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HOW MARRIAGE BECAME OPTIONAL: COHABITATION, GENDER, AND THE EMERGING FUNCTIONAL NORMS

J. Herbie DiFonzo*

I. INTRODUCTION

In 1953, sociologist Ray E. Baber confidently asserted that the “opportunity which marriage affords for constant and complete companionship with the person most loved, with the full sanction of society, is its greatest single attraction.”¹ Another mid-20th century text, Paul H. Landis’ “Making the Most of Marriage”, referred to the “long-accepted idea that marriage is the *natural state* for adults.”² Landis noted that marriage “has a more prominent place in both our aspirations and realizations than ever before in American history.”³ His sociology text equated marriage with the drive to establish family life. Several headings in his chapter on “Needs Fulfilled

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¹ RAY E. BABER, MARRIAGE AND THE FAMILY 163 (2d. ed. 1953).

² PAUL H. LANDIS, MAKING THE MOST OF MARRIAGE 8 (1955) (emphasis in original).

³ *Id.* “It is through a wise marriage that one can be most fully assured of an enduring love in adulthood. . . . There are other kinds of close comradeship, but society recognized none as full, close, and complete as the marriage tie.” *See id.* at 21

by Marriage” reflected the era’s rock-solid perception that true love and family life always commence at the altar: “Marriage Meets the Need for Love and Emotional Security”; “Marriage Meets the Need for Status and Appreciation for Personal Worth”; “Marriage Answers the Need for Companionship”; and “Marriage Meets the Physiosexual Need for Response.”⁴

In the middle of the 20th century, almost half (48.9%) of all women were married by age twenty, and eight out of ten (80.4%) were married by age twenty-five.⁵ In 1960, two-thirds (68%) of all Americans in their twenties were married.⁶ But by 2008, just over one-quarter of twenty-somethings (26%) were wed.⁷ According to the Census Bureau’s American Community Survey, married-couple family households constituted only 49.7% of all households in 2009.⁸ The Census Bureau reported in 2009 that 96.6 million Americans eighteen and older were

⁴ *Id.* at 15-26. Landis’ final heading in this chapter averred that “Marriage Is Not a Perfect Institution.” *Id.* at 32. While insisting that “marriage is designed to meet more human needs than is any other institution,” Landis acknowledged that the high expectations which often accompany marriage can be frustrated by human frailty, rendering marriage “more capable of producing misery, human suffering, and personal torture than any other relationship.” *Id.*; see also J. HERBIE DiFONZO, *BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA* 14 (1997) (“[The] greater emotional content of family relations elevated the stakes in marriage, making domestic life delightful when it succeed[s] and devastating when it fail[s] . . .”).

⁵ LANDIS, *supra* note 2, at 10 fig.3. Since grooms are typically older than brides, see *id.* at 9, the percentages for men married at those ages were lower: 17.7% by age twenty and 66.1% by age twenty-five. *Id.* at 10 fig.3.

⁶ PEW RESEARCH CENTER, *THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES* i (Nov. 18, 2010), <http://pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf>.

⁷ *Id.* The overall numbers are not as stark, but reflect the same trend. In 1960, 72% of American adults were married; by 2008, only 52% were married. *Id.* at 1.

⁸ *2005-2009 American Community Survey 5-Year Estimates, Table S1101: Households and Families*, U.S. CENSUS BUREAU, http://factfinder.census.gov/servlet/STTable?_bm=y&-qr_name=ACS_2009_5YR_Goo_S1101&-geo_id=01000US&-ds_name=ACS_2009_5YR_Goo_&-_lang=en&-format=&-CONTEXT=s (last visited May 7, 2011) (reporting that of 112,611,029 households in 2009, 55,974,600 were married-couple households).

unmarried, a group comprising 43% of all U.S. residents eighteen and older.⁹

Children's living arrangements have also undergone substantial change. In the past generation, the percentage of children in the United States who live with two married parents has markedly declined. In 1971, 83% of children under the age of eighteen lived with two married parents, while in 2010 only 66% did so.¹⁰ According to the Census Bureau estimates for 2009, of the 74.2 million children in the United States, 51.8 million lived with two parents, while 19.4 million lived with only one parent.¹¹ Further, 2.3 million children lived with other relatives, while over 600,000 lived with non-relatives only.¹²

The half-century that followed the 1960s has virtually ended the stigma associated with illegitimacy and single parenthood.¹³

⁹ *Facts for Features: Unmarried and Single Americans Week Sept. 19-25, 2010*, U.S. CENSUS BUREAU NEWS (July 19, 2010), http://www.census.gov/newsroom/releases/pdf/cb10ff-18_single.pdf.

¹⁰ See Rose M. Kreider & Diana B. Elliott, *The Complex Living Arrangements of Children and Their Unmarried Parents* (Population Assoc. of Am., Poster Presentation, May 2, 2009), available at <http://www.census.gov/population/www/socdemo/complex-abstract.pdf>; Press Release, U.S. Census Bureau, U.S. Census Bureau Reports Men and Women Wait Longer to Marry, (Nov. 10, 2010), http://www.census.gov/newsroom/releases/archives/families_households/cb10-174.html.

¹¹ *Living Arrangements of Children Under 18 Years Old: 1960 to Present, Table CH-1*, U.S. CENSUS BUREAU, <http://www.census.gov/population/www/socdemo/hh-fam.html> (last visited May 7, 2011).

¹² *Id.*

¹³ Common law parentage principles aimed to reinforce the central role of marriage. Children born to a married woman were legally the offspring of their biological mother and her husband. See Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 562-65 (2000) (describing the foundations and evolution of paternity determinations at common law). If the child's mother was unmarried, only she was considered the child's legal parent. See *id.* The term applied to an "illegitimate" child, *filius nullius* ("son of no one"), suggested the law's disdain for—and simultaneous fear of—these progeny. See *id.* Acknowledging these children risked upending the regime of marriage, viewed as society's bedrock. See *id.* Over the same period that washed away these erstwhile principles delineating legitimate from illegitimate children, the percentage of children born to unmarried mothers has skyrocketed—increasing eightfold from 5%

It also significantly enhanced the status of women, thus increasing the potential for their economic self-sufficiency.¹⁴ These seismic social changes have fundamentally altered our conceptions of what makes a family. In June Carbone's words, "the dismantling of marriage as the exclusive determinant of family connections . . . [has been] well documented in every discipline that has undertaken the task."¹⁵

The family now encompasses a collection of diverse, sometimes fragile but usually hearty domestic arrangements that comprise the so-called postmodern family—single mothers, blended families, cohabiting couples, lesbian and gay partners, and multi-generational families, in addition to heterosexual married couples and their children.¹⁶ Consider these items from four recent years, each radically at odds with the predominant view of family life in the mid-20th century:

In 2007, almost three in ten (28%) of the unmarried women who gave birth were living with a cohabiting partner.¹⁷

percent in 1960 to 41% percent in 2008. PEW RESEARCH CENTER, *supra* note 6, at 2.

¹⁴ See Janet Radcliffe Richards, Symposium, *The Meaning of Marriage: Metaphysics for the Marriage Debate*, 42 SAN DIEGO L. REV. 1125, 1135 (2005) ("Sex before marriage is normal, childbearing by single women and unmarried couples is no longer much condemned, men can be held responsible for the support of their children irrespective of whether they are married, and married couples can deal with their tax and incomes separately."). Robert T. Michael attributed the divorce rate rise beginning in the 1960s not to the liberalization of divorce laws, but to several factors including: the diffusion of contraceptive techniques and the increase in women's income during this period which reduced their financial dependence on their husbands. See Robert T. Michael, *Why Did the U.S. Divorce Rate Double within a Decade?*, in 6 RESEARCH IN POPULATION ECONOMICS, 367-99 (T. Paul Schultz ed., 1988).

¹⁵ JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW 227 (2000).

¹⁶ See JUDITH STACEY, IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE 6-7 (1996) ("[T]he term postmodern family . . . signal[s] the contested, ambivalent, and undecided character of our contemporary family cultures."); Barbara Stark, *Marriage Proposals: From One-Size Fits-All to Postmodern Marriage Law*, 89 CALIF. L. REV. 1479, 1481 n.1 (2001) ("[T]here is a widespread perception that 'anything goes' with respect to contemporary marriage.").

¹⁷ JANE LAWLER DYE, FERTILITY OF AMERICAN WOMEN: 2008 1 (U.S. Census Bureau, ed., Nov. 2010), <http://www.census.gov/prod/2010pubs/p20-563.pdf>.

In 2008, more than four out of every ten births (41%) were to unmarried women,¹⁸ and more than six out of ten (61%) women with a birth in the past year were in the labor force.¹⁹

In 2009, the Census Bureau reported that 31.7 million Americans lived alone.²⁰ They comprised 27% of all households, up from 17% in 1970.²¹

In 2010, Illinois became the 11th state to pass a “civil union” law which will allow unrelated adults, regardless of gender, to share “the same legal obligations, responsibilities, protections, and benefits as are afforded or recognized by the law of Illinois to spouses”²²

Although our society still exhibits a “cultural ambivalence about families not based on genetic ties,”²³ social acceptance of a

¹⁸ Gretchen Livingston & D’Vera Cohn, *The New Demography of American Motherhood*, 1 (Pew Research Center ed., 2010), <http://pewsocialtrends.org/assets/pdf/754-new-demography-of-motherhood.pdf>. In 1990, only 28% of births were to unmarried women. *Id.* The substantial rise in births to unmarried women “reflects both their rising birth rates and the shrinking share of adults who are married.” *Id.* Significantly, the rate of births to unmarried women varies greatly by race and ethnicity. The proportions of births to unmarried women in 2008 included 72% of black births, 53% of Hispanic births, 29% of white births, and 17% of Asian births. *Id.* at 11-12.

¹⁹ DYE, *supra* note 17, at 1.

²⁰ *Family Status and Household Relationship of People 15 Years and Over, by Marital Status, Age, and Sex, 2009: Table A2*, U.S. CENSUS BUREAU, <http://www.census.gov/population/socdemo/hh-fam/cps2009/tabA2-all.xls> (last visited May 7, 2011).

²¹ Press Release, U.S. Census Bureau, Facts for Features: Unmarried and Single Americans Week: Sept. 19-25, 2010 (July 19, 2010), *available at* http://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb10-ff18.html.

²² Illinois Religious Freedom Protection and Civil Union Act, 2010 Ill. Legis. Serv. 96-1513 (West); Monique Garcia, *Illinois Civil Unions Signed into Law*, CHICAGO TRIBUNE.COM, Jan. 31, 2011, http://articles.chicagotribune.com/2011-01-31/news/ct-met-quinn-civil-union-signing-20110131_1_civil-unions-lesbian-couples-gay-marriage. Note that under this legislation, both homosexual and heterosexual couples may form civil unions, which offer them the same legal rights and obligations as afforded by marriage.

²³ Darra L. Hofman, “Mama’s Baby, Daddy’s Maybe:” A State-By-State Survey of Surrogacy Laws and their Disparate Gender Impact, 35 WM.

wider range of family forms has increased. This multiplicity of family structures means that marriage has become an optional arrangement for creating a family. How did this happen? And where is the American family headed, in both cultural and legal terms? This Article sketches out a framework for analysis of this central social question, and argues that family law is moving in the direction of adopting functional norms for determining family composition and adjudicating family disputes.

This Article is part of a larger research project in which I seek to assess the state of families and the family legal system in the 21st century, and to argue that American society is transitioning along the continuum from exclusively sanctioning families based on biological and adoptive bounds to legally recognizing families crafted on functional norms. After this Introduction, Part II of this Article explores the decline of marriage as an institution and how it became an optional route to family formation. Perhaps framing the issue as one of *decline* is inapt, because many of the millions forming new families have not backed away from marriage as much as they have chosen a more attractive or available alternative. At the same time, many who cohabit in lieu of marriage see their state as a prequel to marriage; some, particularly lesbian and gay male couples, are forbidden in most jurisdictions to choose marriage.

Part III turns to cohabitation, which has, to a dramatic extent, replaced marriage as a means to create a family. But cohabitation has not displaced the ideal of marriage in the public mind. Most Americans still strongly desire matrimony and most eventually marry. Living together, is for some, an exploratory prelude to marriage. For others, it is the only readily available alternative to remaining single. For yet another segment, cohabitation is a waiting room for better times, which may or may not arrive. Examining the motivations and characteristics of today's cohabitants presents a living diagram of evolving social trends in how we shape our forms of intimate association.

Part IV examines the elephant in the room of all family structures: the role of gender. Whether the couple marries or

MITCHELL L. REV. 449, 452 (2009) (quoting Jean Benward, Lecture at American Society for Reproductive Medicine 2005 Conference, Adoption and Gamete Donation: Similarities and Difference (Oct. 15-16, 2005) (internal quotations omitted)).

cohabits, gender still plays a determinant role in how the couple relates to each other and in how their family copes within the broader society. While the legal system in the past generation has labored to eliminate different rules for women and men, the pervasiveness of gender continues. Change has occurred on the home front, but very slowly. No discussion of family norms is complete without an attempt to encompass the influence of gender on family decision-making and on the relative financial strength and resources of each member of the couple.

Part V considers the emerging functional norms, which are governing the resolution of family law disputes. Until recently, the legal system categorized families according to their biological (or adoptive) ties. But today, in the resolution of legal disputes in blended and upended families, nature is beginning to yield to nurture. The biological parents of children who have not taken a significant role in parenting are losing court battles to adults who lack a genetic tie but who have established an actual parent-child bond. What matters most—in an increasing number of cases—is whether the adult has functioned as a parent in the child's life. Similarly, the benefits and burdens, which the law once allocated only to marriage, are increasingly applied to those intimate associations that outnumber marriages and whose creation, composition, and dissolution are greatly contested. Behavioral norms are starting to replace long-established legal rules governing family formation, regulation, and dissolution. But functional norms are not universally accepted. We have a long way to go before we achieve equal legal recognition for all families.

II. HOW DID MARRIAGE BECOME AN OPTIONAL ARRANGEMENT FOR CREATING A FAMILY?

There is a paradox in Americans' relationship to marriage. Most Americans, even if they reject the institution entirely or defer their entry into it, still hold up marriage as the ideal. In a 2006 Gallup Poll, 91% reported that they were either married or planned to be so someday.²⁴ Only 4% had definitely ruled out

²⁴ Lydia Saad, *Americans Have Complex Relationship With Marriage*, GALLUP.COM, (May 30, 2006), <http://www.gallup.com/poll/23041/Americans-Complex-Relationship-Marriage.aspx>.

marriage.²⁵ The ideal of marriage still serves as the pedestal for intimate partnership. National poll results from 2009 reflected strong support for marriage as the exclusive moral framework for sexual relationships and bearing children.²⁶ Ninety-two percent expressed the belief that an affair between married persons is morally wrong; 45% found it morally wrong to have a baby outside marriage; 40% were of the same opinion regarding sex between unmarried women and men; and, a generation after the no-fault divorce revolution, 30% voiced their opinion that divorce is morally wrong.²⁷ Marriages also score high marks in satisfaction. Almost two-thirds of respondents who graded their own marriages in a 2006 survey gave their unions an “A.”²⁸

²⁵ *Id.* Yet a quick glance at the recent popular bookshelf suggests a belief in marriage as dispensable, or perhaps unattainable. See, e.g., EMILY DUBBERLEY, I'D RATHER BE SINGLE THAN SETTLE: SATISFIED SOLITUDE AND HOW TO ACHIEVE IT (2006); ROSANNA HERTZ, SINGLE BY CHANCE, MOTHERS BY CHOICE: HOW WOMEN ARE CHOOSING PARENTHOOD WITHOUT MARRIAGE AND CREATING THE NEW AMERICAN FAMILY (2006); JEN SCHEFFT, BETTER SINGLE THAN SORRY: A NO-REGRETS GUIDE TO LOVING YOURSELF AND NEVER SETTLING (2007); LOUISE SLOAN, KNOCK YOURSELF UP: NO MAN? NO PROBLEM: A TELL-ALL GUIDE TO BECOMING A SINGLE MOM (2007).

²⁶ *Marriage*, GALLUP.COM, (May 2009), <http://www.gallup.com/poll/117328/Marriage.aspx>.

²⁷ *Id.* The value placed on marital fidelity is evident in the results of a 2008 poll in which 64% of respondents reported that they would not forgive their spouse for having an affair. Jeffrey M. Jones, *Most Americans Not Willing to Forgive Unfaithful Spouse*, GALLUP.COM, (Mar. 25, 2008), <http://www.gallup.com/poll/105682/Most-Americans-Willing-Forgive-Unfaithful-Spouse.aspx>. The stated intention not to forgive does not, of course, necessarily predict the consequences of discovering adultery. Whether forgiven or not, many marriages survive instances of cheating. See, e.g., Benedict Carey & Tara Parker-Pope, *Marriage Stands Up for Itself*, N.Y. TIMES, June 28, 2009, http://www.nytimes.com/2009/06/28/fashion/28marriage.html?_r=1&emc=eta1 (“Infidelity is one of the most common reasons cited by people who divorce. But surveys find the majority of people who discover a cheating spouse remain married to that person for years afterward. Many millions more shrug off, or work through, strong suspicions or evidence of infidelity.”).

²⁸ *Marriage*, *supra* note 26. 27% graded their marriages as a “B”; 6% a “C”; 1% a “D”; and the remaining 1% either “F” or “No Opinion.” *Id.*; see also Carey & Parker-Pope, *supra* note 27 (“Despite strong social riptides working against it—the liberalization of divorce laws, the vanishing stigma of divorce, the continual online temptations of social sites like MySpace or Facebook—the marriage bond is far stronger in 21st-century America than many may assume.”).

Yet the bonds of marriage are unmistakably weaker today. No-fault divorce was not the cause of the demise of marriage as the mainstay for domestic partnership, but it served as a significant cultural marker. Our culture is simply too diverse, too variable, and increasingly too atomistic to support the traditional framework of life-long marriage.²⁹ As has been well documented, the rapid rise in divorces in the 1960s *preceded* the onset of no-fault divorce.

In considering which cultural and legal developments have had the greatest impact on marriage in the past half century, the dramatic rise in divorce rates in the wake of the passage of no-fault divorce laws has often taken center stage. But a closer look at the divorce statistics suggests that notion to be misleading. In 1960, the divorce rate stood at its postwar low of 2.2 divorces per 1,000 of the population.³⁰ The rate of divorce then began a dramatic climb in the 1960s, *the decade before no-fault divorce*, reaching 3.5 divorces per 1,000 of the population in 1970.³¹ The divorce rate thus rose 59% during the 1960s, a spectacular and unprecedented rise during peacetime,³² and one occurring in the face of largely unchanged fault divorce laws.³³

²⁹ See generally MILTON C. REGAN, *ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE* (1999) (exploring the tensions between spouses as separate individuals with their own aims, and marital partners committed to the joint goals of their union).

³⁰ U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES: 2006* 64 tbl.72 (2006), available at <http://www.census.gov/prod/2005pubs/06statab/vitstat.pdf>.

³¹ *Id.* California's Family Law Act of 1969, ch. 1608, § 8, 1969 Cal. Stat. 3314, 3324) (codified as amended at CAL. FAM. CODE § 2310 (West, Westlaw through Ch. 20 of 2011 Reg. Sess.) was the nation's first true no-fault divorce law and constituted "the most radical transformation of divorce law in America history." James Herbie DiFonzo, *Customized Marriage*, 75 IND. L.J. 875, 884 (2000).

³² War has had a significant impact on the divorce rate, causing a sharp rise in the divorce rate once the conflict ends, then decreases in succeeding years. During the 20th century, the Second World War triggered the largest postwar divorce boom. In 1946, the divorce rate reached 4.4 per thousand, a rate double that of 1960. See PAUL H. JACOBSON, *AMERICAN MARRIAGE AND DIVORCE* 90 tbl.42 (1959); *supra* note 30.

³³ Although skeptics remain, Andrew Cherlin demonstrated that the surge in national divorce rates began in the early 1960s, prior to the liberalization of

In 1971, the year after the nation's first no-fault divorce law took effect in California, the national divorce rate stood at 3.7, then climbed through the decade until it reached the 1980 rate of 5.2 divorces per thousand population.³⁴ This increase of 41% was quite substantial, of course, but it also represented a dramatic *slowing* of the divorce rate during the first no-fault divorce decade.³⁵ The divorce rate peaked at 5.3 divorces per 1,000 of the population in 1981, after most of the country had experienced no-fault divorce for several years.³⁶ The rate then slowly but regularly declined until it settled at 3.6 divorces per 1,000 of the population in 2005.³⁷ This latter divorce rate matched the rate for 1970-71, the year of the very beginning of no-fault divorce.³⁸ In short, during the first thirty-five years of no-fault divorce, the divorce rate rose sharply (although not as steeply as in the decade before no-fault divorce) and then fell slowly, and has now returned to the rate experienced before no-fault divorce began.³⁹

divorce law in the 1970s. See generally ANDREW J. CHERLIN, *MARRIAGE, DIVORCE, REMARRIAGE* (1992).

³⁴ U.S. CENSUS BUREAU, *supra* note 30.

³⁵ *Id.* The divorce rate increase in the 1970s (41%) was just over two-thirds (69%) of the divorce rate increase in the 1960s (59%). *Id.* References suggesting that the 1970s spawned the "greatest divorcing generation" thus need to be understood within the larger context of marital dissolution rates, which peaked in the 1970s after rapidly rising the previous decade. Tara Parker-Pope, *What Brain Scans Can Tell Us About Marriage*, N.Y. TIMES, June 4, 2010, <http://www.nytimes.com/2010/06/06/fashion/06gore.html?hp> (quoting economist Betsey Stevenson).

³⁶ U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES: 2008* 63 tbl.77 (2008), available at <http://www.census.gov/prod/2007pubs/08abstract/vitstat.pdf>. see DiFonzo, *supra* note 31, at 906 ("By 1977, only three states (Illinois, Pennsylvania, and South Dakota) remained wedded to exclusively fault concepts in marital dissolutions.")

³⁷ U.S. CENSUS BUREAU, *supra* note 36.

³⁸ *Id.*

³⁹ Katherine Caldwell is largely correct in maintaining that "[t]he 'divorce revolution' of the 1970s was . . . less a revolution than a continuation and expansion of postwar divorce patterns" Katherine L. Caldwell, *Not Ozzie*

Even though no-fault divorce is not the villain many hold it to be, there is no question that the institutional predominance of marriage is now ebbing. While individual couples can hew to a marriage commitment (and millions do), their faith and actions are sustained primarily by themselves and by the support structures they draft into service, not by universal social norms.⁴⁰ The lessening of marriage's hold on the family social structure does not, however, mean that Americans hold *families* in any less regard. A 2010 nationwide survey by the Pew Research Center summarized key findings on the American public's views of what constitutes a family:

By emphatic margins, the public does not see marriage as the only path to family formation. Fully 86% say a single parent and child constitute a family; nearly as many (80%) say an unmarried couple living together with a child is a family; and 63% say a gay or lesbian couple raising a child is a family. The presence of children clearly matters in these definitions. If a cohabiting couple has no children, a majority of the public says they are not a family. Marriage matters, too. If a childless couple is married, 88% consider them to be a family.⁴¹

No matter what type family one belongs to, the members of that family generally see it in very positive terms. Over three-quarters (76%) of Americans in 2010 claimed that their own family "is the most important element of their life."⁴² Seventy-

and Harriet: *Postwar Divorce and the American Liberal Welfare State*, 23 LAW & SOC. INQUIRY 1, 47 (1998).

⁴⁰ See Janet Dolgin, Symposium, *Genes and Disability: Defending Health and the Goals of Medicine: The Ideological Contest of the Disability Rights Critique: Where Modernity and Tradition Meet*, 30 FLA. ST. U. L. REV. 343, 350 (2003) (describing the recent "vision of family broadly predicated on Enlightenment values, including especially equality and liberty (framed as autonomy)," and noting that adult family member "increasingly . . . view themselves as autonomous individuals free to negotiate the terms of the familial relationships.")

⁴¹ PEW RESEARCH CENTER, *supra* note 6, at ii.

⁴² *Id.*

five percent were “very satisfied” with their family life, and more (85%) affirm that the family they live in now is either as close as (45%) or closer than (40%) the family in which they grew up.⁴³

Consider families with children born through assisted reproductive technology (“ART”). In this area, the pace of cultural change has truly been dramatic. Donor insemination efforts in the 1950s and 1960s were “viewed with such horror that bills were introduced in state legislatures to ban the procedure.”⁴⁴ But by the end of the 20th century, almost three-quarters of the states had adopted laws facilitating artificial insemination procedures by declaring the consenting husband of the sperm recipient to be the legal father.⁴⁵ The development of *in vitro* fertilization in the 1970s was similarly greeted initially with horror, then tolerated, and is now both widespread and deemed unremarkable.⁴⁶

ART has tremendously increased in complexity and effectiveness in the last few years.⁴⁷ A child created through ART “might have a genetic mother, a genetic father, any number of social/intended parents, and a gestational mother.”⁴⁸ Many infertile heterosexual couples, gay and lesbian couples, as well as single parents have taken advantage of ART.⁴⁹ At the same time, the rise in the number of gestational surrogates—women who bear the genetic children of others—has created another

⁴³ *Id.* The general public is markedly more optimistic about “[t]he institution of marriage and the family” (67%) than about “[o]ur ability to get along with other countries” (56 %), “[o]ur system of education” (50%), “[t]he economic system over the long run” (46%), and “[m]oral and ethical standards” (41%). *Id.* at 4.

⁴⁴ Lori B. Andrews & Nanette Elster, *Regulating Reproductive Technologies*, 21 J. LEGAL MED. 35, 36 (2000).

⁴⁵ *Id.*

⁴⁶ *See id.* at 36-40.

⁴⁷ *See* Jennifer L. Rosato, *The Children of ART (Assisted Reproductive Technology): Should the Law Protect Them From Harm?*, 2004 UTAH L. REV. 57, 57-58 (2004).

⁴⁸ Hofman, *supra* note 23, at 450.

⁴⁹ Rosato, *supra* note 47, at 57-58.

generation of familial and legal dilemmas for our society.⁵⁰ Seen as a whole, collaborative reproduction “is forcing a redefinition of family” by “making a biological distinction between gestation and genetics in determining parentage as well as a consideration of intentionality in defining the family.”⁵¹ American society has moved past the freedom to have sex without reproduction, and now considers the choice to reproduce without sex.⁵²

The increase in the reported number and visibility of same-sex couples has also been striking, paralleling the rise in the growth and acceptance of unorthodox family arrangements.⁵³ Same-sex couples have clearly not achieved equal treatment, either culturally or legally, but they have made tremendous strides in the past few years. Research data indicates that the percentage of Americans who favor allowing gays to adopt children rose from 38% in 1999 to 46% in 2006 to 53% in 2009.⁵⁴ A 2009 Gallup Poll reported that 73% believe that

⁵⁰ See generally J. Herbie DiFonzo & Ruth C. Stern, *The Children of Baby M.*, 39 CAP. U. L. REV. (forthcoming 2011).

⁵¹ Andrews & Elster, *supra* note 44, at 46. See also Michael J. Malinowski, *A Law-Policy Proposal to Know Where Babies Come From During the Reproduction Revolution*, 9 J. GENDER RACE & JUST. 549, 549-50 (2006) (noting that developments in artificial reproduction are expanding parental choice not only about whether to have children but also about their offspring's genetic characteristics). See generally JANET L. DOLGIN, *DEFINING THE FAMILY: LAW, TECHNOLOGY AND REPRODUCTION IN AN UNEASY AGE* (1997).

⁵² See generally JOHN DEWITT GREGORY ET AL., *UNDERSTANDING FAMILY LAW* 163-181 (3d ed. 2005).

⁵³ The 2000 U.S. Census counted 601,209 gay and lesbian families. DAVID M. SMITH & GARY J. GATES, *GAY AND LESBIAN FAMILIES IN THE UNITED STATES: SAME-SEX UNMARRIED PARTNER HOUSEHOLDS 3* (2001), available at http://www.urban.org/UploadedPDF/1000491_gl_partner_households.pdf. This total included 304,148 gay male families, and 297,061 lesbian families. *Id.* Ten years earlier, the U.S. Census Bureau had reported 145,130 total gay and lesbian families (81,343 male, and 63,787 female). *Id.* The statistics for 2000 represent a 314% increase. *Id.*

⁵⁴ *Less Opposition to Gay Marriage, Adoption, and Military Service*, PEW RESEARCH CENTER, (Mar. 22, 2006), <http://people-press.org/report/273/less-opposition-to-gay-marriage-adoption-and-military-service> (data for 1999 and 2006); Press Release, Quinnipiac University, *Gays in the Military should be Allowed to Come Out, U.S. Voters Tell Quinnipiac University National Poll; Key is Belief that Being Gay is By Choice or By Birth*, (Apr. 30, 2009),

same-sex couples should be entitled to inheritance rights, while 67% say gay and lesbian domestic partners should have access to health insurance and other employee benefits.⁵⁵ By a large margin, Americans oppose the denial of federal benefits to spouses in same-sex marriages.⁵⁶

57% of Americans favor “allowing gay and lesbian couples to enter into legal agreements with each other that would give them many of the same rights as married couples.”⁵⁷ Although still a minority position, the public’s support for gay marriage has increased from 27% in 1996 to 44% in 2010.⁵⁸ Moreover, polls suggest that the trend towards legal recognition of same-sex couples is more pronounced among younger people.⁵⁹ This

<http://www.quinnipiac.edu/x1295.xml?ReleaseID=1292> (data for 2009) [hereinafter 2009 Quinnipiac Poll].

⁵⁵ Jeffrey M. Jones, *Majority of Americans Continue to Oppose Gay Marriage*, GALLUP.COM, (May 27, 2009), <http://www.gallup.com/poll/118378/majority-americans-continue-oppose-gay-marriage.aspx>.

⁵⁶ 54% of Americans polled in 2009 opposed the federal law denying same-sex couples access to federal benefits; thirty-nine percent supported their exclusion. 2009 Quinnipiac Poll, *supra* note 54.

⁵⁷ Press Release, Pew Research Center, *Majority Continues to Support Civil Unions: Most Still Oppose Same-Sex Marriage* 1 (Oct. 9, 2009), *available at* http://pewforum.org/uploadedfiles/Topics/Issues/Gay_Marriage_and_Homosexuality/samesexmarriage09.pdf (reporting on 2009 Pew Research Center poll). In the same 2009 poll, 37% indicated their opposition to civil unions. *Id.* The underlying moral issue cannot be ignored in any discussion of the public acceptance of same-sex unions. Homosexual behavior is deemed morally wrong by nearly half of the public (49%), while 9% say it is morally acceptable and 35% say it is not a moral issue. *Id.*

⁵⁸ Jeffrey M. Jones, *Americans' Opposition to Gay Marriage Eases Slightly*, GALLUP.COM, (May 24, 2010), <http://www.gallup.com/poll/128291/Americans-Opposition-Gay-Marriage-Eases-Slightly.aspx> (reporting Gallup Poll results). Two Pew Research Center polls in 2010 reported that 42% favor same-sex marriage while 48% are opposed. *Support for Same-Sex Marriage Edges Upward: Majority Continues to Favor Guys Serving Openly in Military*, PEW RESEARCH CENTER, (Oct. 6, 2010), <http://people-press.org/report/662/same-sex-marriage> (hereinafter *Support for Same-Sex Marriage Edges Upward*).

⁵⁹ Americans born after 1980 favor allowing gays and lesbians to marry legally by a 53% to 39% margin. *Support for Same-Sex Marriage Edges Upward*, *supra* note 58.

latter perception is consistent with survey findings that “the young are much more inclined than their elders to view cohabitation without marriage and other new family forms—such as same sex marriage and interracial marriage—in a positive light.”⁶⁰

The last sixty years have seen divorce rates rise and fall. But the more significant cultural signposts are found in the statistics showing the marked decline in the rates for both marriages and births over the same period. As Table 1 shows, the divorce rate rose in the late 1960s, crested in 1980 and has since receded.⁶¹ Data for 2009 indicate that the divorce rate has now dipped slightly below the 1970 level just prior to the spread of no-fault divorce.⁶² The marriage rate varied within a range of 8.5% to 10.6% during the first three decades following 1955.⁶³ It then began a pronounced decline, from 9.8% in 1990 to 6.8% in 2009.⁶⁴ The birth rate has steadily decreased from a 1955 high of 25% to a 2009 low of 13.6%, a downturn of nearly 46%.⁶⁵

⁶⁰ PEW RESEARCH CENTER, *supra* note 6, at i.

⁶¹ *See infra* Table 1.

⁶² *See infra* Table 1.

⁶³ *See infra* Table 1.

⁶⁴ *See infra* Table 1. *See also* Jeremy Greenwood & Nezih Guner, *Marriage and Divorce Since World War II: Analyzing the Role of Technological Progress on the Formation of Households* 1, (Nat'l Bureau of Econ. Research, Working Paper No. 10772, Sep. 2004), available at <http://www.arts.cornell.edu/econ/CAE/guner.pap.pdf> (analyzing data to conclude that, out of non-widows between the ages of 18 to 64, in 1950 there were 211 marriages per 1,000 unmarried women as compared with just 82 in 2000).

⁶⁵ *See infra* Table 1.

*Table 1. Births, Marriages, and Divorces, 1950-2009:
Rate per 1,000 Population⁶⁶*

| Year | Births | Marriage s | Divorces |
|-------------|---------------|-----------------------|-----------------|
| 1950 | 24.1 | 11.1 | 2.6 |
| 1955 | 25.0 | 9.3 | 2.3 |
| 1960 | 23.7 | 8.5 | 2.2 |
| 1965 | 19.4 | 9.3 | 2.5 |
| 1970 | 18.4 | 10.6 | 3.5 |
| 1975 | 14.6 | 10.0 | 4.8 |
| 1980 | 15.9 | 10.6 | 5.2 |
| 1985 | 15.8 | 10.1 | 5.0 |
| 1990 | 16.7 | 9.8 | 4.7 |
| 1995 | 14.6 | 8.9 | 4.4 |
| 2000 | 14.4 | 8.3 | 4.1 |
| 2005 | 14.0 | 7.7 | 3.7 |
| 2009 | 13.6 | 6.8 | 3.4 |

⁶⁶ See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2007 63 tbl.76 (2007), available at <http://www.census.gov/prod/2006pubs/07statab/vitstat.pdf> (providing table data for the years 1950-2000); CTRS. FOR DISEASE CONTROL & PREVENTION, U. S. DEP'T OF HEALTH AND HUMAN SERVS., 56 NATIONAL VITAL STATISTICS REPORTS, BIRTHS, MARRIAGES, DIVORCES, AND DEATHS: PROVISIONAL DATA FOR MARCH 2007 1 tbl.A (Oct. 30, 2007), http://www.cdc.gov/nchs/data/nvsr/nvsr56/nvsr56_04.pdf (providing table data for the year 2005, statistics measured by 12-month period ending in March); CTRS. FOR DISEASE CONTROL & PREVENTION, U. S. DEP'T OF HEALTH AND HUMAN SERVS., 58 NATIONAL VITAL STATISTICS REPORTS, BIRTHS, MARRIAGES, DIVORCES, AND DEATHS: PROVISIONAL DATA FOR AUGUST 2009 1 TBL.A (May 10, 2010), http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58_18.pdf (providing table data for the year 2009, statistics measured by 12-month period ending in August).

Family life no longer centers on married couples and their children. Marriage has become “just one of several permissible choices for individuals who wish to pursue an intimate relationship within the framework of the law.”⁶⁷ What about children? Between 1940 and 1955, the percentage of births to unmarried women slowly grew from 3.8% of all births to 4.5%.⁶⁸ It then rose more rapidly, and in 2008 over 40% of all births were to unmarried women, as shown in Table 2.

⁶⁷ Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1453. That marriage had lost its preeminence both culturally and legally became evident a generation ago. Comparing national surveys done in 1957 and 1976, Joseph Veroff and his colleagues reported that the most dramatic of the changes in those two decades came in the “increased tolerance of people who reject marriage as a way of life.” JOSEPH VEROFF ET AL., *THE INNER AMERICAN: A SELF-PORTRAIT FROM 1957 TO 1976* 191 (1981). That laws regulating households would be required to encompass a great number of these alternatives to conjugality was signaled by the Supreme Court in *Moore v. City of E. Cleveland*, 431 U.S. 494, 498-99 (1977) (holding that a statute limiting household occupancy was unconstitutional because it intruded upon “freedom of personal choice in matters of marriage and family”).

⁶⁸ U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES: 2003* 23 tbl.HS-14 (2003), available at <http://www.census.gov/statab/hist/HS-14.pdf>. However, the birth rate per 1,000 unmarried women (15-44 years) increased more rapidly in those years, from 7.1 in 1940 to 19.3 in 1955. *Id.*

Table 2. *Unmarried Childbearing, 1960-2008*⁶⁹

| Year | Birth rate per 1,000 unmarried women 15-44 years | Percentage of all births to unmarried women |
|------|--|---|
| 1960 | 21.6 | 5.3 |
| 1965 | 23.4 | 7.7 |
| 1970 | 26.4 | 10.7 |
| 1975 | 24.5 | 14.3 |
| 1980 | 29.4 | 18.4 |
| 1985 | 32.8 | 22.0 |
| 1990 | 43.8 | 26.6 |
| 1995 | 44.3 | 32.2 |
| 2000 | 44.1 | 33.2 |
| 2008 | 52.5 | 40.6 |

⁶⁹ *Id.* (providing table data for years 1960-1985); Table 85. *Births to Unmarried Women by Race, Hispanic Origin, and Age of Mother: 1990 to 2006*, U.S. CENSUS BUREAU, <http://www.census.gov/compendia/statab/2010/tables/10s0085.pdf> (last visited May 15, 2011); Table 86, *Births to Teens and Unmarried Mothers and Births with Low Birth Weight by Race and Hispanic Origin: 1990 to 2007*, U.S. CENSUS BUREAU, <http://www.census.gov/compendia/statab/2010/tables/10s0086.pdf> (last visited May 15, 2011); *National Vital Statistics Reports, Births: Final Data for 2008*, CENTERS FOR DISEASE CONTROL, 90 tbl. 15 (Dec. 2010), http://www.cdc.gov/nchs/data/nvsr/nvsr59/nvsr59_01.pdf.

Not surprisingly, the trend for the percentage of children living in families formed by marriage follows the same pattern as shown by the downward trajectory of marriages, as seen in Table 3.

Table 3: Marriage and Children-in-Marriage Statistics, 1970-2000⁷⁰

| | 1970 | 1980 | 1990 | 2000 |
|--|------|------|------|------|
| Percent of Adults Married | 71.7 | 65.5 | 61.9 | 59.5 |
| Percent of First Marriages Intact | 73.3 | 67.7 | 62.5 | 58.5 |
| Percent of Births to Married Parents | 89.3 | 81.6 | 72.0 | 66.8 |
| Percent of Children Living with Own Married Parents | 68.7 | 64.0 | 60.8 | 59.7 |
| Percent of Children Living with Two Married Parents | 85.2 | 76.7 | 72.5 | 68.1 |

Americans are clearly dethroning marriage from its place as the primary adult relationship. But the demographics do not tell the entire story. Millions of couples now cohabit instead of marrying, but is this decision represents something less than an outright rejection of marriage. The next section explores the ramifications of cohabitation's displacement of marriage.

⁷⁰ See DAVID BLANKENHORN, *THE FUTURE OF MARRIAGE* 218 tbl.1 (2007) (data drawn from U.S. Census Bureau statistics).

III. COHABITATION: MARRIAGE'S ALTERNATIVE OR ITS PREQUEL?

Marriage is in decline, but cohabitation rates are soaring. Defined as a man and woman living together in a nonmarital sexual relationship, cohabitation rivals marriage as a means to create a family. It has not, however, dislodged the ideal of marriage in the public mind. The marital state is still very desirable and most do participate in it at some point.⁷¹ For some, living together is an exploratory prelude to marriage. Others view it as the only feasible alternative to remaining alone. Still for others, cohabitation is a period of expectation, hoping for better fortune in the future. Examining the motivations and characteristics of today's cohabitants presents strong evidence of the evolving social trends in intimate association, since "cohabitation has become the norm for both men and women both as their first form of union and after divorces."⁷²

From 1987 to 2002 the percentage of women aged thirty-five to thirty-nine who had ever cohabited doubled, from 30% to 61%.⁷³ More than half of all marriages occurring between 1990 and 1994 were preceded by cohabitation, a jump of 40% as compared to marriages entered into between 1965 and 1974.⁷⁴ Approximately 65% of marital unions between men and women

⁷¹ Wendy D. Manning & Pamela J. Smock, *Measuring and Modeling Cohabitation: New Perspectives From Qualitative Data*, 67 J. MARRIAGE & FAM. 989, 989 (2005).

⁷² TOM W. SMITH, THE EMERGING 21st CENTURY AMERICAN FAMILY, GSS SOCIAL CHANGE REPORT NO. 42 (Nat'l Op. Research Ctr., ed., Nov. 24, 1999), available at <http://cloud9.norc.uchicago.edu/dlib/sc-42.htm>.

⁷³ *Marriage and Cohabitation in the United States: A Statistical Portrait Based on Cycle 6 (2002) of the National Survey of Family Growth*, CTRS. FOR DISEASE CONTROL & PREVENTION, 4 (Feb. 2010), http://www.cdc.gov/nchs/data/series/sr_23/sr23_028.pdf [hereinafter MARRIAGE AND COHABITATION STATISTICAL PORTRAIT].

⁷⁴ Manning & Smock, *supra* note 71, at 989.

occurring after 1995 were preceded by cohabitation.⁷⁵ Many young adults require an interval of premarital cohabitation in order to assess their compatibility. From their perspective, “marrying without living together first seems quite foolish.”⁷⁶ Some of these couples have no immediate wedding plans but have discussed marriage prior to moving in together. Although, for the present moment they have chosen to cohabit rather than marry, they “may believe there should be the potential of marriage as a criterion for cohabitation.”⁷⁷ Marriage and cohabitation are not competing choices. Rather, the “decision-making calculus”⁷⁸ centers on whether to live together or stay single, that is, to live alone with one’s parents or with roommates. Since the Baby Boom Era, men and women have been marrying at increasingly later ages. For men, the average age at first marriage is twenty-seven, while for women it is twenty-five, the oldest in our nation’s history.⁷⁹ But while marriage is being postponed, cohabitation has risen to the task of filling in the gap, offsetting and compensating for the vastly slower pace of today’s wedding marches. In a 2010 Pew Research Center survey, nearly two-thirds (64%) of those who have cohabited reported that they “thought of this living arrangement as a step toward marriage.”⁸⁰

Marriage is a “highly valued, even if an elusive goal.”⁸¹ Ironically, our reasons for deferring it attest to the

⁷⁵ Pamela Smock et al., *Nonmarital Cohabitation: Current Knowledge and Future Directions for Research*, POPULATION STUDS. CENTER, INST. FOR SOC. RES., U. OF MICH. 5 (July 2008), <http://www.psc.isr.umich.edu/pubs/pdf/rro8-648.pdf>.

⁷⁶ Sam Roberts, *Study Finds Cohabiting Doesn’t Make a Union Last*, N.Y. TIMES, Mar 2, 2010, http://www.nytimes.com/2010/03/03/us/03marry.html?_r=1&hpw (quoting Pamela J. Smock).

⁷⁷ Manning & Smock, *supra* note 71, at 999.

⁷⁸ *Id.* at 998.

⁷⁹ Linda Lyons, *The Future of Marriage: Part I*, GALLUP.COM, July 23, 2002, <http://www.gallup.com/poll/6436/future-marriage-part.aspx>.

⁸⁰ PEW RESEARCH CENTER, *supra* note 6, at iii.

⁸¹ Pamela J. Smock, *The Wax and Wane of Marriage: Prospects for Marriage in the 21st Century*, 66 J. MARRIAGE & FAM. 966, 968 (2004).

extraordinarily high esteem in which we hold it. Many cohabiting couples will delay marriage until they can demonstrate a certain worthiness of it. To seriously consider marrying, cohabiting couples require a sense of financial security and stability, for example, sufficient savings to buy a house or to afford a church wedding and reception.⁸² For working and lower middle-class young couples, “marriage signifies the achievement of an enhanced financial status.”⁸³ Mere decades ago, these young adults would very likely have married, with expectations of having to weather financial hardships, particularly in their first years together.⁸⁴ As cultural pressure to marry has receded, cohabitation has become “normative and marriage increasingly decoupled from childbearing.”⁸⁵ Matrimony has been re-imagined as a symbol of personal and financial attainment.⁸⁶ This view fosters the belief that weddings should be delayed until one’s individual and economic goals have been met, “however defined and unattainable they may be for some social groups.”⁸⁷

The connection between economic stability and one’s marital or cohabitation status is “dramatically stratified by race and ethnicity.”⁸⁸ A greater percentage of whites are currently married than blacks and Hispanics, and, across all races, men and women with a bachelor’s degree or higher are more likely than those without a high school diploma or GED.⁸⁹ The proportion of those who cohabit is highest among those with no

⁸² *Id.* at 969.

⁸³ *Id.*

⁸⁴ Smock et al., *supra* note 75, at 14.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Pamela J. Smock & Wendy D. Manning, *Living Together Unmarried in the United States: Demographic Perspectives and Implications for Family Policy*, 26 LAW & POL’Y 87, 99 (2004).

⁸⁹ MARRIAGE AND COHABITATION STATISTICAL PORTRAIT, *supra* note 73, at 2 figs.1 & 2.

high school diploma or GED.⁹⁰ Educational achievement often serves “as a proxy for social class,”⁹¹ and cohabitants have lower incomes and higher poverty rates than married couples.⁹² Termed a “poor man’s” marriage,⁹³ cohabitation may function as an “adaptive family strategy,”⁹⁴ or as an “alternative to marriage for those with serious economic difficulties.”⁹⁵ Cohabitations are, generally, short-term arrangements, half of them ending in marriage and half of them dissolving.⁹⁶ More than 50% of first cohabitations are expected to transition to marriage within three years, a probability higher for whites than for blacks and Hispanics.⁹⁷ Not surprisingly, those who choose living together as a “stepping stone to marriage”⁹⁸ are more likely to seek a more permanent union. Furthermore, there is a greater likelihood that men and women with less education will cohabit.⁹⁹

In the United States, about one-third of all births occur outside of marriage.¹⁰⁰ Between the early 1980s and early 1990s, the proportion of births to cohabiting women increased at a considerably higher rate than births to single mothers living without partners.¹⁰¹ In addition, nonmarital stepfamilies are formed when a custodial parent, generally the mother, joins a

⁹⁰ *Id.* at 2.

⁹¹ Smock et al., *supra* note 75, at 7.

⁹² Smock & Manning, *supra* note 88, at 96.

⁹³ *Id.* at 100.

⁹⁴ *Id.*

⁹⁵ Smock et al., *supra* note 75, at 10.

⁹⁶ Smock & Manning, *supra* note 88, at 90.

⁹⁷ MARRIAGE AND COHABITATION STATISTICAL PORTRAIT, *supra*, note 73, at 3.

⁹⁸ Smock et al., *supra* note 75, at 12.

⁹⁹ MARRIAGE AND COHABITATION STATISTICAL PORTRAIT, *supra*, note 73, at 13-14.

¹⁰⁰ Smock & Manning, *supra* note 88, at 91-92.

¹⁰¹ *Id.* at 92.

cohabiting relationship. American stepfamilies are now as likely to be built on cohabitation as on marriage.¹⁰² Approximately 40% of all children will spend some time in a cohabiting household before the age of 16.¹⁰³ Compared to white children, black and Hispanic children are “over-represented”¹⁰⁴ in cohabiting families and are at greater risk for instability: “Overall, 15% of children born to cohabiting parents experience the end of their parents’ unions by age one, half by age five and two-thirds by age ten.”¹⁰⁵ Children of cohabiting households fare less well, academically and behaviorally than their counterparts in marital families.¹⁰⁶ Further, they are nearly as likely to experience poverty as children in single-mother households and substantially more likely to be poor than children in married families.¹⁰⁷

Research by Manning and Smock reveals just how fluid cohabiting arrangements are. In the absence of a formal wedding ceremony, it is difficult to pinpoint the “defining moment”¹⁰⁸ marking the beginning of the relationship. Most often, these arrangements are formed gradually, and less deliberately than marriage—a girlfriend residing with her parents who spends increasing amounts of time at her boyfriend’s home, a man who arrived for a first date at a woman’s house and “just never went home.”¹⁰⁹ At times, cohabitants “straddle two living quarters at the same time,”¹¹⁰

¹⁰² *Id.* at 93.

¹⁰³ MARRIAGE AND COHABITATION STATISTICAL PORTRAIT, *supra*, note 73, at 4.

¹⁰⁴ Pamela Smock et al., *supra* note 75, at 7. Indeed, “35% of White cohabitators, 54% of black cohabitators and nearly 60% of Hispanic cohabitators have children present in the household.” Smock & Manning, *supra* note, 88 at 92.

¹⁰⁵ Smock & Manning, *supra* note 88, at 94.

¹⁰⁶ MARRIAGE AND COHABITATION STATISTICAL PORTRAIT, *supra*, note 73, at 5.

¹⁰⁷ Smock & Manning, *supra* note 88, at 94.

¹⁰⁸ Manning & Smock, *supra* note 71, at 994.

¹⁰⁹ *Id.* at 995.

¹¹⁰ *Id.*

reluctant to deny themselves “somewhere to land”¹¹¹ if the cohabiting relationship breaks up. While it is often assumed that married couples will move into homes of their own, more than 37% of cohabiting couples in Manning and Smock’s study sample were living with roommates, parents or other relatives at some point in their relationship.¹¹² The lack of a universally recognizable term to refer to one’s cohabiting partner can render social introductions awkward and embarrassing. This absence of commonly understood language to describe cohabiting partnerships is “[o]ne signal that cohabitation is not fully *institutionalized*.”¹¹³

Premarital cohabitation appears to be associated with instability during marriage and earlier divorce. The probability that a woman’s marriage will last at least ten years is lower for those who cohabit before marriage (60%) than those who do not (66%).¹¹⁴ One possible explanation is that cohabitants who later marry are a self-selected group whose personal attributes and attitudes toward marriage “make marital stability less likely.”¹¹⁵ Moreover, having raised the economic threshold for marriage, we have transformed it into a ‘luxury good,’¹¹⁶ as well as a social ideal. Our exalted expectations of marriage “are part of what is behind the retreat from marriage,”¹¹⁷ the urge to avoid such commitment “until it is clear that our expectations will be met.”¹¹⁸ Ultimately, this brand of idealism raises the bar not only for the decision to marry, but for the decision to stay married.¹¹⁹

¹¹¹ *Id.*

¹¹² *Id.* at 997-8.

¹¹³ *Id.* at 996 (emphasis in the original).

¹¹⁴ MARRIAGE AND COHABITATION STATISTICAL PORTRAIT, *supra*, note 73, at 13.

¹¹⁵ Pamela Smock et al., *supra* note 75, at 12.

¹¹⁶ Smock & Manning, *supra* note 88, at 100.

¹¹⁷ Smock, *supra* note 81, at 971.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 968.

The phenomenal transformation in the number and status of nonmarital intimate associations on the national scale is—perhaps surprisingly—*not* matched in terms of changes *within* these domestic unions. The next section considers income differentials between intimate partners. Taking a close look at which member of a heterosexual couple earns what reveals that gender still plays a major—if slowly fading—role.

IV. THE CONTINUING PERVASIVE ROLE OF GENDER IN OUR INTIMATE ASSOCIATIONS

“[H]usbands were economic providers, disciplinarians, and the heads of families, while wives were nurturers, caretakers, and subservient to their husbands.”¹²⁰ Thus gender roles were defined in mid-20th century marriages. Social changes beginning in the 1970s worked the gears of the legal system to erase laws which required and reinforced gender roles.¹²¹ The economic impact of a marital partner’s gender has in some ways been inverted. A few decades ago, marriage generally enhanced the financial status of wives, but it currently provides an economic boon for men.¹²² In the 1960s, “the typical man did not gain another breadwinner in his household when he married. Today, he does—giving his household increased earning power that most unmarried men do not enjoy.”¹²³ Changes in the allocation of decision-making also suggest a gender turnover. A 2008 Pew Research Center survey found that the woman makes decisions in more areas than the man in

¹²⁰ Martha Albertson Fineman, *Progress and Progression in Family Law*, 2004 U. CHI. LEGAL F. 1, 2; see also NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 7 (2000) (“Marriage decisively differentiated the positions of husband and wife.”).

¹²¹ See, e.g., LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 60-61 (2006).

¹²² Press Release, Richard Fry & D’Vera Cohn, Pew Research Ctr., *Women, Men and the New Economics of Marriage* 1 (Jan. 19, 2010), <http://pewsocialtrends.org/files/2010/11/new-economics-of-marriage.pdf>.

¹²³ *Id.* at 1-2.

43% of all heterosexual couples.¹²⁴ Men assume decision-making power at home in 26% of all couples; in the remaining 31%, decision-making is split.¹²⁵ Indeed, the prevailing norm has shifted away from a *breadwinner/breadmaker* marriage.¹²⁶ But not too far. Movement toward gender equity in this area has not eliminated the fact that “women continue to perform the lion’s share of the homemaking and caretaking duties.”¹²⁷ In fact, whether or not the couple is married, gender still plays a diminishing but still determinant role.¹²⁸

Many family law scholars have pointed to changes in gender norms as a significant feature of the “family law revolution.”¹²⁹ Indeed, as Marion Crain has reminded us, “[t]he vision of the spouse as equal economic partners in the marriage powerfully influences the law of marital dissolution, dictating presumptions of equal division of assets and liabilities upon divorce.”¹³⁰ This vision has led to the elimination of different rules for women and men for purposes of alimony, child custody, property management, and estate oversight.¹³¹ As the U.S. Supreme

¹²⁴ Pew Social Trends Staff, *Social & Demographic Trends: Women Call the Shots at Home; Public Mixed on Gender Roles in Jobs*, PEW RESEARCH CENTER, (Sept. 25, 2008), <http://pewsocialtrends.org/2008/09/25/women-call-the-shots-at-home-public-mixed-on-gender-roles-in-jobs/>.

¹²⁵ *Id.*

¹²⁶ The evocative phrase is June Carbone’s. See CARBONE, *supra* note 15, at xiv.

¹²⁷ Marion Crain, “Where Have All the Cowboys Gone?” *Marriage and Breadwinning in Postindustrial Society*, 60 OHIO ST. L.J. 1877, 1878 (1999).

¹²⁸ CARBONE, *supra* note 15, at 228 (noting the “respective strength of men and women’s bargaining positions in the emerging family order”).

¹²⁹ See, e.g., Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 194 (2007) (“Family law scholars have praised the family law revolution that, over the past forty years, has eliminated most official gender role distinctions within the family.”).

¹³⁰ Crain, *supra* note 127, at 1888-1889.

¹³¹ See Susan Frelich Appleton, Symposium, *Same-Sex Couples: Defining Marriage in the Twenty-First Century: Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL’Y REV. 97, 113 (2005).

Court articulated the principle, “neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.”¹³²

But the reality on the ground, in the home and at the office, within marriages and after divorce, has changed much more slowly than the legal parameters. The former *breadwinners* now spend a bit less time earning the bread and do a bit more around the house and with the children. The former *breadmakers* now bring in a substantial portion of the family’s bread, but continue to do most of the childcare and housework. Dual-earner couples became the norm in the late 20th century. By 1977, 66% of all married or partnered couples lived in dual-earner couples.¹³³ In 2008, that percentage had risen to 79%.¹³⁴ But gendered norms remain pervasive, often buttressed by marketplace differentiation. In 1970, women who were in the work force full-time earned annually 59.4% of what their male counterparts earned.¹³⁵ The median annual earnings ratio reached 60.2% in 1980 and climbed to 71.6% in 1990.¹³⁶ But the pace of narrowing the gap has since slowed and even begun marginally to turn in the opposite direction. The ratio stood at 73.7% in 2000, and moved up to 77.8% in 2007.¹³⁷ In 2008, however, it

¹³² United States v. Virginia, 518 U.S. 515, 532 (1996).

¹³³ Ellen Galinsky et al., *2008 National Study of the Changing Workforce, Times are Changing: Gender and Generation at Work and at Home*, FAMILIES & WORK INST. 8 (2009), http://familiesandwork.org/site/research/reports/Times_Are_Changing.pdf. Significantly, the percentage of men living in dual-earner couples rose from 53% to 75% from 1977-2008. *Id.* The percentage of women in dual-earner couples rose from 85 to 91% in the same period. *Id.*

¹³⁴ *Id.*

¹³⁵, *Fact Sheet: The Gender Wage Gap: 2009*, INST. FOR WOMEN’S POL’Y RES., tbl.2 (Sept. 2010), http://www.iwpr.org/publications/pubs/the-gender-wage-gap-2009/at_download/file.

¹³⁶ *Id.*

¹³⁷ *Id.* A similar narrowing of the gap has occurred in hourly wages. In 1979, the hourly pay of women working in hourly jobs was 58% of the hourly pay of men in hourly jobs. Galinsky et al., *supra* note 133, at 7. In 2007,

slid to 77.1%, and then edged slightly downward again in 2009 to 77.0%.¹³⁸

Recent economic research suggests that weekly or even annual comparisons afford too narrow a window to fairly assess the differences between men's and women's earnings over time. A study which utilized a 15-year time frame (1983-1998) concluded that due to lower work hours and time off for child-rearing, employed women in their prime earning years *earned only 38% of men's income*.¹³⁹ Across the study's decade-and-a-half, the average working woman earned only \$273,592 while her male counterpart earned \$722,693 (in 1999 dollars).¹⁴⁰ This long-term calculation yields a 62% gender earnings gap, far more than double the 22.2% median annual wage gap which is more widely acknowledged.¹⁴¹

women's hourly wages had risen to 82% of men's. *Id.* Younger workers have experienced an even stronger convergence. Employed women 20 to 24 years old in 2007 who were paid on an hourly basis earned 90% of what employed men in that age bracket earned, and female teenagers 16 to 19 years old earned 95% of what their male counterparts earned. *Id.* at 8.

¹³⁸ INST. FOR WOMEN'S POL'Y RES., *supra* note 135, at tbl.2.

¹³⁹ STEPHEN J. ROSE & HEIDI I. HARTMANN, STILL A MAN'S LABOR MARKET: THE LONG-TERM EARNINGS GAP 9 (2004), *available at* http://www.iwpr.org/publications/pubs/still-a-mans-labor-market-the-long-term-earnings-gap/at_download/file. See Galinsky et al., *supra* note 133, at 8 ("[A] motherhood penalty' remains—specifically, that the length of the time that mothers take out of the workforce or work reduced hours to care for their children diminishes their lifetime earnings. . . . [because] [w]omen are more likely than men to be primary caregivers.").

¹⁴⁰ ROSE & HARTMANN, *supra* note 139, at 9. The study compared the average annual earnings, across 15 years, of prime-age workers between the ages of 26 and 59 years, regardless of how many hours they worked or how many years they had earnings. *Id.* Women are more likely than men to work part-time, less likely to work year-round, and more likely to have entire years out of the labor force. *Id.* at 9-11. Fewer than half of all women (48.5%) had earnings in all 15 years of the study compared with six of seven men (84%), and one third of women had four or more years with no earnings compared with only 5% of men. *Id.*

¹⁴¹ See *id.* at 9. Further, the study found that among those prime age adults who work every year and average less than \$15,000 annually, more than 90 percent are women. *Id.* at 11.

Moreover, as the U.S. Bureau of Labor Statistics noted, women and men “tend to work in different managerial and professional occupations.”¹⁴² These gendered choices are readily apparent in college students’ choice of majors. In 1999-2000, female college graduates earned 79% of the degrees in education, 78% of those in psychology, and 73% of those in the health professions.¹⁴³ Men earned 82% of the undergraduate degrees in engineering, and 61% of those in mathematics and the physical sciences.¹⁴⁴ As a consequence, women are not well represented in the higher paying professional jobs. In 2007, while 43% of male professionals worked in the high-paying computer and engineering fields, only 9% of female professionals were so employed.¹⁴⁵ Professional women were more likely to work in the education and health care occupations. These lower-paying fields employed 67% of female professionals in 2007, but only 30% of their male counterparts.¹⁴⁶

Wage differences between college-educated women and men occur almost immediately, and worsen over time. One year after college graduation, women working full time earn only 80% as much as their male colleagues earn.¹⁴⁷ Ten years after college, women earn only 69% as much as men earn.¹⁴⁸ In fact, the gender gap among full-time employees “understates the real difference between women’s and men’s earnings” because it omits women who are working part time or who are not in the labor force.¹⁴⁹ Female college graduates who eventually return

¹⁴² *Highlights of Women’s Earnings in 2005*, U.S. BUREAU OF LAB. STAT., U.S. DEP’T OF LABOR, 2 (Sep. 2006), <http://www.bls.gov/cps/cpswom2005.pdf>.

¹⁴³ JUDY GOLDBERG DEY & CATHERINE HILL, *BEHIND THE PAY GAP* 11 (2007), available at <http://www.aauw.org/learn/research/upload/behindPayGap.pdf>.

¹⁴⁴ *Id.*

¹⁴⁵ *Highlights of Women’s Earnings in 2007*, U.S. BUREAU OF LAB. STAT., U.S. DEP’T OF LABOR, 2 (Oct. 2008), <http://www.bls.gov/cps/cpswom2007.pdf>.

¹⁴⁶ *Id.*

¹⁴⁷ DEY & HILL, *supra* note 143, at 2.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

to full-time employment—as most do—will then have lower wages than similarly-educated males, who have generally remained continuously employed, further worsening the gender wage discrepancy.¹⁵⁰ In this light, the fact that women have been earning more bachelor's and master's degrees than men since the early 1980s may mean *less* than it appears, given the socio-economic context of what women and men *do* with those degrees.¹⁵¹

In the paid labor force, women's and men's rates of participation have been gradually but significantly converging in the past several decades. In 1950, 82% of men aged eighteen and older were in the labor force, while only 42% of women were employed outside the home, a gap of forty points.¹⁵² In 2007, that difference had narrowed to nine percentage points, with 66% of men and 57% of women over 18 in the paid employment.¹⁵³ Strikingly, the labor force participation rate for mothers with children under 18 has risen from 47% in 1975 to 71% in 2007, a higher percentage than both all women and all men over 18.¹⁵⁴

¹⁵⁰ *Id.* In fact, men who did not complete their high school education earn on average more than women with a college degree, \$36,021 to \$35,338; women with graduate degrees earn only slightly more than men with only a high school diploma: \$41,995 for women vs. \$40,822 for men. ROSE & HARTMANN, *supra* note 139, at 18. See also Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1894-95 (2000) ("Sociological research suggests that women's lower pay is due mainly to the fact that we are segregated into separate-but-less-remunerative occupations, firms, and jobs (and even to the fact that we are often paid less than men in the same jobs)—not to the fact that we have more family responsibilities." (footnotes omitted)).

¹⁵¹ See Galinsky et al., *supra* note 133, at 6. In the 2005-2006 academic year, women earned 58% of all bachelor's degrees and 60% of master's degrees. *Id.*

¹⁵² *Id.* at 3 fig.3. Labor force participation in this calculation includes those employed and those unemployed but looking for jobs. *Id.* at 23 n.4.

¹⁵³ *Id.* Far more women than men work "reduced" weeks, however. Almost one quarter (23.6%) of women work fewer than 35 hours a week, compared to 10.2% of men. *Id.* at 4.

¹⁵⁴ *Id.* at 5 fig.5. There may be two reasons for this startling statistic. The average age of employed mothers is older than the average ages of employed women and men. *Id.* at 4-5. Another reason that mothers' participation is higher may be that many employed women (and men) with children have

Women's annual earnings in dual-earner couples have increased compared with the earnings of their spouses/partners in recent years. In 2008, just more than one in four (26%) of women living in dual-earner couples had annual earnings at least 10 percentage points higher than their spouses/partners, up from 15% in 1997.¹⁵⁵ For men, the converse was true. In 2008, 60% of men had annual earnings at least 10 percentage points higher than their spouses/partners, down from 72% in 1997.¹⁵⁶

At home, gender norms continue to regulate the division of labor between parents, which resembles that of previous generations: "Mothers are more likely than fathers (or other women) to work part time, take leave, or take a break from the work force—factors that negatively affect wages."¹⁵⁷ Women frequently devote more time and effort than men to family responsibilities, but "the choices women and men make in allocating their time between work and family are heavily constrained."¹⁵⁸ The paucity of subsidized family care options for children and elderly relatives often results in parents having to provide the care themselves. In the typical couple, the woman earns considerably less than her male partner, and so the decision to sacrifice her earnings makes economic sense and is often the family's only practical alternative.¹⁵⁹ As the primary

already finished their educations, and are thus more likely to participate in the labor force. *Id.*

¹⁵⁵ *Id.* at 8.

¹⁵⁶ *Id.* The proportion of couples earning comparable amounts (within plus or minus 10 percentage points relative to each other) remained steady during this period: 13% in 1997 and 14% in 2008. *Id.*

¹⁵⁷ DEY & HILL, *supra* note 143, at 2; *see also* ROSE & HARTMANN, *supra* note 139, at 26 ("The more years that children are present the more women have: fewer years in the paid labor force, more years with low working hours, and lower annual earnings when working.").

¹⁵⁸ ROSE & HARTMANN, *supra* note 139, at 33.

¹⁵⁹ *See id.* at 21 ("[B]y the time women are starting families, it often 'makes economic sense' for the woman, typically the lower paid partner, to forego work and earnings to take care of the children especially given the lack of suitable alternative care arrangements."); Allen M. Parkman, *Bargaining Over Housework: The Frustrating Situation of Secondary Wage Earners*, 63 AM. J. ECON. & SOC. 765,773 (2004), available at

wage earner, the man is in the labor force earlier and more continuously than his female partner, thus securing a higher and more consistent income stream for the family. Also, since higher income jobs are often accompanied by more generous fringe benefits, the man's employment may already supply important benefits such as health insurance.¹⁶⁰ Multiplied a million-fold, the results will perpetuate gender stratification in employment and wide disparities in income over time.¹⁶¹ For example, of college students who graduated in 1992-93, 23% of mothers were out of the work force a decade later, and another

http://findarticles.com/p/articles/mi_mo254/is_4_63/ai_n7072367 ("While both parents are responsible for the care of their children, viewed incrementally the cost of child care has to be attributed to the employment of the secondary wage earner.")

¹⁶⁰ See Parkman, *supra* note 159, at 772 (describing the range of economic advantages to a family if the primary wage earners remains in the labor force, rather than the secondary wage earner).

¹⁶¹ Public opinion on the pay gap issue also turns on perceptions of motherhood and fatherhood. While 41% in a 2005 national poll stated their belief that differences in men's and women's earnings are due to employer discrimination, an identical percentage opined that the gender pay gap was the result of women's prioritizing family over work and manifesting a lower level of commitment to their careers. Catherine Hill & Elena Silva, *Public Perceptions of the Pay Gap*, AM. ASS'N OF UNIV. WOMEN EDUC. FOUND., 3 (Apr. 19, 2005), <http://www.aauw.org/learn/research/upload/perceptionsPayGap.pdf> ("More than half (56 %) of Americans include employers' unwillingness to promote young women because they may leave when they have children as either the first (29 %) or second (27 %) most important reason for the pay gap."). Rose & Hartmann explained that a "perverse internal logic perpetuates a system with a rigid division of labor both in the workplace and in the home." ROSE & HARTMANN, *supra* note 139, at 33. Rose & Hartmann further explained:

Employers may feel justified in discriminating against women workers if they think they will be less devoted to their jobs because of family responsibilities. They may structure jobs as part-time and dead-end for this reason and many women may accept them because they cannot find better-paying jobs. Labor market discrimination means lower earnings for women; women's low earnings mean women spend more time in family care; women's commitments to family care contribute to discrimination against them. Single mothers especially suffer as they must attempt to support their families on women's lower wage levels.

Id.

17% were employed part-time.¹⁶² By contrast, less than 2% of fathers were out of the work force, with an equally minuscule percentage working part-time.¹⁶³ Tellingly, the United States in 2008 had an estimated 5.3 million “stay-at-home” mothers but only 140,000 “stay-at-home” fathers.¹⁶⁴

Personal choices intertwine with economic choices and consequences, but they are still firmly rooted in gender. In the middle of the twentieth century, a man’s “thrift and industry”¹⁶⁵ were matched against a woman’s “domestic skills,”¹⁶⁶ but their differences were perceived as shrinking. A 1953 sociology text downplayed the economic motive for marriage, arguing quite implausibly that “a single woman can support herself as well as the average husband would support her”¹⁶⁷ Yet gender largely determined the cultural roles for spouses. A woman in the Eisenhower era needed to accommodate more to marriage than a man:

The man goes to shop or office after marriage the same as he did before, and even though he comes home to his own home instead of his parental home or a rooming house, he still comes home as before to someone who provides for his needs in food and rest.¹⁶⁸

A married woman in the 1950s labor force needed to satisfy the needs of her husband and children as well as those of her

¹⁶² DEY & HILL, *supra* note 143, at 2.

¹⁶³ *Id.*

¹⁶⁴ Press Release, U.S. Census Bureau, As Baby Boomers Age, Fewer Families Have Children Under 18 at Home (Feb. 25, 2009), http://www.census.gov/newsroom/releases/archives/families_households/cbo9-29.html.

¹⁶⁵ LANDIS, *supra* note 2, at 4.

¹⁶⁶ *Id.*

¹⁶⁷ BABER, *supra* note 1, at 163.

¹⁶⁸ *Id.* at 173.

boss, and thus faced “the heavy strain of double work.”¹⁶⁹ Women in that era could join the labor force but could never leave their domestic employ. In the evocative words of historian Jessica Weiss, “[a] woman walked up the aisle a bride and back down it a housewife, whether or not she continued to work or study.”¹⁷⁰

Much has changed in the succeeding half-century, but much has not. The socio-economic gap between motherhood and fatherhood is still “particularly stark,”¹⁷¹ and parental obligations “continue to be assigned on the basis of gender.”¹⁷² Even when both parents are employed, the social mores continue to induce a woman to undertake the lioness’ share in childcare and housework, resulting in the unequal division of labor famously described by Arlie Hochschild and Anne Machung as “The Second Shift.”¹⁷³

¹⁶⁹ Id. at 174; see also LANDIS, *supra* note 2, at 275 (observing in 1955 that the birth of children resulted in far more difficult adjustments for women than for men); ROBERT F. WINCH, *THE MODERN FAMILY* 411 (rev. ed., 1963) (reporting the general view in the mid-1960s that “in the American family the wife-mother fulfills the role of bandaging up the skinned knees of her children and applying balm to the scarred psyches of her husband and children,” whether or not she is employed outside the home).

¹⁷⁰ JESSICA WEISS, *TO HAVE AND TO HOLD: MARRIAGE, THE BABY BOOM, AND SOCIAL CHANGE* 31 (2000).

¹⁷¹ DEY & HILL, *supra* note 143, at 3.

¹⁷² Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1937 (2000). Prof. Scott adds that the allocation of roles by gender “reinforces women’s dependency and, in subtle ways, perpetuates hierarchy in marriage.” Id.

¹⁷³ See Arlie Hochschild, *The Fractured Family*, AM. PROSPECT, June 23, 1991, available at http://www.prospect.org/cs/articles?article=the_fractured_family (“[W]e are living in a time of a stalled revolution, a time in which women have changed much faster than the men they live with or the institutions in which both sexes work. This has indeed marginalized family life and turned it into a ‘second shift.’”); Exactly How Much Housework Does a Husband Create?, UNIV. OF MICH. NEWS SERV. (Apr. 3, 2008), <http://www.ns.umich.edu/htdocs/releases/story.php?id=6452> (“There’s still a significant reallocation of labor that occurs at marriage—men tend to work more outside the home, while women take on more of the household labor And the situation gets worse for women when they have children.”) (quoting Institute for Social Research economist Frank Stafford, who directed a detailed

Hochschild and Machung concluded in 1989 that the gendered tasks of marriage generate an extra month of work per year for women in chores related to home and children.¹⁷⁴ A decade later, a research review article concluded that although men and women now believed that domestic tasks should be shared, “[o]n average, women perform two or three times as much housework as men.”¹⁷⁵ That the gender-driven assumptions behind this 21st century division of labor have been deeply internalized may be seen by the study’s finding that “the vast majority of men, as well as most women” consider the fact that women perform twice or thrice as much housework as men to be fair.¹⁷⁶

The sexes are slowly heading toward equal sharing of child rearing and household work.¹⁷⁷ Very slowly. Between 1965 and

study of housework trends). See generally ARLIE HOCHSCHILD & ANNE MACHUNG, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989).

¹⁷⁴ HOCHSCHILD & MACHUNG, *supra* note 173, at 3.

¹⁷⁵ Scott Coltrane, Research on Household Labor: Modeling and Measuring the Social Embeddedness of Routine Family Work, 62 J. MARRIAGE & FAM. 1208, 1208 (2000) [hereinafter Research on Household Labor]; see also SCOTT COLTRANE, *FAMILY MAN: FATHERHOOD, HOUSEWORK, AND GENDER EQUITY* 53 (1996) (“[T]he majority of men still make only minimal contributions to those tasks conventionally performed by housewives, such as cooking and cleaning”).

¹⁷⁶ Research on Household Labor, *supra* note 175, at 1208. See also Parkman, *supra* note 159, at 772 (suggesting that the grossly unequal division of household tasks in two-paycheck families may stem from the recognition by wives “that they are limited in their ability to reduce their household activities if they want to keep their spouse happy in the marriage. As a result, they will increase their employment more than they reduce their domestic labor.”); Schultz, *supra* note 150, at 1892-1919 (arguing that mass-cultural expectations that women be nurturing wives, mothers and daughters shape women’s and society’s notion of women as “inauthentic workers”). But see Naomi R. Cahn, Gendered Identities: Women and Household Work, 44 VILL. L. REV. 525, 526-528 (1999) (arguing that pursuing the domestic tasks expected of them has afforded women a “household power base”).

¹⁷⁷ Researchers have pointed to several signs of gender shift within couples since the 1960s:

[T]here has been a growing convergence in the hours that both women and men spend in the broad categories of paid work, family work and leisure. Women’s paid work time has significantly increased, while that of men has decreased.

2003, women doubled and men tripled the amount of time they spent in childcare.¹⁷⁸ These trends track those of much of the Western industrial world. Data from 20 industrialized countries covering this same period show an overall increase in men's proportional contribution to family work (including housework, child care and shopping), from less than one-fifth in 1965 to more than one-third by 2003.¹⁷⁹ A 2005 study by University of Michigan's Institute for Social Research confirmed this emerging trend toward domestic convergence, comparing the average amount of housework done by women and by men in 1976 and 2005. Women's domestic labor decreased from 26

Correspondingly, women's time devoted to housework has decreased, while the time men spend in family work of all kinds has increased.

Oriel Sullivan & Scott Coltrane, *Men's Changing Contribution to Housework and Childcare: A Discussion Paper on Changing Family Roles* (Apr. 2008) (citations omitted), available at <http://www.contemporaryfamilies.org/marriage-partnership-divorce/menchange.html> (prepared for the 11th Annual Conference of the Council on Contemporary Families) . However, one researcher pointed to "invisible" household work as exposing the extremely uneven progress in sharing domestic labor:

When it comes to responsibility for less "visible" aspects of housework than chores or child care, the gender divide remains large in most families. Women still tend to do the "emotional labor," noticing when things need to be discussed or resolved. They also do most of the "household management" planning, buying presents for birthday parties a child will be attending, scheduling doctor appointments, and marking things that must be done on the calendar on the refrigerator door. Finally, women still tend to do the "kin work," calling relatives, arranging for holiday gatherings, sending holiday cards and so on. Until men begin to take responsibility for invisible household work, women will continue to shoulder more family work, and therefore to face more constraints in their freedom to engage in paid work.

Id. (quoting Pamela J. Smock).

¹⁷⁸ Sullivan & Coltrane, *supra* note 177.

¹⁷⁹ Jennifer L. Hook, *Care in Context: Men's Unpaid Work in 20 Countries, 1965-2003*, 71 AM. SOC. REV. 639, 650 fig.1 (2006).

hours per week to 17 hours.¹⁸⁰ The time men spent on household tasks increased from 6 hours to 13 hours per week.¹⁸¹ But a 2010 U.C.L.A. study found that mothers still spend 27% of their time on housework, compared to 18% of father's time.¹⁸²

But actual convergence of gender roles has not only been elusive, it may be both undesired and unachievable.¹⁸³ The percentage of employees "who agree (strongly or somewhat) that it's better for all involved if 'the man earns the money and the woman takes care of the home and children'" has indeed dropped substantially over the past thirty years—from 64% in 1977 to 41% in 2008.¹⁸⁴ But that statistic reveals that two of five adults in the paid workforce still subscribe to so-called "traditional" gender roles.¹⁸⁵ Among employees 28 years of age and younger in 2008, over a third (35%) believed that a women's place is in the home.¹⁸⁶ Even in the 21st century, motherhood "entails substantial economic and personal sacrifices" while fatherhood "appears to engender a 'wage premium.'"¹⁸⁷ Men spend more time at work after the birth of their children, while women do the reverse.¹⁸⁸ Given the stress

¹⁸⁰ See *Exactly How Much Housework Does a Husband Create?*, *supra* note 173 (reporting on research).

¹⁸¹ *Id.* The study also found that having a husband created an additional seven hours a week of housework for women, while having a wife reduced men's housework by approximately one hour. *Id.*

¹⁸² See Benedict Carey, *Families' Every Fuss, Archived and Analyzed*, N.Y. TIMES, May 22, 2010, <http://www.nytimes.com/2010/05/23/science/23family.html?pagewanted=1> (describing the U.C.L.A. study).

¹⁸³ See Crain, *supra* note 127, at 1879 ("While men and women generally agree that the trend toward sharing the breadwinner role and renegotiating caretaking roles in the family sphere has enriched both sexes, many also feel that today's gender-neutral ideal of having it all—a happy marriage, family, and a successful career—is unattainable.").

¹⁸⁴ Galinsky et al., *supra* note 133, at 9.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 11.

¹⁸⁷ DEY & HILL, *supra* note 143, at 3.

¹⁸⁸ *Id.*

levels of the multi-tasking family, parenting has been aptly limned as “Two people. Three full-time jobs.”¹⁸⁹ And even as we head into the second decade of the 21st century, two of those three jobs are held by a woman.

One of the lessons from this data is that while marital unions and cohabitating couples are often seen as the polarities in the decline-of-marriage debate, the issue of gender cuts across marital lines. As historian Hendrik Hartog observed, marriage has always “meant a dyadic relationship between two unequally situated individuals.”¹⁹⁰ That husbands and wives have been succeeded, in millions of instances, by unmarried partners does not re-balance the inequality. Research on same-sex couples is far less extensive than on their heterosexual counterparts. But preliminary studies have found that “same-sex relationships, whether between men or women, were far more egalitarian than heterosexual ones.”¹⁹¹ The perspective of gender helps to refocus the key issue of family policy into one encompassing all types of family composition. Which families should our legal system recognize? The next section sketches a response, one grounded in functional norms for all families.

V. THE EMERGING FUNCTIONAL NORMS

Twenty-first century American families have arranged themselves in many different ways. Unmarried couples—both heterosexual and homosexual—are setting the cultural norms for family life, raising children and relating to each other and to the larger community as the members of a family. Married

¹⁸⁹ Carey, *supra* note 182 (quoting Kathleen Christensen of the Alfred P. Sloan Foundation).

¹⁹⁰ Hendrik Hartog, *What Gay Marriage Teaches About the History of Marriage*, HISTORY NEWS NETWORK (Apr. 5, 2004), <http://hnn.us/articles/4400.html>; *see also* Scott, *supra* note 172, at 1934 (“The legal reinforcement of spousal commitment norms was accompanied by an equally powerful validation of hierarchical gender roles and differentiated legal enforcement of commitment obligations.”).

¹⁹¹ Tara Parker-Pope, *Gay Unions Shed Light on Gender in Marriage*, N.Y. TIMES, (June 10, 2008), <http://www.nytimes.com/2008/06/10/health/10well.html> (reporting on studies).

couples and their children now form a minority of households. For some years and in thousands of cases, “[t]he citadel of the biological/adoptive family has . . . been besieged by the burgeoning segment of nontraditional families.”¹⁹² But our legal system has not kept pace with this rapid cultural change. Family law statutes still largely envision an Ozzie and Harriet world in which families appear as two heterosexual spouses and their biological children, with all other family units deemed exceptions to this rule.¹⁹³

But major changes are stirring as the legal system shifts from biological to functional norms. Not long ago, the legal system would categorize families according to their biological (or adoptive) ties. But nurture has dislodged nature as the primary determinant in the resolution of legal disputes within these new family forms.¹⁹⁴ Adults who lack a genetic tie to children with whom they have established a parent-child bond are scoring victories in court battles over biological parents who seek to exclude these functional parents from the families they helped

¹⁹² J. Herbie DiFonzo & Ruth C. Stern, *The Winding Road From Form to Function: A Brief History of Contemporary Marriage*, 21 J. AM. ACAD. MATRIMONIAL LAW 1, 38 (2008).

¹⁹³ Kris Franklin conceptualizes this as follows:

Our cultural ideology assumes that everyone should live in some form of nuclear family, and that the nuclear family is ideally suited to modern American society. Although this form of family has a long history, its primacy as an ideological construct is relatively recent. However, the nuclear family as a cultural ideal does not accurately reflect the reality of many families today, if it ever did.

Kris Franklin, Note, “A Family Like Any Other Family:” *Alternative Methods of Defining Family in Law*, 18 N.Y.U. REV. L. & SOC. CHANGE 1027, 1032 (1991). A minority of scholars believe that the norms of the prototypical 1950s marriage could still function as models for contemporary families. See, e.g., Daniel D. Polsby, *Ozzie and Harriet Had It Right*, 18 HARV. J.L. & PUB. POL’Y 531, 533 (1995) (arguing for the “superiority of the Ozzie-and-Harriet family”); Scott, *supra* note 172, at 1964 (“[M]any modern religious and cultural conservatives would like to return to an earlier era of both stable marriage and patriarchal gender roles.”).

¹⁹⁴ See, e.g., Katherine R. Allen et al., *An Overview of Family Diversity: Controversies, Questions, and Values*, in HANDBOOK OF FAMILY DIVERSITY 1 (David H. Demo et al. ed., 2000) (“[A] family is characterized by two or more persons related by birth, marriage, adoption, or choice”).

construct. Increasingly, the central issue is whether the adult has functioned as a parent in the child's life. At the same time, the benefits and burdens that the law once reserved for marriage are increasingly allocated to those intimate associations which outnumber marriages and whose creation, composition, and dissolution are often hotly contested. The increasing use of assisted reproductive technology has also resulted in the formation of very different families.

The central difficulty with contemporary family law is that the subject matter has changed faster and more thoroughly than the formal legal principles. Thus, "the essential purposes of family regulation cannot be fully accomplished when 'family' is defined in law to exclude a significant part of the population of actual families."¹⁹⁵ Because of these changing norms and practices, family governance issues are brought to the courts more frequently than ever.¹⁹⁶ As the number of non-marital families continues to grow, many more families are finding child-rearing issues, financial obligations, and their very legal existence as a family subject to judicial resolution. The Colorado Supreme Court noted the shift in court dockets in observing that "[p]arenthood in our complex society comprises much more than biological ties, and litigants increasingly are asking courts to address issues that involve delicate balances between traditional expectations and current realities."¹⁹⁷

In resolving these disputes, courts are increasingly turning away from enforcing legal rights and obligations on the basis of pre-determined legal classifications. Instead, they are starting

¹⁹⁵ Margaret M. Mahoney, *Forces Shaping the Law of Cohabitation for Opposite Sex Couples*, 7 J.L. & FAM. STUD. 135, 164 (2005). See also Nancy E. Dowd, *Law, Culture, and Family: The Transformative Power of Culture and the Limits of Law*, 78 CHI.-KENT L. REV. 785, 789 (2003) ("Although our dominant legal norm is that family is a heterosexual, marital, biological unit, our social and cultural patterns expose a culture that is largely at odds with that nuclear, marital family norm.").

¹⁹⁶ See Kris Franklin, *The "Authoritative Moment": Exploring the Boundaries of Interpretation in the Recognition of Queer Families*, 32 WM. MITCHELL L. REV. 655, 656 (2006) ("[T]hese cases ask the courts to think about the growing elasticity in cultural understandings of families in the United States, and to make decisions about where to draw the line in defining the legitimacy (or illegitimacy) of different kinds of families.").

¹⁹⁷ N.A.H. v. S.L.S., 9 P.3d 354, 359 (Colo. 2000).

to embrace functional arguments, rationales based upon the actual lived experience and expectations of the parties. Many courts are recognizing, in the words of the Supreme Court of Washington, that “individuals may comprise a legally cognizable family through means other than biological or adoptive.”¹⁹⁸ Behavioral norms are beginning to replace long-established legal rules governing family formation, regulation, and dissolution. But functional norms have not yet conquered the field. Our legal system is in transition and has far to go in realizing equal recognition for all families.¹⁹⁹

Historian Nancy Cott has observed that this transitional period features the “disestablishment” of marriage, since the state no longer effectively supports a single model of marriage and family life.²⁰⁰ The families whose cases fill the dockets in the nation’s family courts do not, for the most part, adhere to the norms of formal law’s original conception of a married couple and their biological children. Yet family courts do their best to adjust the legal system to these heterodox unions.²⁰¹

¹⁹⁸ Carvin v. Britain, 122 P.3d 161, 169 (Wash. 2005).

¹⁹⁹ See Mahoney, *supra* note 195, at 165 (“The agenda of reform that would recognize and regulate unmarried cohabiting relationships in the law remains largely unaccomplished.”).

²⁰⁰ COTT, *supra* note 120, at 212. See also V.C. v. M.J.B., 748 A.2d 539, 556-57 (N.J. 2000) (Long, J., concurring) (citation omitted):

Those qualities of family life on which society places a premium—its stability, the love and affection shared by its members, their focus on each other, the emotional and physical care and nurturance that parents provide their offspring, the creation of a safe harbor for all involved, the wellspring of support family life provides its members, the ideal of absolute fealty in good and bad times that infuses the familial relationship (all of which justify isolation from outside intrusion)—are merely characteristics of family life that, except for its communal aspect, are unrelated to the particular form a family takes.

Those attributes may be found in biological families, step-families, blended families, single parent families, foster families, families created by modern reproductive technology, and in families made up of unmarried persons. What is required is the creation of “an intimate familial relationship that is stable, enduring, substantial and mutually supportive, . . . one that is cemented by strong emotional bonds and provides deep and pervasive emotional security.”

²⁰¹ See, e.g., COTT, *supra* note 120, at 212 (“The public willingness [in child support cases] to see marriage-like relationships as marriage is driven by the aim of guaranteeing economic support by family members, thereby minimizing

Case-by-case lawmaking frequently results in this rapidly changing area of law, leading to a transformation in the scope of marriage and other domestic unions, as well as in the allocation of parenting rights and obligations. These resolutions resist classification, since they occur in every corner of family law, and often result in contradictory holdings. A paradigmatic case demonstrating this trend is the New Jersey Supreme Court's decision in *V.C. v. M.J.B.*²⁰² The court held that the same sex partner of a biological mother who had assumed a parental role in helping to raise the biological mother's child—with the consent and cooperation of the biological parent—had established a “psychological parenthood” with respect to the child and thus had a legal right to petition for custody and visitation.²⁰³ This case exemplifies a trend pivoting away from formal legal principles and toward functional norms. However, as often occurs in a deeply transitional period, uniformity has proven elusive. Maryland's highest court declined to follow New Jersey's lead and held that *de facto* parenthood is not recognized as a legal status.²⁰⁴ In 2010, the North Carolina Supreme Court held that a biological mother who “intentionally creat[ed] a family unit in which [her lesbian partner] permanently shared parental responsibilities . . . acted inconsistently with her paramount parental status” and thus opened the door for an award of joint legal custody.²⁰⁵

A selection of recent cases—some of them controversial—illustrates the dimensions of the rift between formal legal sanction and cultural phenomenon in the current construction of *family*. Although the denouement is not crystal clear, the

demands on public assistance, but it also diversifies social views of family relationships.”); DiFonzo & Stern, *supra* note 192, at 38-39 (“Courts are gradually—and legislatures more gradually still—recognizing the pervasiveness of alternative family forms by allocating legal rights and burdens to ‘equitable parents’ equivalent to biological and adoptive families.”) (citations omitted).

²⁰² *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000).

²⁰³ *Id.* at 551-552. The New Jersey Supreme Court largely adopted the test set out by the Wisconsin Supreme Court in *Holtzman v. Knott*, 533 N.W.2d 419, 421 (Wis. 1995).

²⁰⁴ *Janice M. v. Margaret K.*, 948 A.2d 73, 87 (Md. 2008).

²⁰⁵ *Boseman v. Jarrell*, 704 S.E.2d 494, 496 (N.C. 2010).

holdings in these cases flow in the direction of a resolution based on functional norms, on recognizing and preserving “the emotional bonds that develop between family members as a result of shared daily life.”²⁰⁶

UNDER WHAT CIRCUMSTANCE MAY A WOMAN’S LIVE-IN BOYFRIEND BECOME HER CHILD’S “PSYCHOLOGICAL PARENT”?

Courts in Ohio and South Carolina have held that, if the man participated significantly in raising that child over a period of time and with the mother’s consent, he is now a legal parent to the child.²⁰⁷ Indeed, as the Maine Supreme Court affirmed in 2009, under similar circumstances the state may obtain child support from a man who raised a child but whose paternity test established that he was *not* the child’s biological father.²⁰⁸

WHEN DOES THE SAME-SEX DOMESTIC PARTNER OF A BIOLOGICAL PARENT OBTAIN THE RIGHT TO CONTEST CUSTODY OF THE PARENT’S BIOLOGICAL CHILD?

Courts in Montana, North Carolina, California, and Pennsylvania have held that when the natural parent voluntarily created and actively fostered a parent-child relationship between her partner and her child, the domestic partner then has the right to seek custody and visitation of the child.²⁰⁹ That the domestic partner in those states lacked the ability to either marry the parent or even adopt the child was deemed irrelevant. In a 2008 case involving a mother, a biological father, and a de facto parent, an appellate court in Washington approved a plan calling for the child to spend residential time with all three parents.²¹⁰

²⁰⁶ V.C. v. M.J.B., 748 A.2d 539, 550 (N.J. 2000) (further citation omitted).

²⁰⁷ Waszkowski v. Lyons, No. 2008-L-077, 2009 WL 224540, at *4 (Ohio Ct. App. 2009); Middleton v.

Johnson, 633 S.E.2d 162, 172-73 (S.C. Ct. App. 2006).

²⁰⁸ Dep’t of Health & Human Servs. v. Pelletier, 964 A.2d 630, 636 (Me. 2009).

²⁰⁹ Elisa B. v. Superior Court, 117 P.3d 660, 670 (Cal. 2005); Kulstad v. Maniaci, 220 P.3d 595, 609-10 (Mont. 2009); *Boseman*, 704 S.E.2d at 496; T.B. v. L.R.M., 786 A.2d 913, 919-20 (Pa. 2001).

²¹⁰ *In re Parentage of J.A.B.*, 191 P.3d 71, 72-73 (Wash. Ct. App. 2008).

A RELATED PROBLEM IS POSED WHEN A STEPFATHER SEEKS CUSTODY OF THE BIOLOGICAL MOTHER'S CHILD AFTER HER DEATH, IN PREFERENCE TO THE BIOLOGICAL FATHER.

The Pennsylvania Supreme Court affirmed the award of custody to the stepfather, who had established a close parental bond with the child, even though the stepfather could not adopt the child since the biological father's parental rights had not been terminated.²¹¹ In this area—and in a radical departure from the common law—courts are moving toward a conclusion that finds, in the words of the Washington Supreme Court in 2008, “no principled distinction between a legal parent and a stepparent who assumes all the obligations and exercises all the responsibilities of parenthood”²¹²

MAY A SPERM DONOR WHO HAS BEEN INVOLVED IN THE CHILDREN'S LIVES SINCE THEIR BIRTH OBTAIN PARENTING RIGHTS TO THE RESULTING CHILD BORN TO A WOMAN AND HER LESBIAN PARTNER, EACH OF WHOM ALSO HAVE PARENTING RIGHTS?

In 2007-2008, Pennsylvania and New Mexico courts said yes, if the sperm donor had established a parent-child relationship with the children.²¹³

Other courts have ruled in contrary ways; the terrain of family law is quite conflicted. But the cases highlighted above point in the direction of functional norms—*those who are doing the job have a right to the title*—and represent the vanguard of this legal movement. These functional decisions are in fact *conservative*, since they aim to preserve, as much as possible, the family structure and composition which the parties themselves adopted when they were actually living life together and not litigating its end.

²¹¹ Charles v. Stehlik, 744 A.2d 1255, 1259 (Pa. 2000).

²¹² Zellmer v. Zellmer, 188 P.3d 497, 505 (Wash. 2008).

²¹³ Mintz v. Zoernig, 198 P.3d 861, 862 (N.M. Ct. App. 2008); Jacob v. Schultz-Jacob, 923 A.2d 473, 481-82 (Pa. Super. Ct. 2007).

VI. CONCLUSION

Marriage remains popular, both as a personal goal and a perceived societal foundation. But the preeminent role of marriage in our society is gone. Unmarried couples and their dependents now compose a majority of families. Yet the legal system treats unmarried adults (and their children) as exceptions to the rule, deviations from the norm. This reluctance to make the legal system reflect the reality of family life is slow to change. Functional norms are best suited to fairly serve our nation's increasingly diverse families. The drive from form to function in family law is strong and growing stronger, as theory strains to keep pace with the exuberant practice of living families. These contrasting family forms, whether based on marriage or cohabitation, have similar goals: raising children, resolving domestic disputes, and building a life for themselves and their children. Our family law system should value all family configurations, resolving disputes about family composition according to the functional norms that are emerging as more accurate barometers of living American families.