. The housewife wears herself out simply marking time: she makes nothing, simply perpetuates the present. She never senses the conquest of the positive Good, but rather indefinite struggle against negative Evil.²⁷⁸

According to De Beauvoir, women’s work within the home does not provide her with any autonomy. She is not useful to the wider society; her work is seen as being mere maintenance. A woman’s work is only given meaning through her husband and children—“she is justified through them; but in their lives she is only an inessential intermediary.”²⁷⁹ Despite the fact that her obedience is no longer a legal obligation, this does not change the way that she is perceived in society. It is very difficult for a woman (wife) to gain recognition for her work, to be “respected as a complete person.” However respected a woman is, she is still regarded as “subordinate, secondary, parasitic.”²⁸⁰

c. Marriage – An Ineffective Means to an End

This Section questions the legitimacy of the values promoted by marriage as described above. It is debatable whether marriage is actually an effective means for achieving the government ends described in Part III.A.1. Linking the marital status of individuals to the State can be as harmful as it is helpful. “Obviously, legally sanctioned benefits and social approval for marriage entails corresponding legal disadvantages

²⁷⁴ *Id.* at 1937 n.95 (citing STEVEN L. NOCK, MARRIAGE IN MEN’S LIVES 23, 28–30, 132–33 (1998)).

²⁷⁵ Garcia-Rodrigo, *supra* note 246, at 120.

²⁷⁶ Aloni, *supra* note 247, at 620.

²⁷⁷ See DE BEAUVOIR, *supra* note 215, at 504.

²⁷⁸ See *id.*

²⁷⁹ See *id.* at 510.

²⁸⁰ See *id.* at 501.

and social disapproval for the unmarried.”²⁸¹ In light of the many critiques of marriage described above, promoting marriage can have an unfair and unwarranted disadvantage on those who choose not to marry.

The State’s promotion of traditional marriage as a means of achieving conformity with normative sexual behavior, family stability, and economic security is problematic for two main reasons. First, the means-ends relationship is tenuous and often reversed, propelling the myth that marriage actually helps to achieve any of these goals, when the government often uses these values to promote the institution of marriage itself. Second, the means-ends justification assumes that the government’s goals are in fact legitimate.

First, consider the chicken and the egg perspective on the benefits of marriage. Studies show that “married couples live longer, are healthier, earn more, have lower rates of substance abuse and mental illness, are less likely to commit suicide, and report higher levels of happiness.”²⁸² Are these statistics, used to justify the valorization of marriage, not conceivably linked to the economic and social benefits ascribed to married couples by the State in the first place? Correlation here does not necessarily equal causation. By promoting marriage through economic benefits, the State contributes to the economic stability and the social acceptance, which may lead to an easier lifestyle for married couples. Can it be that a typical married couple is happier than a couple that is in a long term committed relationship that chooses not to marry? In its promotion of marriage to achieve these goals, the government perpetuates the paradigm and fails to consider the larger socio-economic and class factors that play a much more important role in determining outcomes.

Although the State exalts the virtues of abstinence before marriage, monogamy, and other sexual behavioral norms, promoting traditional marriage has little, if any, effect on achieving these government ends. For example, while the government, in the past, has put significant resources²⁸³ toward promoting abstinence before marriage, it is unclear whether such promotion of “normative” behavior as a public health goal

²⁸¹ Robson, *supra* note 6, at 778.

²⁸² *Id.* at 757 n.214.

²⁸³ *Id.* at 797 (citing Press Release, U.S. Dep’t of Health & Human Servs., President’s Budget Increases Abstinence Program Funding (Jan. 31, 2002), available at <http://archive.hhs.gov/news/press/2002pres/20020131a.html>, which notes that the President’s 2003 budget “pledged to spend \$135 million for abstinence-only education”). In 2000, one commentator noted that in the previous five years, Congress had increased federal funding for abstinence only sex-education by three thousand percent. Elizabeth Arndorfer, *Absent Abstinence Accountability*, 27 HASTINGS CONST. L.Q. 585 (2000).

is even realistic.²⁸⁴ Indeed, despite state efforts to promote abstinence until marriage, “[a]lmost all Americans have sex before marrying.”²⁸⁵

Additionally, promoting traditional marriage is only tangentially related to the goals of building stronger family units or enhancing economic security. Interestingly, a 1990 U.S. Department of Health and Human Services report identifying characteristics of strong families references six studies and forty-nine characteristics before the mention of “marriage.”²⁸⁶ W. Robert Beavers identified that strong families typically share the following:

1. Connectedness with other social systems, and open to other viewpoints, lifestyles and perceptions. A respect for differences and awareness of individual boundaries. Intimacy is attained via skillful communication.
2. Solid parental coalitions and clear role definition without rigid stereotyping.
3. Complementary rather than symmetrical power roles.
4. An encouragement of autonomy. The family is comfortable with differences of opinion. There is an absence of invasiveness. The family has a degree of flexibility and adaptability.
5. The belief that human behavior is limited and finite and that human behavior is the result of a number of variables, not one clear-cut cause.
6. Family members are involved with each other. Conflict may exist between members, but not unresolvable conflict.
7. Effective negotiation and task performance.
8. Transcendent values.²⁸⁷

While “economic security”²⁸⁸ can play a role in promoting a stronger family unit, it is not dispositive. Moreover, economic security is more closely related with class and socio-economic factors than with marriage. As Ruthann Robson notes, if the economic consequences of unwed motherhood were the State’s primary concern, government policy could simply “address the issue by fostering premarital birth control, including abortion, or perhaps even more radically, economic support for single parents.”²⁸⁹ Instead, the State is using purported social ends (normative sexual behavior, family stability, and economic security) to promote its favored choice for the means—traditional marriage. Robson notes that the government, through abstinence-only education, utilizes sex itself to promote marriage.²⁹⁰ Similarly, by

²⁸⁴ Lawrence B. Finer, *Trends in Premarital Sex in the United States, 1954–2003*, 122 PUB. HEALTH REP. 73, 73 (2007).

²⁸⁵ *Id.*

²⁸⁶ MARIA KRYSAN ET AL., IDENTIFYING SUCCESSFUL FAMILIES: AN OVERVIEW OF CONSTRUCTS AND SELECTED MEASURES 1, 20 (1990), available at <http://aspe.hhs.gov/daltcp/reports/idsucfam.pdf>.

²⁸⁷ *Id.* at 20 (citing W. ROBERT BEAVERS, PSYCHOTHERAPY AND GROWTH: A FAMILY SYSTEMS PERSPECTIVE (1977)).

²⁸⁸ *Id.* (citation omitted).

²⁸⁹ Robson, *supra* note 6, at 797.

²⁹⁰ *Id.*

subsidizing marriage through the enticement of a bundle of economic benefits, the State lures couples into marriage, using the ends (economic stability) to justify and promote the means (marriage). This tautological justification boils down to the State lauding marriage as a means to achieving greater economic security, while at the same time exclusively subsidizing married couples.

d. The Contractual Alternative

Cohabitation agreements allow couples to clarify financial commitments and regulate their property rights. Not only can cohabitation agreements provide security in the event of break up, but also in the event of death or illness, or even when there is no event and the couple stays together. Through contract, couples can determine in advance how specific assets will be divided if they separate, and also specify with great detail how responsibilities will be shared in the household while they live together and how they will manage their day-to-day finances. These contracts provide a measure of certainty where the law is silent and a level of specificity to their relationship that is otherwise impossible to attain from state law. It is unsurprising then that many feminists support family contracts for their empowerment of women.²⁹¹

The policy arguments opposing contracting in this area are increasingly less persuasive. The enforcement of contracts between cohabiting partners has historically been seen as immoral in that the consideration for such agreements was considered to be illicit sex.²⁹² This moral hurdle should hardly present an obstacle today, however, in light of the cultural shifts toward cohabitation before marriage or without marriage described above. An additional policy concern is for individuals who do not want to enter contracts that define something as personal as their intimate relationship or their relationship with their children. Couples can be uncomfortable discussing financial issues and obligations. The reality is that couples rarely sign contracts; it costs money to draw up a contract and contracts can be complicated and intimidating. Most couples do not sign pre-nuptial agreements, for example, if for no other reason than they are optimistic about their relationships. However, this truth should not prevent the enforcement of contracts otherwise validly entered.

Similarly, potential disparities in bargaining power should not prevent the enforcement of all cohabitation agreements. It is often the case that one of the parties to a contract has substantially more bargaining power over the other party. However, unequal bargaining

²⁹¹ Weinrib, *supra* note 145, at 208–09.

²⁹² Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1449–50 (1992); *see also* Weinrib, *supra* note 145, at 210.

power alone, absent a showing of unconscionably one-sided terms, should not be reason enough not to enforce an agreement. As with all contracts, cohabitation agreements can be struck down as unconscionable. But short of unconscionability (or the existence of some other contract defense), such contracts should be presumed to be valid. Free-market principles of contract law rely on the premise that individuals—especially when it comes to intimate matters of family planning—are and should be freely autonomous to choose the agreements they wish to enter into.

Based on this real harm from the religious and patriarchal components of marriage, some couples choose not to marry. These couples should have the autonomy to define their rights as to each other without the intervention of the State. When courts fail to enforce cohabitation agreements, there are two possible effects. First, couples who do not face legal impediments are in effect faced with “compulsory matrimony.”²⁹³ If they want the government benefits and economic rights that are provided to marital partners through the current legal regime, as we can presume all rational economic actors do, they must actually get married. Such “coercive aspects of the phenomenon of marriage”²⁹⁴ cannot be overstated. Second, for couples that cannot legally marry, they are left with unequal access to a variety of economic benefits.

2. Co-Parenting Agreements

Twenty-eight million children in the United States are raised in families in which their caregivers are not exclusively two heterosexual parents who are biologically related to their children—they may instead have a single parent, one or both parents may not be biologically related to them, or they may have multiple primary and non-primary caregivers.²⁹⁵ Family law is not meeting the needs of these families. Therefore, families must often seek to secure parenting rights through contract.²⁹⁶ The State can regulate to some extent, with the idea that the

²⁹³ ROBSON, *supra* note 10; Robson, *supra* note 6. Robson argues that matrimony, like heterosexuality, may not be a “preference at all but something that has had to be imposed, managed, organized, propagandized, and maintained by force.” Robson, *supra* note 6, at 780 (citing Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in *BLOOD, BREAD, AND POETRY: SELECTED PROSE 1979–1985*, at 50 (1986)).

²⁹⁴ Robson, *supra* note 6, at 746.

²⁹⁵ Kavanagh, *supra* note 12, at 91.

²⁹⁶ For some, co-parenting agreements are not necessary in light of the rising prevalence of second-parent adoptions. Since courts often do not recognize private co-parenting contracts—and because parental rights are not automatically conferred to a child’s unmarried parents—second-parent adoptions have become a crucial means of securing parental rights for unmarried parents. Sam Castic, *The Irrationality of a Rational Basis: Denying Benefits to the Children of*

arrangement of second-parent adoptions, for example, is good for most people. However, there are many family arrangements that do not fit squarely into state-sanctioned paradigms; the State cannot possibly legislate all of those individual arrangements.

Private contracts between or among intended parents can fill this gap and should be enforced as long as the intended parents are fit. Intention to parent (which may be revealed through contract or through the initiating role in the conception and birth of a child) can and should trump genetics in establishing legal parenthood. Contracts between intended parents should provide even *greater* evidence of intent to be bound than biology—indeed, children may be born through natural and traditional means by accident, where the natural parents did not “intend” to become parents. But at a minimum, such manifestation of intent should become equivalent to biology as the ultimate seal of approval. Thus, contracts that identify the intended parents as the legal parents should be enforced. If later the intended (legal) parents have a dispute, the best interest of the child will be considered, as always, to determine who should have custody.

The California case, *In re Marriage of Buzzanca*, got this right. In that case, a heterosexual married couple had a gestational surrogacy agreement to have a biologically unrelated embryo implanted in another woman, a surrogate, who would carry and give birth to the child.²⁹⁷ After the fertilization, implantation, and pregnancy, the husband filed for divorce and asserted there were no children, despite the surrogacy contract.²⁹⁸ While the trial court held that neither the husband nor wife were lawful parents because there was no genetic connection, the appellate court reversed, directing the trial court to declare that both intended parties were indeed the child’s lawful parents.²⁹⁹ The court analogized to an artificial insemination statute, providing that an infertile husband who consents to artificial insemination, though not genetically related to the child, is still the “lawful father” because he consented to having the child.³⁰⁰ By consenting to have a child through

Same-Sex Couples, 3 MOD. AM., Summer–Fall 2007, at 3, 6. However, even when the parties are seeking second-parent adoptions, and courts are willing to grant second-parent adoptions, they often analyze the same-sex, co-parent-child relationship under a higher level of scrutiny. See Forman, *supra* note 108, at 33. Further, second-parent adoptions are not a viable or desirable solution for all couples—the biological parent might be opposed to giving full parental rights to the “second parent,” and similarly, the “second parent” might not be interested in full parental rights. For example, a grandparent who seeks visitation rights, without the desire to actually adopt the child, would be best served by coming to an agreement with the parents for visitation entered as a consent decree with the court. Contracts allow for more flexible arrangements.

²⁹⁷ *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Ct. App. 1998).

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 282.

artificial insemination, intent to parent or intent to be the “first cause, or prime movers, of the procreative relationship” is established.³⁰¹

Adopting dicta from *Johnson v. Calvert*—the California Supreme Court’s first surrogacy decision—the *Buzzanca* court noted that intent to parent—choosing to bring a child into being—is also the “best rule” in providing “certainty and stability for the child.”³⁰² Despite not sharing the same genetics, the court in *Buzzanca* held that like a husband who consents to artificial insemination, the husband and wife here were the child’s lawful parents because of “their initiating role as the intended parents in her conception and birth.”³⁰³ Significantly, the court did not sugar coat this notion with any best interest of the child language, which is left for any potential future custody dispute about between the two intended parents who signed the contract.

In a related scenario, when one of the parties to the contract is a biological parent of the child and the other is not, the biological parent’s participation in the contract elevates the weight of the agreement even further as it shows her manifestation of intent to raise the child jointly with the non-biological parent. The biological parent’s very act of agreeing to the arrangement with the non-biological parent is persuasive evidence that the court should treat the two parties on equal footing. Through the execution of the co-parenting agreement, the biological, legal parent manifests intent to jointly create a family with her partner and identifies the partner as equal co-parent. This, of course, assumes that all other safeguards provided by contract law are in place to assure the assent was real and voluntary and truly manifested through the agreement.

My proposal works off the premise that, when establishing relationships and families, non-biological parents deserve the same certainty regarding the care and custody of their children that biological parents have. Since it is presumed that legal (biological) parents will act in the best interests of their children, private co-parenting agreements between them are encouraged and routinely enforced.³⁰⁴ Once a co-parenting agreement identifies the intended (legal) parents (regardless of their biological relationship to the intended child), the same presumption should be made, and the contract should also be enforced as written, as long as both intended parents are fit.

In the sub-sections that follow, I elaborate on my proposal and address the two expected primary critiques of this position: (1) that

³⁰¹ *Id.* at 290 (citation and internal quotation marks omitted).

³⁰² *Id.* at 290–91 (citing *Johnson v. Calvert*, 851 P.2d 776, 783 (Cal. 1993) (holding that in a gestational surrogacy dispute, she who intended to procreate is the natural mother under California law)).

³⁰³ *Id.* at 293.

³⁰⁴ See *infra* note 313 and accompanying text.

enforcing co-parenting agreements will be at odds with the superior concern of the best interest of the child; and (2) that enforcing co-parenting agreements inappropriately commodifies and devalues women and children.

a. Co-Parenting Agreements and the Best Interest of the Child

Typically, co-parenting contracts are only considered as one of many factors in determining the best interests of the child.³⁰⁵ At first glance, this analysis appears logical and correct—custody should, of course, be determined based on what is best for the child. This hurdle, however, is not equally applied to all intended parents. Biological parents enjoy a fundamental right to the care, custody, and control of their children.³⁰⁶ As long as the biological parents are not deemed “unfit,” they retain rights as to their children, and co-parenting contracts between them that work out custody arrangements are encouraged.³⁰⁷ Non-biological parents do not enjoy this same presumption. In order to gain custody of an intended child, a non-biological, non-adoptive parent must overcome a more rigorous analysis of what custody arrangement is in the child’s best interest. Indeed, non-biological, non-adoptive parents have no standing even to file a claim for custody absent a contract in most states, making contracts indispensable tools for non-biological intended parents.³⁰⁸

The most compelling arguments against co-parenting contracts relate to the requirement that custody decisions be made according to the best interests of the child. There are abundant concerns about the child’s interests and rights, given that preconception agreements are made before the child is born and thus the best interests of the child cannot be considered.³⁰⁹ Logically, a child’s interests in receiving adequate care and love should not be subordinated to a parent’s right to raise her children.³¹⁰ Some argue that intended parents, however

³⁰⁵ See *supra* notes 103–05 and accompanying text.

³⁰⁶ See *supra* note 72 and accompanying text.

³⁰⁷ See *infra* notes 321–25 and accompanying text.

³⁰⁸ See generally Lawrence Schlam, *Third-Party “Standing” and Child Custody Disputes in Washington: Non-Parent Rights—Past, Present, and . . . Future?*, 43 GONZ. L. REV. 391 (2008); see also *Frazier v. Goudschaal*, 295 P.3d 542, 554–58 (Kan. 2013) (holding in part that a parenting agreement between a same-sex couple was enforceable as long as enforcing it would be in the best interests of the child). Some states, such as New York, have an “extraordinary circumstances” basis for gaining standing. *Bennett v. Jeffreys*, 356 N.E.2d 277 (N.Y. 1976). The *Bennett* court held that “absent surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances,” a biological parent cannot be deprived of custody rights to the child by the state. *Id.* at 280. The court added that, “[i]f any of such extraordinary circumstances are present,” such as the birth mother’s prolonged separation from her child, the best interest of the child standard applies to the determination of custody. *Id.*

³⁰⁹ Vanessa S. Browne-Barbour, *Bartering for Babies: Are Preconception Agreements in the Best Interests of Children?*, 26 WHITTIER L. REV. 429, 467–68 (2004).

³¹⁰ *Id.* at 468.

complete their agreement, should not be able to determine the status of children without the imprimatur of the State³¹¹ and without a mandated consideration of the best interests of the child. It may also be argued that parenting agreements violate states' *parens patriae* authority by allowing the parties to such contracts to circumvent this authority.³¹² A major critique of contracting in this area is the fear that parties can contract around state authority, which requires a best interest of the child analysis before making any custody determinations.

However, enforcing co-parenting agreements does not have to be at odds with best interest of the child requirements. I advocate the use of contracts as a means of giving non-biological intended parents the same status and presumptions as biological parents. Putting non-biological parents on a similar footing as biological parents does not side-step the best interests standard. Rather, courts can make custody determinations in the same manner in which they are made for two biological parents.

Co-parenting agreements between two biological parents tend to be enforced in most cases because of the presumption that parents know better than courts what is best for their children and for their families.³¹³ When a man and a woman conceive a child, there is no requirement for court approval;³¹⁴ biological parents are presumed to act in accord with a child's best interest, and the court will interfere with the parents' rights to raise their children only if there is an allegation or concern that one parent is not fit.³¹⁵ In essence, there is a preconception agreement implied between two biological parents. Supreme Court precedent requires lower courts to apply the presumption that fit parents act in the

³¹¹ Schlam, *supra* note 308, at 430.

³¹² Browne-Barbour, *supra* note 309, at 472.

³¹³ See also Linda Jellum, *Parents Know Best: Revising Our Approach to Parental Custody Agreements*, 65 OHIO ST. L.J. 615, 618 (2004) (noting that some states allow for a parental agreement to be a factor in the best interests of the child analysis while others will presume a parental agreement made between two biological parents to be in the best interest of the child unless proven otherwise); see also Robert E. Emery & Kimberly C. Emery, *Should Courts or Parents Make Child-Rearing Decisions?: Married Parents as a Paradigm for Parents Who Live Apart*, 43 WAKE FOREST L. REV. 365, 379 (2008) (observing that judges often do not overturn parenting agreements between two biological parents despite the discretion to do so).

³¹⁴ *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 291 (Ct. App. 1998) (noting that "[p]arents are not screened for the procreation of their *own* children; they are screened for the adoption of *other* people's children").

³¹⁵ *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (explaining "[w]e have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest'" (quoting *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring))).

best interests of their children.³¹⁶ The Supreme Court in *Parham* has stated:

The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.³¹⁷

Therefore, if a parent "adequately cares for his or her children,"³¹⁸ "there is normally no reason for the State to inject itself into the private realm of the family to further question fit parents' ability to make the best decisions regarding their children."³¹⁹

This presumption and belief carries over to situations in which the two biological parents enter an agreement surrounding custody—co-parenting agreements between two biological parents assigning custody and visitation rights are generally enforceable and encouraged.³²⁰ Generally, the State has no interest in interfering in custody agreements between two fit parents. The assumption is that the "parents have better information about family functioning than third party decisionmakers and, in most cases, are more likely than judges to make workable plans for their post-divorce families."³²¹ Divorcing biological parents are often encouraged to create parenting agreements for their biological children as a matter of public policy favoring the "prompt resolution of disputes concerning the maintenance and care of minor children."³²² It is commonly believed that "most families will benefit if parents avoid adjudication altogether by making decisions about custody themselves."³²³ Indeed, "cooperation and involvement of both parents"

³¹⁶ *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (noting that "there is a presumption that fit parents act in the best interests of their children" (citing *Parham v. J.R.*, 442 U.S. 584, 602 (1979))).

³¹⁷ *Parham*, 442 U.S. at 602 (citations omitted).

³¹⁸ *Troxel*, 530 U.S. at 68–69 (citing *Reno v. Flores*, 507 U.S. 292, 304 (1992)).

³¹⁹ *Id.* at 58.

³²⁰ See *supra* note 296 and accompanying text.

³²¹ Elizabeth S. Scott & Robert E. Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best Interest Standard* 4 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 13-352, 2013) (citing Jana B. Singer, *Dispute Resolution and the Postdivorce Family: Implications of a Paradigm Shift*, 47 FAM. CT. REV. 363 (2009)), available at <http://ssrn.com/abstract=2275581>.

³²² See, e.g., *Shoup v. Shoup*, 556 S.E.2d 783, 787 (Va. Ct. App. 2001) (noting that voluntary, court-approved agreements promote the policy of "prompt resolution of disputes concerning the maintenance and care of minor children" and should therefore "be encouraged" (quoting *Morris v. Morris*, 219 S.E.2d 864, 867 (Va. 1975))); see also *In re Marriage of Coulter & Trinidad*, 976 N.E.2d 337, 343 (Ill. 2012) (noting that public policy of encouraging parties to reach agreement before resorting to litigation is "as strong, if not stronger, in the context of disputes between divorcing parents as it is in other contexts"); *In re Marriage of Kraft*, 868 N.E.2d 1181, 1186 (Ind. Ct. App. 2007).

³²³ Scott & Emery, *supra* note 321, at 48.

is believed to lead to greater overall family wellbeing.³²⁴ Thus, with an eye toward enforcing cooperative co-parenting agreements, custody is still determined based on the best interests of the child, but the best interest of the child analysis is heavily influenced by the presumption of custody in favor of the parents and their private agreements.

This same policy and presumption should also be applied to non-biological parents who prove their parental intent through contract. The flexible nature of the best interest of the child standard allows for the same presumptions to be made about all intended parents, regardless of how a child is conceived. Courts hold considerable discretion³²⁵ to apply the “broad and flexible”³²⁶ best interest of the child standard within the general framework set out by the Supreme Court,³²⁷ after consideration of a wide variety of factors.³²⁸ The vagueness of the best interest of the child standard, and its inherent subjectivity and flexibility, “permit[] the decision maker the opportunity to render a decision which reflects the social mores of the day without having to consider values and mores which have become dated.”³²⁹ It is this very flexibility that would allow judges to recognize a presumption that, like biological parents, fit “intended” parents too act in the best interests of their children.

³²⁴ *Id.* at 50.

³²⁵ 27C C.J.S. *Divorce* § 1000 (2013) (noting that “[t]he implementation of the best interest standard has been left to the sound discretion of the trial judge” (footnote omitted)); *see also* 14A Roland F. Chase, “*Best Interests of the Child*” Standard—Generally, in MASSACHUSETTS PRACTICE SERIES § 8.185 (4th ed. 2013) (explaining that “[t]he trial court has broad discretion in exercising its determination of the child’s best interests” (footnote omitted)); 12 ALAN D. SCHEINKMAN, *Best Interests of the Child—Factors Considered*, in NEW YORK PRACTICE SERIES: NEW YORK LAW OF DOMESTIC RELATIONS § 21:17 (2011) (noting that “there are no absolutes in making the best interests determination, but rather only policies designed to guide the courts in their determinations” (footnote omitted)).

³²⁶ *See, e.g.*, 3 TIMOTHY TIPPINS, *Traditional Standard: Best Interest of Child*, in NEW YORK MATRIMONIAL LAW AND PRACTICE § 20.2 (2013).

³²⁷ *See* Troxel v. Granville, 530 U.S. 57 (2000) (affirming the lower court in dismissing grandparents’ visitation petition and holding that the Washington statute as applied to the case violated the mother’s due process right to make decisions about the care, custody, and control of her daughters, where paternal grandparents were seeking visitation of deceased son’s children and wanted more visitation than the mother desired).

³²⁸ In determining the best interests of a child, a court may consider many different factors, including the quality of a child’s interaction with her parents, siblings, and other individuals with whom the child is close, continuity of care, parenting abilities, parents’ employment, health, and morality, as well as the stability offered by each parents’ home environment, and the child’s preference. 27C C.J.S. *Divorce* § 1000 (2013). In making custody determinations a court may also look at the age and character of the parties seeking custody, the sex and age of the child, and the ability of each parent to satisfy the child’s educational, emotional, material, and social needs. *Id.* (citing Mullis v. Mullis, 994 So. 2d 934 (Ala. Civ. App. 2007)). Generally this is a fact-based approach that requires courts to consider all factors relevant to the child’s interests. *Id.* (citing Peterson v. Peterson, 281 P.3d 1096 (Idaho 2012)); *see also* McCormic v. Rider, 27 So. 3d 277 (La. 2010); Julian B. v. Williams, 948 N.Y.S.2d 399 (App. Div. 2012) (holding that the court’s primary responsibility in a child custody determination is to establish, under the totality of the circumstances, what is in the best interests of the child).

³²⁹ SCHEINKMAN, *supra* note 325.

Indeed, courts have recognized that parents are generally better positioned than courts to determine the needs and best outcomes for their children. Critics of the best interest of the child standard, of which there are many, bemoan its vagueness and indeterminate outcomes.³³⁰ The standard is known to invite litigation and imposes substantial costs and burdens on courts and parties. It is argued that “courts are not well positioned to select and weigh best interest proxies or evaluate the wide-ranging evidence offered by parties.”³³¹ Because the circumstances surrounding custody disputes are “varied and complex,” courts face “insurmountable obstacles” in sifting through the complexities to render fair and consistent outcomes.³³² If family members were free to make custody decisions themselves, there would likely be less hostility between them and more cooperation. Operating under the presumption that non-biological intended parents are also best suited to raise their children would narrow the court’s discretion, “obviate[] the need for psychological evidence” which has proven to be problematic, and bring “greater determinacy to custody doctrine.”³³³

Such a presumption makes sense in light of society’s changing attitudes regarding families and parenthood. Honoring contracts made between partners who are not both biologically related to their children creates parity between biological parents and non-biological intended parents. With the growing numbers of non-biological families, the law should protect the rights and interests of intended parents who declare their intentions through contract. A partnership where one member is infertile, or where the members are the same sex and cannot reproduce with each other should not be barred from enjoying the same rights as a couple where both the woman and man are biologically related to their child. This is not to say that the second couple deserves superior rights, but rather that they should not be penalized for their inability to produce a child who is related to both members.

Such a presumption also makes sense in light of the natural bonds that form between non-biological parents and the children they raise. It is somewhat arbitrary to treat biology as the sole or most important

³³⁰ See, e.g., Susan Beth Jacobs, Note & Comment, *The Hidden Gender Bias Behind “The Best Interest of the Child” Standard in Custody Decisions*, 13 GA. ST. U. L. REV. 845, 849 (1997) (arguing that courts set a higher standard for mothers as parents than fathers in a best interests of the child analysis); Richard A. Warshak, *Parenting By The Clock: The Best-Interest-of-the-Child Standard, Judicial Discretion, and the American Law Institute’s “Approximation Rule”*, 41 U. BALT. L. REV. 83, 103 (2011) (critiquing the American Law Institute’s approximation rule on the grounds that it undervalues parents’ intangible contributions and is unwieldy and imprecise); Janet Weinstein, *And Never The Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 109 (1997) (pointing out that very often a judge is forced to decide custody between two capable parents, leading to unpredictable results).

³³¹ Scott & Emery, *supra* note 321, at 6–7.

³³² *Id.* at 7.

³³³ *Id.* at 3–4.

determinant of a parent's likelihood of providing a safe and nurturing home for their child. The fact that a couple cannot produce a child who is biologically related to both of its members does not of itself make these parents less fit, nor does it weaken the deep bond between themselves and the child that they choose to raise. There is nothing inherently less deserving, from a public policy standpoint, about a partnership that produces a child who is not biologically related to both parents. The parents undoubtedly have the same desire for and love of their child, and the same likelihood of being good parents. As the Supreme Court has noted, "[n]o one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship."³³⁴ In fact, studies have shown that adopted children are actually more likely to have certain enriching experiences in their families than the general population.³³⁵

b. Co-Parenting Agreements and the Market

A second argument against the enforcement of co-parenting agreements relates to its intersection with market values. Public policy may dictate that co-parenting agreements are an inappropriate and immoral application of contract law to families as they "devalue human life," "exploit" and "commodify women and babies," and "devalue[] the roles of mothers, fathers, children, and families."³³⁶ Moral arguments may be that "all humans [should be treated] as ends in themselves, not merely as means to other ends" and that gestational services are "so intimately connected to one's personhood that . . . [they] should be protected from the free market."³³⁷ Children, according to this argument, should not be subject to contractual bargaining, given that "a

³³⁴ *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 (1977); see also *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 290 (Ct. App. 1998) (adopting dicta of the California Supreme Court that "people who 'choose' to bring a child into being are likely to have the child's best interest at heart" (footnote omitted)).

³³⁵ See SHARON VANDIVERE, KARIN MALM & LAURA RADEL, ADOPTION USA: A CHARTBOOK BASED ON THE 2007 NATIONAL SURVEY OF ADOPTIVE PARENTS (2009), available at <http://aspe.hhs.gov/hsp/09/NSAP/chartbook/index.pdf>. While "love" for adoptive children may be a somewhat ambiguous measure, the report made several findings regarding the general well being of adoptive children compared to the general population. These findings concluded that eighty-five percent of adopted children are in excellent or very good health, and a majority of adopted children have enriching positive experiences in their families. For example, adopted children are more likely to be read to everyday as young children (sixty-eight as compared to forty-eight percent of the general population), sung to or told stories (seventy-three as compared to fifty-nine percent), and participate in after school activities (eighty-five as compared to eighty-one percent). Additionally, eighty-seven percent of adopted parents said they would "definitely" make the same decision to adopt their child knowing everything they now know about their child. *Id.* at 64–72.

³³⁶ *Browne-Barbour*, *supra* note 309, at 431, 471–72.

³³⁷ *Id.* at 474–75.

child is a person, and not a sub-person over whom the parent has an absolute possessory interest.”³³⁸ These agreements also implicate issues of race and poverty, because they could lead to difficult choices for socially and economically marginalized women.³³⁹

Such justifications for not enforcing contracts involving family or intimate issues tend to be grounded in anti-commodification principles. Pure commodification (espoused by “Chicago school” legal theorists Justice Richard Posner and Nobel Laureate Gary Becker) is the belief that real welfare is always promoted by permitting exchange—so things like sexuality, love, marriage, health, surrogacy, organs, babies, and the like can be commodified (i.e., can be made available on open markets and therefore the subject of contracts).³⁴⁰ The critique (usually a feminist critique led by Professor Margaret Jane Radin) is that some things (things with emotional content like the examples listed above) should not be contractible or commodifiable.³⁴¹ This critique of bargaining in general is based on the notion that not everything should be a *quid pro quo*.

The commodification theory of human interaction has drawn criticism in large part because it does not distinguish between that which is “human” and that which is “not human.”³⁴² Professor Radin explains the distinction as follows: there are certain things that hold value because they are intrinsic to our self-conception as human beings, and to commodify them is to undermine the idea of personhood.³⁴³ Commodities are typically commensurable (they can be compared and ranked in value), fungible (they can be substituted one for the other), and monetizable (they can be sold and converted into dollars); qualities that certainly do not apply to human beings.³⁴⁴ However, it is not enough to say that people have a visceral reaction against contracting for the above-mentioned “contested commodities.”³⁴⁵ She centers her critique upon three separate rhetorical, symbolic aspects of commodification that are troubling.

The first is the “indicia of commodification.”³⁴⁶ This is the discomfort that arises from using the language of exchange for human

³³⁸ *Alison D. v. Virginia M.*, 572 N.E.2d 27, 31 (N.Y. 1991).

³³⁹ Browne-Barbour, *supra* note 309, at 476.

³⁴⁰ See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 156–57 (6th ed. 2003); RICHARD A. POSNER, *SEX AND REASON* (1992).

³⁴¹ Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1903 (1987).

³⁴² *Id.* at 1906. See generally Martha M. Ertman, *Mapping the New Frontiers of Private Ordering: Afterword*, 49 ARIZ. L. REV. 695, 704–05 (2007); Michele Goodwin, *The Body Market: Race Politics & Private Ordering*, 49 ARIZ. L. REV. 599 (2007).

³⁴³ Radin, *supra* note 341, at 1906.

³⁴⁴ MARGARET JANE RADIN, *CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS* 118–20 (1996).

³⁴⁵ *Id.*

³⁴⁶ *Id.*

commodities, and it is generally worked around by referring to such exchanges in donative terms. For example, while trade in organs is illegal, people can “donate” organs or reproductive cells. Similarly, while surrogacy is illegal in some states, people can serve as surrogates for free. However, this “incomplete commodification”³⁴⁷ is not actually remedied by the use of ambiguous language, so we end up with the paradoxical situation where a woman can “donate” eggs, but other actors down the line in the transaction unquestionably profit from the sale of the “donation.” Thus, the result of decoupling certain sales and services in intimate areas from the market is the continued provision of such services, but without just compensation to the person providing the valued service. While Radin’s anti-commodification argument purports to value women’s bodies and reproductive labor as *above* market concerns, in practice, this really leaves women at a disadvantage to both articulate their individual autonomy, and receive just compensation on their own terms.³⁴⁸

Radin’s second critique of commodification is the “market rhetoric”—discussing intimate human relationships or other things that bear on our humanity in terms of transaction costs, demand curves, and ownership.³⁴⁹ According to Radin, market rhetoric “transform[s] the texture of the human world”³⁵⁰ and “turns unique individuals into fungible entities with monetary values.”³⁵¹ Here, the problem with the “contractual family” is not necessarily in the actual transactions, but in thinking about them in depersonalizing, objectifying economic terms. However, if we shift the conversation about enforcement of such contracts away from protecting markets to protecting a broader range of family relationships, we avoid this problem. As pertaining to co-parenting agreements, allowing intended parents to contract for custody rights over their intended children when they otherwise can not have

³⁴⁷ *Id.* at 102 (coining the term “incomplete commodification” to indicate that some commodities are monetized, but not entirely).

³⁴⁸ The social stigma of, for example, selling a kidney, has an immeasurable negative impact on public health, as many people die everyday waiting for a kidney. However, it is illegal to sell a kidney because of this type of non-commodification argument. The reality is, the non-commodification principle in this case serves no one, especially the people who need kidneys. Beyond the simple rhetorical application of this non-commodification argument to kidneys, some would say that we cannot sell our kidneys because of ethical concerns: e.g., poor people would barter their bodily integrity for a paycheck. But this highly principled argument forgets that poor people, in fact, compromise their bodies and health in all kinds of ways in dangerous working conditions in order to survive economically. While Radin’s position claims to protect women and children, it does not actually empower or protect anyone. It boils down to subjective values over the sanctity of a woman’s reproduction—a conservative, not feminist, argument.

³⁴⁹ Radin, *supra* note 341, at 1859 (explaining that “[b]roadly construed, commodification includes not only actual buying and selling, but also market rhetoric, the practice of thinking about interactions as if they were sale transactions . . .”).

³⁵⁰ Radin, *supra* note 341, at 1883–87.

³⁵¹ Jennifer E. Rothman, *The Inalienable Right of Publicity*, 101 *GEO. L.J.* 185, 218 (2012).

children naturally (for example, if they are infertile or in a relationship with a person of the same sex) protects their right to procreative liberty or their fundamental right as parents in the care, custody, and control of their children, located in the Fourteenth Amendment's substantive due process protection.³⁵² For example, lesbian partners (who do not have the right to marry in their state) who desire to start a family (wherein one woman is the biological mother of the couple's child), could use contract to establish an equitable custody arrangement which would bypass laws giving custody solely to the biological mother.³⁵³ Enforcing contracts between intended parents honors and gives weight to parties' intentions, over their biology. Through contract, the couple would have the option of basing custody on the child's relationship with her parents, rather than on traditional criteria such as biology, adoption, or marriage.³⁵⁴ Such a rule and policy creates equality, certainty, and fairness.

Arguments in favor of enforcement of co-parenting agreements (such as those made above) have often gotten short shrift because they focus on the individual interests of parents, whose rights, it is believed, should not trump the rights of their children. However, with a shifting of presumptions, as described above, the rights of these two groups do not have to be at odds. In addition to protecting the constitutional rights of the intended parents, a persuasive argument can be made from the point of view of the child—denying children an opportunity to have two parents, the same as children of a traditional marriage, impinges upon the children's constitutional rights.³⁵⁵ Without an enforceable co-parenting agreement, some non-biological partners of biological parents may be reluctant to serve as a true parent to a child, fearing that should the partnership fall apart, they would completely lose their relationship with the child. It may be difficult for such non-biological parents to invest in relationships with their children emotionally or financially, given the uncertainty of the relationship and the unpredictability of the law in this area. Such agreements arguably advance the public policy of protecting family relationships even in the absence of blood relationships.³⁵⁶

³⁵² See Browne-Barbour, *supra* note 309, at 468 (citing *Troxel v. Granville*, 530 U.S. 57, 65 (2000)).

³⁵³ Spitko, *supra* note 141, at 1151–52.

³⁵⁴ *Id.*

³⁵⁵ See Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47 *FAM. L.Q.* 1 (2013).

³⁵⁶ See, e.g., *Smith v. Org. of Foster Families For Equality & Reform*, 431 U.S. 816, 844 (1977). In *Smith*, the Supreme Court explained that:

[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in “promot(ing) a way of life” through the

The third aspect of commodification that is troubling to Radin is “fungibility”—the idea that once a value is ascribed to something, it can then be valued respective to other things, traded, and is no longer irreplaceable. She gives the example of children who are sold, whether it be through what we traditionally think of as impermissible baby-selling or whether it be through a surrogacy agreement.³⁵⁷ According to Radin, these children may come to see themselves in terms of their monetary value in the transaction in which they were “purchased,” and base their self-conception against the value that other children would fetch on the baby-market. Another example would be in the practice of bride price, where certain monetary or commodity values are ascribed to marriageable women, and it is clear that brides are not all valued equally.

Radin’s critique is grounded in a cultural feminist perspective, which values nurturing as a specifically feminine form of understanding the world (and one that is markedly lacking in the pure commodification perspective). However, she acknowledges—without explicitly acknowledging the non-monolithic nature of feminism—that her perspective is somewhat at odds with liberalism, and by implication with liberal feminism. That is to say, a perspective that values autonomy of the individual as a liberty interest, as opposed to merely valuing freedom of contract, would experience markets as liberating. The ability to sell commodities gives people who are excluded from the economy on the basis of sex, race, or class an ability to buy things. For example, allowing women to contract for sex or reproduction gives them an opportunity to enter into the market even when they have been denied the opportunity to cultivate any other skills. The rhetorical argument against the commodification of family harms a woman’s ability to fully participate in the market economy on her own terms. Notions about a woman’s reproductive and emotional labor in the marketplace and her home are based on deeply rooted assumptions about women’s inability to articulate the boundaries of her family and the market from herself.

Indeed, though emotional arguments regarding the objectification and commodification of children and parenthood are to be expected, they may be overstated in a society that already routinely determines parental rights and duties through market avenues in the context of childcare, domestic work, adoption, and ART. In her 2003 article about re-theorizing commodification, Martha Ertman debunks the common

instruction of children, as well as from the fact of blood relationship.

Id. (footnote and citation omitted).

³⁵⁷ Radin does not make a distinction between the two, and considers the factor of possible genetic relatedness between the would-be purchaser and the gestational surrogate to be an arbitrary distinction used to assuage our discomfort with baby-selling. See RADIN, *supra* note 344, at 140.

belief that parenthood should not be bought and sold.³⁵⁸ She outlines in detail the ways in which parenthood is already bought and sold:

People routinely exchange funds to obtain parental rights and obligations through adoption and reproductive technologies. Thus there is a functioning market. In the case of reproductive technologies, especially in vitro fertilization and alternative insemination, this market is a relatively free market, operating as it does largely unhampered by legal regulation.³⁵⁹

The paradigm of exalting marriage or other sacred institutions of womanhood and motherhood, as above the market, historically serves to undermine the market value of gendered work typically performed in the home, such as home healthcare work or domestic work. The fact is the market already assigns monetary value to childcare, surrogacy, housework, adoption, and other gendered labor, and compensates non-family members for that work; but when performed by family members, the monetary value of the work is not only lost, but too taboo to articulate in a contract. Consequently, the value of “women’s work” becomes illegible and deeply undervalued in the market economy.

Anti-commodification arguments carry less weight in today’s world, as we shall see in the next Part. Accordingly, co-parenting agreements that accurately represent the intent of the parties to form a family should be considered over theoretical arguments in support of non-commodification.

III. EXISTING MODELS FOR ENFORCING FAMILY-BASED CONTRACTS

There is already a contracts regime that co-exists with marriage and parenting regimes, in which courts routinely enforce contracts in family relationships. For example, contracts to buy genetic material and gestational services are routinely enforced, and foster parents regularly contract with the State to raise children. Similarly, post-adoption visitation agreements are increasingly enforceable, as open adoptions have become the norm. In these areas, biology does not supersede the contract. Further, contracts made prior to marriage and settlement agreements (contracts in anticipation of divorce) are also enforced regularly. In these areas, marriage does not supersede the contract.

Generally, premarital agreements made voluntarily between two consenting adults are presumptively valid and the burden lies with the party challenging the enforceability of the agreement. Courts employ

³⁵⁸ Martha M. Ertman, *What’s Wrong with a Parenthood Market: A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 3 (2003).

³⁵⁹ *Id.* at 7–8 (footnotes omitted).

several factors in analyzing the “voluntariness” of the agreement including: (1) the relative bargaining power of the parties (including age and sophistication of the parties); (2) potential coercion based on the timing and presentation of the agreement (e.g., whether the agreement was signed shortly before the wedding); (3) whether there was full disclosure of assets; (4) whether the waiving party had the advice of independent counsel; and (5) whether the waiving party understood the terms, purpose, and effect of the agreement.³⁶⁰ While premarital agreements are unique contracts given the family law context, the trend among courts is to treat them just like any other contract, applying the rules of contract law to analyze whether the agreement is valid and should be enforced.³⁶¹ Ironically, prenups are most likely enforced because they support the State’s interest in marriage. Indeed, it is believed that the marriage oftentimes would not go forward without the agreement.³⁶²

Post-adoption agreements, in which adopting parent(s) and birth parent(s) typically agree upon the extent and form of communication and/or contact that will take place between the adopted-out child and the birth parent(s) after the adoption decree is final, are also routinely enforced. Although adoption is “a legal status completely created by statute,”³⁶³ birth parents and adoptive parents are now increasingly able to use traditional contract law to alter the privileges and obligations fixed by state statute. Under Section 1-105 of the Uniform Adoption Act of 1994, a final adoption decree terminates “any previous order for visitation or communication with an adoptee but leaves to other law of the State whether agreements for post-adoption visitation or communication are enforceable in a separate civil action.”³⁶⁴

³⁶⁰ *In re Marriage of Bonds*, 5 P.3d 815, 824–25 (Cal. 2000).

³⁶¹ However, premarital agreements signed shortly before the wedding, without the advice of independent counsel, between two parties with disparate bargaining power, are unlikely to be enforced, just as any other private contract that is deemed unconscionable would likely be void as a matter of public policy. *See, e.g., Lutgert v. Lutgert*, 338 So. 2d 1111, 1115–16 (Fla. Dist. Ct. App. 1976) (holding that the circumstances surrounding the execution of the agreement—including that the husband sprang the agreement upon the wife and demanded its execution within twenty-four hours of the wedding, passage had been booked for a honeymoon cruise to Europe, invitations had been given and arrangements for the wedding had been made, and the husband had insisted on the agreement—together with the agreement’s disproportionate terms, supported a presumption, as a matter of law, of undue influence and overreaching which bore adversely on the free exercise of the wife’s will).

³⁶² Allison A. Marston, Note, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 896 (1997). Recent surveys have demonstrated that prenuptials are becoming more culturally accepted in the United States, and larger numbers of women are asking for them. *See Prenuptial Agreements Are on the Rise, and More Women Are Requesting Them*, HUFFINGTON POST (Oct. 22, 2013, 8:25 PM), http://www.huffingtonpost.com/2013/10/22/prenups-_n_4145551.html.

³⁶³ Carol Sanger, *Bargaining For Motherhood: Postadoption Visitation Agreements*, 41 HOFSTRA L. REV. 309, 315 (2012).

³⁶⁴ UNIF. ADOPTION ACT § 1-105 cmt. (1994).

Consequently, as open adoptions become increasingly more common, many states have enacted statutes—with various and sometimes unique requirements—that specifically permit the enforceability of post-adoption agreements and guide judicial decisions.³⁶⁵ Statutes that address post-adoption agreements have gotten positive attention, and are believed to allow courts to retain their “traditional supervisory role over the welfare of the child” *and* honor the preferences—for visitation, yearly photographs, etc.—of birthparent(s) and adoptive parent(s).³⁶⁶ Some states, such as New Mexico, even have statutes explicitly stating that post-adoption agreements are presumed to be in the best interest of the child unless proven otherwise.³⁶⁷

Post-adoption contracts are most likely enforceable because they are thought to actually foster adoptions, another state interest.³⁶⁸ For instance, there are many instances in which adoption is in the best interest of the child but the child’s natural parents are hesitant—or unwilling—to relinquish complete contact with their child. Post-adoption agreements foster adoptions in these cases by giving birth parents the opportunity to retain contact with the adopted-out child post adoption.³⁶⁹

Finally, contracts for genetic material and gestational services are widely available to married and unmarried heterosexual couples, same-sex couples, as well as single individuals. Since the advent of assisted reproductive technology in the 1970s and advancements of *in vitro* fertilization technology in the mid 1980s, recent years have marked a shift away from traditional surrogacy (where the surrogate’s ovum is artificially inseminated by a fertile male’s sperm, thus the surrogate shares a genetic relation to the child) to gestational surrogacy arrangements (where the egg is fertilized *in vitro* and is then implanted in the uterus of the surrogate, such that the child is genetically related to the donor man and woman and not to the surrogate). The shift to gestational surrogacy arrangements has, in part, mitigated instances where a surrogate might renege, which has resulted in a shift in attitude of many courts toward contracts in these areas.

³⁶⁵ ANN M. HARALAMBIE, *Open Adoption*, in HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES § 14:23; *see, e.g.*, ARIZ. REV. STAT. ANN. § 8-116.01 (2008); CAL. FAM. CODE § 8616.5 (West 2008); D.C. CODE § 4-361 (2014); OR. REV. STAT. ANN. § 109.305 (West 2007).

³⁶⁶ Sanger, *supra* note 363, at 323.

³⁶⁷ N.M. STAT. ANN. § 32A-5-35 (West 2008).

³⁶⁸ Sanger, *supra* note 363, at 315–18.

³⁶⁹ *Id.*

CONCLUSION

It is becoming increasingly more apparent that the laws defining and regulating relationships and family formations are antiquated and must modernize. Even with federal recognition of marriage equality and the increasing number of states that allow same-sex marriage, many people still choose not to marry. However, there remains a presumption that marriage is a prerequisite to many legal protections. Similarly, despite the advent and popularity of ART, there remains a presumption that biology is a prerequisite to many legal protections regarding parenting. With these continuing presumptions, the ever-growing number of families and couples not fitting the traditional mold are forced to search other areas of the law, such as contract law, for legal protections. By utilizing contract law, modern families can achieve some of the protections that are currently awarded to “traditional” families by law upon marriage and from biology. But even where the opportunity for contract protection exists, non-married couples trying to contract for legally recognized relationships, and parents who are not biologically related to their children (and who have not adopted them) yet try to contract for custody rights, are often faced with tests of their intentions, credentials, and fitness that their traditional counterparts need not endure.

The dialogue about the rights of non-marital couples often focuses on same-sex unions, assuming that heterosexual, non-married couples could just get married and enjoy the benefits. With the recent DOMA decision, the concerns of non-married couples might be diminished further. This presumption undermines the coercive nature of requiring marriage as a means of receiving state and federal economic benefits and protections. As discussed, many couples choose not to marry, or desire to order their affairs in ways that deviate from state norms. Similarly, the dialogue about parenting continues to assume that the best interest of the child is in conflict with the rights of non-traditional parents, when data do not bear that out. This presumption can have harmful results to both the intended parents and their intended children.

I do not favor contracting over other legal protections such as, for example, tax reforms that benefit married and single people equally. These certainly are not mutually exclusive movements to redefining family. Indeed, there are many evolving laws and regulations that successfully capture the needs of non-traditional families. For example, recently, the New York City housing authority has allowed shelter residents to define their own gender, as well as define their own family. This means that people can choose whether they want to go into men’s or women’s residences, and if they have children, residents can choose

who they want to bring into family housing, including non-conjugal partners and co-parents. While far from perfect in its execution, this type of administrative policy is actively dismantling the state-sanctioned privileges assigned to biology and marriage.

Similarly, I do not see contract law as simply a temporary way of addressing the shortcomings of family law or other areas of the law. Of course family law could simply be reformed to reflect some of what I would like to see contracts achieve, such as creating a legal presumption that puts intended parents on equal footing with biological parents. But ultimately contracts will always be able to do what state regulation can not, which is define the exact contours of a private relationship in the way that the individuals involved desire.

Autonomy and privacy are core principles of the American legal system and are especially important in matters of intimacy. People in non-traditional intimate relationships and people who are raising children not biologically related to them should not have to jeopardize their self-determinacy and privacy in order to arrange their personal economic lives efficiently.