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I. Introduction

My new book, *A Parent-Partner Status for American Family Law*, is not a desk book for family lawyers. Instead, the book is intended to stretch the imaginations of family lawyers, academics, and policy makers about the future of family law. This essay attempts to convey some of the main ideas in the book, omitting nuances and references that you can find in the book if I pique your interest.¹

The book is my reaction to a change in family demographics of which family lawyers are well aware: Many children have parents who are not married to each other. Approximately forty percent of children are now born out of wedlock. In addition, both married and unmarried couples with children regularly end their romantic relationships. While many of these parents then repartner—and only sometimes through marriage—their subsequent romantic relationships often end too.

These changes have implications for parents, children, and society, and also for lawyers and their practices. Yet, in many ways, the law has lagged behind and lawyers are sometimes left struggling to offer clients the answers, protections, or remedies they seek. For example, have you ever had to review a prenuptial agreement for a client who was marrying the other parent of his or her child and your client wanted to know whether

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¹ Many of the assertions contained in this short essay rely on the work of others, but only direct quotes are footnoted here. The book provides complete citations for those who seek that information.
the child’s existence affected the likely enforceability of the agreement? Have you ever represented an unmarried parent who wanted a remedy at the end of a romantic relationship for the sacrifices he or she made raising the couple’s child, but no remedy existed? Have you ever represented someone who was being psychologically abused by the other parent of his or her child, and no remedy existed to stop the abuse? Have you ever represented a spouse who wanted to try professional counseling to save a marriage, but the other spouse refused and that response ended the matter even though the couple had a child? Have you ever represented a divorcing parent who was slated to perform most of the future caregiving for the couple’s child, and compensation for that work seemed unlikely?

The questions in the prior paragraph are not about the law of custody, although the answers can sometimes affect a custody award or the parents’ willingness to co-parent cooperatively. Rather, the questions touch upon whether parents who share a child are legally obligated to each other in various ways. Family law tends not to alter the obligations between two people simply due to the fact that they have a child in common. I argue that the law should.

Why should it? Because family law, at its core, tries to position children for success and redress unfairness within families. But without making parenthood a legally consequential act for the relationship between the adults involved, the law fails to guide human behavior in a desirable way. The law could do so. After all, family law shapes behavior by attaching consequences to human action and thereby defining responsibility. It recognizes and reinforces commitment, conveys norms, and creates social roles. Family law accomplishes these things mostly outside the courtroom and apart from the adjudication of issues.

With this in mind, my book proposes a new legal status for two people who have a child in common. The book suggests that the birth or adoption of a child should automatically trigger an array of core legal obligations between the parents. These obligations would exist whether the couple is married or not and would survive the demise of the couple’s romantic relationship. I call this regime the “parent-partner status.”

The book frames the proposal by addressing a number of questions: Is parenthood relevant for the legal relationship between the parents (i.e., their inter se relationship)? Why isn’t it more relevant? Why should it be more relevant? What might the law look like if parenthood were legally significant for the parents’ inter se relationship? What disadvantages might accompany a new status based upon parenthood? Given the advantages and disadvantages, should society adopt a new status based upon parenthood? The remainder of this essay summarizes some of the answers to these questions.
II. The Insignificance of Parenthood to the Legal Relationship Between Parents

Parenthood is a big deal. Upon the birth or adoption of a child, a person enters the socially defined role of “mother” or “father.” Parenthood changes a person’s self-conception as well as others’ perceptions of the person. Parenthood, of course, is also legally significant. It triggers legal obligations between the parent and the child. For example, a parent has to care for and financially support his or her child. These legal obligations help define and reinforce the social role of parent.

In contrast, parenthood is not particularly consequential for the relationship between the parents. No word describes the relationship created by joint parenthood, although we have words like “spouse” and “cohabitant” to describe other relationships. Sometimes people use the phrase “baby mama” or “the father of my children,” but these phrases often have derogatory connotations and suggest that the parents are not married or in a romantic relationship. The term “co-parent” usually refers to parents who have broken up and only to a subset of their broader relationship. No label exists that suggests that parents have a permanent family relationship from the moment of their child’s birth.

We shouldn’t be surprised by the absence of a clear social role or term for parents’ relationship to each other. The law does not define that relationship as a significant one either. While parenthood might make some legal obligations between the parents more likely (e.g., alimony may become more probable if the parties are married and later divorce), parenthood by itself rarely establishes new legal obligations between the parents, whether the parents are married or unmarried. Most people cannot identify how parenthood changes the legal obligations between parents.

This state of affairs is unfortunate. Parenthood should trigger legal obligations between parents for two obvious reasons. First, after the birth or adoption of a child, the parents’ behavior toward each other no longer affects just them. Their interactions can deeply affect their child. Society, therefore, should encourage the parents to act toward each other in ways that are best for their child. Second, the child’s existence will make the parents interdependent for the next eighteen years. By setting some legal parameters for the parents’ relationship, society could deter and remedy the harm that sometimes emerges from long-term interdependence.

In the past, the law of marriage governed the relationships of most parents who had a child in common, fulfilling those two reasons for regulation. Marriage was adequate for the task because reproduction typically occurred within marriage and parents usually stayed married. Society’s rules for spousal behavior spilled over to guide parental
behavior. Formal exit from the marital relationship was difficult, signaling an expectation of permanence. The grounds for a fault-based divorce explicitly communicated improper spousal behavior. If the parents parted ways, the judge typically allocated custody in ways that mirrored the gendered marital roles, and alimony was at least theoretically available for the child’s custodian.

But the explosion of nonmarital childbirth and the popularity of divorce have created a gap. Many parents’ inter se relationships are largely unregulated by the legal obligations and social norms that govern marital families. The gap will not be closed by channeling more people into marriage. As Isabel Sawhill concluded with respect to the decline in the marriage rates, “it will be hard to put the toothpaste back in the tube.”

Even if more couples could be convinced to marry, marriage itself is not a panacea. The law of no-fault divorce encourages people to focus on their individual interests during the marriage. Moreover, marriages frequently end, especially for couples in certain socioeconomic strata. A return to fault-based divorce seems both unwise and politically unlikely.

Today, child custody and child support laws largely govern the relationships of parents who split. These frameworks create obligations between parents as a byproduct of each parent’s obligations to his or her children. However, these frameworks are inapplicable until the romantic relationship ends; they have little meaning for parents at the outset of parenthood, when the parents do not anticipate breaking up. Nor do these legal rules address many areas in which unfairness can arise between parents. Moreover, even at the end of the romantic relationship, the derivative obligations that parents owe each other are too hidden, too few, and too tenuous to provide an adequate structure to guide the parents’ relationship so that it is fair and works best for their child. For example, while a custody adjudication may involve an assessment of whether a parent is “friendly” to the other parent, this factor is not the sole or even predominant consideration.

III. Why Doesn’t Parenthood Create Legal Obligations Between the Parents?

We can only speculate why society doesn’t impose a legal structure on parents who have a child in common to guide their inter se relationship. The status quo probably exists because of our reverence for marriage, the historic patterns of family obligation, and a lingering disapproval of illegitimacy.

Society’s reverence for marriage, reinforced recently by the Supreme Court’s ruling in *Obergefell v. Hodges*,\(^3\) has arguably created myopia about how legal obligations between parents should arise and what those obligations should be. After all, most proposals for alternatives to marriage are modeled on marriage. Explicit consent or a marital-like relationship is usually a prerequisite for legal obligations. Yet proposals that require explicit consent or a marital-like relationship leave out many couples with children, including parents who are divorced, parents who do not cohabit, and parents who eschew a legal relationship. Omitting those people from a new proposal might be acceptable if the new proposal were extending marital obligations to nonmarital couples, but that need not be the case. Other types of legal obligations might be appropriate for people who have a child in common.

The parent-child relationship, instead of marriage, could serve as a model for the imposition of legal obligations between parents. Legal obligations between a child and the child’s legal parent are imposed automatically, that is “ascriptively.” The law could similarly impose legal obligations automatically between parents. If consent were necessary for the imposition of obligations between parents, consent could be inferred from consensual intercourse or adoption. The parents’ interdependency (created by parenthood) and the benefits to society and children from a status could also justify the imposition of legal obligations regardless of consent.

Reformers may have avoided an ascriptive approach because it is so contrary to the usual pattern. The legal relationship between adults sometimes affects the existence of a parent-child relationship, but the legal relationship between a parent and child never affects the existence of legal obligations between the adults. The usual pattern is seen in many contexts, such as when courts apply the marital presumption of paternity, when courts refuse to enforce a parenthood contract between unmarried parties who jointly used reproductive technology, or when states refuse to allow unmarried couples to adopt. In contrast, the parent-child relationship (i.e., parenthood) rarely determines whether the parents are legally obligated to each other as family. While the Puritans punished fornication with marriage, and while some courts in the nineteenth century considered engaged couples to be married after they had intercourse, those responses were never assured even then, and they have long since disappeared. Rather, the law of annulment reflects the more typical pattern: Absent fraud, infertility is usually not a ground for an annulment. Simply, obligations between adults are neither created by the existence of children nor destroyed by

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their absence.

A lingering disapproval of “illegitimacy” may also have deterred reformers from finding parenthood sufficient to impose obligations between parents. The opprobrium has emerged in different contexts, such as the congressional findings attending the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. The 2002 “Barbie scandal” is another example. Walmart pulled Mattel’s doll Midge from its shelves after public outcry. Midge was sold pregnant (with a detachable infant) but no husband. Reformers may have thought that a legal regime that imposed similar obligations between parents—whether married or not—would have been politically infeasible, even though a parent-partner status need not have eliminated all of the differences between married and unmarried parents.

Times are changing. People are less judgmental about nonmarital births. People still revere marriage, but they also recognize that joint parenthood is, or should be, a type of commitment between the adults too. Partnership parenting has gained momentum, fostered by changes in child custody law and procedure. Legal scholars are building upon the partnership idea, proposing new legal obligations between parents to address the costs of pregnancy and the financial implications of caregiving. A new parent-partner status could build upon these changing social attitudes and emerging scholarship. A new parent-partner status could obligate parents to each other in various ways, including in ways that are not directly related to custody or caregiving.

IV. The Reasons for a Parent-Partner Status

A parent-partner status is worth developing because it could benefit children, parents, and society in various ways. On the one hand, new legal obligations between parents could fill particular holes in the law and thereby better remedy and deter specific instances of injustice. For example, absent marriage, a parent is not obligated to offer reasonable aid to the other parent when the other parent is physically imperiled and needs assistance. Consequently, a parent can refuse to call 911, even though the other parent is dying in the street. While admittedly this legal hole is not a big problem because most parents would voluntarily assist the other parent, an unassisted parent (and that couple’s child) might feel otherwise. Moreover, as the questions posed at the outset of this essay suggest, bigger holes exist that a parent-partner status could help fill.

On the other hand, and more importantly, a new status could create a parent-partner social role with attendant norms. Upon parenthood, people would become both a “mom” or a “dad” and also a “parent-partner.” Through this role, society could convey its expectation that the relationship between the parents is a supportive partnership. The status would “clarify an emerging norm consensus” and serve a “constitutive function,” which in turn would help to “create[] and sustain[] cultural narratives about ourselves and our intimate relationships with others.” This function is essential because the absence of the parent-partner status has hampered the development of a social role that could encourage parents to work together and treat each other in ways that benefit their children. The absence has also produced role confusion and relationship turmoil, especially when parents repartner.

The status’s legal obligations would both set a floor for acceptable behavior and signal society’s expectations for the relationship. Consequently, any legal obligations chosen to comprise the status should convey the idea that a good parent-partner exhibits flexibility, fondness, acceptance, togetherness, and empathy toward the other parent. Psychologists believe these qualities help parents co-parent successfully through the transition to parenthood and after breakup. The status, through its obligations, should also suggest that a parent-partnership is a family relationship, regardless of whether the parents are still romantically involved. Family members are supposed to be supportive and kind to each other. The message conveyed by a status would affect a much wider swath of the population than any particular legal obligation. Consequently, while a duty to aid might affect very few people in any direct way, the fact that a duty to aid exists between parents with a child in common would send an important message to everyone about the nature of a parent-partnership.

The law has an important part to play in creating, defining, and reinforcing the social role, although adjudication would not be the primary method for conveying the normative framework. “Identity theory,” a sociological concept, explains how the new legal status could affect behavior on a grand scale. People define, perform, and prioritize a social role in large part based on their interactions with others and how others see that role. The parent-partner status would affect the probability that others would

5. Weiner, supra note 2, at 281 (citing Elizabeth Scott, Social Norms and Legal Regulation of Marriage, 86 Va. L. Rev. 1901, 1925 (2000)).
6. Id. at 229 (citing Milton C. Regan Jr., Postmodern Family Law: Toward a New Model of Status, in Promises to Keep: Decline and Renewal of Marriage in America 157, 178 (David Popenoe et al. eds., 1996)).
7. Id.
8. Id. at 225 (citing Sheldon Stryker, Identity Salience and Role Performance: The
treat parents as parent-partners, thereby making the role socially relevant for the parents. For example, health care professionals might treat couples as parent-partners during labor and delivery, showing partners how to assist their pregnant companions. Businesses might offer party-planning services to couples who want to celebrate entry into the new parent-partner status. Civil society might offer free programs for low-income parents related to particular status obligations, such as “relationship work” at the transition to parenthood. People would interact daily with others and with each other as parent-partners, thereby reinforcing the role. Children would learn about the parent-partner role as they observed their parents and saw how others treated their parents.

A. Benefits for Children

Children would benefit from parental behavior that aligned with the legal obligations and the norms of the new status. For instance, children would be advantaged if their parents did not psychologically abuse each other (one of the specific legal obligations recommended) and acted like supportive partners. Among other things, a parent-partner orientation might encourage parents to improve and maintain their romantic relationship, which is generally good for their children.

A parent-partner orientation would also help parents co-parent better if their romantic relationship were to end. Children today are often disadvantaged by their parents’ breakup because the children may lose contact with a parent, suffer economic hardship, and/or miss out on the benefits from the coordination of parenting. Consider the fact that parallel parenting has become the most common form of co-parenting even among couples that are generally cooperative and even though supportive parenting is the gold standard. Repartnering tends to exacerbate tension between parents. Parents with a supportive partnership, in contrast, enhance their children’s lives in many ways. Their behavior facilitates their children’s contact with the other parent (through gate opening and/or joint custody), permits better parenting (by allowing parents to address issues of competency together and to step in when the other parent needs a break), and enhances the likelihood of better economic outcomes for the children (by promoting generosity and economic cooperation).

The law does too little to encourage parents to have a strong supportive partnership for the duration of their child’s minority. The law needs to

nurture co-parenting from the moment of a child’s arrival because parents are much more likely to co-parent successfully after breakup if they have co-parented successfully during their romantic relationship. In addition, the law needs to encourage and promote friendly, supportive relationships overall because successful co-parenting, both during and after the romance, typically occurs within such relationships. A parent-partner status could set clear expectations about co-parenting and relationship quality, as well as impose obligations that would enhance the likelihood of these outcomes during and after the romantic relationship.

**B. Deterring Ill-Advised Reproduction**

Unfortunately, some people intentionally conceive (or risk conception) with a person whom they would not marry, do not love, know little about, or distrust because of serious relationship problems. Similarly, spouses sometimes conceive to improve a partner’s flaws or make a bad marriage better. If a couple is uninterested, unwilling, or unable to work together from the outset to benefit their child (let’s call these couples “uncommitted”), they are more likely to see their relationship break up over time and to resist supportive co-parenting after their romantic relationship ends. Such parents expose their children to a higher likelihood of poverty and disadvantage.

Currently, the law does not discourage uncommitted couples from reproducing. Yet a parent-partner status could help people regulate their sexual behavior in a socially desirable way. If the birth or adoption of a child triggered legal repercussions between the parents, the status would cause people to consider whether they have the type of relationship with the other parent that childbearing should entail, whether they are married or not. The normative message associated with the parent-partnership would do the same. If society said that it is wrong for uncommitted couples to reproduce, society would convey a more contemporary, widely applicable, and probably effective message than the “abstinence until marriage” mantra currently in vogue.

Social norms and legal obligations can influence reproductive behavior. For example, the second most commonly cited reason that girls give for maintaining their virginity is that they “haven’t found the right person yet.” The “right person” is a social construct. Today social norms provide a clear image of an ideal marriage partner and affect decisions to marry. But no clear image of an ideal parent-partner yet exists to influence reproductive

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decision making. Additionally, since child support enforcement can affect sexual behavior, other legal obligations should be able to have a similar impact. Therefore, a parent-partner status should discourage unplanned and planned pregnancies by uncommitted partners. That result would be beneficial.

C. Fairness

A parent-partner status should improve fairness in various ways. For example, parents, and sometimes only one parent, currently control whether family law will govern the parents’ *inter se* relationship. The present system leaves many parents and children vulnerable and disadvantaged. In fact, from the nonmarital child’s perspective, it is arguably unfair, disrespectful, and discriminatory for the government to provide a supportive structure only for married parents’ relationships. It is as if the government cannot be bothered to craft a core set of legal obligations appropriate for all parents’ relationships, even though nonmarital children would benefit if such a structure guided their parents’ behavior toward each other to be more supportive and fair.

D. Love

Parents themselves should benefit from the parent-partner status, and their gains would also advantage their children and society. At its best, the status might generate love between parent-partners and/or make their love more durable. Both passionate love and companionate love could be affected. Since these types of love do not necessarily involve lust, parent-partners could love each other without shame even after their romantic relationship ended and they repartnered.

How exactly might this work? As background, recognize that sex and childbirth set the stage for the parents’ love. Hormones associated with these biological events trigger certain actions and feelings that are associated with passionate and companionate love. But love ultimately involves a decision to love and a decision to maintain that love. These decisions create feedback, leading to feelings and behavior associated with love. The person who is loved often responds by feeling and acting loving in return. Social psychologists have argued that love can become a “self-fulfilling prophecy.”

Within this context, the parent-partner status should foster love because culture influences decisions about whom and when to love, as well as how to behave and feel when one loves. The parent-partner status would

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convey the message that it is appropriate to love a parent-partner and that parent-partnerships should be characterized by “friendly affection and deep attachment.” In addition, particular legal obligations might promote hands-on caregiving or feelings of trust, both of which can present themselves as love and affect parental decisions about whether to love.

By solving a coordination problem, the status might also reduce the type of selfish behavior that can undermine love. Game theory and common sense tell us that parties sometimes act selfishly for short-term gain when they are unsure that the other person will invest similarly in a relationship. The parent-partner status should minimize uncertainty in the following ways: it conveys society’s expectations that the relationship is long-term, loving, and supportive; it makes the parties’ interactions more durable and potentially more frequent; it changes the penalties for selfish behavior in some circumstances; it encourages parents to consider the importance of a strong parent-partnership for their child’s well-being; and it conveys to third parties the inappropriateness of undermining the parent-partnership and the appropriateness of supporting it.

E. Civic Virtue

The status might also promote civic virtue. It might foster those qualities that allow citizens to function effectively and act responsibly in a constitutional democracy. Admittedly, this accomplishment—like promoting love—would be remarkable. Still, the book discusses the possibility because this outcome would be the icing on the cake, i.e., a bonus on top of the other advantages that independently justify the status’s adoption.

How would this happen? Families develop children’s capacity to be virtuous citizens. Parents do so by modeling for their children the qualities that make citizens virtuous and by raising children who are capable of being virtuous. Once a parent-partnership existed, parents would be more likely to model the qualities of a virtuous citizen—such as cooperation, compassion, personal responsibility, and respect for others—because parents in a successful parent-partnership exhibit these same qualities. Most parents can demonstrate these qualities toward each other, regardless of other deficits in their lives. To the extent that the status would promote equality and justice within the family, children would also be more likely to be “guided by principles of justice” in adulthood and to treat women

11. Id. at 278 (citing Elaine Walster & G. William Walster, A New Look at Love 2 (1978)).
12. Id. at 312 (citing Susan Moller Okin, Justice, Gender, and the Family 17 (1989)).
as “equals in social and political life.”

Apart from the status’s effect on the parents’ modeling of virtuous behavior, the parent-partner status should enhance children’s capacity for civic virtue by promoting parental behavior (such as supportive co-parenting) that contributes to children’s healthy development.

V. The Inadequacy of Existing Constructs

When one contemplates what the parent-partner status might achieve, the shortcomings of the existing legal structures become evident. Structures that presently regulate parents’ inter se relationships do not necessarily further a supportive co-parenting partnership throughout a child’s minority or remedy the various forms of unfairness that arise between parents. Nor do these structures govern all parents.

Consider, for example, the law’s present inability to remedy the unfairness that can arise between parents in the context of caregiving, an activity that is central to the parent-partnership. Disproportionate caregiving, in particular, can produce inequities. Marriage can address some of this unfairness, but marriage, like domestic partnerships and contracts, requires two parties’ agreement, leaving some parents vulnerable to the other parent’s selfishness and greed. Common law marriage only exists in a handful of states and requires marital-like behavior. When marital couples divorce, the “clean break” ideology reduces courts’ willingness to remedy inequities that can occur after divorce. Unmarried caregivers fare even worse after breakup. Despite the promise of *Marvin v. Marvin*, the *Marvin* remedies are often not known, not used, and ineffective. States with cohabitant statuses, like Washington, require a marital-like relationship to qualify, and having a child in common with someone is not necessarily sufficient.

Expanding cohabitants’ obligations would be an incomplete, and arguably suboptimal, substitute for a parent-partner status. A high percentage of nonmarital children are born outside of cohabiting unions. In addition, if cohabitation triggered legal obligations, then parents might structure their living arrangements in ways that would disadvantage their children (for example, they might elect not to cohabit). If, however, the law tied core inter se obligations solely to the birth or adoption of a child (regardless of cohabitation), then the law would affect reproductive decision making, and that is the best place to influence behavior.

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VI. The Continuation of Marriage

A parent-partner status would not devalue, decenter, or replace marriage. After all, the two statuses would differ in their social and legal significance. While marriage and a parent-partnership could trigger some of the same obligations (such as the duty to aid when the other person is physically imperiled), marriage and the parent-partner status would also trigger different *inter se* obligations. For example, perhaps only spouses (and maybe also those with a marital-like relationship) would be eligible for alimony and a property division at breakup, while only parent-partners would be eligible for a civil protection order predicated on psychologically abusive conduct. We can debate the exact obligations that should accompany each of these statuses, but marriage should have legal significance for parents who later marry and childbirth or adoption should have legal significance for spouses.

My book recommends that the parent-partner status only affect private law obligations between the parents. The status would not make people eligible for public benefits or obligate third parties in any way to the parent-partners, at least not initially. Consequently, people would still have plenty of reasons to marry. While it might make good sense to extend some governmental benefits or third-party obligations to parent-partners, any such proposal would need a thorough vetting to assess its potential negative consequences, including its effect on marriage.

For reasons of symmetry, obligations should not be imposed on parent-partners for the benefit of the government or third parties either. Such an extension of the status might occur in the future, however, as the status evolved. For example, one day, a parent-partnership might be identified as a family relationship for purposes of conflict-of-interest rules.

VII. What Would the Status Look Like?

The parent-partner status would extend for the duration of a child’s minority, but no longer. During that time, the law would impose certain obligations between the two parents, and society would expect the parents to work together for their child’s benefit and to treat each other fairly and supportively.

The status would only regulate the relationship of the child’s legal parents and not extend to social, functional, or psychological parents (called here “nonlegal parents”). If the law obligated nonlegal parents to a child’s legal parents, then the law might discourage nonlegal parents from caring for a child. Similarly, if the legal parents were obligated to a nonlegal parent, then the law might discourage legal parents from seeking others’ help to care for a child. Society can always expand the status in
the future to govern the *inter se* relationships of more than two individuals or define “parent” differently, but any expansion of the status should be evidence-based and incremental.

All of the legal obligations (and accompanying social norms) that comprise the status would be subject to any court orders, including orders that allocated parental authority solely to one parent or that proscribed certain parental behavior. The termination of parental rights would terminate the parent-partnership.

VIII. The Legal Obligations

By now, you are probably wondering what legal obligations would make up the status. While this is an important question, consider what a step forward it would be if people agreed that a new status were appropriate. The obligations are just the details, albeit important details.

A status needs to earn its label. After all, a status describes who “one is” (i.e., a spouse, a parent, a parent-partner). Parenthood must trigger a sufficient number of legal obligations between the parents to create the social role. The legal obligations must be of the right type. They must convey the proper norms so that the parent-partnership is viewed as a supportive family relationship.

My book proposes five new legal obligations to constitute the parent-partner status: an obligation to aid, an obligation not to abuse, an obligation of relationship work, an obligation of fair dealing when contracting, and an obligation to give care or share. At least half of a chapter is used to describe each of these obligations; my discussion of them here is obviously abbreviated.

These obligations offer a starting point for a conversation about which obligations should constitute a status. They show the range of possibilities. They address parents’ physical and psychological security, the health of the relationship, and economic issues. If a parent-partner status is worth developing, then legal experts—and family lawyers in particular—should help lawmakers craft the status with these or other legal obligations. The chosen obligations could be refined over time if necessary, as has happened with other statuses. Marriage, for example, no longer restricts divorce or causes women to suffer the legal disabilities that existed before enactment of the married women’s property acts.

A. The Obligation to Aid

The obligation to aid already exists for spouses. If the obligation were extended to parent-partners, a parent would have to lend reasonable assistance to his or her parent-partner if the parent-partner were physically imperiled. Failure to lend reasonable assistance would make the parent liable for the resulting damages. This obligation would convey the idea that society expects parent-partners to be empathetic, fond of each other, and helpful in times of dire need.

B. The Obligation Not to Abuse

Parent-partners are already obligated not to abuse each other physically. Most states allow a victim to obtain a restraining order if the perpetrator and victim have a child in common. However, gaps remain in some states’ protection order systems. An expectant parent may not qualify for an order (absent another qualifying relationship between the parties, such as cohabitation, an existing child in common, or a dating relationship), even pregnancy can trigger or intensify physical abuse. Some states do not allow psychological abuse to qualify the victim for an order, even though psychological abuse can debilitate the victim and prove toxic for the couple’s children. Some states require that a restraining order contain a stay-away provision, even though the prohibition stops some parents from seeking a restraining order because they want contact, albeit nonabusive contact, with the other parent. In short, the law in some states could be improved to meet the needs of parent-partners. In addition, the criminal law could better address the physical abuse of a parent-partner. While some states have criminalized abusive behavior that is witnessed by a child, a child’s presence can be happenstance. Yet the child can still suffer harm even if the child does not witness the abuse. After all, abuse can impair the parent’s ability to care for the child. It might be preferable, therefore, to criminalize the abuse of a parent-partner. The beefed-up obligation “not to abuse” would convey the idea that society expects parent-partners from the get-go to be fond of each other and not to abuse each other.

C. The Obligation of Relationship Work

Counseling and educational programs can promote healthy, high-quality relationships between parents. Such programs are useful at the transition to parenthood. At that time, the quality of a couple’s relationship often plummets. Effective programs help preserve relationship quality, enhance support and affection, improve conflict management, and further co-parenting.
At the end of the romantic relationship, reconciliation counseling and friendship counseling can be beneficial. Only a small percentage of couples currently get professional help when they break up, although many parents express an interest in reconciliation and counseling can sometimes resolve common relationship problems, such as “growing apart” and “showing inadequate attention.” “Friendship counseling” should be an option if reconciliation counseling is rejected, ineffective, or inappropriate. Friendship counseling is meant to develop or strengthen the parents’ friendship after the romantic relationship ends. That goal matters because couples with good overall relationships are better co-parents.

The law could encourage these options by requiring parent-partners to engage in “relationship work” at the transition to parenthood and at the demise of their romantic relationship. Such an obligation would convey society’s belief that parents should work together to ensure that their relationship is healthy and supportive. The mere existence of this legal obligation might motivate parents to engage in relationship work, just like compulsory education laws motivate parents to send their children to school. At the transition to parenthood, friends and family might urge more couples to try relationship work, just like they recommend other preparations for the baby’s arrival, such as acquiring a car seat. At the end of the romantic relationship, lawyers would have to inform clients about the legal obligation of relationship work. Parents might be receptive to the idea because they would have already experienced the value of professional help at the transition to parenthood. Participating in relationship work might become as routine for parents as sending their children to school.

Because the relationship work obligation would be a legal obligation between the parents, a parent could obtain a court order to enforce the obligation. The order, however, would merely require a reluctant parent-partner to attend an informational session on the potential benefits of relationship work. That remedy would be the only one available; no further compulsion is recommended. Consequently, relationship work would not occur if one or both parents ultimately refused to participate.

D. The Obligation of Fair Dealing

Parent-partners who contract with each other are vulnerable to being swindled. Parent-partners typically do not deal with each other at arm’s length; rather, their special connection leads them to trust each other (or should lead them to trust each other). Duress is foreseeable when one parent requires the other parent to enter an agreement as a condition of continuing the romantic relationship. Consequently, the law should require a parent-partner who seeks to enforce a family law contract (such
as a premarital, post-marital, or cohabitation agreement) to show that the agreement was voluntarily entered, that certain disclosures were made, and that the agreement is substantively fair at the time of enforcement.

These requirements—like the other legal obligations proposed for the status—are meant to convey the norms of the relationship. For example, if the law required a parent who was enforcing the agreement to prove that the other parent voluntarily entered the agreement, then society would convey its expectation that parent-partners are empathetic and appreciate each other’s circumstances. Similarly, if the law prohibited a parent-partner from enforcing a substantively unfair agreement, then society would express its expectation that parent-partners are fond enough of each other to forego enforcement of an unfair agreement. If the law required parties to disclose certain information at the time of contracting, then society would declare that a parent-partnership is like other confidential relationships that involve trust.

These recommendations would change the law in some states in some ways. They go beyond some notable reform proposals. For example, the American Law Institute (ALI) recognized in its *Principles of the Law of Family Dissolution* that the enforcement of a substantively unfair premarital agreement can harm children.\(^{16}\) The ALI recommended that a court review the premarital agreement for substantive fairness at the time of enforcement if the couple shares a child. However, the ALI eliminated this automatic review for any couple who had a child together at the time they executed the agreement. Yet a couple’s future does not become clear and immutable just because a child exists. In fact, a couple with a child is likely to minimize the chance of divorce, and minimize the risk of advantage taking, even more than a childless couple. The ALI’s approach leaves all children who are born prior to their parents’ marriage vulnerable to their parents’ cognitive errors; it also fails to protect all of those children’s siblings, even those siblings who were born after the parents’ marriage.

**E. The Obligation to Give Care or Share**

This obligation would require a parent-partner to pay compensation to the other parent for any unfairly disproportionate caregiving that the other parent provided to their child. “Unfair” means that the parent-partner engaged in morally problematic freeloading. This situation exists, most obviously, when one parent performs all of the caregiving and the other parent gives the caregiver nothing in return. If the law had a remedy for unfairly disproportionate caregiving, then society would convey the

\(^{16}\) *Id.* at 407 (citing Am. Law Inst., *Principles of the Law of Family Dissolution: Analysis and Recommendations* § 7.05 cmt. c (2002)).
message that caregiving is the parents’ mutual responsibility and that freeloading is antithetical to a relationship characterized by fondness. The proposed remedy is not a support obligation, but compensation. In fact, the caregiver’s need, the obligor’s ability to pay, and the parents’ marital status would be irrelevant to eligibility.

Current law lacks a remedy for a lot of parental freeloading. Only a married parent has a remedy for unfairly disproportionate caregiving, and only for the caregiving that was performed during the marriage. At divorce, the married caregiver may receive a property award and perhaps alimony, but the clean break ideology means the caregiver is unlikely to receive much, if anything, for any future caregiving that is unfairly disproportionate. Yet, doesn’t the “clean break” rhetoric seem inappropriate for parents in a supportive parent-partnership? It also creates the unfortunate illusion that an economic clean break is possible, even though without compensation the caregiver’s labor simply subsidizes the noncustodial parent’s leisure or work. Of course, unmarried parents fare worse. Most unmarried parents are left without a remedy for unfairly disproportionate caregiving, whether their labor occurs during or after the romantic relationship. Child support is not meant to compensate a caregiver for career damage or for lost income attributable to caregiving, and it does not do so.

Caregiver compensation would require judges to determine a just remedy if the parents could not agree on one. Guidelines would not be immediately available because couples’ circumstances are just too diverse. Judges, however, are accustomed to exercising discretion, as they did before the advent of child support guidelines and as they do now when they divide property equitably and award alimony. Judicial discretion need not be unbridled; it could be guided by the compensatory theories that have developed within the context of alimony (gain theory, loss theory, and contribution theory), as well as four factors that should affect an assessment of fairness: (1) the time each parent spent working in the market and the home; (2) the relative allocation of market work and nonmarket work between the parties; (3) the couple’s sharing behavior; and (4) the couple’s agreement, whether explicit or implicit, about the allocation of work and the sharing of economic resources.

Any uncertainty surrounding the precise remedy should encourage parents to divide their caregiving labor equally, because that arrangement would eliminate the possibility of a remedy. For couples with lopsided caregiving arrangements, the legal obligation should encourage parents to reach a fair arrangement about remuneration because their agreement would get substantial weight in a future adjudication.
IX. The Disadvantages of a New Status

A proposal that requires such a monumental shift in people’s thinking about the law will undoubtedly encounter resistance. There is a lot to consider in this proposal and it is undoubtedly easier to maintain the present system. The book tries to reduce “status quo bias” by explicitly addressing the most likely concerns.17

A. Everyone’s Concern: Autonomy

Today, family law elevates the importance of individual autonomy in many ways. The commitment to individual autonomy is at times a constitutional requirement and at times a policy preference. Neither source of the commitment, however, requires or justifies the rejection of a parent-partner status.

A parent-partner status would not unconstitutionally infringe the right to decide whether to bear or beget a child or the right of intimate association. The government can attach civil consequences to sex and childbirth. The parent-partner status would not directly burden the right to decide whether to bear or beget a child but only indirectly burden it, and the burden would not be substantial enough to necessitate heightened scrutiny. Nor would the status unconstitutionally infringe autonomy by imposing an unwanted intimate association. After all, the status is a legal relationship, not a relationship that requires physical proximity. In addition, if the status were to infringe either right, the status’s benefits would justify the infringement.

The strong preference for autonomy within family law should not doom the status either. The status’s overall impact on autonomy would be negligible. As proposed, only five legal obligations comprise the status. Much is left unaffected, including a parent-partner’s ability to have different romantic partners, to enter multiple parent-partnerships, and even to treat the other parent in a manner inconsistent with the status’s norms in areas not subject to the five legal obligations. Moreover, claims of autonomy are fairly weak when the government is merely enacting a civil legal remedy to address behavior with harmful consequences, as is the case with the status’s obligations.

The status might also increase individual autonomy in various ways, thereby offsetting any reductions. For example, the status might accomplish any or all of the following: unburden people from guesswork about the expected behavior of parent-partners; set boundaries that encourage acts of responsibility, which are themselves expressions of autonomy; provide

17. Id. at 143 (citing William Samuelson & Richard Zeckhauser, Status Quo Bias in Decision Making, 1 J. Risk & Uncertainty 7 (1988)).
a type of relational stability so parents can focus on obtaining achieved status, if that is their goal; and insulate parents from governmental intrusion into their family affairs by designating the unit as family. Any residual concerns about autonomy must be balanced against the status’s benefits. Autonomy is not a trump card.

B. Feminists’ Concerns

The parent-partner status should not disadvantage women as a group, although at first blush the proposal might raise some questions. First, the status would not privatize dependency. Simply, the status does not include a support obligation and is marriage-neutral. Second, the status would not tie women to bad men. Nothing about the status would stop a mother from doing what she needed to do to be safe, including seeking sole legal and physical custody, severing personal ties with a bad man, and opting out of relationship work. Third, the status might result in more men obtaining sole or joint custody after the status’s adoption, but that outcome would result from the success of the partnership ideology and more hands-on parenting by men during the romantic relationship, not from changes to custody law (the book proposes none). Fourth, some of the proposed obligations would benefit women as a class by remedying particular injustices that have disproportionately impacted women. For example, the obligation of fair dealing should reduce the number of unfair prenuptial agreements that courts enforce. Fifth, the status would not preclude people from becoming “single mothers by choice” (or “single fathers by choice”). A person could use adoption or reproductive technology to ensure that she or he were the sole legal parent; no parent-partner status would then arise.

Admittedly, the overall effect of the status on gender roles is impossible to predict because, among other things, gender roles are shifting and the combined effect of the legal changes on gender roles is difficult to anticipate. It is conceivable, however, that the status could accelerate the demise of gender roles. The new parent-partner role is gender-neutral. The norms of flexibility and togetherness suggest a supportive partnership that entails joint effort, but in no predetermined form. The specific obligation “to give care or share” should promote a fair allocation of caregiving and breadwinning and should encourage a re-envisioning of the traditional allocation of these activities.

C. Conservatives’ Concerns

Conservatives may be concerned about the status’s potential effect on the rates of abortion and nonmarital birth. Yet, the status might decrease
the number of abortions and nonmarital births simultaneously. If the status encouraged unmarried couples to use contraceptives or to use them more effectively, then the rates of both abortion and nonmarital childbirth should decline, regardless of whether more marriages followed out-of-wedlock pregnancies. As already discussed, the status would convey a strong message about the immorality of unprotected sex between two individuals who cannot commit to a supportive parent-partnership for a period of eighteen years. The new legal obligations associated with the status should also incentivize contraceptive use. The status might also reduce nonmarital births by causing more unmarried couples to marry after a pregnancy. Although the status is marriage-neutral, the status could affect the marriage rate if it improved the quality of couples’ relationships in any of the following ways: by increasing love between the parties, by causing people to be choosier about their reproductive partners, or by encouraging relationship work at the transition to parenthood.

Conservatives may also be concerned about whether the status would increase the number of children without legal fathers. It should not. Unmarried parents are usually on good terms at their children’s births and most unmarried fathers acknowledge paternity at this time. In fact, more mothers and fathers might acknowledge paternity voluntarily if they thought that the status would benefit their relationship with each other and their child. Moreover, if the status were to reduce the total number of nonmarital births and/or increase the total number of births among committed partners who are more likely to acknowledge paternity voluntarily or marry after their child’s birth, then the status should result in a higher percentage of legal fathers overall. If these predictions were to prove wrong, paternity could always be established by adjudication.

X. Conclusion

This essay has introduced family lawyers to a proposed new family law structure. While many of my conclusions would benefit from further research and discussion, family lawyers have an important role to play in the future development of this concept. Family lawyers are well positioned to weigh in on whether society needs a new family law structure, to identify obligations that should comprise the parent-partner status, and to recommend the status’s adoption by state legislatures. Such initiatives would be consistent with family lawyers’ past efforts to improve family law for families. Family lawyers can also help improve the lives of their clients’ children by recommending that their clients act like parent-partners, both before and after the adoption of a parent-partner status.