

EQUALITY AND FAMILY AUTONOMY

*Katharine K. Baker**

ABSTRACT

Contemporary family law scholarship and a growing body of doctrine often assume that a functional approach to family law—treating those who have acted like family as family—is the best way to secure equal treatment for people who live in relationships that have not been recognized legally as familial. This Article argues that these functional claims, made in the name of equality, inevitably disrupt the very protection they are asking for because they undermine principles of family privacy and autonomy. In unpacking the benefits of a robust family autonomy doctrine—benefits that are crucially important to communities of color and LGBTQ communities—this Article challenges not only the functional turn in family law, but feminist scholarship that has been critical of family autonomy and privacy doctrine. Building on the consistent defense of privacy that emanates from women scholars of color, this Article demonstrates how functional analyses demand interference and judgement that is likely to tear at the fabric of minority communities. Functional approaches vest judges with the power to define who a family is and what it should look like. This Article shows how when judges do this in the parental area, they reify dyadic, heteronormative, and usually white middle class notions of parenthood. When they do so in the context of cohabitation, they reify gender roles and a morality that assumes the ubiquity of long-term conjugal relationships. Thus, the functional turn, hailed as progressive, actually re-inscribes traditional understandings of family relationships.

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* University Distinguished Professor of Law, IIT Chicago-Kent College of Law. Many thanks to Kim Bailey, Alex Boni-Saenz, Steve Heyman, Nancy Marder, Mark Rosen, Carolyn Shapiro and always reliable participants in the Chicago-Kent workshop series for their insights and comments. Special thanks to Doug NeJaime and Courtney Joslin for engaging with these ideas notwithstanding their disagreements with them.

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INTRODUCTION

Contemporary family law scholarship and a growing body of doctrine often assume that a functional approach to family law—treating those who have acted like family as family—is the best way to secure equal treatment for people who live in relationships that have not been recognized legally as familial. This article highlights the unique and growing threat to family autonomy that these equality-based functional arguments present. An embrace of functionalism runs the risk of eviscerating the freedom from state interference that the Constitution has previously afforded to families.

The problem at the core of this tension between functional arguments and family autonomy is that the Supreme Court has never defined the Constitutional family, even as it has held that the Constitution affords substantial protection to the family as a unit. From *Meyer v. Nebraska* (a parent-child relationship),¹ to *Griswold v. Connecticut* (a marital relationship),² to *Moore v. City of East Cleveland* (an extended family),³ the Court has reified the notion that the Constitution affords families, as families, liberty; it prohibits the state from interfering too substantially with the family as a unit. But how do we know what a family is? Historically, the Court seemed to

¹ See 262 U.S. 390, 399 (1923) (noting that the Fourteenth Amendment denotes the right to “establish a home and bring up children”).

² See 381 U.S. 479, 485 (1965) (holding that a marital relationship lies “within the zone of privacy” created by several fundamental constitutional guarantees).

³ See 431 U.S. 494, 505–06 (1977) (finding that the broader family’s choice to live together “may not lightly be denied by the State”).

define family as including only those with family status, that is, legal spouses, legal parents, and legal children. All of these statuses required marriage,⁴ but marriage is no longer a tenable root for family definition.

Both courts and commentators often assume that equality doctrine can serve as a constructive means of expanding the law's understanding of family. For instance, in the 1970s and 80s, using equal protection analysis, the Court held that—at least at times—it should be genetics, and not marriage, that defines family.⁵ Today, many scholars argue—in the name of LGBTQ equality—that family should be defined not by genetics but by function: those who act like they are family should be treated as family.⁶ Comparably, given the extremely robust correlation between marriage and class, many scholars argue that class equality requires treating a variety of “kinship structures” as family because those with less money are so much less likely to marry than those with more money.⁷ These critiques of the traditional means of determining legal family status are powerful; millions of people who live in family-like relationships today do not enjoy the legal benefits of family status.

Critiques rooted in equality confront an inevitable comparator problem, however. Before one can make an equality argument that, for instance, a same sex partner should be treated as a legal parent, or cohabitants should be treated as legal spouses, or that a kinship group—perhaps consisting of a parent, his mother and his adopted children—should be considered a family, one has to determine the salient features that make the comparison appropriate. Before one can argue that “relationship Y” must be treated as “relationship X,” one needs to define what features of relationship X are salient to the comparison and then one must decide whether relationship Y shares those features. Both of those inquiries, (i) what kinds of behavior constitute family and (ii) does a particular relationship exhibit those

⁴ Marriage determined not only who was a spouse, but who was a parent. Paternal status was vested in the husband of the woman who gave birth. An unwed father was not treated as a legal father, and a child born to an unwed mother was *fillius nullius*, or child of no one (though many states did recognize the mother of an illegitimate child as a mother). See generally Katharine K. Baker, *The DNA Default and Its Discontents: Establishing Modern Parenthood*, 96 B.U. L. REV. 2037, 2043–44 (2016).

⁵ Katharine K. Baker, *Procreation and Parenting*, THE OXFORD HANDBOOK OF CHILDREN AND THE LAW 176–80 (James G. Dwyer ed., 2020) (explaining how both the illegitimacy cases and the unwed fatherhood cases flirted with but never fully embraced rooting all legal parenthood in genetics).

⁶ Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2314 (2017) (noting that the law's accommodation of assisted reproductive technology invalidates the limited and gendered, heterosexual logic of reproductive biology).

⁷ See Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1223 (2016).

behaviors, result in deprivations of relational liberty, as it has been interpreted in constitutional family autonomy doctrine and as it has been actualized in common law understandings of family privacy. To assess whether a group functions as a family in order to decide whether they should be treated as other families invades the liberty families are supposed to enjoy as a unit.

In elaborating on the threat to family autonomy posed by functionalism, this article challenges the ascendant trend in contemporary family law scholarship that celebrates judicial recognition of functional relationships.⁸ The article does not condone the restrictive traditional approach to family definition, but it does suggest that there are important pluralistic, self-determination and privacy values that can be lost when we invite the judiciary to determine who counts as family. By analyzing how invasive, ineffective and often damaging judicial interference in family relationships has been, this article switches the burden to those who invite more state evaluation of intimate relationships to explain why they think judges are capable of defining family in ways that will do justice to pluralistic family forms, to the individuals within those families, and to the communities in which a dyadic, nuclear family is not the norm. Those most at risk of losing the benefits of the values family autonomy protects are those whose intimate lives do not look familiar to judges.

Part II of the article offers an explication of the autonomy that most families have been afforded both constitutionally and as a matter of common law. The constitutional doctrine of family autonomy, rooted in the Due Process Clause's guarantee of liberty, suggests there is a "private realm of family life which the state cannot enter."⁹ At common law, there is an "ethic or ideology of family privacy,"¹⁰ often understood as a doctrine of non-

⁸ For a sampling, see Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 269 (2020) and Douglas NeJaime, *Marriage, Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1187 (2016) (endorsing robust functional approach to parenthood); Courtney G. Joslin, *Autonomy in the Family*, 66 UCLA L. REV. 912, 915 (2019) (endorsing robust functional approach to both parenthood and marital-like relationships); Albertina Antognini, *Nonmarital Contracts*, 73 STAN. L. REV. 67, 73 (2021) (advocating increased judicial scrutiny of marital and nonmarital contracts which requires increased judicial evaluation of the nature of the marital and nonmarital relationships). Susan Appleton describes the ascendancy of these doctrines as "a functional turn" that understands family life as "constitut[ing] a set of practices and performances produced by choice, affection and nature, but not law." Susan Frelich Appleton, *The Forgotten Family Law of Eisenstadt v. Baird*, 28 YALE J.L. & FEMINISM 1, 43 (2016).

⁹ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

¹⁰ Martha Albertson Fineman, *What Place for Family Privacy*, 67 GEO. WASH. L. REV. 1207, 1214 (1999).

interference, that manifests itself in a variety of ways. The common law doctrine of non-interference has proven as resilient as the constitutional doctrine of family autonomy, even as divorce rates and non-marital child-rearing have surged.¹¹

Part III explores the justifications for these autonomy doctrines. They are rooted in an understanding of the unique role of family love and the constitutive role that families play in individual and communal self-determination. The importance of that self-determination is especially strong for people in marginalized communities, whose lived experiences of family are often different than those in majority communities. For over twenty years, scholars of color have warned of the dangers of excessive state interference into the intimate lives of people in communities of color.¹² Functional analyses require that interference and ask judges to evaluate family norms in communities that look very different than those from which most judges come.¹³

Autonomy doctrines are also rooted in far more practical considerations. Judges are not well qualified to pass judgement on most emotional and financial interactions between intimates and even less able to ensure that what they may order is enforced. As family forms grow more diverse, judges become ever less qualified and less capable of assessing what constitutes appropriate family behavior. As the U.S. experience with the child welfare system attests, when judges do not recognize what is before them as a family, they feel free to destroy it.

Part IV explains how contemporary calls for a more functional-based family law undermine the notion of family autonomy. For instance, in deciding whether someone who has acted like a parent to a child should be

¹¹ One notable exception to the resilience of autonomy doctrines is in communities of color, where judges routinely interfere with and pass judgement on parental behavior. As Parts II and III will argue, child welfare cases are canaries in the coal mine. They presage what happens when we turn the job of defining family over to judges.

¹² See *infra* notes 143 to 147 and text accompanying.

¹³ Both the federal and state judiciaries are predominantly white, predominantly male, predominantly wealthy, and predominantly straight. See Tracey E. George & Albert H. Yoon, *The Gavel Gap: Who Sits in Judgement on State Courts?*, AM. CONST. SOC'Y FOR L. & POL'Y 7 (2016), <https://www.acslaw.org/wp-content/uploads/2018/02/gavel-gap-report.pdf> [<https://perma.cc/NA4K-7UMT>] (illustrating lack of gender and racial diversity); Erick Lesh, *Justice Out of Balance: How the Election of Judges and the Stunning Lack of Diversity on State Courts Threatens LGBT Rights*, LAMBDA LEGAL 14 (2018), http://www.lambdalegal.org/sites/default/files/justiceoutofbalance_final_rev1_2.pdf [<https://perma.cc/373Y-3MQZ>] (illustrating the lack of LGBT diversity). For the salaries of state court judges, see *Judicial Salaries at a Glance*, NAT'L CTR. FOR STATE CTS. 2 (2020), https://www.ncsc.org/__data/assets/pdf_file/0023/25358/2020-jss.pdf [<https://perma.cc/M3F7-2GLG>] (showing a compilation of state court judges' salaries).

permitted to assert parental rights just as a legal parent can, courts assess whether the non-legal parent developed a parent-like relationship with the child. Comparably, in deciding whether two people involved in a committed, long-term relationship should be treated as if they are married, courts analyze whether they think the couple demonstrated the emotional and financial interdependence that is thought to characterize marriage. In these analyses, judges assume the power to evaluate and define what counts as family.

When allocating rights and imposing obligations in these situations, courts inevitably find that whoever is asked to relinquish custodial rights (in the case of parental rights) or money (in the case of a cohabiting couple) sacrificed their right to be free of state interference by letting the relationship develop. The decision to function as a family is construed as a decision to sacrifice one's liberty to be free of family obligations.¹⁴ The individual liberty that may be sacrificed in these situations is not the autonomy that this article is concerned with. As Part IV argues, the functional turn in family law undermines not only the rights of some individuals, but the legitimacy of family autonomy doctrine itself. Functional analyses interrupt the relational privacy that both constitutional doctrine and state family law has protected in the name of pluralism, cultural identity, institutional competence and restrictions on state power generally.

In deciding whether someone has acted like a spouse, or developed a parent-child like relationship with a child, a court must inquire into the "intimacy of daily association"¹⁵ that defines family-like relationships. The threat to liberty is not in the way functional analyses restrict individuals' rights, it is in the way the way functional analyses empower judges by inviting them into the family unit and giving them the authority to define what counts as family and why. Empowering judges in this way inevitably undermines the notion that there is a realm of family life that the state should not enter.

The arguments that follow presuppose some definition of family. Indeed, this article contends that the law should be more careful to define family with clarity so that we know which relationships should be entitled to familial treatment. The urgent contemporary question is *how* the state should decide

¹⁴ See Joslin, *supra* note 8, at 939–45 (arguing that functional parenthood doctrine does not improperly interfere with individual liberty because a legal parent exercises her autonomy when she decides to parent with someone else). *But see* Gregg Strauss, *What Role Remains for De Facto Parenthood*, 46 FLA. ST. U. L. REV. 909, 913 (2019) (arguing that the modern trend to expand functional parenthood doctrine improperly interferes with parental rights).

¹⁵ *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 844 (1971).

who is entitled to recognition as a family. Registration systems for both parent-like and marriage-like relationships offer alternatives that can protect relational autonomy while honoring non-traditional families.¹⁶ A full explication of how registration systems could work is beyond the scope of this article, but unpacking why the law continues to protect families as autonomous entities helps explain why functional analysis is a dangerous path to family definition. As the Conclusion suggests, equality-based functional arguments run the risk of destroying the very family rights they are asking for.¹⁷

I. WHAT IS FAMILY AUTONOMY

The idea that there is a doctrine of family autonomy or some ideal of family privacy is itself controversial. Professor Fran Olsen uses the word “incoherent” to describe the idea of family privacy.¹⁸ This potential incoherence stems from the state’s role in defining family. As Martha Nussbaum explains, “it is the state that says what [family] *is* and controls how one becomes a member of it.”¹⁹ Maxine Eichner makes a comparable point: “[w]hat counts as family is inherently intertwined with politics and power.”²⁰ If the state has the power to define who counts as family, how could it be bound to afford the family freedom from state interference? In theory, if the state desired to regulate some activity “within” the family unit, it could simply redefine that activity as outside the familial sphere. Professor Susan Appleton uses the word “paradox” to describe this dilemma. Family law has “contradictory objectives: the protection of autonomy, liberty, and personal choice, on one hand, and the ongoing regulation of intimate life, on the other.”²¹ Meanwhile Professor Martha Fineman suggests that the relationship between family and state is symbiotic. “[F]amily and state are

¹⁶ See *infra* notes 245–247, 290–293.

¹⁷ Alternatively, if one posits that equality is best served by ensuring autonomy for non-traditional families, then equality may demand a rejection of functional analysis because it is so inconsistent with family autonomy.

¹⁸ Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 835 (1985) (stating that the “the private family is an incoherent ideal”).

¹⁹ Martha C. Nussbaum, *The Future of Feminist Liberalism*, THE SUBJECT OF CARE: FEMINIST PERSPECTIVES ON DEPENDENCY 186, 199 (Eva Feder Kittay & Ellen K. Feder eds., 2002).

²⁰ Maxine Eichner, *The Supportive State: Families, Government, and America’s Political Ideals*, OXFORD SCHOLARSHIP ONLINE 14 (2010).

²¹ Appleton, *supra* note 8, at 41.

interactive; they define one another.”²² Thus, one might question whether family autonomy even exists.

Other scholars acknowledge the paradox and incoherence at the core of the relationship between family and state, but suggest that it has analogies in other areas of law, particularly property law.²³ The state is prohibited from taking property (without just compensation) even as the state has the power to define what property is.²⁴ Justice Holmes famously said that the question of whether a state regulation constitutes a mere “incident” of “property” that can be “diminished” or a taking of property that must be compensated is a question of whether it “goes too far.”²⁵ When a state goes too far it crosses the line into taking property even as the state has considerable power to diminish people’s property rights. There can be coherence to the idea of property even if there is flexibility and variation—between states and over time—in how states define property.

Comparably, there can be a law of the family, “a system of exemptions from the everyday rules that would apply to interactions among people in non-family context[s], complemented by the imposition of a set of special family obligations”²⁶ without there being a fixed understanding of what constitutes family.²⁷ Some states recognize domestic partnerships. Others

²² Martha Albertson Fineman, *What Place for Family Privacy?*, 67 GEO. WASH. L. REV. 1207, 1208 (1999).

²³ See David D. Meyer, *Partners, Care Givers and the Constitutional Substance of Parenthood*, RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE’S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 47, 57–58 (Robin Fretwell Wilson ed., 2006) (suggesting that the state’s ability to grant and withhold family status aligns with Thomas Merrill’s explication of Takings jurisprudence in that the Court’s understanding of property, like the Court’s understanding of family, is informed by “general expectations about kinds of interests that are commonly regarded as being property in our society”); Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 939 (2000); see also Katharine K. Baker, *Marriage and Parenthood as Status and Rights: The Growing, Problematic and Possibly Constitutional Trend to Disaggregate Family Status from Family Rights*, 71 OHIO ST. L.J. 127, 151 (2010) (“The Constitution forbids state from taking property even as it gives states the extensive discretion to define it.”).

²⁴ States are free to modify their property laws by redefining the elements of nuisance or changing entitlements to water rights or altering the statute of limitations for adverse possession, but the Constitution prevents states from “taking” too much property without just compensation. Baker, *supra* note 23, at 151.

²⁵ Pa. Coal Co. v. Mahon, 260 U.S. 393, 413, 415 (1922).

²⁶ Fineman, *supra* note 22, at 1207.

²⁷ For the suggestion that there should not necessarily be an understanding of what constitutes family, or a law of the family instead of, for instance, a law of altruistic relations, see generally Janet Halley, *What Is Family Law?: A Genealogy Part I*, 23 YALE J.L. & HUMAN. 1 (2011) (arguing that the construction of the market as public and the family as private was more ideological than inevitable and allowed the work that married women did to remain hidden under a cloak of family privacy

do not. Some states enforce surrogacy contracts that assign parenthood. Others do not. When states recognize certain relationships as family, those relationships are “exempt . . . from otherwise prevailing rules of contract, tort, and criminal law. In these respects . . . courts follow[] a tradition of non-interference in family lives”²⁸ Indeed, our understanding of the family as a relational unit operating under a different set of norms and/or rules is integral to our understanding of what family is: “[W]e use some notion of privacy to give the very idea of family some coherence.”²⁹

We start then with a recognition that both interference and the family are fluid and controversial constructs, but acknowledging their fluidity and controversy does not render them legally meaningless. In the necessary contemporary debate over how the law should define family, the importance of non-interference and exemptions from everyday rules, especially for those whose intimate lives do not track mainstream patterns, should not be lost. If the mechanisms we develop for defining family ignore the privacy that gives the idea of family coherence, not much will be gained by re-defining the family.

A. *Constitutional Autonomy*

The Supreme Court first recognized a right to family autonomy in *Meyer v. Nebraska*,³⁰ when the Court struck down a post-World War I era statute prohibiting the teaching of the German language to children. After invoking the Fourteenth Amendment’s protection against deprivation of “life, liberty or property without the due process of law,” the Court found a notion of family protected within the concept of liberty:

While this court has not attempted to define with exactness the liberty thus guaranteed Without doubt, it denotes . . . the right [to] . . . establish a home and bring up children.³¹

Meyer’s twin case, *Pierce v. Society of Sisters*, decided two years after Meyer, also involved parental liberty—the right of parents to “direct the upbringing and education of children under their control” by sending the children to private school.³² Twenty years later, in *Prince v. Massachusetts*, the Court went

and prevented women from accessing common law doctrines of tort and contract that could have allowed them to be seen as fuller citizens).

²⁸ Martha Minow & Mary Lyndon Shanley, *Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law*, 11 HYPATIA, 4, 17 (1996).

²⁹ Fineman, *supra* note 22, at 1210.

³⁰ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

³¹ *Id.* at 399.

³² *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925).

out of its way to emphasize the deference the state must give to parental decision-making even when it upheld a state law prohibiting children from selling (for very marginal sums) periodicals in public: “It is cardinal [to] us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation of obligations the state can neither supply nor hinder.”³³

The particularities of the parental rights at stake in these early cases, teaching German, sending a child to parochial school, distributing religious literature, seem almost quaint today, but the legacy of these cases has proved remarkably robust. Almost seventy years after *Meyer*, Justice Brennan wrote in *Michael H. v. Gerald D.*, “I think I am safe in saying that no one doubts the wisdom or validity of those decisions.”³⁴ *Meyer* and *Pierce* have routinely formed the basis of Supreme Court holdings having anything to do with parenthood, from the right to withdraw a child from school at age fourteen (arguably a much more serious rejection of an important governmental objective),³⁵ to an entitlement to the presumption that one acts in the best interest of one’s child,³⁶ to the right to have parental status,³⁷ to the right to procedural safeguards before one’s parental rights are terminated,³⁸ to the rights of foster parents to maintain relationships with their foster children,³⁹ to the right of a grandmother to live with her grandchildren.⁴⁰ *Meyer* and *Pierce* thus speak not only to the negative liberty associated with being able to educate one’s children as one wants, but to the right to be a legal parent and not have the state revoke that status.

What is perhaps more notable is that the parental autonomy cases also form the basis of almost all Supreme Court cases having to do with marriage. The Court has recognized a right to marital privacy only once, in *Griswold v. Connecticut*, when it held that a law barring married people from using contraception interfered with a marital couple’s privacy.⁴¹ In famous language, the Court made clear that the privacy extended to the couple as an entity; it was the association that marriage involves, not the individuals that were afforded protection.

³³ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

³⁴ *Michael H. v. Gerald D.*, 491 U.S. 110, 142 (1989) (Brennan, J., dissenting).

³⁵ *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

³⁶ *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

³⁷ *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

³⁸ *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

³⁹ *Smith v. Org. of Foster Fam.*, 431 U.S. 816, 843 (1977).

⁴⁰ *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977).

⁴¹ *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.⁴²

In introducing its discussion of the doctrines and penumbras that might support this right to marital privacy, the Griswold court started with parental autonomy: “And so reaffirm the principle of the *Pierce* and the *Meyer* cases.”⁴³

Something about the right to teach one’s child German is relevant to the right to use birth control in the marital bedroom. What is that something? An understanding, as Martha Minow and Mary Shanley describe, of the “family as a unitary entity entitled to protection from state scrutiny or interference[.]”⁴⁴ *Meyer* and *Pierce* are also cited in the right to marriage cases, including *Zablocki v. Redhail*,⁴⁵ and *Obergefell v. Hodges*.⁴⁶ This suggests that something about the right to be let alone as a parent has something to do not only with the positive right to be recognized as a parent, but the positive right to have one’s intimate associations recognized as family. The way in which the Court moves so seamlessly from negative rights to be let alone as a family to the positive rights to be a family in both the parental and marital contexts underscores Professor Fineman’s point that “some notion of privacy . . . [gives] the very idea of family some coherence.”⁴⁷ To be a family is to be let alone as such.

As I have suggested elsewhere, some confusion in this area stems in part from the repeated but not necessarily consistent use of three related and overlapping terms: privacy, autonomy and intimacy.⁴⁸ Some scholars argue that when the Supreme Court uses the word privacy, it usually means autonomy, or the right to be free from governmental regulation.⁴⁹ Others note that privacy can mean one of two things, the right to self-determination (which is also often called autonomy) and the right not have facts about

⁴² *Id.* at 486.

⁴³ *Id.* at 483.

⁴⁴ Minow & Shanley, *supra* note 28.

⁴⁵ *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (reiterating the right of a man who was in arrears on child support to marry).

⁴⁶ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2590, 2598 (2015) (citing *Pierce* and *Meyer* as a basis for protecting the right to marry).

⁴⁷ Fineman, *supra* note 22, at 1210.

⁴⁸ Baker, *supra* note 23, at 173–74.

⁴⁹ Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1415 (1974). Anita Allen argues that some scholars use the word “privacy” when they really mean “liberty.” See ANITA ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY 4 (1988).

oneself known.⁵⁰ In his landmark article on intimate association, Professor Kenneth Karst argued that a right to intimate association meant both the right not to have facts disclosed and the right to “close and enduring [relations] between people.”⁵¹ Coming full circle, others argue that it is relationships that make autonomy possible: “If we ask ourselves what actually enables people to be autonomous, the answer is not isolation, but relationships[.]”⁵² Together, this suggests that:

[S]ometimes that which is protected when we protect relational privacy is the right not to have things disclosed, but sometimes it is the right to self-determination. Sometimes, by autonomy, we mean the right to be free from governmental regulation, but sometimes we mean the right to be treated as intertwined with others. What makes intimate relationships special is that they are both private and autonomous.⁵³

Though far from a picture of clarity, the Supreme Court’s doctrine of family autonomy thus includes the right to close and enduring relationships, the right to have acts and decisions made within those relationships kept private and the right to the self-determination enabled by being let alone.

For purposes of this article, I will use the term autonomy to refer to the right of the family as an entity to be let alone. In protecting that autonomy, courts also protect family members rights to self-determination and their rights not to have things about them known.

B. Common Law Relational Privacy

The constitutional doctrine of family autonomy finds considerable support in the state common law courts, albeit with doctrines and policies of slightly different names. The vast majority of family law manifests itself in state courts, in no small part because of the domestic relations exception to diversity jurisdiction.⁵⁴ Whatever the Supreme Court might announce with regard to a constitutional doctrine of family autonomy, if a conception of family autonomy did not exist at the state court level, the concept would wither away to nothing. But a notion of non-interference has always been a part of state family law doctrine. The extent of state court non-interference in families has ebbed and flowed and its implementation has been raced and

⁵⁰ Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 6–7, 10 (1992).

⁵¹ Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 634 (1980).

⁵² Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thought and Possibilities*, 1 YALE J.L. & FEMINISM 7, 12 (1989).

⁵³ Baker, *supra* note 23, at 174.

⁵⁴ *Barber v. Barber*, 62 U.S. 582, 584 (1858).

classed, but it has proven just as resilient as the constitutional family autonomy doctrine.

1. *Marriage*

a. *The Fault Era*

*McGuire v. McGuire*⁵⁵ is the most famous—perhaps infamous—articulation of the family law doctrine of non-interference. In *McGuire*, the Nebraska Supreme Court dismissed a petition from a wife asking the court to force her husband to provide her with suitable support. The record established that Mr. McGuire had the resources to install indoor plumbing, a kitchen sink, and a central heating system, but he refused. The Court declined to force him to make those expenditures, stating:

The living standards of a family are a matter of concern to the household, and not for the courts to determine, even though the husband's attitude toward his wife, according to his wealth and circumstances, leaves little to be said in his behalf. As long as the home is maintained and the parties are living as husband and wife . . . [p]ublic policy requires such a holding.⁵⁶

In reaching that decision, the court dismissed the relevance of cases in which the spouses had actually separated. Doctrine at the time allowed a spouse to petition for bed and board if the parties were living in different homes, but still married. Divorce was often not a viable option in these situations because if one spouse was not at fault—even if, as was the case with Mr. McGuire, there was little to say on his behalf—divorce was unavailable. Separating without divorcing was a way to invoke the court's jurisdiction, but it was risky—by leaving a spouse, the wife could herself be sued for divorce on grounds of desertion (in which case she would likely get no support on account of her fault). Thus, before the era of no-fault divorce, courts would involve themselves in the distribution of finances within a marriage, but only rarely and only if the parties were no longer living as a unit.

There was one exception to this doctrine of non-interference: necessities. Under the necessities doctrine, a merchant who sold a spouse goods on credit could sue the other spouse for payment if it was not forthcoming, as long as: (i) the purchase was appropriate to the purchaser's station in life; (ii) she did not already have the purchased item; and (iii) the parties were still

⁵⁵ *McGuire v. McGuire*, 59 N.W.2d 336, 342 (Neb. 1953).

⁵⁶ *Id.*

living together or the husband had committed marital fault.⁵⁷ Professor Elizabeth Katz has recently argued that, at least for a time, the necessities doctrine was used more than previously reported.⁵⁸ This suggests the doctrine of non-interference may not have been as robust as previously thought.

Katz's work explains that industrialization and commercialization increased the need for the necessities doctrine, but also, ultimately, made it untenable. This trajectory of the necessities doctrine in the nineteenth century demonstrates the endurance of the non-interference principle. As homes ceased to be units of significant production, women had to buy that which they had previously made. Purchasing goods in the market became part of a wife's role and was recognized as such. This led more women and merchants to rely on the necessities doctrine because husbands were not always there when wives needed to make purchases. But the more diverse and anonymous the market became, the more dangerous it was for merchants to extend wives credit. In cities or towns of any size, merchants were unlikely to know enough about a wife's station in life, what she already had, or her marital situation. The evidentiary burden on merchants became too much to bear.⁵⁹

A doctrine that allows for judicial interference only if the plaintiff incurs a significant risk of no recovery is not likely to be a doctrine that results in much judicial interference. Eventually, increased mobility, diversity and transition to a cash economy severely undermined the utility of the necessities doctrine, but its evolution presages what happened to the law of marital dissolution in the latter twentieth century. Just as the necessities doctrine died because it asked merchants and therefore judges to know much more than they could about the intricacies of too many different families' day-to-day decision-making, so the mid-twentieth century law of marital dissolution, which originally required judicial evaluation of marital behavior and interspousal economic interaction, became more unsustainable as the number of divorces continued to climb.

⁵⁷ Elizabeth Katz, *What's Yours Is Mine*, in *COURTING AMERICAN FAMILIES: THE ENFORCEMENT OF MARITAL FINANCIAL DUTIES AND THE CREATION OF COURTS OF DOMESTIC RELATIONS, 1880-1930*, at 66-67 (dissertation, Harvard Univ., 2019).

⁵⁸ *Id.* at 36-37, 59-62.

⁵⁹ *Id.* at 65-67. Some legislatures tried to help merchants by passing Family Expense Statutes, meant to cover all family expenditures. These eliminated the traditional fact-based inquiry into station and fault, but created more pressure on the question of what counted as a "family" expenditure. *Id.* at 79-82.

b. The No-Fault Era

The divorce reform movement of the 1970s was fueled by the widespread belief that the fault-based system was a sham. The fault-based system allowed a couple to divorce only if a court found that one party was at fault, but by the latter part of the twentieth century, couples were getting divorced because they wanted to, not because anyone was necessarily at fault. As the 1950s turned into the 1960s and 70s, people increasingly wanted to get divorced. Fabricating a fault story became an accepted part of the legal process necessary to secure a divorce, but everyone knew it was a fabrication. No one was interested in judges doing an assessment of marital fault, least of all the judges.⁶⁰ The decreasing willingness to take the fault standard seriously is itself a version of non-interference. The law asked judges to interrogate the behavior in a marriage and see if one party was at fault, but no one, not the parties or the lawyers or the judges, took that interrogation of marital behavior seriously.

Judges had to interfere to distribute property, however. The law has always assumed jurisdiction—interfered—to allocate marital property and post-marital support at divorce. One might therefore think that the increased divorce rate would have been the death knell for a common law understanding of family non-interference, because even if judges did not want to determine fault, they had to distribute property and support. If half of all marriages end in divorce, that could mean that judges would interfere in half of all marriages.

The ethic of non-interference endured, however, albeit it in modified form. Today, judges distribute property and allocate support to ex-spouses at the end of a marriage, but they do not do so now based on the kind of contextual analysis Mrs. McGuire asked for or the assessment of need the necessities doctrine required. They do so based on a set of formulaic rules that avoid the kinds of inquiries the judges in *McGuire* also eschewed.

Until the divorce reform movement of the 1970s, resolution of the financial incidents of divorce in this country had, in theory, depended on whether one was in one of the nine community property or the forty-one common law states. In community property states, for the most part, all property acquired during a marriage was jointly held. At divorce, it was supposed to be split in half. Post-marital support was rare in community

⁶⁰ Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 666–67 (1984) (describing reticence of judges to evaluate fault seriously).

property states because the lower earning spouse got half the property.⁶¹ In common law states, after the introduction of Married Women's Property Acts and before divorce reform, women were able to keep the property they brought into the marriage, but anything earned during the marriage was distributed based on title—meaning that it usually went to the husband as the earning spouse.⁶² To alleviate some of the hardship on divorcing women, common law states allowed judges to award alimony, but the awards were highly discretionary and often tied to the fault of the husband.⁶³ They were determined by the kind of judicial assessment that non-interference doctrine allowed judges to avoid—was the marital behavior appropriate and what is an appropriate standard of living?

The Uniform Marriage and Divorce Act, passed during the move to no-fault, encouraged the elimination of that kind of judicial interrogation and suggested that property division alone could be the vehicle for allocating the financial incidents of a marriage.⁶⁴ Most common law states adopted a rule of equitable distribution of marital property at divorce, allowing judges broad discretion to allocate property. The move to equitable distribution gave judges a formidable role. They had to decide what was equitable.⁶⁵

There was tremendous variation in how judges divided property “equitably.”⁶⁶ Many judges continued to use a title-based system. Others refused to rely on title, but were not held accountable for any principled analysis for why they divided property as they did. In addition, so much property was indivisible⁶⁷ and so much marital wealth was tied to human capital—often developed during the marriage but considered too personal to

⁶¹ J. THOMAS OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY § 3.03[5] (2006).

⁶² LESLIE JOAN HARRIS, JUNE CARBONE & LEE TEITELBAUM, FAMILY LAW 314–15 (2014).

⁶³ This brief account is familiar but probably too simplistic. Many common law jurisdictions used some notion of equitable distribution when they deemed it necessary, and the line between property distribution and support was not always clear. The divorce reform movement solidified the move to equitable distribution and tried to impose a sharp divide between support and property distribution. *Id.*

⁶⁴ UNIF. MARRIAGE & DIVORCE ACT § 307 (amended 2011), 9A ULA 288 (1998); Cynthia Lee Starnes, *Mothers As Suckers: Pity, Partnership and Divorce Discourse*, 90 IOWA L. REV. 1513, 1539 (2005).

⁶⁵ Mary Ann Glendon, *Family Law Reform in the 1980's*, 44 LA. L. REV. 1553, 1556 (1984) (describing the equitable distribution system as “a lottery whose outcome greatly depend[ed] on the luck of the judicial draw”).

⁶⁶ *Id.*

⁶⁷ For instance, goodwill in a business is often considered indivisible under state law, as are shares in a partnership. See *May v. May*, 589 S.E.2d 536, 544–46 (W. Va. 2003) (explaining different approaches).

divide⁶⁸—that judges were unsatisfied with property division as the sole tool available to them. A wealth of scholarly commentary highlighted how some kind of alimony was necessary to compensate women who had invested in non-market work during a marriage, but there was little consensus on an appropriate theory.⁶⁹ Should alimony compensate for a spouse's foregone opportunities, or simply try to rehabilitate her ability to engage in productive work, or reflect her investment in family work or an expectation to a standard of living to which she was reasonably entitled? All of these theories seemed appropriate at times, but none seemed appropriate all the time and many judges disagreed about when such relief might be appropriate. The result was an increasing willingness to use alimony, but exceedingly little guidance on how to do so.

In the last twenty-five years, however, a good deal of consistency has emerged and its emergence has vastly decreased the role that divorce reformers expected judges to assume. While there can still be problems valuing marital property (a problem that is assigned to financial experts, not judges), there is a growing consensus in all equitable distribution states that marital property should be divided as it is in community property states, equally. The American Law Institute proposed this in 2000, and while only some states have moved to codify a fifty-fifty division presumption, many other states have reached that result judicially.⁷⁰ With a strong fifty-fifty presumption, there is little work for judges to do with regard to property division once they figure out the value of what is in front of them. They just divide it in half.

The move to consistency in maintenance (alimony) awards is less complete but arguably more telling. Judges and lawyers have encouraged legislatures to take away the judiciary's role in evaluating marital behavior and instead adopt formulae for determining maintenance. It turned out that judges do not want to evaluate whether a lesser earning spouse invested sufficiently in the family, or forewent market opportunities or bolstered the earnings of her spouse. Judges do not know how to evaluate these factors.

⁶⁸ Professional degrees are the quintessential example of this kind of human capital.

⁶⁹ See Ira Mark Ellman, *The Maturing Law of Divorce Finances: Toward Rules and Guidelines*, 33 FAM. L.Q. 801, 810 (1999) (discussing the “burst of academic writing” proposing policy rationales for maintenance).

⁷⁰ PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 4.09 (AM. L. INST. 2000) [hereinafter ALI PRINCIPLES] (strongly endorsing a fifty-fifty split of marital property); 24 Am. Jur. 2d Divorce & Separation § 531 (2010) (equal division is the norm). This is not to say that every case involves a precise division in half. Judges have discretion around the mean, but the mean is clearly fifty-fifty.

Nor do they want to decide what standard of living is appropriate post-divorce. State Supreme Courts, local bar associations, and judges acting with their peers have instead pushed for formula and algorithms that encourage them to ignore contextual questions and marital behavior and just use objective numbers.⁷¹ These formulae are almost always now based on two variables: the length of marriage and the income differential at the end of the marriage. The longer the marriage and the greater the income differential, the more lengthy and generous the maintenance award.⁷² No one has to evaluate anything else or make a subjective ruling regarding entitlement. The formulae give guidance to litigants who usually want to settle, and they allow judges to avoid inquiries into marital behavior.

This story of the move to no-fault and formulas suggests that the non-interference doctrine lives on. Judges refused to accept responsibility for determining marital fault. They initially accepted responsibility for distributing property equitably, but the move toward a much brighter line rule of an equal divide proved inexorable. Judicial pressure for maintenance formulas in the last twenty years demonstrates that judges would rather not be responsible for determining who deserves what after a marriage. They want about as much to do with assessing the “living standards of a family”⁷³ after a marriage as the court in *McGuire* did during the marriage.

C. Parenthood

1. Child Support

The ideology or ethic of family non-interference also informs judicial treatment of parental rights and responsibilities. Reliance on formulae, instead of contextual analysis of behavior within a family, has been a part of child support doctrine for some time. Objective child support guidelines, mandated by Congress, preceded property division and alimony formulae by more than a decade.⁷⁴

In the 1990s, in order to facilitate a more predictable and efficient child support system, Congress mandated that states develop guidelines using

⁷¹ Katharine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family*, 2012 U. ILL. L. REV. 319, 338–39 (describing the move to maintenance formulae).

⁷² *McGuire v. McGuire*, 59 N.W.2d 336, 339 (Neb. 1953).

⁷³ *Id.* at 342.

⁷⁴ In 1984, using the spending power, Congress ordered all states to draft child support formulae. Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305, 1306 (1984).

“data on the cost of raising children.”⁷⁵ In developing the eventual guidelines, however, economists refused to develop or use “data on the ‘cost’ of raising children,” because before one can ask what a child costs, one has to decide what is appropriate for a child to have.⁷⁶ That is a necessarily subjective and contextual question. Should a child have new sneakers, or a second coat, or a separate bedroom, or piano lessons, or a soccer uniform? Individual parents make such decisions every day, but the economists charged with coming up with child support formulae did not want to make those decisions for others. Doing so requires the very kind of interference with family decision-making that the *McGuire* court eschewed. So most of the formulae rely instead on objective expenditure data (how much more does an average two adult household at a given income level spend if it has a child versus how much does such a household spend at that income level if it does not have a child).⁷⁷

In using these expenditure figures, the formulae makers rely on a two-parent, same household ideal that does not reflect the life most children will live in this country. Most children spend at least part of their minority in a single-parent or blended family.⁷⁸ The reliance on expenditure data in this two-parent, same household ideal leads to results that overestimate what low-income parents can pay and underestimate what high-income parents often do spend on their children.⁷⁹ The data is both under- and over-inclusive, and the metrics on which the data is based are “empirically unverifiable, theoretically questionable, and . . . [based] on flawed data. . . .”⁸⁰ But the child support guidelines are mostly uncontroversial.

⁷⁵ Office of Child Support Enforcement, 45 C.F.R. § 302.56(h).

⁷⁶ Ira Mark Ellman, *Fudging Failure: The Economic Analysis Used to Construct Child Support Guidelines*, 2004 U. CHI. LEGAL F. 167, 170–73 (discussing reticence of economists to use a subjective standard—what a child needs?—as opposed to an objective standard that tries to incorporate what adults actually spend on children).

⁷⁷ Attempts to reform these models by using data on expenditures in single-parent households and trying to assess the standards of living in the relevant household after child support was paid have largely failed. See generally Ira Mark Ellman, *A Case Study in Failed Family Law Reform: Arizona’s Child Support Guidelines*, 54 ARIZ. L. REV. 137 (2012).

⁷⁸ More than 50% of children born to unmarried, but cohabitating parents are expected to live without two parents in the household for at least part of their childhood. More than 20% of children born to married parents are expected to live without two parents in the household for at least part of their childhood. Sheela Kennedy & Larry Bumpass, *Cohabitation and Children’s Living Arrangements: New Estimates from the United States*, 19 DEMOGRAPHICS RSCH. 1663, 1685 (2008).

⁷⁹ See Ellman, *supra* note 76, at 210–216 (explaining how the data used to construct child support formula tend to overreport income in low-income households and underreport income in higher income households, which increases child support obligations for low-income obligors and decreases them for higher income obligors).

⁸⁰ *Id.* at 215.

Why is there so little concern with the fiction at the core of most models? Because few people are comfortable doing individualized assessments of what any particular parent should pay for any particular child. It depends on the child's needs and abilities, competing needs of other family members, parental values, the child's behavior, beliefs about entitlement and desert generally—just to name some of the variables parents consider when deciding what to spend on children. These are quintessential family decisions, the very kinds of decisions that a notion of non-interference shields from judicial determination. With guidelines, judges do not have to make them. They are given a questionnaire to fill out with mostly objective numbers involving income; the algorithm spits out a number constituting the obligation/entitlement.⁸¹ The non-interference principle lives on in child support doctrine as well.

2. Custody

Child custody is different. There is much more judicial assessment of family behavior in custody decisions, but only if one parent invokes the court's jurisdiction and only if the parents are separated. A much less famous parenthood equivalent to the *McGuire* case makes this clear. In *Kilgrow v. Kilgrow*⁸² decided a few years after *McGuire*, an Alabama court refused a husband's request to have his wife enjoined from enrolling their child in public school. The court declined jurisdiction:

It would be anomalous to hold that a court of equity may sit in constant supervision over a household and see that either parent's will and determination in the upbringing of a child is obeyed, even though the parents' dispute might involve what is best for the child. Every difference of opinion between parents concerning their child's upbringing necessarily involves the question of the child's best interest.⁸³

The court acknowledged that it would have to accept jurisdiction if the parties had separated, but until separation, the judges deferred.

As the divorce rate rose throughout the twentieth century, judges were increasingly called on to make custody decisions. Until the latter part of the century, these custody decisions were not particularly controversial because

⁸¹ Turning over one's tax returns can seem invasive, but it is far less invasive than having to list all sources of income and justify all expenditure. For an example of the information required by the formulae, see ILLINOIS CHILD SUPPORT CALCULATOR, <https://cscwebext.hfs.illinois.gov/CscWebEx/app/csc?execution=e1s1> (last visited Apr. 20, 2022).

⁸² 107 So. 2d 885 (Ala. 1959).

⁸³ *Id.* at 889.

prevailing gender norms left everyone in agreement that mothers should raise children. This view was encapsulated in the tender years doctrine, which explicitly preferred maternal custody if a child was “of tender years.” In practice, it was exceedingly rare for fathers to get custody even if a child was not of tender years.⁸⁴

This reflexive approach to custody was rightfully questioned by emerging views of gender equality in the 1960s and 70s, but more inclusive understandings of who might be entitled to custody created its own problem: How should a court decide? The legal standard that replaced the tender years doctrine, mostly in the 1970s, was the “best interests of the child” standard.⁸⁵

By its own terms, the best interest standard seems unassailable. How could anyone criticize a standard that tries to do what is best for children? But when forced to take that standard seriously, judges often confessed that they had no idea what they were doing. “[I]n the average divorce proceeding [an] intelligent determination of relative degrees of fitness requires a precision of measurement which is not possible given the tools available to judges.”⁸⁶ A federal judge confronting the standard asked “[o]n what do we draw in making these choices? Are we, as Federal Judges, endowed with sufficient prescience to decide such delicate issues? We should remind ourselves we do not possess the wisdom of Solomon”⁸⁷

The judges who deemed themselves qualified to embrace the standard were roundly criticized by commentators. Academics from all backgrounds attacked the standard as arbitrary,⁸⁸ “mindlessly” reflective of “the majority’s (or the judge’s) preferences[,]”⁸⁹ overly dependent on medical and social

⁸⁴ See generally Robb Strom, *The Tender Years Presumption: Is It Presumably Unconstitutional?*, 21 SAN DIEGO L. REV. 861 (1984) (discussing use of tender years presumption and the difficulty fathers had in getting custody).

⁸⁵ Some argue that the tender years doctrine was a subset of the best interest standard, such that awarding mothers custody was a means of ensuring that children’s best interests were met. See MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 239 (1985). Regardless, once there were sufficient challenges to presumptions based on gender, judges were confronted with having to determine what was in a child’s best interest without resorting to gender norms.

⁸⁶ *Garska v. McCoy*, 278 S.E.2d 357, 361 (W. Va. 1981).

⁸⁷ *Drummond v. Fulton Cnty. Dep’t of Fam. & Children’s Servs.*, 563 F.2d 1200, 1212 (5th Cir. 1977).

⁸⁸ See Robert Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 L. & CONTEMP. PROBS., 226, 258–61 (1975) (explaining that the standard is unpredictable and difficult to work with).

⁸⁹ David Chambers, *Rethinking the Substantive Rules of Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 491 (1984).

professionals instead of on parents themselves (who usually have child-specific knowledge),⁹⁰ and indeterminate and therefore damaging to children because of its ability to be exploited by parents.⁹¹ In June Carbone's words, under the best interest standard, custody disputes became "ground zero in the gender wars because they are among the few remaining family law disputes where courts judge adult behavior."⁹²

The best interest of the child standard remains the standard used by most courts in most custody disputes today not because anyone particularly likes it, but because no one can figure out what to replace it with. The Primary Caretaker standard, which awards custody to the parent who has done the most caretaking, arguably unfairly disadvantages the parent who has contributed financially for a family's benefit. Fathers' rights groups, in particular, reject this standard.⁹³ The American Law Institute has suggested that "the proportion of custodial time the child spends with each parent [should] approximate[] the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation. . . ."⁹⁴ This rule reduces judicial discretion but it assumes that it will be plausible to replicate the allocation of caretaking time when the adults are living in two households instead of one. It also assumes that the parents lived together for a long enough time to establish caretaking patterns, and that is often not the case.

Comparable problems attach to presumptions of joint custody. Though endorsed by both some feminists and father's rights advocates, joint custody often runs into insurmountable practical problems. If the parents have assumed roles in which one provides more economically and the other provides more caretaking, it is hard for the person who has provided more economically to assume 50% of the caretaking role without significantly disrupting his work life and thereby likely hurting the child financially. Providing two homes, close enough to the same school, and the same

⁹⁰ See Martha L. Fineman, *The Politics of Custody and the Transformation of American Custody*, 22 U.C. DAVIS L. REV. 829, 846 (1989) ("Asserting that a professional (or political) position conforms to or is advanced in a manner designed to advance the best interest of the child has become the rhetorical price of entry into the debate over custody policy.").

⁹¹ Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1181 (1986).

⁹² JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW 193 (2000).

⁹³ For a discussion of the fight between fathers' rights groups and women's groups, see Elizabeth Scott & Robert Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best Interest Standard*, 77 L. & CONTEMP. PROBS. 69, 70, 77–80 (2014).

⁹⁴ ALI PRINCIPLES § 2.08(1) (AM. L. INST. 2000).

caretaking resources and the same activities that a child has known, is often impossible.

Thus, in deciding how much time a child will spend with each parent, custody remains one of the few areas in family law where judges do interfere with the day-to-day lives of a family unit, but few people defend the standard under which those decisions are made. Just as important, statutes routinely discourage judges from engaging in this inquiry by mandating that parents try to develop a parenting plan. Policy-makers have come to understand that by far the best solution for children is one that both parents can arrive at together.⁹⁵ Thus, judges insist that parents try to cooperate to develop a plan acceptable to both of them. Only if they fail repeatedly do judges get involved. Ultimately, custody determinations are only as good as parents' willingness to abide by them. Judges simply do not have the power to keep parents from fighting. The best way to avoid those fights is to let the parties come to some sort of resolution on their own—precisely because judicial interference is ineffective. Judges only develop a best interest allocation of custodial time when parents abjectly fail to do so. Again, non-interference lives on in the law of parentage as in the law of marriage.

Before exploring the justifications and explanations for why the doctrines of family autonomy and non-interference have proven as resilient as they have, it is important to note two consistent critiques of the doctrine. First, the refusal to interfere in the marital family may too readily serve the interest of a more empowered spouse, shielding him from common law causes of action and criminal accountability for battery. Second, the non-interference doctrine has never been robustly applied to low-income families.

Professor Reva Siegel has argued that much of the doctrine of non-interference and privacy reflects what she calls “preservation through transformation,” transformed justifications for what coverture and the doctrine of marital unity made explicit: husbands' rights to control their wives.⁹⁶ Traditionally, a wife had few, if any, rights to legal action against her spouse while they were married. Blackstone famously wrote that “[b]y marriage, the husband and wife are one person in law . . . [the] legal existence of the woman . . . is incorporated and consolidated into that of the husband”⁹⁷ If the state is not permitted to treat a wife as her own person

⁹⁵ *Id.* at § 2.05 (describing model plan) and § 2.05 cmt. a (listing states with parenting plan requirements).

⁹⁶ Reva B. Siegel, “*The Rule of Love: Wife Beating as Prerogative and Privacy*,” 105 *YALE L.J.* 2117, 2119 (1996).

⁹⁷ 1 *WILLIAM BLACKSTONE, COMMENTARIES* *439.

and enter the realm of the family to help her, it leaves women and other people in families who might be protected by that state interference vulnerable.

For instance, interspousal tort immunity, which can be seen as a manifestation of the non-interference principle, kept women from suing their spouses in tort, even for intentional torts. Treating the marital couple as a unit, not as an association of two individuals each with separate legal rights, severely limited a spouse's ability to invoke the law.⁹⁸ Comparably, as Professor Jill Hasday has documented, courts routinely refused to enforce interspousal contracts.⁹⁹ Hasday argues that this systematically hurt women more than men because women worked in reliance on promises of compensation from men, and when courts refused to enforce those contracts, women lost. Arguably most important, decades of feminist scholarship has criticized how the doctrine of non-interference allowed men to beat their wives with impunity. In Professor Elizabeth Schneider's formulation, privacy is "violent."¹⁰⁰ The state's reticence or refusal to interfere with family life left millions of women without recourse when they were physically and emotionally abused by family members. As Lee Teitelbaum warned years ago, "the practical consequence . . . [of non-interference] . . . is to confer or ratify the power of one family member over others."¹⁰¹

As Part II will explain, the doctrine of family autonomy is supposed to protect family relationships from mettlesome, overbearing, and probably not-very-effective state efforts to control intimate lives, but not all state interference is so oppressive. Whatever the benefits of non-interference might be, it diminishes the ability of those with less power within a relationship to invoke the law's protection.

A different kind of critique of family autonomy emerges from those concerned with the child welfare system. The Supreme Court has proven far less willing to protect parental decision-making if a parent is receiving any form of state aid. In *Wyman v. James*, for example, the Court condoned a home inspection by a state welfare agent so that the state could make sure that payments made to the household were "be[ing] used in the best interests

⁹⁸ Today, states have dispensed with spousal immunity for most intentional and nonintentional torts. See JILL ELAINE HASDAY, *FAMILY LAW REIMAGINED* 115 (2014) (stating that at least seven states have some form of interspousal tort immunity but these litigations are rare and marginalized).

⁹⁹ *Id.* at 70, 82 (discussing courts refusing to enforce contracts between spouses).

¹⁰⁰ Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 974 (1991).

¹⁰¹ Lee Teitelbaum, *Family History and Family Law*, 2006 UTAH L. REV. 197, 234.

of the child.”¹⁰² Because “[t]he focus was on the child,”¹⁰³ state interference was acceptable. But the legislation the court had previously struck down under the parental autonomy doctrine, prohibitions on teaching one’s child German, and sending one’s child to private school, and mandating schooling through age sixteen, were all focused on the child as well.¹⁰⁴

The need to protect the child does not explain the result in *Wyman*; the desire to protect state coffers does. The rationale for family autonomy—discussed more fully below—is rooted in the understanding that parents are better than the state at determining what is in the best interest of the child. Income should have nothing to do with it. But perhaps it does. In his autobiography, Malcolm X explains that the welfare check his mother received “was [the social workers’] pass. They acted as if they owned us”¹⁰⁵ Once the state came in, the family soon dissolved. Malcolm X and his siblings were sent to foster care, eliminating any semblance of family autonomy.

The insistent interference by child welfare workers into the lives of certain families suggests that however noble an ideal of family autonomy might be, in practice its only beneficiaries are those who are perceived as entitled to it because their economic and home life conforms to a judicial understanding of family. If only the wealthy are entitled to an understanding that their family, as a unit, has an integrity the state must respect, the doctrine may produce pernicious class effects.

These critiques point reformers in opposite directions. The critique that family autonomy hurts those with less power within the family suggests that those with less power would be better served by the law abandoning notions of privacy and non-interference. The critique that low-income, marginalized communities have never been permitted the benefits of family autonomy suggests that those communities would be better served by an expansion of the doctrine, not its abolition. In explaining the justifications for the doctrine, the next Part addresses both of these critiques.

¹⁰² *Wyman v. James*, 400 U.S. 309 (1971).

¹⁰³ *Id.* at 318.

¹⁰⁴ As Martha Fineman has noted, numerous subsidies, including mortgage interest deductions, subsidized health care, and child tax deductions flow to middle class families, but those subsidies have not opened the door to state interference. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 191 (1995).

¹⁰⁵ MALCOM X & ALEX HALEY, *THE AUTOBIOGRAPHY OF MALCOM X* 16 (1965).

II. WHY FAMILY AUTONOMY

Part I described a constitutional doctrine of family autonomy and a common law principle of non-interference that have evolved and live on despite their paradoxes and critiques. This Part explores why the doctrines endure, starting first with the doctrine as it applies to parent-child relationships, where the benefits may be easiest to identify.

A. Parental Autonomy

Children benefit from robust state deference to parental decision-making because most parents love their children with an intensity that makes them best qualified to rear their children. As Stephen Gilles writes, “[p]arents’ loving efforts to transmit their values help form [] children’s characters, enable them to learn what it is to have a coherent way of life, and develop their capacity to enter into caring, long-term relationships with others.”¹⁰⁶ Professor Emily Buss writes, “[p]arents’ strong emotional attachment to their children and considerable knowledge of their particular needs make parents the child-specific experts most qualified to assess and pursue their children’s best interests in most circumstances.”¹⁰⁷ Elizabeth and Robert Scott analogize the parents’ role to fiduciaries.¹⁰⁸ The law recognizes fiduciary relationships when there is reason to believe that one person has the expertise or particular capacity to act on behalf of others.¹⁰⁹ Children cannot teach themselves what they need to know to thrive, and parents are better suited than anyone else to do so.

The Supreme Court has also acknowledged the importance of parental love. In *Smith v. Organization of Foster Families for Equality & Reform* (“OFFER”), the Court wrote that “the importance of the familial relationships, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association and from the role it plays in ‘promot[ing] a way of life through the instruction of children’”¹¹⁰ Professor Dorothy Roberts quotes an African-American psychologist who works with children in foster care saying much the same thing. “We learn how to love and share in families We learn how to

¹⁰⁶ Stephen Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 941 (1996).

¹⁰⁷ Emily Buss, *Parental Rights*, 88 VA. L. REV. 635, 647 (2002).

¹⁰⁸ Elizabeth B. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2402 (1995).

¹⁰⁹ *Id.* at 2401–02.

¹¹⁰ 431 U.S. 816, 844 (1977) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 231–33 (1972)).

trust by trusting our parents to take care of us”¹¹¹ Without that trust, children are ill-prepared for life as adults.

In addition, belonging to a family, or a unit, gives children the sense of connection that allows them to grow into an understanding of their own autonomy as adults.¹¹² As Martha Minnow suggests, “belonging is essential to becoming.”¹¹³ Children of privilege, who never experience significant family disruption or who experience it with parents who have the means and maturity to keep the judicial system out of the process, may never even realize how much they know they belong. But for children whose family attachments are constantly questioned, there can be constant doubt about where one fits and who one is.¹¹⁴ This can be particularly dangerous for children in marginalized groups. As Peggy Cooper Davis explains, protecting “family liberty” is a means of fostering “full personhood” and “intellectual and moral autonomy.”¹¹⁵ The sense of belonging to a family allows one to feel secure in an “oppositional enclave” that stands apart from the (potentially racist) state.¹¹⁶ Davis argues that exercising that right to create that enclave, to be a family and left alone as such, was a critical part of what slaves understood freedom to mean.¹¹⁷ Liberty was not understood in purely individual terms but was understood as including a right to family autonomy, as well.

A pluralistic society is also well served by affording parental relationships this autonomy. In *Meyer*, the Supreme Court explicitly rejected Plato’s suggestion that the state should be responsible for raising children and that “no parent is to know his own child, nor any child his parent.”¹¹⁸ The Court observed that “such measures have been deliberately approved by men of great genius, [but] their ideas [on] the relation between individual and State

¹¹¹ DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 239 (2002) (quoting Dr. Maisha Hamilton-Bennett).

¹¹² See Nedelsky, *supra* note 52, at 12 (“If we ask ourselves what actually enables people to be autonomous, the answer is not isolation, but relationships”).

¹¹³ Martha Minnow, “Forming Underneath Everything that Grows:” *Toward a History of Family Law*, 1985 WIS. L. REV. 819, 894 (1985).

¹¹⁴ See comments of Dr. Hamilton-Bennett, *supra* note 111.

¹¹⁵ Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1371 (1994).

¹¹⁶ Jane Mansbridge, *Using Power/Fighting Power: The Polity*, in DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 46, 58 (Seyla Benhabib ed., 1996).

¹¹⁷ See generally PEGGY COPPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES (1997); see also *supra* note 115.

¹¹⁸ *Meyer v. Nebraska*, 262 U.S. 390, 401–02 (1923) (quoting THE REPUBLIC OF PLATO: AN IDEAL COMMONWEALTH 147 (trans. Benjamin Jowett, 1901)).

were wholly different from those upon which our institutions rest[.]”¹¹⁹ Presumably the Court was acknowledging that our institutions rest on a notion that the polity must recognize and incorporate difference. Parents will raise their children with values that reflect the parents’ own identity and that will inevitably lead to diversity between families. That difference is to be cultivated and respected. Respecting family autonomy is a means of respecting diversity, and democratic institutions rest on a healthy appreciation of and acceptance of that diversity.¹²⁰

There are also entirely practical, but critically important, reasons for states to defer to parental decision-making. Unless the state is prepared to take a child away, state intervention must be implemented by the parent. The state can try to standardize children in certain ways, or it can dictate certain practices, or try to order that different people be included in the family, but if a parent does not want to do what the state dictates, it is unlikely it will be done well. As Professor Buss writes, “even good state decisions about child-rearing practices are likely to produce bad results when the state relies on resistant parents to carry them out, and the self-interested or overstressed parent can be expected to do a particularly bad job of coping with these intrusions.”¹²¹

Thus, parental autonomy, though often construed as an individual liberty interest of a parent, is rooted as much in its instrumental benefits to children and pluralistic societies, and in what Martha Fineman refers to as the practical “limitations of legal . . . systems as substitutes for family decision-making.”¹²² No doubt, individual parents can benefit from a robust parental autonomy doctrine. The selflessness engendered by parental love, but undermined if the state dictates the terms of parenting, allows adults to realize what Katharine Bartlett calls “ennobled selves.”¹²³ David Richards suggests that “[c]hild-rearing is one of the ways in which many people fulfill

¹¹⁹ *Id.* at 402.

¹²⁰ Indeed, the family may play an important role in mediating the space between individual and state in order to foster and support difference and democracy at the same time. See Gerald Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1088 (1980) (suggesting that liberalism has undermined “the vitality of all groups that [hold] . . . an intermediate position between what we now think of as the sphere of the individual and that of the state.”).

¹²¹ Buss, *supra* note 107, at 649.

¹²² Fineman, *supra* note 22, at 1214.

¹²³ Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 301 (1988) (citing NED NODDINGS, *CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION* 5 (1984)).

and express their deepest values about how life is to be lived.”¹²⁴ Parenthood thus constitutes a critical source of self-expression for many parents,¹²⁵ but to think of the parental autonomy doctrine as only ensuring the liberty interests of individual parents misses other essential benefits of the doctrine.

Whatever an individual parent may have done to dissipate or undermine her own right to be free from state interference, the child and the polity have a separate interest in keeping the state out. The state is not well-qualified to make child-rearing decisions, there is no evidence that the state is good at it, and when the state does get involved and stay involved, it inevitably undermines the relationships of dependence and trust that are so critical to child development.

Consider the data from contested custody fights. Recall that custody is the one area in which contemporary family law has not resorted to objective formula to resolve disputes within the family. When parents can work out custody arrangements on their own, they keep the family—albeit in a reconfigured form—autonomous, free from state interference. As indicated above, in most states, parents must at least attempt to draft a parenting plan between themselves rather than just let a judge decide a custody arrangement.¹²⁶ It is only when parents do not work it out on their own, that a court must decide a custody schedule and often make individual parenting decisions.

There is ample evidence that once the court gets involved to this extent, children suffer. Custody hearings breed discord between the parents – discord that interferes with their ability to cooperate with each other. Cooperation is the single most important feature of successful shared custody arrangements.¹²⁷ Custody hearings require time and money, time and money that might otherwise be going to the child. Angry parents often use custody hearings as an opportunity to express their anger over a break-up they wish never happened.¹²⁸ What matters most to child well-being is not

¹²⁴ David A.J. Richards, *The Individual, The Family and The Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1, 28 (1980).

¹²⁵ See Katharine K. Baker, *Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection*, 59 OHIO ST. L.J. 1523, 1541–1545 (1998) (describing expressive constitutive benefits to parenting).

¹²⁶ See *supra* text accompanying note 95.

¹²⁷ See Marsha Kline Pruett & J. Herbie DiFonzo, *Closing the Gap: Research Policy, Practice and Shared Parenting*, 52 FAM CT. REV. 152, 161–62 (2014) (stating that shared parenting arrangements require agreement on decision making and parenting time, and that children benefit from shared parenting arrangements when parents can cooperate).

¹²⁸ See generally Esther Rosenfeld & Michelle Oberman with Jordan Bernard & Erika Lee, *Confronting the Challenge of the High Conflict Personality*, 53 FAM. L.Q. 79 (2020) (discussing motives of parents to keep a relationship alive if only through custody proceedings).

the continued relationship with both parents but civility and cooperation between parents.¹²⁹

Parents who do not strive to cooperate with each other do their children a severe disservice, but judges can do little, if anything, to help. Judges simply do not have the power to force parents to behave better. If they use the sticks they have available, by manipulating time with the child or money, they can end up hurting the child's relationship with that parent more. In interfering, judges try to serve the best interest of the child, but they either do not know how or are powerless to change the dynamics that cause the child harm. Thus, interference often does more harm than good.

This is nowhere more evident than in the child welfare system. The child welfare system is designed to ensure that the state protects children from abusive or neglectful situations, but studies of the system give us every reason to doubt judges' ability to determine what is in children's best interest. There is little consistency between child welfare judges when making best interest determinations.¹³⁰ Perhaps afraid of what they do not recognize, judges prove remarkably willing to remove children because of "potential"—not actualized—harm.¹³¹

Children of color make up the majority of children in the foster care system—in numbers that dwarf their percentage in the population. Overwhelming evidence suggests that when the state "protects" low-income children, it disproportionately breaks up families of color (particularly Black and Native American), in the name of "helping" them.¹³² The Children's

¹²⁹ See, e.g., Christy M. Buchanan & Parissa L. Jahromi, *A Psychological Perspective on Shared Custody Arrangements*, 43 WAKE FOREST L. REV. 419 (2008); Cynthia C. Siebel, *Fathers and Their Children: Legal and Psychological Issues of Joint Custody*, 40 FAM. L.Q. 213 (2006), Hon. Arnold F. Blockman, *Survey of Illinois Law: Joint Custody Dilemmas and Vies from the Bench*, 31 S. ILL. U. L.J. 941 (2007) (discussing implementation problems with shared custody and the need for parental cooperation). There is abundant evidence that judicially imposed joint custody does not serve children's interests, even though judges may use joint custody as a default for solving high-conflict disputes over parenting. See generally Nancy Ver Steegh & Dianna Gould-Saltman, *Joint Legal Custody Presumptions: A Troubling Shortcut*, 52 FAM. CT. REV. 263 (2014) (detailing the problems with using joint custody); ELEANOR E. MACCOBY & ROBERT R. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 58 (1992) (suggesting that some courts use joint custody to resolve seemingly irresolvable disputes between the parents, even though children will be ill-served by living with so much conflict between the parents).

¹³⁰ In one study in which established judges were given the same fact patterns, the judges agreed only 25% of the time. ROBERTS, *supra* note 111 at 53. Children in Vermont are twice as likely as children in New Hampshire to be placed in foster care, despite the cases and the demographics of the two states being almost homogenous. *Id.* at 54.

¹³¹ *Id.* at 55.

¹³² See Annette Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 771–72 (2001) (describing the racial composition of the child welfare system).

Bureau of the Child Welfare Information Gateway has developed what it calls a Racial Disproportionality Index (“RDI”), which measures the extent to which certain groups are disproportionately over- or under-represented in the child welfare system. A rating of one indicates that the percentage of children in the foster care system is proportional to the ethnic group’s percentage in the population. In 2014, Black children had an RDI of 1.8, down from 2.5 in 2000. American Indian/Alaskan Native children had an RDI of 2.8. Children who identified with two or more races had an RDI of 1.7. White children have an RPI of 0.8, and Asians of 0.1.¹³³

Poverty has something to do with these numbers. Black children are disproportionately likely to live in low-income households, as are Indian/Native Alaskan children. It is materially and emotionally more difficult to provide for children when one lives in poverty. But the RDI cannot be explained based on poverty alone. One study from Texas concluded that even though Black families tended to be assessed with a lower risk score (which includes factoring in income) than white families, they were more likely to have substantiated cases, and thus be subject to on-going supervision.¹³⁴ Yet the documented incidents of child mistreatment is no greater for Black families than white families.¹³⁵ Moreover, poverty cannot explain why Asian American children are so underrepresented. A substantial number of Asian Americans live in poverty and their income rose even less than Blacks from 2010 to 2016.¹³⁶

Professor Dorothy Roberts argues that “vague definitions of neglect” and “unbridled discretion” open the door for racist bias to permeate the system.¹³⁷ Roberts’ work recounts countless incidents of social workers mistaking difference for neglect. Lacking funding to pay the electric or gas bill, even though it has nothing to do with one’s parenting ability, is often

¹³³ U.S. DEP’T OF HEALTH & HUM. SERVS., CHILDREN’S BUREAU, CHILD WELFARE INFO. GATEWAY, RACIAL DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE 1, 3 (2017).

¹³⁴ *Id.* at 6. “Substantiated” means that the social worker determined that interference was appropriate.

¹³⁵ See ROBERTS, *supra* note 111, at 49–50 (discussing that while abuse in Black families are more likely to be reported, the link between abuse and race is tenuous).

¹³⁶ Rakesh Kochhar & Anthony Cilluffo, *Income Inequality in the U.S. Is Rising Most Rapidly Among Asians*, PEW RSCH. CTR. (July 12, 2018), <https://www.pewresearch.org/social-trends/2018/07/12/income-inequality-in-the-u-s-is-rising-most-rapidly-among-asians/> [<https://perma.cc/UFA5-KUW6>] (showing that in 2016, Asians displaced African-Americans as the group with the greatest income inequality).

¹³⁷ ROBERTS, *supra* note 111, at 55.

treated as neglect and grounds for removing children from their families.¹³⁸ State agents tend to define the norm as something that resembles a white, middle-class life, and anything that deviates from that can be monitored because there is *potential* for harm.¹³⁹ Culture, including household composition, child-rearing customs, parental behavior, and judicial perceptions of what constitutes appropriate family behavior ineluctably affect which children judges think they need to help. When they try to help, these judges undermine the benefits of family autonomy, and there is scant evidence that the interference does children much good.¹⁴⁰

In sum, the doctrine of family autonomy in parent-child relationships respects the unique role that parental love can play in ensuring appropriate child-specific decisions get made on behalf of a child and in fostering relationships of trust between parent and child. That trust breeds a sense of belonging to a particular family unit that allows children to grow into autonomous adults, understanding who they are as individuals and who they are as members of the family from which they come. In addition, family autonomy fosters a respect for pluralism that is essential for a diverse democracy. And finally, in practice, the doctrine of family autonomy reflects the more mundane but vital recognition that courts are not effective caretakers of children. Decisions made on behalf of children inevitably must be executed by parents or caretakers. Thus, judges have minimal power to implement the decisions they make on behalf of children, even if judges do feel confident making those decisions. Child custody disputes and the disturbing state of our child welfare system suggest that the benefits of the doctrine are most obviously seen in its breach. When the judicial system inserts itself into parental decision-making in the name of helping children, the results are at best ineffective and at worst catastrophic for children, parents, and the polity.

¹³⁸ LINDA GORDON, *THE GREAT ARIZONA ORPHAN ABDUCTION* 309 (1999) (arguing that poverty is often confused with neglect).

¹³⁹ Thus, the state can take a six-year-old boy who was still nursing from his mother, even though there was no sign of detrimental effect on the child. See ROBERTS, *supra* note 111, at 55.

¹⁴⁰ See Mark E. Courtney et al., *Midwest Evaluation of the Adult Functioning of Former Foster Youth: Outcomes at Age 26*, CHAPIN HALL U. CHI. (2011), <https://www.chapinhall.org/wp-content/uploads/Midwest-Eval-Outcomes-at-Age-26.pdf> [<https://perma.cc/B9M6-9RUT>] (discussing “poor” outcomes across many domains—including employment, incarceration, poverty, education, mental health—for adults raised in the child welfare system); see generally Joseph R. Doyle, *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583 (2007) (finding that children ages five through fifteen who are removed from families do worse than children who are not removed). See also ROBERTS, *supra* note 111, at 237 (“Excessive state interference in Black family life damages Black people’s sense of personal and community identity.”).

B. Marital Autonomy

Marital autonomy is considerably less well developed as a constitutional concept than parental autonomy. *Griswold* is the one case in which the court has recognized such a concept, though the Court has occasionally addressed why families in general are afforded special treatment. For instance, Justice Blackmun wrote in dissent in *Bowers v. Hardwick*, “we protect the family because it contributes so powerfully to the happiness of individuals.”¹⁴¹ In *Roberts v. Jaycees*, Justice Brennan wrote that “[f]amily relationships by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares . . . distinctively personal aspect of one’s life.” We protect those relationships because “individuals draw much of their emotional enrichment from close ties with others.”¹⁴²

This understanding of family, and the happiness and enrichment it brings, may be particularly important for marginalized groups. Kimberlé Crenshaw writes that “[t]he home is not simply a man’s castle in the patriarchal sense, but may also function as a safe haven from the indignities of life in a racist society.”¹⁴³ Dorothy Roberts explains that family life for women of color is a “site of solace and resistance against racial oppression.”¹⁴⁴ And bell hooks suggests that family life allows black women in particular to “experience dignity, self-worth, and a humanization that is not experienced in the outside world.”¹⁴⁵

These defenses of family autonomy were written by Black women in response to the (mostly white) feminist critique of privacy. It is not that women of color do not care about domestic abuse; it is that Black women are particularly suspicious of state interference, even if justified in the name of helping.¹⁴⁶ “The solution to domestic violence,” writes Anita Allen, “is not to end families and seclusion, but to make better use of evidence of chronic violence.”¹⁴⁷ When there is sufficient distrust of the state, there is robust

¹⁴¹ *Bowers v. Hardwick*, 478 U.S. 186, 205 (1985) (Blackmun, J., dissenting).

¹⁴² *Roberts v. Jaycees*, 469 U.S. 609, 619–20 (1980).

¹⁴³ Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257 (1991).

¹⁴⁴ Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality and the Right of Privacy*, 104 HARV. L. REV. 1419, 1470–71 (1991).

¹⁴⁵ BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 37 (1984).

¹⁴⁶ See also Kimberly Bailey, *It’s Complicated: Privacy and Domestic Violence*, 49 AM. CRIM. L. REV. 1777, 1813 (2012) (discussing the hesitance of domestic violence victims to relinquish their privacy to state authorities).

¹⁴⁷ Anita Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 746 (1999).

support for family autonomy, even if some harms may go unaddressed because of that noninterference.

1. Non-Interference and the Problems of Intimacy

Skepticism about the non-interference doctrine still runs deep, however, likely because of its origins in the unity doctrine, which was rooted in unabashed patriarchy. Because a wife did not exist legally, the state did not have to address any of her concerns.¹⁴⁸

No contemporary court endorses that understanding of unity, but as described in Part I, non-interference lives on today in courts reticence to get involved in the kind of marital decision-making at stake in *McGuire*. One sees this in the formulaic approach to property division and maintenance, explained above. One also sees this in judicial reticence to enforce common law rights and duties within a marriage. This reticence has been critiqued by those concerned about women's welfare.¹⁴⁹

Today, most courts will enforce contracts between spouses as long as the contracts address how to divide the financial incidents of the relationship at its end, as opposed to compensating for labor during the marriage. Prenuptial and post-nuptial agreements, outlining how property and support should be divided in case of divorce, are routinely upheld and courts enforce contracts between spouses for particular assets, like a business or a home.¹⁵⁰ Yet courts strongly resist enforcing contracts for marital services or labor.¹⁵¹ In unpacking why, justifications for marital non-interference emerge.

What follows is not a defense of the justifications courts give for why they do not enforce contracts for marital services or labor. Those arguments are usually weak. Courts usually try to rely on contract doctrine to explain why they are not enforcing intramarital contracts for services, but contract doctrine itself is not the problem: intimacy is. The arguments in favor of non-interference are found in the psychological, economic and political theory literature that explains why and how human behavior in intimate and family relationships differs from behavior outside of those relationships.

¹⁴⁸ See BLACKSTONE, *supra* note 97, at 430.

¹⁴⁹ See generally Antognini, *supra* note 8; see also HASDAY, *supra* note 98.

¹⁵⁰ HASDAY, *supra* note 98, at 91 (“[C]ourts routinely uphold interspousal contracts about property, earnings, cash and nondomestic labor.”).

¹⁵¹ See generally Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65 (1998) (discussing courts reticence to enforce contracts for marital services); see also HASDAY, *supra* note 98, at 69 (“Spouses cannot make enforceable agreements providing that one spouse will pay the other for domestic services, such as housework, childcare, or nursing.”).

Scholars rightly indict courts for claiming that marital contracts cannot be enforced because marital labor is priceless; the parties themselves often give it a price.¹⁵² Courts fail to find consideration even though there is bargaining in abundance.¹⁵³ Courts assume that the parties had duties to do that which they contracted for even though the parties themselves did not make that assumption.¹⁵⁴ As written, the judicial justifications for not enforcing these contracts do not stand up to scrutiny.

In practice, however, the judicial reticence can be seen as an understandable invocation of the non-interference principle. All contracts are incomplete.¹⁵⁵ Contract interpretation always involves filling in that incompleteness with reasonable assumptions about what the parties meant, and/or market-measures of value and/or industry norms of behavior.¹⁵⁶ It is that gap-filler that is so hard to gauge in marital contracts *because* bargains and behaviors tend to be different in families.

People's understandings of entitlement, our conception of what is fair or appropriate, depends upon the domain in which we are operating.¹⁵⁷ What we feel entitled to as members of a family has much more to do with the fact of belonging than any contribution we have made.¹⁵⁸ Psychologists suggest that "an 'exchange orientation' may be inimical to the process of establishing intimacy."¹⁵⁹ Reciprocity norms are not strong among intimates, though they are strong in other domains. "[F]riendship and kinship [can] bestow a license to request help without imposing any imperative obligation to reciprocate."¹⁶⁰ In most contract enforcement, it is the belief in the ubiquity

¹⁵² Antognini, *supra* note 8.

¹⁵³ *Id.*

¹⁵⁴ See, e.g., *Borelli v. Brusseau*, 12 Cal. App. 4th 647, 655 (1993) (refusing to uphold contract in which husband, who did not want to enter a nursing home, contracted with his wife to care for him at home).

¹⁵⁵ See Robert E. Scott & George G. Triantis, *Incomplete Contracts and the Theory of Contract Design*, 56 CASE W. RES. L. REV. 187, 190 (2005) (discussing different ways contracts are incomplete).

¹⁵⁶ See ROBERT E. SCOTT & JODY S. KRAUSE, *CONTRACT LAW AND THEORY* 33–36 (2013) (discussing some of the ways courts fill gaps in contracts); ALLAN FARNSWORTH ET AL., *CONTACTS: CASES AND MATERIALS*, chs. 5, § 6 (7th ed. 2008) (discussing ways in which courts fill gaps in contracts).

¹⁵⁷ See JENNIFER L. HOCHSCHILD, *WHAT'S FAIR? AMERICAN BELIEFS ABOUT REDISTRIBUTIVE JUSTICE* 47–50 (1981).

¹⁵⁸ *Id.*

¹⁵⁹ John G. Holmes & Susan D. Boon, *Developments in the Field of Close Relationships: Creating Foundations for Intervention Strategies*, 16 PERSONALITY SOC. PSYCH. BULL. 23, 27 (1990) (citation omitted).

¹⁶⁰ Lenahan O'Connell, *An Exploration of Exchange in Three Social Relationships: Kinship, Friendship and the Marketplace*, 1 J. SOC. & PERS. RELATIONSHIPS 333, 341 (1984).

of reciprocity norms that allows courts to assess the parties' mutual intent. If those norms are absent, how can courts interpret the parties' bargain?

Some courts suggest that all marital contracts should be unenforceable because marriage and contract are inconsistent.¹⁶¹ I am not suggesting that the non-interference principle is or should be that strong. An explicit, written contract that clearly lays out most of the parties' expectations and obligations can and should be enforced. But judicial reticence to enforce vague, oral and incomplete marital bargains is much more understandable, and recognizing how hard it is for courts to enforce those vague contracts further explains the endurance of the modern non-interference principle.

The bargains one strikes in intimate relationships—where to live, how much to work, how much sex to have, how to raise children, how to play, how to save, how to behave in public—are extremely difficult to analyze in traditional contract terms. What is a decision to move close to one's spouse's parents worth? When can courts assume that goods or services have been bargained for not given as gift? What kind of damages might be associated with not spending enough time with the children even though one promised to do so? What of the spouse who planned to earn considerable money but decided she didn't want to? What of the spouse who promised not to have affairs but couldn't help herself? What of the spouse who was just a jerk? If the duty not to behave in the ways just listed was incurred in some kind of contractual arrangement between the parties, how is the court supposed to assess damages?¹⁶² What is substantial performance?¹⁶³ When are the basic assumptions of the contracts defeated such that losses should fall where they lie?¹⁶⁴ Should we trust judges or juries to determine any of that?

Just as most people balk at assessing, in some objective sense, what should be spent on a child whom they do not know, but whose basic needs are met,¹⁶⁵ so people balk at interpreting what a couple really meant when they entered into any of the above promises. But what the parties "really meant" is the critical question in contract law. The law will enforce what parties

¹⁶¹ See, e.g., *Borelli v. Brusseau*, 12 Cal. App. 4th 647, 655 (1993); HASDAY, *supra* note 98.

¹⁶² A court will not award a remedy if there is no objective way to assess damages. See *Freund v. Wash. Square Press, Inc.*, 314 N.E.2d 419, 421 (N.Y. 1974) ("[D]amages claimed [must] be measurable with a reasonable degree of certainty and, of course, adequately proven.").

¹⁶³ See generally SCOTT & KRAUSE, *supra* note 156, at 780–73 (discussing difficulties with substantial performance doctrine).

¹⁶⁴ If the basic assumption of the contract is no longer operative, losses fall where they lie and there is no remedy. For the paradigmatic case, see *Taylor v. Caldwell*, Eng. Rep. 309 (1863) (destruction of music hall by fire eliminates both parties' obligation to perform because a basic assumption of the contract was no longer viable).

¹⁶⁵ See *supra* text accompanying note 79.

agreed to be *legally* bound to in a bargain, nothing more.¹⁶⁶ Intimacy—not just sex, but the emotional enmeshment that in some sense defines our understanding of familial relationships—does not map easily onto the way in which contract law draws the line between enforceable bargains and conversation.

The nature of intimacy also makes the imposition of tort duties complex. Most states now permit spouses to sue each other in tort, but there are some hold-outs particularly for the tort of intentional infliction of emotional distress. Intimacy makes some infliction of emotional distress on one's partner inevitable and the imposition of duties of care difficult. It is both easier to hurt someone that one knows very well because one knows their vulnerabilities, and it is easier to feel hurt by them because one is being attacked by someone one loves. That recognition is perhaps tragic but it is also mundane: People in intimate relationships purposefully hurt each other all the time. It is not that much of a stretch to suggest that the decision to commit to someone is a decision about whom one wants to intentionally inflict emotional pain on and whom one wants to do it to you. It is that inevitable.

That inevitability stems from the way intimate relationships encourage the transcendence of self. The draw to intimacy for many comes from a desire to transcend self, to merge oneself with another, not just physically but emotionally.¹⁶⁷ As Kenneth Karst wrote, “our intimate associations are powerful influences over the development of our personalities.”¹⁶⁸ They are, or can be, constitutive of who we are. Just as diving into water to save one's child can be felt as an act of self-interest more than altruism, so can coming to the rescue of one's partner.¹⁶⁹ There is robust psychological literature that suggests that healthy relationships retain a bit of Blackstone: Spouses can view themselves as one.¹⁷⁰ That one is not the husband, as Blackstone maintained, but figuring out the nature of what that one is may be well

¹⁶⁶ Of course, parties can also use notions of promissory estoppel to try to secure relief. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. L. INST. 1979) (stating that for promissory estoppel, one does not need to prove an intent to be legally bound, but one does need to prove a promise).

¹⁶⁷ For more on the draw to intimacy, and on intimacy as more about relationship than libido, see RONALD FAIRBARIN, AN OBJECT-RELATIONS THEORY OF THE PERSONALITY 84 (libido is “primarily object-seeking,” not pleasure-seeking.).

¹⁶⁸ Karst, *supra* note 51, at 636.

¹⁶⁹ See MILTON C. REGAN JR., FAMILY LAW AND THE PURSUIT OF INTIMACY 113 (1993) (arguing that self-interest becomes blurred).

¹⁷⁰ *Id.*

beyond the capability of legally trained judges. When the self and the other are blurred, it is harder to figure out who owes what duty of care to whom.

Of course, not all marriages achieve this degree of intimacy. Some married people may not want it. And intimacy can be dangerous, especially for women. Socialized to care for others, women can lose critical sources of self-worth by becoming too enmeshed in relationships.¹⁷¹ This diversity between relationships just makes a judge's job that much harder. Duties of care can readily be seen as more onerous (perhaps one should have a duty to put oneself in danger to rescue a spouse) and less (perhaps one doesn't have to shovel the sidewalk even if one knows one's spouse may need to walk over it). How one understands one's duties in a relationship is a function of that relationship. For sure, the law must set outside boundaries for abuse, as it does with parent-child relationships, but even drawing that outside line is often difficult and implemented in problematically subjective fashion, as the child welfare system suggests.

Consider the case of *Twyman v. Twyman*,¹⁷² in which a Texas court held that spouses could sue each other for intentional infliction of emotional distress. Mrs. Twyman, a sexual assault survivor, alleged that Mr. Twyman inflicted emotional distress on her because he maintained his interest in bondage even after she told him she did not like it because it reminded her of having been raped previously. After being told by his wife that she did not like the behavior, Mr. Twyman never asked her again, though he did have an affair with a woman with comparable interests and he did see a psychologist in whom he confided about his interests. He also told his wife that if she had been willing to engage in bondage, he never would have had the affair. When she found out about the affair, Mrs. Twyman filed for divorce and intentional infliction of emotional distress.

How is a court supposed to address the duties of care in the Twyman case? If he had just left when she said she did not like the bondage, she would have no cause of action. He tried to stay in his marriage notwithstanding his sexual desires. Was that tortious? Would it be tortious if they hadn't been married? Or would the law impose a duty on her to leave? Was it his duty to overcome his fetish because he was married? Does she have a special duty to try to not be scared because she is married? Do we really trust judges to

¹⁷¹ See Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 29–35 (1988) (“For radical feminists, [the] potential for connection—experienced materially in intercourse and pregnancy, but experienced existentially in all spheres of life—is the source of women’s debasement, powerlessness, subjugation, and misery.”).

¹⁷² 855 S.W.2d 619 (Tex. 1993).

decide these questions? Would they have come out the same way if Mr. Twyman had just wanted more sex than Mrs. Twyman had wanted because of her history of abuse? What, doctrinally, would be different about that? Isn't it quite possible they let the cause of action proceed because the sexual act seemed deviant to them? Allowing the law into the relationship invites that result.

The discomfort with the questions above suggests that the justifications for non-interference in marital relationships are rooted in the same kind of practical and pluralistic concerns as is the parental autonomy doctrine. When called on to interpret contract or tort actions between marital parties, courts are called on to assess, objectively, the reasonableness of marital behavior, the content of the parties' mutual intent in coming to agreements, and the extent to which the parties intended to be legally bound. The nature of intimate relationships, in which irrationality, lack of reciprocity, and the subordination of self are the norm, makes legally trained judges particularly ill-suited to determine entitlement and obligation. Just as judges are likely to assess a child's best interest with reference to their own understanding of what a parent is supposed to do, so judges are likely to assess marital relationships with reference to their own understanding of how married people are supposed to act. The diverse ways in which people live their intimate lives make these searches for objective answers illusive.

Respect for marginalized communities also counsels against too much judicial interference. Given the subjectivity and bias that inevitably affects such judicial assessments of intimate behavior, discouraging such judicial interference, by respecting family autonomy, will be particularly important for those in communities that will not seem familiar to a judge. As Professor Kimberly Bailey has shown, Black women, even if they are victims of domestic violence, often prioritize their community attachments over a desire for retribution against a man who abused them.¹⁷³ Black women are all too well aware that inviting the state in, even if it might do some immediate good, is likely to be ineffective, if not more damaging in the end. In the marital as well as the parental area, there are sound reasons for being skeptical of the state's ability to make and implement decisions that will help the people the decisions are ostensibly designed to help.

¹⁷³ See Kimberly D. Bailey, *Lost in Translation: Domestic Violence, "The Personal is Political," and the Criminal Justice System*, 100 J. CRIM. L. & CRIMINOLOGY 1255, 1289–1291 (2010) (describing various reasons, such as dual arrest policies, why Black women distrust state interference into their private lives).

III. FUNCTIONAL FAMILIES AND EQUALITY

We now turn to how the growing calls for more functional analyses in family law undermine the constitutional doctrine of family autonomy and the common law non-interference principle just described. As suggested, these doctrines have always and usually only applied to those with family status, that is, to legal parents and married people. Those two statuses have been related because the marital presumption of paternity vested parental status in the husband of a woman who gave birth. Marriage was the primary route to paternal status (and hence constitutional protection). When most people married, most people stayed married, and the vast majority of the children were born into marriages, linking parental and marital status in this way may not have been problematic. Today, because fewer people marry and stay married and far more people have children outside of marriage, there is tremendous confusion and inconsistency with regard to how the law should determine parental status for anyone other than a woman who gives birth.¹⁷⁴

At the outset, I should emphasize that the argument here is not that functional parents or functional spouses should not be recognized as family members, but that they should not be recognized unless they have taken steps to register their relationships with the state. That registration should be what allows them to invoke a court's jurisdiction in granting them parental or spousal-like rights. At present, particularly in states still hesitant to recognize same sex partners as parents, some functional analyses may be necessary as a transitional matter in order to overcome hostility to same sex partner families. Without access to a registration system, nontraditional families have no ability to secure access to the protection of the family law system unless courts engage in a functional analysis. But the goal should be to minimize functional analyses because of its invasiveness and the way in which it re-inscribes traditional understandings of family.

A. Legal Parenthood

Any study of functional parenthood must begin with an explication of legal parenthood because the incoherence of contemporary legal parenthood doctrine helps explain functional parent doctrine's ascendance. Approximately 60% of children in this country are born to married

¹⁷⁴ The woman who gives birth is almost always deemed the legal parent, unless the woman has signed a legal surrogacy agreement. See UNIF. PARENTAGE ACT ("UPA") § 201(1) (2017) ("A parent-child relationship is established between an individual and a child if . . . the individual gives birth to the child."); *id.* at § 809 (creating an exception for surrogacy agreements).

women.¹⁷⁵ For these children, paternity is established through marriage. Just under 40% of children, but 69% of Black children and 52% of Latinx children are born to unmarried mothers.¹⁷⁶ Of those births to unmarried mothers, 58% are to women who are cohabiting with men they identify as the father.¹⁷⁷ Most of these men, and a considerable number of men who are not cohabiting with the mother, establish paternity by signing a Voluntary Acknowledgement of Paternity (“VAP”).¹⁷⁸ In signing a VAP, a man and the woman who just gave birth usually aver that the man is the genetic father of the child. A VAP is the legal equivalent of a judgment of paternity, though the vast majority of men who sign a VAP do so without knowing for sure that they are the genetic father.¹⁷⁹ This means that most legal determinations of paternity are not dependent on genetics because neither husbands (presumed to be legal fathers) nor VAP signers usually know whether they are the genetic father.

The fact that most paternity is determined independent of genetics sits rather uncomfortably with the law as it is articulated in state parentage acts, all of which have provisions allowing either a man alleging himself to be the genetic father or another party (mother, child, or the state) alleging a man to be the genetic father to sue for paternity based on genetics. The extent to which a finding of genetic fatherhood should trump either the marital presumption or a VAP is increasingly contested,¹⁸⁰ but a genetic connection

¹⁷⁵ See NAT’L CTR. FOR HEALTH STATS., UNMARRIED CHILDBEARING (2021), <https://www.cdc.gov/nchs/fastats/unmarried-childbearing.htm> [https://perma.cc/9LQA-GCZJ] (estimating births to unmarried women in the U.S. at 40% of all births).

¹⁷⁶ Elizabeth Wildsmith, Jennifer Manlove & Elizabeth Cook, *Dramatic Increase in the Proportion of Births Outside of Marriage in the United States from 1990 to 2016*, CHILDREN (Aug. 8, 2018), <https://www.childtrends.org/publications/dramatic-increase-in-percentage-of-births-outside-marriage-among-whites-hispanics-and-women-with-higher-education-levels> [https://perma.cc/8TNX-HSM5].

¹⁷⁷ Marcia J. Carlson, *Families Unequal: Socioeconomic Gradients in Family Patterns Across the United States and Europe*, in UNEQUAL FAMILY LIVES: CAUSES AND CONSEQUENCES IN EUROPE AND THE AMERICAS 21, 30 (Naomi R. Cahn et al. eds., 2018).

¹⁷⁸ In 2009, 1.81 million children were born to unwed mothers and 1.17 million children had their parentage established by a VAP. See OFF. CHILD SUPPORT ENF’T, FY 2009 ANNUAL REPORT TO CONGRESS (2009), <http://www.acf.hhs.gov/css/report/fy-2009-annual-report-congress> [https://perma.cc/7TTF-9PA2].

¹⁷⁹ See Baker, *supra* note 4, at 2049.

¹⁸⁰ See, e.g., In re Donovan L., Jr., 244 Cal. App. 4th 1075 (2016); In re D.S., 230 Cal. App. 4th 1238 (2014); In re J.W., 972 N.E.2d 826 (Ill. App. Ct. 2012); Quiroz v. Gray, 441 S.W.3d 588 (Tex. App. 2014); Mario WW v. Kristen XX, 149 A.D.3d 1227 (N.Y. App. Div. 2017); C.G. v. J.R., 130 So. 3d 776 (Fla. Dist. Ct. App. 2014) (all involving contests between alleged biological father and the man who was presumed father by marriage). See also In re Z.M., No. D069110, 2016 WL 1169246 (Cal. Ct. App. Mar. 22, 2016); In re Custody of C.C., 1 N.E.3d 1238 (Ill. App. Ct. 2013); Frost v.

can still serve as a sole reason for finding parental status. States often rely on the genetic connection to pursue a man for child support.¹⁸¹

Further complicating the relevance of genetics is the law of reproductive technology. The same parentage acts that vest paternity determinations in genetics for children who are conceived sexually use a completely different framework, preconception intent and contract, to extinguish the parental rights and obligations of a gamete provider and vest parental rights and obligations in the receiver of the gametes.¹⁸² So sometimes contract, not genetics or a VAP or marriage, determines parenthood. And, of course, in this country, states have recognized adoption as a valid means of transferring parental status since the nineteenth century.¹⁸³

As the LGBT equality movement gained traction in the late twentieth century, many LGBT couples wanted to parent and be recognized as legal parents, but establishing legal parentage as a couple in the regime just described was often impossible. States that allowed an acknowledged gay man or lesbian to adopt still usually prohibited both members of a same sex couple from adopting. If a lesbian purchased sperm from a sperm bank or a gay man entered into a surrogacy agreement, there was no mechanism for the resulting child to have two parents. When same sex couples could not marry, there was no marital presumption to apply. Same sex partners were not afforded the opportunity to sign VAPs because most VAPs required an averment (rarely scrutinized) that the signer was the genetic parent.¹⁸⁴

To help combat a legal structure that left them no room to establish themselves as joint parents, many gay couples cobbled together various legal documents, reciprocal guardianship papers, wills, parenting agreements and the like, which tried to establish in some objective way their intent to be legal

Wisniewski, 126 A.D.3d 1305 (N.Y. App. Div. 2015); *M.J.M. v. R.M.B.*, 204 So. 3d 366 (Ala. Civ. App. 2016), *cert. denied* Mar. 25, 2016 (all involving contests between alleged biological father and a man who signed a VAP).

¹⁸¹ See *Baker*, *supra* note 4, at 2048 (explaining Congressional efforts to put pressure on states to increase paternity enforcement in order to decrease the number of children receiving federal aid).

¹⁸² For the landmark case, see *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (en banc) (using preconception intent and contract to allocate parental rights in a case of gestational surrogacy).

¹⁸³ See generally *Burton Z. Sokoloff, Antecedents of American Adoption*, 3 *FUTURE CHILD*. 17 (1993) (discussing the history of lawful adoption in the United States).

¹⁸⁴ The 2017 UPA suggests that states now afford a same sex partner—or any other person—the opportunity to sign a “Voluntary Acknowledgement of Parentage.” See UNIF. PARENTAGE ACT § 301 (2017). Instead of emphasizing this means of establishing parenthood for same sex couples, the UPA welcomes a functional analysis. See *id.* at §§ 204(2), 609 (detailing a section on the presumption of parentage when an individual openly holds out the child as the individual’s child (“holding out provision”) and a section on *de facto* parenthood).

parents together.¹⁸⁵ Other gay parents just proceeded to parent together. When couples like this broke up and the couple could not resolve custody and visitation issues on their own, courts were left to decide whether the non-legal parent should be treated as if she had parental status.

Note that this is a different inquiry than the more typical custody or visitation question. Courts were not (and still are not) familiar with deciding whether someone who was not a parent had standing to sue for parental rights. Common law doctrines like *in loco parentis* had sometimes been used by step-parents or other extended family members to assert visitation rights,¹⁸⁶ but those cases were rare. The marital presumption and VAPs answer the vast majority of standing questions. If neither of those presumptions apply, state parentage acts assume that genetics controls the standing question for children conceived sexually and intent controls for children produced with purchased gametes. Those intent-based rules originally assumed that the person receiving gametes in order to parent was either single, in which case parentage acts sanctioned the idea of single parenthood,¹⁸⁷ or married, in which case the spouse of the person receiving the gametes was, after indicating his consent, presumed to be a parent.¹⁸⁸ Same sex cohabitants appeared as neither single (because they were cohabiting in a relationship that resembled marriage) nor married (because they couldn't be). Nor, as discussed, were they able to co-adopt a child. Thus, same sex parents presented a more systemic problem in a world in which same sex parenting was becoming much more common.

Contemporary functional parent doctrines grew out of these situations.¹⁸⁹ In essence, same sex partners of legal parents argued that the law should treat them as legal parents because they had lived as other parents do. As the LGBT Advocacy group GLAD writes on its website: “We believe (as with

¹⁸⁵ See, e.g., *J.A.L. v. E.P.H.*, 682 A.2d 1314 (Pa. 1996) (discussing a situation where a same sex couple executed numerous documents indicating an intent to co-parent).

¹⁸⁶ See, e.g., *Simpson v. Simpson*, 586 S.W.2d 33 (Ky. 1979) (discussing *in loco parentis* doctrine as it applies to step-parents).

¹⁸⁷ See UNIF. PARENTAGE ACT § 702 cmt. (2002) (stating that when an unmarried woman uses donor sperm, the donor is not the parent); *id.* at § 705 (providing that a husband is not a parent in circumstances in which the husband does not consent to his wife's insemination); *id.* at § 706 (providing that a husband is not a parent when the husband's original consent has been formally withdrawn or voided by divorce).

¹⁸⁸ See Katharine K. Baker, *Quacking Like a Duck? Functional Parenthood Doctrine and Same-Sex Parents*, 92 CHI. KENT L. REV. PARENTAGE 135, 171 (2017) (discussing when consent of spouse is needed in cases of non-sexual reproduction).

¹⁸⁹ See NeJaime, *supra* note 8, at 1196–1229 (describing many of the early de facto parenting cases involving same sex couples).

ducks) that if it looks like a family, if it holds itself out as a family, and if it functions like a family, then it is a family.”¹⁹⁰

This aphorism assumes that courts know what a family is. It frames the family status question as one of equality, should the law treat some people who look like X, like X, without acknowledging that courts have never been in the business of defining what X is. Functional arguments asked courts to do that which they had very little experience doing, defining family, in an area in which both constitutional and common law doctrines discouraged any judicial evaluation of the behavior that serves as the evidence for determining whether a family exists.

B. Functional Parenthood

In 1995, Wisconsin became the first state to adopt a functional, or de facto, parenthood test. The court concluded that an individual with a sufficiently “parent-like relationship” with their same-sex partner’s child could be granted visitation right.¹⁹¹ The court enunciated the following doctrine, which provides someone who was not a legal parent with the right to establish standing to sue for parental rights. The non-legal parent had to prove:

- (1) that the biological or adoptive parent consented to, and fostered, the petitioner’s formation and establishment of a parent-like relationship with the child;
- (2) that the petitioner and the child lived together in the same household;
- (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child’s care, education and development, including contributing towards the child’s support, without expectation of financial compensation; and
- (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.¹⁹²

The first element of this test requires the legal parent to “consent[] to . . . the establishment of a parent-child relationship.” Originally, most de facto parenthood tests required some inquiry into the consent or intent of the legal

¹⁹⁰ GAY & LESBIAN ADVOCS. & DEFS., PROTECTING FAMILIES: STANDARDS FOR LGBT FAMILIES (2017), <https://www.glad.org/wp-content/uploads/2017/01/protecting-families-standards-for-lgbt-families.pdf> [<https://perma.cc/4JNX-5SGV>].

¹⁹¹ *Holtzman v. Knott*, 533 N.W.2d 421 (Wis. 1995).

¹⁹² *Id.* at 435–36.

parent,¹⁹³ and those states that resisted adopting a functional approach often did so because they were worried about encroaching on the family autonomy rights of the legal parent who did not consent to sharing her legal rights.¹⁹⁴ For several years, scholars debated the relative importance of intent vs. function,¹⁹⁵ though much of that debate might be better described as a debate about what the intent inquiry is really about. Is it about intent to share legal rights (which is often difficult to prove in the absence of formal documents), or is it about intent to let a “parent-child relationship” develop? The contemporary trend seems to be that courts need not focus on whether the legal parent intended to include her partner in her legal family. Intent to let something that looks like a parent-child relationship develop—usually proved by the existence of the parent-child relationship itself—is enough to confer standing on the non-legal parent.¹⁹⁶

The 2017 Uniform Parentage Act adopts this approach. It requires that the legal parent “fostered or supported [a] bonded and dependent relationship” with the child.¹⁹⁷ California courts, and a growing number of other states¹⁹⁸, had already endorsed tests that focused much more on the existence of a parent-child relationship than on the intent of the legal parent to share legal rights.¹⁹⁸ In 2017, both Maryland and New York overturned previous decisions that had emphasized the importance of finding a legal parent’s intent to share legal rights, and endorsed a more functional

¹⁹³ See ALI PRINCIPLES § 2.03(c) (AM. L. INST. 2000) (requiring a de facto parent to demonstrate “the agreement of a legal parent to form a parent-child relationship” absent “a complete failure . . . of [the] legal parent to perform caretaking functions”).

¹⁹⁴ See, e.g., *Janice M. v. Margaret K.*, 948 A.2d 73, 88–89 (Md. 2008) (relying on Maryland caselaw, which in turn had relied on the Supreme Court’s most recent parental autonomy decision in *Troxel v. Granville*, to hold that even an individual qualified as a de facto parent must have exceptional circumstances to overcome visitation or custody rights over the objection of a legal parent); *Debra H. v. Janice R.*, 930 N.E.2d 184, 189–191 (N.Y. 2010) (citing *Troxel v. Granville*, 530 U.S. 57 (2000)) (summarizing New York cases that articulate strong parental rights).

¹⁹⁵ See, e.g., Carlos A. Ball, *Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding Behind the Façade of Certainty*, 20 AM. U.J. GENDER, SOC. POL’Y & L. 623, 659 (2012) (“[T]he issue of intent may not always be clear It seems highly relevant . . . to determine whether the party who lacks a biological or adoptive connection of the child functioned as a parent . . .”).

¹⁹⁶ See *Joslin*, *supra* note 8, at 955–960 (discussing the evolution of functional approaches in several states); *NeJaime*, *supra* note 8, at 319–23 (describing the development of functional approaches in family law).

¹⁹⁷ UNIF. PARENTAGE ACT § 609(c)(6) (2017).

¹⁹⁸ See, e.g., *Elisa B. v. Superior Ct.*, 117 P.3d 660, 670 (Cal. 2005) (finding the petitioner was the “presumed mother . . . because she received the children into her home and openly held them out as her natural children . . . [and] voluntarily accepted the rights and obligations of parenthood”); *Chatterjee v. King*, 280 P.3d 283, 293 (N.M. 2012) (finding state parentage laws apply to a mother who “is seeking to establish a natural parent and child relationship with a child whom she has held out as her natural child”).

approach that emphasized the existence of a parent-child relationship. Both state high courts suggested that the Supreme Court's decision in *Obergefell v. Hodges* might compel their decision to rely on function, thus underlining the link between equality and functional analyses.¹⁹⁹

Presumably, the high courts of New York and Maryland read *Obergefell* to require that same sex partners be treated as opposite sex partners, though the courts ignored how their equality analysis might affect the link between genetics and parenthood. In the absence of a functional assessment, a same sex partner who is not genetically or legally related to her partner's child is treated just as an opposite partner who is not genetically or legally related to his partner's child. Neither has a non-functional path to legal parenthood. In finding that equality doctrine compels acceptance of functional parenthood, the courts seem to be saying that a partner who *is not* genetically related to her partner's child must be treated as a partner who *is* genetically related to his partner's child. Again, this is hard to reconcile with parentage acts that root parenthood in genetics.²⁰⁰ Genetic connection triggers responsibility for child support in opposite-sex partners, regardless of desire or intent to parent.

By the time the 2017 Parentage Act was adopted and many states endorsed functional parenthood, same-sex couples had access to formal mechanisms for securing parental rights for both partners. The Supreme Court has now held that states must treat married same-sex couples the same way they treat married opposite sex couples, thus making the marital presumption available to all same-sex married couples.²⁰¹ Married same-sex

¹⁹⁹ *Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488, 498 (N.Y. 2016) (suggesting that the court's previous decision rejecting functional parenthood was "unsustainable" in light of *Obergefell*); *Conover v. Conover*, 146 A.3d 433, 448 (Md. 2016) (suggesting the Maryland legislature's adoption of same sex marriage "undermined" the courts previous rejection of functional parenthood).

²⁰⁰ The court in *Brooke S.B.* grounded its decision more in intent to parent than function, but as Professor NeJaime has explained, it suggested that *Obergefell* and LGBT equality may demand nonbiological paths to parenthood for same-sex couples who are not married or do not adopt. See Douglas NeJaime, *The Story of Brooke S.B. v. Elizabeth A.C.C.: Parental Recognition in the Age of LGBT Equality*, in *REPROD. RTS. & JUST. STORIES* 245, 263 (Melissa Murray, Katherine Shaw & Reva B. Siegel eds., 2019). If equality demands opening up those paths to parenthood for same-sex couples, one might ask why biologically related parents—especially men who have no say in a pregnancy termination decision—shouldn't have the right to walk away from a child in the same way a non-biologically related same-sex partner can. In other words, the court's language in *Brooke S.B.* may demand the elimination of paternity doctrine.

²⁰¹ See *Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017) (holding that states must treat married same-sex couples the same way they treat married opposite sex couples and therefore make the marital presumption available to same-sex married couples). If, as some people fear, a conservative federal judiciary will resist enforcing a robust understanding of *Pavan*, then the need for functional analyses may be more compelling.

partners can adopt everywhere.²⁰² In most states, it is no harder for an unmarried LGBT individual whose partner conceives with purchased gametes than it is for an unmarried straight person whose partner conceives with purchased gametes to establish legal parenthood. In both cases, courts look to pre-conception intent to share parenting, best established with a formal legal proceeding, like marriage or adoption or a signed parenting agreement.²⁰³ Still, in the name of equality, functional parenthood advocates suggest that such formal mechanisms of establishing family status should not be required and that courts should endeavor to determine whether a family relationship existed in order to determine parental status.

In suggesting that courts should focus on whether the petitioning party developed a parent-child relationship, courts and commentators must be assuming, as the GLAD pamphlet cited above does, that judges know what a parent-child relationship is.²⁰⁴ The next section questions how judges might know that and whether we should be comfortable with judges' ability to recognize parent-child relationships.

1. Functional Parent Doctrine's Narrow Definition of Family

Children in this country are raised in many different kinds of what one might call families and by many people whom one might or might not call parents. Non-white children are much more likely than are white children to be raised in "kinship groups," which include multi-generational households related by blood or marriage²⁰⁵ and can also include "fictive kin"—defined as people who are not related by blood or marriage but have

²⁰² See *Same-Sex Adoption*, ADOPTION NETWORK, <https://adoptionnetwork.com/types-of-adoption-options/same-sex-adoption/> [https://perma.cc/8XPL-6J7K] (last visited Apr. 20, 2022) ("As of 2016, LGBTQ adoption was effectively made legal in all 50 U.S. states.").

²⁰³ See, e.g., *Ferguson v. McKiernan*, 940 A.2d 1236, 1248 (Pa. 2007) (using an intent standard to enforce an agreement that the sperm donor not be held liable in paternity, even though the parties had had a sexual relationship previously). Admittedly, some states seem more hesitant to enforce these contracts than others. Compare *E.E. v. O.M.G.R.*, 20 A.3d 1171, 1172 (N.J. Super. Ct. Ch. Div. 2011) (refusing to enforce a contract in which sperm donor and mother agreed that the donor would not be the legal father) with *A.A.B. v. B.O.C.*, 112 So. 3d 761, 762 (Fla. Dist. Ct. App. 2013) (enforcing an oral contract disclaiming legal parenthood even though the sperm donation was "do-it-yourself").

²⁰⁴ See GAY & LESBIAN ADVOCS. & DEFS., *supra* note 190.

²⁰⁵ C. Quince Hopkins, *The Supreme Court's Family Law Doctrine Revisited: Insights from Social Science on Family Structures and Kinship Change in the United States*, 13 CORNELL J.L. & PUB. POL'Y 431, 433–34 (2004) (defining kinship group).

“reciprocal social or economic relationship[s].”²⁰⁶ Studies indicate that 25 to 44% of Black Americans live in kinship groups,²⁰⁷ compared to only 11% of white Americans.²⁰⁸ Approximately 57% of Black children and 35% of Hispanic children, but only 20% of white children spend time as children living in an extended family.²⁰⁹ Many of these Black children are informally adopted by relatives, a process that usually involves relatives registering as guardians with the state in order to make decisions on behalf of the child.²¹⁰ Latinx and Native American children are also much more likely than white children to be raised by extended families and kinship groups.²¹¹

In *Moore v. City of East Cleveland*, the Supreme Court encountered one of these Black kinship groups in a household including a grandmother, one of her sons, his son, and another grandson.²¹² The municipal ordinance at issue in *Moore* did not define family in a manner that included an adult uncle and nephew, even if the grandmother was considered a family member to everyone in the household. The Court held that the Moore family had a constitutional right to live together because the East Cleveland ordinance impermissibly “slice[d] deeply into the family itself” and the City could not

²⁰⁶ Signithia Fordham & John U. Ogbu, *Black Students’ School Success: Coping with the “Burden of ‘Acting White’”*, in MINORITY STATUS, OPPOSITIONAL CULTURE & SCHOOLING 593, 601 (John U. Ogbu ed., 2008).

²⁰⁷ See, e.g., Darlene B. Hannah, *The Black Extended Family: An Appraisal of its Past, Present, and Future Statures*, in THE BLACK FAMILY: PAST, PRESENT, & FUTURE 33, 35 (Lee N. June ed., 1991) (estimating 25% to 33%); Cynthia G. Hawkins-León, *The Indian Child Welfare Act and the African American Tribe: Facing the Adoption Crisis*, 36 BRANDEIS J. FAM. L. 201, 210–11 (1998) (“[F]orty-four percent of African Americans live in an extended family situation, whereas only eleven percent of whites reflect a similar family structure.”).

²⁰⁸ Hawkins-León, *supra* note 207, at 210.

²⁰⁹ Cristina J. Cross, *Extended Family Households Among Children in the United States: Differences by Race/Ethnicity & Socio-economic Status*, 72 J. DEMOGRAPHY 235 (2018); see also Mandira Banerjee, *More than One-Third of American Kids Have Lived in Extended Family Households*, U. MICH. NEWS (Jan. 14, 2019), <https://news.umich.edu/more-than-one-third-of-american-kids-have-lived-in-extended-family-households/> [<https://perma.cc/WE3V-6D3K>].

²¹⁰ See, e.g., *Guardianship*, CAL. CTS., (last visited Apr. 20, 2022), <https://www.courts.ca.gov/selfhelp-guardianship.htm> [<https://perma.cc/W85F-AJAZ>]. For estimates on the number of Black children who are informally adopted, see Robert B. Hill, *Institutional Racism in Child Welfare*, in CHILD WELFARE REVISITED: AN AFRICENTRIC PERSPECTIVE (Joyce E. Everett, Sandra P. Chipungu & Bogart R. Leashore eds., 2004) 57, 69 (estimating 80% of Black children not living with either parent are informally adopted); ANDREW BILLINGSLEY, CLIMBING JACOB’S LADDER: THE ENDURING LEGACY OF AFRICAN-AMERICAN FAMILIES 30 (1992) (estimating 15% of Black children are informally adopted). In order to perform basic tasks for the child, registering her for school or childcare or free lunches or getting medical treatment, informal adopters must fill out guardianship papers.

²¹¹ For information relating to Latinx communities, see Michael J. Higdon, *The Quasi-Parent Conundrum*, 90 U. COLO. L. REV. 941, 971–973 (2019).

²¹² 431 U.S. 494 (1977).

“standardiz[e] its children—and its adults—by forcing all to live in certain narrowly defined family patterns.”²¹³ In his concurrence, Justice Brennan explained that “[t]he Constitution cannot be interpreted . . . to tolerate the imposition by government upon the rest of us of white suburbia’s preference in patterns of family living.”²¹⁴

As I detail below, functional parenting analyses usually require precisely what Justice Brennan suggested the Constitution prohibits. In determining whether a parent-child relationship exists, courts routinely import nuclear, binary, sexual and heteronormative understandings of what parenting is. The losers under this regime are not just the legal same-sex parent (for whom one may not have much sympathy) who has to share rights with an ex-partner, but also all non-normative families, kinship groups and others who want the autonomy and privacy to be treated as a family even though they don’t conform to white suburbia’s living patterns.

a. Dyadic, Sexual, “Natural” and Broken Families

Either explicitly or implicitly, functional parent analyses lionize a dyadic understanding of parenthood. Often courts do this explicitly, invoking a public policy in favor of two parents.²¹⁵ The 2017 Uniform Parentage Act and the most recent California Parentage Act, while offering an option for a court to find more than two parents, suggests that such situations should be rare.²¹⁶ The Acts do not explain why it should be easier to find a second than a third parent. A significant percentage of children in this country are raised by one or more than two parent(s). There may be sound reasons for a two-parent policy—it reduces the number of adults who can invite the law into parenting relationships—but to acknowledge the legitimacy of that reason is to question whether courts should be engaging in functional analyses at all. It is also an argument for the robust protection of single parent rights because respecting the legitimacy of a single parent model would be the best way to

²¹³ *Id.* at 498, 506.

²¹⁴ *Id.* at 508.

²¹⁵ *See, e.g.,* *Elisa B. v. Superior Court*, 117 P.3d 660, 669 (Cal. 2005) (stating that the paternity statute reflects a legislative preference for two parents); *Chatterjee v. King*, 280 P.3d 283, 292 (N.M. 2012) (citing *In re Parentage of Robinson*, 890 A.2d 1036, 1039, 1042 (N.J. Super. Ct. Ch. Div. 2005)) (“[T]he state has a strong interest in ensuring that a child will be cared for, financially and otherwise, by two parents.”).

²¹⁶ UNIF. PARENTAGE ACT § 613 (2017); CAL. FAM. CODE §7612(c) (West 2018). The comments to the alternative option included in the UPA that permits a finding of more than two parents require courts to find that the failure to award parental rights to a third parent would cause harm to the child. UNIF. PARENTAGE ACT § 613 cmt. (2017). This is harder to prove than that maintaining the relationship would be the in child’s best interest.

minimize legal interference into parenting relationships.²¹⁷ Instead of acknowledging these tensions, most courts just assume that two is the right number.

Judges also seem strangely willing to accept a functional parent's suggestion that she was too busy to execute legal documents, like guardianship or adoption papers, or co-parenting agreements, that would have indicated a clear intent to create a legal family.²¹⁸ That judges think it normal and excusable to dispense with formalities before one assumes parental responsibility says much about where judges' understanding of legal parenthood comes from. The only legal parents who do not have to execute a formal document indicating parenthood or decision-making authority on behalf of a child are spouses of women who give birth.²¹⁹ This is a class that is overwhelmingly male, white, and heterosexual. For them, but not for anyone else, legal parenthood is "natural"; it happens even if they do nothing formal. In contrast, millions of unmarried men sign VAPs and millions of grandmothers and neighbors and sisters and uncles execute guardianship papers.²²⁰ This group is overwhelmingly people of color. They realize they have to register with the state if they expect the state to honor their parental decision-making.

Perhaps most telling in judicial discussions of functional parenthood is courts' implicit understanding of why they are being drawn into the child's life. In *Frazier v. Goudschaal*, the Kansas Supreme Court explained that judicial interference on behalf of a same-sex partner was necessary because the "family unit fail[ed] to function."²²¹ The New Mexico Supreme Court

²¹⁷ Courts often resist single parenthood if a genetic father wants to claim parenthood. In sperm donor situations, courts seem far more interested in the genetic father's professed intent to be a parent than the mother's intent that he not be. Susan B. Boyd, *Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility*, 25 WINDSOR Y.B. ACCESS JUST. 63, 85 (2007). Adding a genetic father is often not seen as "tak[ing] away anything from the family . . . it only adds to it." Jenni Millbank, *The Limits of Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family*, 22 INT'L J.L. POL'Y & FAM. 149, 162 (2008) (emphasis removed).

²¹⁸ See *Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488, 490 (N.Y. 2016); *Sinnot v. Peck*, 180 A.3d 560, 562 (Vt. 2017) for examples of courts accepting the idea that the parties were too busy to formalize any parental relationship.

²¹⁹ Mothers fill out birth certificates in the hospital. Guardians must file formal papers. See *Guardianship*, *supra* note 210. Adopters go through extensive legal proceedings. Those who become parents through reproductive technology sign extensive legal contracts. Unwed fathers sign VAPs. See *supra* text accompanying notes 179–183.

²²⁰ Guardianship is not the equivalent of adoption, but it is a formal process through which the legal parent makes clear that she is sharing parental responsibility with someone else.

²²¹ 295 P.3d 542, 552 (Kan. 2013). In this case, the parties signed a shared parenting agreement, so one could argue that the legal family the parties deliberately created had broken down. But the court did not enforce the parenting agreement, it assessed the relationship separately.

in *Chatterjee v. King*, cited the state's interest "in the integrity of the family."²²² How are these courts defining family? Certainly not in the way that comports with the Moores of East Cleveland, who claimed that they were functioning just fine as the unit they were, even though there were not two parents in the household.²²³ Not in the way that comports with how ethnographers of the inner city describe parenting, as a job carried out primarily by one parent, with perhaps help from other kin, because that is what both the genetic fathers and "the community at large" have come to understand as best for the child.²²⁴ Not in the way that comports with how many single parents by choice, women and men who decide to parent on their own after purchasing gametes, or women who simply choose not to go after the genetic father of their child for child support, define their own family.²²⁵ These other kinds of families do not consider themselves broken. They are single or intergenerational by design.

In assessing the strength of the bond between the non-legal parent and the child, courts also routinely mention the past romantic relationship between the non-legal parent and the legal parent. While the requirement of a romantic relationship is rarely part of the official tests for functional parenthood, the vast majority of the decisions involving same sex couples mention the length of time that the adult parties were together in an intimate (presumably sexual) relationship.²²⁶ Advocates and judges may be invoking that sexual relationship as an indirect way of making an equality argument (i.e., same sex people who sleep together and have children should be treated as opposite sex people who sleep together and have children) but conflating co-parenthood and sex is inherently heteronormative. In the name of LGBT equality, courts assume a connection between a sexual relationship and a co-parenting relationship even though that connection was not what produced the children in any of these cases and is no longer necessary for anyone to

²²² 280 P.3d 283, 290 (N.M. 2012).

²²³ *Moore v. East Cleveland*, 431 U.S. 494, 498 (1977).

²²⁴ KATHRYN EDIN & MARIA KEFALAS, *PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE*, 66–68 (2005).

²²⁵ See *Baker*, *supra* note 4, at 2079–80 (describing the growing number of women who decide that "it is easier for them and better for the child to just parent alone").

²²⁶ See, e.g., *In re Madelyn B.*, 98 A.3d 494, 496 (N.H. 2014) (couple was "romantically involved"); *In re Elisa B.*, 117 P.3d 660, 663 (Cal. 2005) (couple lived in a "lesbian relationship"). Often, courts simply use the word "relationship" euphemistically, stating that the parties were in a "relationship." See, e.g., *Sinnott v. Peck*, 180 A.3d 560, 561 (Vt. 2017) ("relationship"); *Holtzman v. Knott*, 533 N.W.2d 419, 421 (Wis. 1995) ("close committed relationship"); *Chatterjee v. King*, 280 P.3d 283, 284 (N.M. 2012) ("committed, long-term domestic relationship"). Perhaps these courts would have used the same language to describe a platonic arrangement between the parties, but that seems unlikely.

produce a child. When courts find the romantic relationships of the legal parent relevant to a parent-child of the non-legal parent child, courts delegitimize parenting relationships that might be non-sexual by design.

Defenders of functional analysis would likely argue that that the functional inquiry becomes necessary in these alternative families by design whenever the established parenting patterns change. So if there were originally three parents by design or two non-romantically involved parents acted as parents but the original relationships break down, then courts should get involved to protect the child. To put this in the language of the Kansas court in *Frazier*, whenever there is a change in composition of a group that has functioned as a family, the family is “broken.”

This approach would eviscerate family autonomy for most children born outside of marriage. One extensive longitudinal study of low income non-marital child-rearing found that 45% of genetic mothers and 47% of genetic fathers have another child with a different partner by the time their first child is five years old.²²⁷ Given the changing living patterns of adults, especially non-elite adults, who are much less likely to marry, much more likely to have children with more than one sexual partner and much more likely to cohabit with multiple individuals over their lifetime, a rule that justifies state interference whenever there is a change in the status quo is a rule that destroys any notion of family autonomy or non-interference in non-elite communities—the communities for whom some notion of home and privacy is likely to be most important. These are also the communities in which judicial refusal to honor parental autonomy has been the most devastating.²²⁸

2. *For the Sake of the Child*

The ubiquitous justification for vesting judges with all this power is that courts must be concerned, primarily, with protecting the best interest of the child. Professor Courtney Joslin suggests that it is concern for the child’s well-being that prompts courts to dispense with the formalities of intent and legal registration of parenthood.²²⁹ Professors Clare Huntington and Elizabeth Scott write that “[a]llowing a legal parent to exclude a de facto parent would disrupt one of a child’s central relationships, which robust

²²⁷ Sara S. McLanahan & Irwin Garfinkel, *Fragile Families: Debate, Facts and Solutions*, in MARRIAGE AT THE CROSSROADS: LAW, POLICY, AND THE BRAVE NEW WORLD OF TWENTY-FIRST-CENTURY FAMILIES 142, 152–154 (Marsha Garrison & Elizabeth S. Scott eds. 2012).

²²⁸ See *supra* text accompanying notes 130–137.

²²⁹ See Joslin, *supra* note 8, at 964 (speaking of the “growing appreciation that [formalities] . . . often harmed children”).

research shows would create a risk of serious harm.”²³⁰ These scholars have considerable confidence in courts’ ability to dive responsibly into inquiries they have never made before—determining whether a particular relationship qualifies as parental—and swim in waters that the constitutional autonomy doctrine and the non-interference principle caution them to avoid.

It is not at all clear that judges know what they are doing—though they are curiously confident about their ability to recognize “strongly formed”²³¹ and “profound”²³² bonds and “bonded and dependent” relationships.²³³ They seem sure that they know the difference between these kinds of bonds and the bonds a child might form with a paid caretaker, or a grandmother or a sibling. The ALI, citing nothing but the need to do so, explicitly excluded people who received pay for caretaking from asserting *de facto* parenthood.²³⁴ The New Jersey Supreme Court, citing nothing, opined that the requirement of a “profound bond” would exclude claims of paid caretakers.²³⁵

Many young children, regardless of how many legal or functional parent-like figures they may have in their lives, spend far more waking hours with non-parental caretakers than anyone else. They develop routines and loving relationships with aunts, cousins, neighbors, fictive kin and paid caretakers. Parents with the social and financial resources to do so try to choose a caretaker that will develop those kinds of bonds with their children. How are judges so confident they know which bonds are parental? Is it really the bond they are protecting or the interest of the person who invested in caretaking without getting paid?²³⁶

In defending their decisions, courts and commentators routinely invoke data showing that children suffer when important psychological relationships

²³⁰ Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood for the Twenty-first Century*, 118 MICH. L. REV. 1371, 1425–26 (2020). Huntington and Scott, while mostly sympathetic to robust parental rights, suggest that functional parents are different because from a child’s perspective, “the adult who has been acting as a parent *is* a parent.” *Id.* One might question when, whether, and how children appreciate the difference between someone acting like a parent and someone acting like a caretaker or aunt or grandmother.

²³¹ *Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488, 498 (N.Y. 2016).

²³² *V.C. v. M.J.B.*, 748 A.2d 539, 552 (N.J. 2000).

²³³ UNIF. PARENTAGE ACT § 609(d)(6) (2017).

²³⁴ ALI PRINCIPLES 70 §2.03(1)(c)(ii)(B) (AM. L. INST. 2000) (“[A] *de facto parent* is an individual . . . who . . . for reasons primarily other than financial compensation . . . regularly performed a share of caretaking functions.”).

²³⁵ *M.J.B.*, 748 A.2d at 552.

²³⁶ If what courts are protecting, despite their language, is not the bond a child experiences, but the adult who invested in that bond, then one might think the court could be stricter about demanding that the adult who expects the state to protect her interest registers with the state first.

are disrupted. Judges use words like “heartbreaking”²³⁷ to describe the child’s plight if its relationship with the functional parent is severed. And Professors Huntington and Scott are right, there is data showing that children are hurt when relationships are disrupted. But the proper analysis under a best interest test is not just whether the child will be hurt by severing the bond with the functional parent. The question the judges should be asking themselves is far more difficult to answer. In determining what is in the child’s best interest in these cases, courts should weigh the pain of losing a meaningful relationship against the cost to the child of being brought up in an unstable environment with significant parental discord. The more adults a court vests with parental rights, the more unstable that environment. The data showing how difficult it is for children to navigate highly contentious relationships between their parents is just as daunting as the data showing that children are hurt when existing relationships are disrupted.²³⁸

The acrimonious process, theoretically necessary in order to protect the child in the functional parent analysis, often ends up hurting the child. As noted above, part of what has motivated an increasingly hands-off approach to most custody determinations is the recognition that effective cooperation between parents is probably the most important factor in child well-being.²³⁹ If the parties are in court fighting over a functional parent’s rights, the parties have already demonstrated their inability to cooperate effectively as co-parents. It is easy to say that the severing of a very important relationship will hurt a child. It is much harder to conclude that severing that relationship will be worse than the cost to the child of being placed in the middle of a toxic relationship between two adults who have proved themselves incapable of working it out on their own. This reflects the practical execution concerns that animates the family autonomy doctrine. Child-rearing decisions must be mediated through a parent. If that parent is going to resist cooperating, with the court or another parent, it is highly unlikely that the judicial intervention will be successful and that the child will be well-served.

²³⁷ See, e.g., *Sinnott v. Peck*, 180 A.3d 560, 573 (Vt. 2017); *Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488, 491 (N.Y. 2016).

²³⁸ See Marsha Kline Pruett & J. Herbie DiFonzo, *Closing the Gap: Research, Policy, Practice, and Shared Parenting*, 52 FAM. CT. REV. 152, 153–54 (2014) (explaining that shared parenting is not always appropriate); Paul R. Amato & Joan G. Gilbreth, *Nonresident Fathers & Children’s Well-Being: A Meta-Analysis*, 61 J. MARR. & FAM. 557, 558–559 (1999) (explaining that if quality of parental involvement is not high, contact may not be that positive to child’s welfare); Janet R. Johnston, *High-Conflict Divorce*, in 4 THE FUTURE OF CHILD. 165, 174 (1994) (describing how high conflict after separation significantly impedes children’s adjustment).

²³⁹ Jeffrey T. Cookston et al., *Effects of the Dads for Life Intervention on Interparental Conflict and Coparenting in the Two Years After Divorce*, 46 FAM. PROCESS 123, 123 (2006).

And then there is the temporal problem that afflicts every contested parenting dispute. In functional parent cases, courts must not only resolve deeply contested facts about whether a family ever existed, it must try to determine whether that family existed by assessing, as Professor Millbank notes, “roles that . . . are no longer being performed, or no longer being performed in the same way, or are being performed by others[.]”²⁴⁰ In two particularly divisive functional parent cases, the courts eventually found that the best interest of the child would not be served by continued contact, despite the finding that the functional parent had proved the necessary relationship.²⁴¹ Parties move on; new relationships develop.²⁴² Enforcing past relationships can do more harm than good by the time a case is decided. So a child is the subject of bitter, expensive, protracted litigation for nothing.

All of this invasive, possibly self-defeating inquiry into functionality could be avoided if reformers worked to routinize formal registration procedures instead of normalizing judicial evaluation of functional parenthood. As various commentators have suggested, a Voluntary Acknowledgement of Parentage system, rooted not in genetics or marriage, but in the mutually expressed intent to be legal parents, could establish legal parenthood as solidly and efficiently as does a current VAP.²⁴³ Instead of getting mired in an incoherent hybrid system of genetics, marriage, contract, and function, the law could require everyone to acquire legal parental status in the same

²⁴⁰ Millbank, *supra* note 217, at 151.

²⁴¹ *V.C. v. M.J.B.*, 748 A.2d 539, 545 (N.J. 2000) (asserting that visitation was not in child’s interest because of the demonstrated animosity of the parents toward each other); *A.H. v. M.P.*, 857 N.E.2d 1061, 1073 (Mass. 2006) (stating that the child’s best interest not served by visitation).

²⁴² Multi-partner fertility is now the norm for many straight cohabitants, thus making the execution of any functional parent rights complicated. Re-coupling is common for both straight and gay couples. *See Baker*, *supra* note 4, at 2075.

²⁴³ The 2017 UPA begins this process by expanding the VAP process to include presumed parents and intentional parents. As a result, it makes the process available to both men and women. *See UNIF. PARENTAGE ACT §301* (2017) (“A woman who gave birth to a child and an alleged genetic father of the child, intended parent under [Article] 7, or presumed parent may sign an acknowledgment of parentage to establish the parentage of the child.”) But the UPA does not suggest that the VAP process should supplant the confusing mix of genetics, marriage and contract that currently governs so much of parentage law. For other commentators suggesting something like a Uniform Acknowledgment of Parentage, *see* Leslie Joan Harris, *Voluntary Acknowledgements of Parentage for Same-Sex Couples*, 20 AM. U.J. GENDER, SOC. POL’Y & THE L. 467, 475–78 (2012) (advocating making VAPs available to same sex partners); Baker, *supra* note 188 at 161 (stating that VAPs should be available to same sex partners); NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 134 (2008) (suggesting a registration system); Courtney G. Joslin, *Travel Insurance: Protecting Lesbian and Gay Parent Families Across State Lines*, 4 HARV. L. & POL’Y REV. 31, 43–45 (2010) (advocating for a registration system to protect parental rights of gay parents).

way.²⁴⁴ Judicial evaluation of parenting behavior would become necessary only when the people who had formally agreed to share parental responsibilities were incapable of compromising.

Registered family units, be they intergenerational, asexual, multi-partied, single parent, low or high income, would be entitled to the autonomy that the Supreme Court has said families deserve. This system would not only eliminate the need for functional analyses, it could bolster family boundaries for low income families. By registering, these families, like those with higher income, would make clear that they were entitled to a robust version of family autonomy, one which could serve as a defense against state attempts to follow its money and interfere with low income family decision-making.²⁴⁵

To be clear, registration still requires states to define family. To again quote Martha Nussbaum, “it is the state who says what [family] is and controls how one becomes a member of it.”²⁴⁶ But *how* the state comes to define family affects how much autonomy families are afforded as families. With a registration system, either legislatures or administrative bodies would have to decide various questions—for example, how many people could register as parents of one child, who would be eligible to do so, would there have to be consensus among all potential parents, and whether registration rights wane over time. Judges would not be deciding who is a parent on an ad hoc, ex post, case-by-case basis. The registration approach thus has two clear advantages from the standpoint of family autonomy. First, a more transparent, broad, and democratically accountable body would be defining parenthood,²⁴⁷ and second, there would be little need for invasive individualized assessment of any particular parent-child relationship.

²⁴⁴ Many states would probably still vest initial parenthood in the woman who gives birth (unless she has signed a previous surrogacy agreement). Vesting her with these rights could be seen as an appropriate appreciation of the far greater work she does in producing the child. For an explanation, see Katharine K. Baker, *Bargaining or Biology: The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL’Y 1, 46–48 (2004). Alternatively, courts could require women who give birth to sign a Voluntary Acknowledgement of Parentage also. Then all non-adoptive parents would be subject to the same registration system for parentage.

²⁴⁵ See MALCOLM X & ALEX HALEY, *supra* note 105 (describing a time when the state became involved in family affairs regarding welfare checks which resulted in Malcolm X and his siblings being sent to foster care).

²⁴⁶ Nussbaum, *supra* note 19, at 61.

²⁴⁷ Some judges are elected and administrators are not, but administrative agencies answer to legislatures or executives and judicial elections are notoriously non-transparent. Most elected judges are forbidden from making promises that “appear to commit them with respect to . . . issues.” See AM. JUDICATURE SOC’Y, *JUDICIAL CAMPAIGNS AND ELECTIONS—CAMPAIGN CONDUCT* (2020) (outlining ethical requirements for elected judges). As Richard Posner has

C. Marriage

The contemporary call for more recognition of functional marriage is distinct from the call to recognize functional parenthood, but it shares many of the same attributes.

1. Nonmarriage Equality

The trend to recognize functional marriage has a different history and often serves different constituencies than the trend to recognize functional parenthood. As just explained, most of the movement to functional parenthood grew out of the LGBT equality movement. While there is some overlap with the LGBT movement for equality in the modern call to recognize functional marriage, that overlap is not as strong as it is with parenthood. But as with functional parenthood, the case for functional marriage often sounds in equality: it involves the same invasive, fact-based inquiries, it implicitly imports the same class-based understanding of normative family life, and its continued application runs roughshod over the family autonomy and non-interference doctrines.

In contemporary scholarship, functional marriage is often referred to simply as “nonmarriage.”²⁴⁸ Some have argued that the law should recognize nonmarriage as a means of ensuring gender equality, in order to protect women who tend to disproportionately invest in non-market work and develop interdependencies within relationships.²⁴⁹ A related gender equality concern encourages courts to recognize non-marriage so as to allow women the freedom to reject the gendered, patriarchal legacy of marriage.²⁵⁰

argued, “it is completely unrealistic to think that the average voter will ever know enough about judicial performance to be able to evaluate judicial candidates intelligently.” Richard A. Posner, *Lecture, Judicial Autonomy in a Political Environment*, 38 ARIZ. ST. L.J. 1, 5 (2006). See generally Martin H. Redish & Jennifer Aronoff, *The Real Constitutional Problem with State Judicial Selection: Due Process, Judicial Retention, and the Dangers of Popular Constitutionalism*, 56 WM. & MARY L. REV. 1 (2014) (arguing against all forms of judicial elections).

²⁴⁸ Katharine K. Baker, *What is Nonmarriage?* 73 SMU L. REV. 201, 203 (2020) (citing Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1 (2017)).

²⁴⁹ See generally Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 711–12 (1996).

²⁵⁰ Unlike most functional parent arguments, which excuse the failure to adopt or execute legal documents indicating intent to co-parent because the use of these formalities is not widespread (at least in middle-class communities), the calls to recognize nonmarriage often celebrate the purposeful rejection of traditional formalities. Because marriage has such a problematic history, reformers argue the law should embrace the plight of those who reject marriage. See generally Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 619–20 (2013) (describing the reasons many people might want to reject marriage).

Others root the need to recognize nonmarriage in class or race equality because low-income people in general and Black people in particular are much less likely than wealthier white people to marry. Professor Robin Lenhart suggests that the law must “find[] unmarried black couples . . . where they are”²⁵¹ Professors Melissa Murray and Robin West lament the way that marriage is viewed as “dignified”²⁵² and imply that non-marital relationships should be equally entitled to dignity.²⁵³

Other equality calls for recognizing functional marriage simply assert that there is no reasonable basis for treating nonmarriage differently than marriage. It is worth pausing on this assertion, in part because it is so common,²⁵⁴ and in part because it is so question-begging. What is nonmarriage and why should it be treated as marriage? Scholars routinely invoke the need to recognize nonmarriage without defining it.²⁵⁵

As I have suggested elsewhere, one can sometimes find a scholar’s definition of nonmarriage in their explanation of why it needs to be recognized. So, for instance, scholars who speak of the need to protect those left vulnerable by the interdependencies that develop over the course of the relationship,²⁵⁶ or the need to reward those who provide emotional support and intimacy, or the need to support caregivers, suggest that nonmarriage is an arrangement in which interdependencies develop and emotional support and caregiving is given. In other words, the law needs to recognize nonmarriage because people in nonmarriages do the same things that married people do. It is this argument that makes the calls to recognize

²⁵¹ R. A. Lenhardt, *Marriage as Black Citizenship?*, 66 HASTINGS L.J. 1317, 1357 (2015).

²⁵² Murray, *supra* note 7, at 1210 (exploring how the Supreme Court’s decision in *Obergefell v. Hodges* treats marriage as inherently dignified and non-marriage, by implication, “undignified, less profound and less valuable”). See ROBIN WEST, MARRIAGE, SEXUALITY AND GENDER 200 (2007) (noting that a community’s reification of marriage can feel punitive and moralistic to those who do not marry).

²⁵³ The more prevalent cohabitation becomes, the more problematic is the United States’ reliance on marriage as a gateway to numerous social welfare entitlements, like workers compensation, social security, and tax benefits. The classed nature of marriage means that millions of people who may most need those programs do not have access to them. Baker, *supra* note 248 at 210–211.

²⁵⁴ See Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425 (2017) (*passim*); Robert Leckey, *Judging in Marriage’s Shadow*, 26 FEMINIST LEGAL STUD. 27 n.4 (2018) (quoting a Canadian commission declaring that nonmarital partners should be treated as marital ones); Murray, *supra* note 7, at 1207–1209. *But see* June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 59 (2016) (arguing that the characteristics of most nonmarital relationships are sufficiently distinct from marital relationships that the two should not be treated equivalently).

²⁵⁵ Baker, *supra* note 248, at 201.

²⁵⁶ CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 3 (2010) (“Cohabitants who have merged their lives for a period of time develop relations of dependency that leave them vulnerable when the union ends . . .”).

nonmarriage so similar to the calls to recognize functional parenthood. The law should recognize nonmarriage because a marital relationship has developed just as the law should recognize functional parenthood because a parent-child relationship has developed. But in order for courts to determine whether a nonmarriage exists, courts must engage the same kind of invasive, contextual analysis of intimate behavior that family autonomy and non-interference principles reject.

2. *Functional Marriage*

The question of whether to recognize family-like work done in non-marital couples is not new. The law has wrestled with how to treat people who are not married, but have lived somewhat like people who are married, for centuries.²⁵⁷ “Common Law marriages” in some form were recognized, though discouraged, in England throughout the Middle Ages.²⁵⁸ The doctrine migrated to this country in the seventeenth and eighteenth centuries and, though still discouraged in communities in which it was relatively easy to formalize a marriage, was more widely used in frontier communities that had limited religious and state infrastructure. Just as same sex couples who were denied access to formal means of securing legal co-parenthood relied on functional parenthood doctrine in the late twentieth century, so opposite sex couples who lived far away from the institutional structures that formalized marriage relied on common law, or functional, marriage in earlier centuries.

Common law marriage doctrine allows courts to confer the rights and responsibilities of marriage on two people who lived as married without ever having gotten married.²⁵⁹ The doctrine requires courts to determine whether the couple cohabited and held themselves out as married. In the mid-nineteenth century, more than two-thirds of the states in this country recognized the doctrine, though by the mid-twentieth century, all but nine states and the District of Columbia had eliminated it.²⁶⁰ Most states that eliminated it did so believing that it was unnecessary (given the modern

²⁵⁷ See GORAN LIND, COMMON LAW MARRIAGE: A LEGAL INSTITUTION FOR COHABITATION 32–37 (2008) (discussing marriage rules as far back as Roman law).

²⁵⁸ *Id.*; but see Rebecca Probert, *Common Misunderstandings*, 43 FAM. L.Q. 587, 588–591 (2009) (book review) (questioning Lind’s claims about how entrenched common law marriage was in British law).

²⁵⁹ Baker, *supra* note 248, at 219–21.

²⁶⁰ Bowman, *supra* note 249, at 718–31 (discussing history of common law marriage).

availability of formal mechanisms of registration), costly (the litigation was deeply fact-bound) and encouraged fraud.²⁶¹

Since the mid-twentieth century, common law marriage has had a bit of a resurgence. The Texas legislature opted not to eliminate the doctrine in 1970, despite strong pressure that it do so.²⁶² Utah re-adopted the doctrine in 1987 after being vociferously against it earlier in the century.²⁶³ Around the same time, the state of Washington began recognizing what it now calls “equity relationships” or “committed intimate relationships.”²⁶⁴ In 2000, when the ALI published its Principles, it suggested that states recognize what it called “domestic partnerships” for people who “for a significant period of time share[d] a primary residence and a life together as a couple.”²⁶⁵ Domestic partnerships were subject to the same dissolution rules as marriage. Many foreign jurisdictions, including most common law countries, passed new laws providing marital-like protection for many cohabiting couples. Note that when this resurgence of common law marriage started gaining traction, same-sex marriage, or even a legal equivalent - like a civil union - was not available in most places. As with functional parenthood, some notion of functional marriage was viewed as critical to securing same sex couples’ equal access to family law.

Those jurisdictions that recognized some form of functional marriage have not retreated from that recognition since the legalization of same sex marriage. The state of Washington continues to evaluate equity relationships and most common law countries continue to recognize nonmarital couples even as they allow same-sex couples to marry. Professor Lawrence Waggoner suggests that, in the “Anglosphere” [Australia, Canada, Ireland, New Zealand, and the U.K.] a “consensus has quietly emerged” to allow

²⁶¹ Professor Bowman convincingly questions how much of a problem fraud was in common law marriage litigation, though she concedes that the litigation is deeply fact-dependent (and therefore costly). *See id.* at 741–43.

²⁶² Kathryn S. Vaughn, Comment, *The Recent Changes to the Texas Informal Marriage Statute: Limitation or Abolition of Common-Law Marriage*, 28 HOUS. L. REV. 1131, 1150 (1991) (“Despite strong institutional pressure to do so, the Texas legislature refused to abrogate common-law marriages when it enacted Title 1 of the 1970 Family Code.”).

²⁶³ Bowman, *supra* note 249, at 749–50 (describing the motivation behind Utah’s re-adoption of common law marriage).

²⁶⁴ Walsh v. Reynolds, 335 P.3d 984, 986 n.1 (2014).

²⁶⁵ ALI PRINCIPLES § 6.03(1) (AM. L. INST. 2000).

courts to treat “relationships that show that they are (or were) deeply committed” as entitled to the same treatment as marriage.²⁶⁶

Defining “marriage-like” or “deeply committed” or “cohabiting couple” turns out to be quite a struggle for judges and a deeply normative exercise. In general, courts look to the extent of a couple’s financial and emotional interdependence,²⁶⁷ though courts make clear that there can be “no checklist” of relevant behaviors,²⁶⁸ and “[a]ll relevant factors must be weighed.”²⁶⁹ The lack of a checklist expands the breadth of judicial discretion in this inquiry. As two Canadian reformers presciently observed in 2001, the functional approach “is necessarily tied to the pursuit of an imagined marital ideal.”²⁷⁰

In looking at the degree of the parties’ financial interdependence, courts must conduct the kind of review of a couple’s spending and living patterns that the *McGuire* court avoided and that the move to property distribution formulas at divorce rendered unnecessary. For functional inquiries, courts look at the relative economic contributions of both parties, how much they comingled their finances, and the living patterns established during the relationships to determine if there is financial interdependence.²⁷¹ Separate finances are not necessarily a bar to a finding of financial interdependence, but neither are they determinative.²⁷² Financial interdependence for non-marital couples is often easiest to establish when a couple lived traditionally gendered lives.²⁷³ Note that modern property distribution doctrine for

²⁶⁶ Lawrence Waggoner, *Marriage Is on the Decline and Cohabitation Is on the Rise: At What Point, if Ever, Should Unmarried Partners Acquire Marital Rights?*, 50 FAM L.Q. 215, 216. For instance, all of the Canadian provinces except Quebec allow one party in a cohabiting relationship to establish marriage-like rights by proving that their relationship was sufficiently interdependent and committed to warrant those rights. Robert Leckey, *Judging in Marriage’s Shadow*, 26 FEMINIST LEGAL STUDS. 27 (2018).

²⁶⁷ Brenda Cossman & Bruce Ryder, *Beyond Beyond Conjugalities*, 30 CAN. J. FAM. L. 227, 246 (2017) (courts look to whether a couple is “emotionally committed” and “function as an economic and domestic unit.”). See also *Walsh v. Reynolds*, 335 P.3d 984, 991 (2014) (demonstrating that in assessing a relationship’s “purpose”, Washington courts look to whether the couple supports each other “emotionally and financially.”).

²⁶⁸ *Kirkhanasatit v. Lunt*, 2016 BC 599 [38] (“no checklist”); *Campbell v. Campbell*, 2011 BCSC 1491 [43], *rev’d on other grounds*, 2013 BCCA 109 (“no checklist”).

²⁶⁹ *Yakiwchuk v. Oaks*, 2003 SKQB 124 at ¶ 15.

²⁷⁰ Brenda Cossman and Bruce Ryder, *What is Marriage-Like Like? The Irrelevance of Conjugalities*, 18 CAN. J. FAM. L. 269, 290 (2001).

²⁷¹ *Baker*, *supra* note 248, at 221–22.

²⁷² *Ruskin v. Dewar*, 2003 SKQB 514 at ¶ 49.

²⁷³ *Compare Fenn v. Lockwood*, 136 Wash. App. 1017 (2006) (finding that the woman earned considerably less than the man and did not have a separate income) *with* *In re Marriage of*

divorce was adopted to spare courts this kind of granular analysis of financial decision-making and evaluation of gendered roles. Functional analyses demand the kind of judicial evaluation that modern non-interference doctrine cast away.

As for determining emotional interdependence, though some courts reject the necessity of a sexual relationship, other courts insist and focus on it.²⁷⁴ In Washington state, monogamy is not essential, but it is relevant to commitment.²⁷⁵ The focus on sex, and moralistic judicial evaluation of a couples' sex life, is precisely what modern family law had sought to avoid with its continued adherence to non-interference principles. As Canadian scholar Robert Leckey observes, cohabitants whose relationships are being evaluated "fall under evaluative scrutiny of a kind spared to married couples by no-fault divorce and a presumption of equal sharing."²⁷⁶

In his study of how Canadian judges perceive their job in evaluating nonmarriage cases, Leckey found that judges express considerable frustration with the evaluative task they have been assigned. One British Columbia judge noted that "[d]etermining whether parties have been married is a simple proposition Determining whether parties have lived in a marriage-like relationship is considerably more complicated and nuanced."²⁷⁷ A Saskatchewan judge explained that "variation in the way human beings structure their relationships . . . make[s] the determination of when a 'spousal relationship' exists difficult to determine."²⁷⁸ Judges are particularly flummoxed by how to determine commitment: "With no social barrier to a sexual relationship while dating and no social pressure to get married, it is hard to say when a dating relationship turns from the casual to the committed relationship."²⁷⁹

Pennington, 14 P.3d 764 (Wash. 2000) (finding that the woman earned less but maintained her employment during the relationships). *See also* Leckey, *supra* note 254, at 41 (functional analyses "foster a search for conventional gendered roles").

²⁷⁴ LIND, *supra* note 257, at 1042-44 (discussing inquiries into sex lives in cases in Washington state, New Zealand and Canada).

²⁷⁵ In re Long & Fregeau, 244 P.3d 26, 30 (Wash Ct. App. 2010).

²⁷⁶ Leckey, *supra* note 254, at 26.

²⁷⁷ Kirkthanasatit v. Lount, 2016 BCSC 599 at ¶ 37.

²⁷⁸ Yakiwchuk v. Oaks, 2003 SKQB 124 at ¶ 10.

²⁷⁹ Bressette v. Henderson, 2013 BCSC 1661 at ¶ 26. It is curious that these Canadian judges are so much less confident in their ability to identify marital-like relationships than American judges are in identifying parent-like relationships. As suggested, in functional parenthood decisions, courts emphasize that the most important factor is the parent-child bond. *See* V.C. v. M.J.B., 748 A.2d 539, 553 (N.J. 2000) ("It bears repeating that the fourth prong is most important because it requires the existence of a parent-child bond."). Parenting relationships are just as varied as are spousal

Leckey suggests that even with Canadian judges' candid recognition about their limited ability to evaluate others' intimate relationships, the judges inevitably "make value judgments about 'good' family relationships."²⁸⁰ In finding marital like relationships judges rely on their "sense of the 'normal' path to marriage, reflecting ideas of appropriateness and taste shaped by social class."²⁸¹ The existence of those biases counsels in favor of a robust family autonomy doctrine, lest, as Justice Brennan warned, we impose majoritarian understandings of family on everyone. Fact-intensive, invasive functional analyses necessarily undermine that doctrine.

Functional analyses also have the potential to undermine the primacy that many women, particularly low income women place on their parental, not their nonmarital relationship. There is ample evidence that women in low-income communities, particularly women of color, preference their relationships with their children over their relationships with their partners.²⁸² Relationships with their partners are often more fleeting and less emotionally reliable. For these women, the family autonomy that they prize is the autonomy to parent as they believe they need to.²⁸³ These single-parent-by-choice families are now commonplace in many communities. The mothers in these families can have cohabiting relationships with men even while they consider their primary attachments to be to their children. They live with, and have sex with, and share meals and money with partners, but they do not necessarily consider that partner to be their family. A doctrine that instructs courts to evaluate the content of that conjugal relationship to see if it is interdependent enough runs the risk of depriving these women of the parental autonomy they believed they afforded themselves by not marrying.

relationships, yet U.S. judges rarely express concern about their ability to identify when and why a parental relationship started. The level of commitment within a couple that Canadian judges find hard to evaluate—a level of commitment that research suggests waxes and wanes over time for most cohabiting couples—would seem to be relevant to whether the legal parent was fostering the parent-child relationship with the partner whom she is not sure she is committed to. Why do judges see the waxing and waning in one context but not the other?

²⁸⁰ Leckey, *supra* note 254, at 35.

²⁸¹ *Id.* at 37.

²⁸² See Baker, *supra* note 248, at 225–27 (“[M]others assume the primary provider role for a child in part because that gives mothers the power to leave a relationship.”).

²⁸³ See JUNE CARBONE AND NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICA FAMILY 131–32 (2014) (explaining how many low-income women would rather forego any potential child support in order to stay out of court and retain their freedom to parent as they feel they need to).

3. *The Contract Alternative*

Related to the push to recognize cohabiting relationships as nonmarriage, is the scholarly push for courts to better enforce more implied contracts between non-marital couples. These alleged contracts serve as an alternative means of finding a functional marriage. Instead of finding that the relationship itself constitutes a kind of status, scholars ask courts to let the relationship serve as consideration in contract actions in order to allow the person who invests in marital-like work to collect divorce-like remedies (property and spousal support). Using implied contract as a means of compensating people who invest in conjugal relationships provides a means of protecting people who reject marriage, but by asking judges to infer contractual terms from parties' conjugal cohabitation, plaintiffs inevitably ask judges to infer marital-like commitment and obligation from behavior. Thus, judges in implied contract actions end up conducting the same kind of inquiry that judges conduct when considering whether a relationship is "marriage-like" or "committed" or "interdependent."²⁸⁴

For instance, Professor Courtney Joslin suggests that the Supreme Court of New Jersey failed to understand the nature of the non-marital bargain when it awarded the plaintiff only minimum wage for the uncompensated work she did in a trucking business that her non-marital partner owned.²⁸⁵ The parties never explicitly agreed to share property or post-relationship income. After the plaintiff had worked at the business for several years, the defendant had agreed to pay and the plaintiff agreed to accept, minimum wage for the hours she worked. In the subsequent contract action, she was awarded "back pay" (at minimum wage) for the work she did before he agreed to pay her, but nothing more.

Professor Albertina Antognini criticizes a California court for not enforcing an alleged oral contract in which the man promised to provide for his non-marital partner financially for the rest of her life.²⁸⁶ The court found that the woman had "received benefits from the relationship, including payment of living expenses and other goods and services,"²⁸⁷ but that was all she was entitled to. Specifically, the court found that the woman failed to prove mutual assent necessary to find a contract for life-long support. The

²⁸⁴ See Baker, *supra* note 248, at 244–45 (discussing how implicit contract claims mimic conduct-based or functional systems).

²⁸⁵ Joslin, *supra* note 8, at 934 (citing *Carney v. Hansell*, 831 A.2d 128 (N.J. Super. Ct. Ch. Div. 2003)).

²⁸⁶ Antognini, *Nonmarital Contracts*, *supra* note 8, at 114–15 (citing *Barron v. Meredith*, No. CGC 13-535537, 2017 WL 772444, at *1 (N.J. Super. Ct. Feb. 28, 2017)).

²⁸⁷ *Barron*, 2017 WL 772444 at *4.

court was not convinced the man promised to do anything more than support her while they were together.

Both of these cases went to trial. As always in a contract trial, the person alleging the contract had to prove there was a *mutual* intent to form a binding agreement.²⁸⁸ There was no written document suggesting mutual intent and the women in these cases were not able to convince the court that there was a meeting of the minds on the terms of their agreement. This is not that surprising. Their ex-partners argued that they had no intention of sharing property or providing post-dissolution support after the relationship ended. Like Mr. McGuire, that does not leave much to be said on their behalf—and they would not have been permitted that selfishness if they were getting divorced—but they never married.

The women in these cases tried to use contract law to get the long-term remedy that family law may have given them, but one can contract for short- or long-term exchange. Only if we ask courts to assume the ubiquity of long-term (and) marital norms—that everyone who cohabits and sleeps together and divides labor in the household agrees to terms like those provided in family law’s property distribution and maintenance rules—would it be appropriate to assume that the act of living, sleeping and working together triggers sharing property and long-term obligations. Perhaps these men did agree to share long-term responsibility and then tried to back out of their promises, but the courts were free to conclude, as the men argued, that they had no such long-term intentions. Imposing long-term obligations in these situations by presuming that the men agreed to them re-inscribes mid-twentieth century understandings about the enduring nature of conjugal relationships.

The men in these actions were also free to argue that even if there was a contract, their ex-partners did not substantially perform or failed to meet necessary conditions. Perhaps the women did not have sex enough or their services were inferior or they spent too frivolously or they were too unpleasant to live with. However distasteful those arguments may seem, they are fully consistent with contract doctrine.²⁸⁹ One party always tries to argue

²⁸⁸ If the women relied to their detriment on an implicit or explicit promise, courts should possibly afford them the opportunity to try to prove that under promissory estoppel doctrine, but the reliance must be reasonable. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).

²⁸⁹ Though contracts for sex are unenforceable, agreements and negotiations around sex are commonplace for intimate couples. This presents another problem for contract doctrine in the context of conjugal cohabitation. It is possible for couples to intend to enter into legally binding agreements that have nothing to do with sex, but not all of their agreements are likely to have nothing to do with sex.

that the other party did not perform adequately enough to trigger reciprocal obligation. What these performance arguments are inconsistent with is modern no-fault divorce law and the non-interference doctrine that it exemplifies. Judges hated (and effectively refused) to evaluate fault in marital behavior once divorces became commonplace and sexual mores and gender norms relaxed considerably. Contract actions open the door for fault arguments in the form of unmet conditions or subpar performance arguments.

Contract actions, especially implicit or vague contract actions, require judges to both determine the terms of the contract and discern whether both parties met those terms. Precious few judges feel qualified to evaluate what the mutual terms of an intimate relationship might really have been. As explained above, it is the law's inability to evaluate intimate bargains effectively that justifies so much modern non-interference doctrine.

Registration systems, like those that exist in some European countries and some states, provide a less moralistic, less invasive nonmarital alternative.²⁹⁰ By giving couples the opportunity to register their relationship as a legal relationship, entitling them to certain statutory rights as spouses²⁹¹ and/or economic rights against each other,²⁹² the law can afford people who make themselves vulnerable in relationship some protection, without asking them to sacrifice relational privacy and—just as important—without asking the judiciary to define family.²⁹³ Functional marriage systems and implied contract actions that ask courts to infer family law's property distribution rules as the parties' intent reify traditional, monolithic understandings of what "committed" relationships look like. Putting responsibility for defining commitment and relationship in the hands of the people actually in a relationship, by having them register for it, is a far more promising means of

²⁹⁰ For a survey, see Aloni, *supra* note 249, at 607–09 (describing registration alternatives).

²⁹¹ See, e.g., COLO. REV. STAT. ANN. § 15-22-105 (West 2017) (explaining that under this "Designated Beneficiary Agreement" one can designate a partner to get rights to workers' compensation, inheritance, hospital visitation, pensions, health insurance, and standing for wrongful death suits, among other benefits).

²⁹² Those states that have retained domestic partnerships or civil unions provide a non-marital registration alternative that imposes the same economic consequences as marriage.

²⁹³ As I've argued previously, registration systems that do not give partners the marriage-like options of fully sharing their property and future income run the risk of undermining family law's communitarian principles, whereas functional systems run the risk of perpetuating marital hegemony because functional systems make it difficult to escape marital norms. See Baker, *supra* note 248, at 235. If registration systems offer a non-marital alternative that involves marriage-like economic commitment from the parties, this tension will be avoided.

maintaining relational autonomy than asking judges to interrogate the relationships in order to discern whether commitment exists.

Again, the state, in the form of legislatures or administrative agencies could delineate who would be eligible to register and what they could register for. If a menu of options were available, as it partially is today, for instance, in Colorado,²⁹⁴ the state would decide what goes on the menu and who would be eligible to choose from what. A couple might elect any or all of the following: rights to government benefits as partners, intestacy rights, hospital visitation rights, rights traditionally given spouses in tort, rights to shared property, rights to future support from the other. States could also allow more than two adults to register as a family, as the Massachusetts cities of Cambridge and Somerville did last year.²⁹⁵ The menu choices would be made transparently by democratically accountable governmental actors, informed by a diverse constituency, and they would be made *ex ante*. Individuals could choose whether and how they wanted to be treated as a family. If individuals opted for family treatment, they would be entitled to autonomy and non-interference. Judges would not be called on to assess the familial legitimacy of the relationship *ex post*.

CONCLUSION

For the last forty years, much legal scholarship has portrayed family autonomy doctrine and the common law non-interference principle as modern incarnations of patriarchal rules designed to diminish women's ability to be recognized as full legal actors. The critiques of that narrative, and an implicit defense of non-interference, has come mostly from marginalized communities, wary of letting the state pass judgement on their intimate lives. Building on that critique from marginalized communities, this article has offered a positive frame for understanding the enduring doctrines of family autonomy and non-interference.

These doctrines, even if unevenly applied to date, reflect respect for the limitations of law. They restrain judicial evaluation of family life in order to honor the unique role that intimate family life plays in the healthy

²⁹⁴ See COLO. REV. STAT. ANN. § 15-22-105 (West 2017) (providing a variety of benefits that can be designated to registered partners, including rights to workers' compensation, inheritance, hospital visitation, pensions, health insurance, and standing for wrongful death).

²⁹⁵ Elizabeth Nolan Brown, *Cambridge Will Recognize Polyamorous Partnerships and Other Domestic Arrangements With More Than 2 Adults*, REASON (Mar. 10, 2021, 9:30 AM), <https://reason.com/2021/03/10/cambridge-will-recognize-polyamorous-partnerships-and-other-domestic-arrangements-with-more-than-2-adults/> [<https://perma.cc/ZX3X-FM98>].

development of children and to maximize the benefits of allowing families to thrive as intermediate institutions in a diverse polity. The people who need those intermediate institutions the most are those who are excluded from or subordinated in more mainstream institutions.

In embracing functional analyses, more recent scholarship has encouraged courts to overestimate their ability to make and enforce constructive judgements on people's intimate lives. The functional turn in family law vests judges with the power to define who a family is and what it should look like. When judges do this in the parental area they reify dyadic, heteronormative notions of parenthood. When they do it in the context of cohabitation they reify traditional marriage. Thus, the functional turn, hailed as progressive, actually re-inscribes traditional understandings of family relationships. In doing so it further marginalizes kinships groups and single parents, many of whom live in communities that, because of their economic status, are already vulnerable to too much state interference in their intimate lives.

The push to recognize functional relationships has come mostly from those concerned about securing equality for women, the LGBT community, and others who reject the problematic legacy of marriage. These equality advocates argue, with justifiable zeal, that non-traditional intimate relationships deserve the same kind of legal treatment as traditional intimate relationships. But the functional arguments made in the name of equality inevitably undermine the ability to secure the very protection they are asking for because functional arguments run roughshod over family autonomy and non-interference.

An alternative formulation of equality might posit that equality in the family context requires comparable autonomy for all family forms. Equality and autonomy are related because equality demands autonomy. If equality demands protecting the relational autonomy interests of non-traditional intimate relationships, especially in racial and sexual minority communities, we must look to mechanisms other than functional analyses, lest we destroy the very protection we are asking for.