

## Introduction

I decided to marry my husband after four weeks of courtship. The first three weeks were separated from the fourth week by a year. He had dumped me after week three and it took a while for him to realize his mistake. The pivotal event during week four that sealed our future was his answer to a single question. I asked, “What do you want your tombstone to say when you die?” At twenty-five years old, he responded, “Here lies a man who was a great father.” At that moment, I knew that he was the man with whom I wanted to have children and share my life. We married in Las Vegas two days later. We waited five years to have our first son and another three years to have our second. We celebrated our twenty-fourth wedding anniversary in August 2015.

Despite the fact that we have spent the past nineteen years raising children together, and despite the fact that our children are central to our relationship, my husband and I are legally obligated to each other only as spouses. While the law required us to participate in a wedding ceremony to validate our marriage, the law did not require us to go through a ceremony at the birth of either of our children. At our wedding in Las Vegas, we vowed to remain married “til death do us part,” but it wasn’t until the birth of our children that our declarations became ineluctable: it was the children who would tie us together for the rest of our lives in a way that marriage only might. While our ceremony at the Candlelight Wedding Chapel triggered an elaborate set of legal rights and obligations that would govern our relationship, the birth of our children left our legal relationship to each other virtually unchanged. Even as lawyers, we were hard pressed to identify the relevance that our children had to our legal relationship. We knew, for example, that the birth of our children would not hinder in any way our ability to obtain a divorce.

Not long after I became a mother, I started to think that it was odd for the laws of society to give so little attention to the relationship of two people joined together by a child. Despite the fact that becoming a parent is a pivotal adult

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developmental event with both personal and social significance, becoming a parent has little importance for the parents' legal relationship to each other (i.e., their *inter se* relationship), regardless of whether the parents are spouses, cohabitants, lovers, platonic friends, or virtual strangers, and regardless of whether they became parents the old-fashioned way, with modern technology, or through adoption. Instead, the law sets the parameters of their family relationship through marriage, domestic partnership, contract, some equitable remedies, or not at all. Our language reflects this reality: while the law has terms like "spouse," "cohabitant," and "domestic partner," no term readily describes the relationship between adults that parenthood creates.

This book argues that society's indifference to the parents' *inter se* relationship is antiquated. Parenthood should create legal obligations between parents, regardless of the type of relationship the parents have otherwise chosen or not chosen for themselves (e.g., marriage, cohabitation, or friendship). In fact, family demographics today make it essential that parenthood trigger legal and social repercussions that would encourage parents from the outset to show each other the sort of support and cooperation that is best for their children. The high rates of divorce and nonmarital birth suggest that marriage no longer provides the necessary legal structure for many couples' interactions, even assuming that marriage suffices on its own to regulate the relationship between married parents. A better system would be one that automatically imposed a core set of obligations on parents to govern their *inter se* relationships. The obligations would continue until the last of their children reached age eighteen and would survive the breakup of couples' romantic relationships. I call this proposed regime the "parent-partner status."

A new legal status for parents is warranted because the law is a powerful and important instrument for influencing human behavior. A legal status could help demarcate parenthood as the beginning of legal obligations and social norms that would guide the parents' relationship, both encouraging parents to act toward each other in ways that would advantage their children (or requiring parents to do so in some instances), and distributing between them in a fair way the disadvantages that might accompany childrearing. An ascriptive legal status could also prompt moments of reflection before two people have unprotected sex – deliberation that should influence each person's judgment about the other and the act – and could thereby result in fewer unplanned, or poorly planned, pregnancies. A status might have other effects too, including, most magnificently, causing the parents to fall in love and stay in love. It might also encourage children and their parents to act in civically virtuous ways. All of these possibilities require elaboration, and by the end of this book it should be clear that a new parent-partner status offers many potential benefits, including the improvement of children's lives, the remediation of inequities between the parents, and the advancement of social goals.

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Yet for the law to achieve these sorts of results, parents must come to see themselves as parent-partners. They must recognize that upon the birth of their child, they assume a new role with legal and social consequences vis-à-vis the other parent. They must understand their relationship as a supportive and cooperative partnership. The law can play an important part in developing parents' identities as parent-partners. A legal status could create the parent-partner role, convey norms that shape the public's understanding of that role, and trigger a process of socialization by which members of society would have expectations for people who find themselves in that role. The law could even promote the sort of interactions between parents and third parties that would help transmit and reinforce the relevant norms. Society's expectations, in turn, would influence behavior, emotions, and identities.

To spark a conversation about the desirability of this type of legal change, this book proposes a parent-partner status with five specific legal obligations. Parents who share a child in common would have the following obligations to each other: a duty to aid; a duty not to abuse; a duty to engage in relationship work at the transition to parenthood and at the demise of the romantic relationship; a duty of loyalty when contracting; and a duty to prevent unfairly disproportionate caregiving. The first two obligations address the personal well-being of parent-partners; the last two obligations relate to economic issues between parent-partners; and the middle obligation concerns the health of the parent-partner relationship itself. All of them are proposed tentatively. They are a first attempt at conceptualizing a new legal status.

The argument for the development of a status unfolds in three parts. The first part of this book (Chapters 1 through 4) provides background that explains the need for a new parent-partner status and the reasons for the absence of a status to date. The second part of this book (Chapters 5 through 8) sets forth the conceptualization of the new parent-partner status and describes its potential benefits. The third part of this book (Chapters 9 through 12) details the specific legal obligations that might be part of the parent-partner status and discusses the possible drawbacks to this proposal. The following description of the individual chapters, while brief, is intended to provide a roadmap to the arguments that appear in each chapter.

Chapter 1 describes what every parent knows: becoming a parent is a very big deal. It changes a person's life in so many ways. Chapter 1 discusses the effects that parenthood has on individuals and their relationships, noting that a child's arrival inextricably intertwines the parents' lives for at least eighteen years. The different impact parenthood and marriage have on individuals' day-to-day lives raises questions about the fact that marriage, but not parenthood, changes a person's legal obligations to the other parent. The demographics of families today, including the high rates of nonmarital childbearing, divorce, and repartnering, also raise questions about the wisdom of relying on marriage to set the legal parameters of parents' *inter*

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*se* relationships. After all, vicissitudes frequently disrupt couples' lives, regardless of marital status, and the resulting instability can harm children or leave them vulnerable to harm. Couples with children, including married couples, lack a legal structure that is adequate to fortify their romantic relationship and support their social relationship after the romantic relationship ends.

Chapter 2 begins with an obvious, although rarely discussed, fact: the birth of a child triggers so few legal obligations between the parents that a parent typically does not expect to have a new legal relationship, and a new social role, with the other parent. Parents today do not think of themselves as parent-partners. Not surprisingly, the absence of a parent-partner status also causes others in society to ignore or minimize the importance of the parents' relationship to each other as parents. Even courts and scholars sometimes lose sight of the possible significance of parenthood to a couple's relationship when resolving legal issues and conceptualizing family obligations more generally.

The chapter then explores the reasons a parent-partner status has never developed. While the answer is somewhat speculative, marriage appears to be responsible. The law's evolution is track-dependent, or, to use social constructivists' terminology, the existing categories have had a preformative effect. The dominance of marriage, with its history and tradition, has constrained lawmakers' approaches when they have addressed the legal relationship between parents. Marriage has also hindered the emergence of a parent-partner status because lawmakers have difficulty deviating from the distinct patterns created by marriage. The usual pattern is for marriage to influence the recognition of parental status, but not for parenthood to define the parents' legal relationship to each other. Additionally, marriage has stymied a parent-partner status by spawning the concept of illegitimacy. A new status that would give all children's parents the same core *inter se* legal obligations regardless of marriage risks legitimizing a disfavored practice.

Chapter 3 considers whether the existing legal constructs are sufficient for organizing parents' relationships, or whether a parent-partner status might add something useful. Marriage, of course, is the principal method for imposing legal obligations between parents. In fact, marriage is still a goal for most people.<sup>1</sup> Yet marriage is no longer a prerequisite to parenthood for a large segment of society. Today almost 41 percent of children are born to unwed parents.<sup>2</sup> The rate of marriage for American women has fallen approximately 50 percent from 1970 to 2010.<sup>3</sup> Marriage is unlikely to have the sort of revival that would render a parent-partner status unnecessary. Marriage has become an institution primarily for the economically privileged, although even the economically privileged have rates of nonmarital childbearing and divorce that suggest an additional legal structure is needed to regulate the relationship between those parents. Moreover, even if marriage rates rebounded, marriage would still be unavailable to many parents

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(sometimes because one parent is resistant), marriage would be the wrong fit for some, and, importantly, marriage would not be a “forever” commitment. On top of everything else, the law governing marriage and divorce is itself insufficiently attentive to whether the spouses have a child in common. The appropriateness of an additional legal structure is perhaps revealed by the fact that 70 percent of Americans do not think that the main purpose of marriage is to have children.<sup>4</sup> Marriage need not, and should not, be the only device to regulate parents’ *inter se* relationships.

Nor are parents’ *inter se* relationships adequately regulated by other family law structures. Cohabitation is often mentioned as an alternative to marriage, but approximately half of all nonmarital children are born outside of cohabiting unions.<sup>5</sup> Even if parents cohabit, rarely do they cohabit long enough, or with the necessary behavior and intent, to create legal obligations between the parents. Nor does the parent-child relationship provide a sufficient framework to govern parents’ *inter se* relationships either. Parents have some duties to each other that derive from their duties to their children, primarily in the areas of child support and child custody, but these derivative duties offer remarkably little structure to the parents’ interactions. Rather, these derivative duties reinforce the sense that the parents’ relationship is indirect and insignificant. Chapter 3 also explains that the U.S. Constitution’s guarantee of equal protection could not be invoked successfully to obtain a marital-like structure for the parents of nonmarital children. Nor would such an approach be the best way forward.

Chapter 4 canvasses the work of some law reform organizations and scholars that have promoted alternatives to marriage for structuring parents’ *inter se* legal relationships. Mainstream law reform efforts have largely ignored the bond that parenthood creates between parents, but instead have used cohabitation as the lynchpin for *inter se* obligations. Critics of this approach have sometimes defended marriage, but without adequately considering the significance of parenthood to cohabitating or non-cohabitating couples. Other scholars have proposed making parenthood more consequential, but then limit their proposals to married couples. Other proposals to regulate adult relationships are more novel and inclusive, but either are impractical because marriage would be abandoned or substantially decentered, or are incomplete because the advocates ignore the importance of parenthood to their own conceptualizations. While academics are increasingly suggesting that joint parenthood should trigger particular legal obligations between parents, their proposals underutilize parenthood as a source of duty. Either the proposals exclude too many parents by making consent a precondition to the obligations, or they focus on parental obligations that are derivative (i.e., child custody), or they address only a single legal obligation. Such proposals are too limited to shape parental relationships through the law’s normative power, as would happen with the proposed parent-partner status.

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Yet the previous reform proposals and scholarly endeavors have made substantial contributions to a larger generative discourse that is paving the way for a new legal regime. A growing segment of the public is disconnecting marriage and parenthood and concluding that parenthood commits people to one another to the same extent – or to a greater extent – than does marriage. Courts and legislators have encouraged parents to act as partners already, albeit almost exclusively in the context of child custody. Scholars are advancing the partnership ideology in areas on the periphery of child custody doctrine. All of these initiatives lay the groundwork for a new parent-partner status that could regulate parents' *inter se* relationships in areas outside the custody context, and for reasons beyond needing to address the economic impact of caregiving on the primary caregiver.

Chapter 5 describes the new parent-partner status at a fairly high level of generality. The chapter identifies the norms that a legal structure should embody if society wants to encourage parents to have supportive partnerships. Those norms are fondness, acceptance, togetherness, empathy, and flexibility. The chapter also defines the parent-partner relationship as a “family relationship” so that the status acquires by association all of the norms connected to loving families. Boundaries are then set for the status. For pragmatic reasons, the new status would only affect rights and obligations between the parents themselves, and not between parents and the government or parents and third parties. This line might shift in the future, and a discussion of conflict-of-interest laws and social security benefits illustrates how the new status might advantage third parties and the government one day. But as proposed, the status would not obligate others to parent-partners or parent-partners to others.

Chapter 5 also explains and justifies the fact that the status is ascriptive, that is, the status would be imposed automatically on parents upon the birth of their children. This book rejects a regime of choice because permitting couples to opt in or out of the status would pose practical challenges, dilute the normative impact of the status, leave certain children without a legal structure to govern their parents' relationships, and fail to deter uncommitted couples from having unprotected sex. Two classic reasons for family obligation justify the approach chosen: consent and dependency-causation. The voluntary nature of child creation and an expanded notion of dependency-causation provide alternative theoretical rationale for the ascriptive status. The chapter assumes the sufficiency of these justifications, but not their necessity, and suggests that other deontological and consequential grounds may also exist for an ascriptive approach (as well as for particular individual obligations). In discussing the notion of consent, rape is differentiated from other types of involuntary parenthood, such as the failure of birth control.

Chapter 5 concludes by recommending that parents participate in a voluntary celebration ceremony shortly after the birth of their children. The ceremony would

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celebrate the parents' relationship to each other as parent-partners. The event would have several functions, including marking the parents' role change, reinforcing the parents' commitment to the parent-partnership, educating the parents about the legal obligations and social norms that accompany the status, and involving the community in the success of the parties' parent-partnership. Businesses and other third parties involved in the celebration would help reinforce the parents' identity as parent-partners.

Chapters 1 through 5, while building the argument with important background information and theoretical analysis, beg the question, "Should the existence of children change the parents' legal obligations to each other?" That is, even if an ascriptive status can be justified as consistent with family obligations generally, and even if nothing like it exists presently, would such a status be good policy? Drawing heavily on the work of psychologists, sociologists, economists, and others, Chapters 6 through 8 make the case for the desirability of a new status. In essence, these chapters argue that a new status would be good for children, society, and parents.

Chapter 6 details the benefits to children that might flow from the new status. Vignettes provide a preliminary look at the specific legal obligations that are proposed in later chapters, in order to demonstrate that some children would benefit directly from their parents' *inter se* legal obligations. For example, if a parent aided her parent-partner in order to save the parent-partner's life (a variant of one of the obligations that will be recommended), then their child would be advantaged because he or she would continue to have two parents.

Beyond the direct benefits to specific children, Chapter 6 argues that *all* children would gain from the status. Psychologists have been saying for a while that children are served well when their parents have supportive partnerships. The status's legal obligations (individually and in the aggregate) would convey a set of social norms about the nature of the parent-parent relationship: it should be a supportive partnership that exists inside and outside the co-parenting context, from the moment of conception until the child turns eighteen, and regardless of whether the romantic relationship continues or ends. The nature of the partnership should encourage both parents to share the day-to-day care of their children and to exhibit other supportive behavior during the romantic relationship, thereby increasing the likelihood that both parents would continue to do the same if their romantic relationship ever ended. The increased involvement of both parents in their children's lives over a long period of time should improve the economic and psychological well-being of these children.

For the status to foster supportive partnerships between parents, parents would need to internalize society's vision and act consistently with it. "Identity theory," which Chapter 6 explains, suggests that a legal status could have a significant effect on

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people's conception of themselves as parent-partners. The status would create a new parent-partner role and convey a message about the parents' relationship. The legal obligations that constitute the status should influence society's expectations, which in turn should guide parents' actions. Most of the results from the parent-partner status would stem from the socialization process. As John Dewar astutely observed, family law sets broad expectations about appropriate behavior; parties use these cues to order their lives, often without ever invoking the underlying legal obligations in court. Dewar aptly described family law as having a "wide reach and low intensity."<sup>6</sup>

Because Chapter 6 focuses on what children would gain from the status, it is there that this book considers whether encouraging two parents to have a supportive partnership might harm some children. The concern is that the status's norms, particularly "togetherness," might encourage involvement by "bad" parents. Fortunately, most parents are not threats to the other parent or child, and the parent-partner status is designed for this broader population. Optimistically, the status might have a salutary effect on bad actors and eliminate their problematic behavior, in part because the status would define them as unacceptable reproductive partners. While some bad people would undoubtedly still become parents, the status would provide their parent-partners with new legal tools for addressing the harmful behavior.

Chapter 7 explains that a parent-partner status would also be good for society. The status quo imposes costs on all of us. Too many couples conceive children when their relationships are not, and will never be, supportive parent-partnerships. Some of these couples marry, others do not; regardless, a high percentage of these couples see their romantic relationships end. Benjamin Scafidi, an economist, estimated that nonmarital childbirth and divorce cost the American taxpayers \$112 billion a year in public benefits and reduced tax revenue.<sup>7</sup> While other economists have challenged his numbers, even his critics admit that family breakup, and the income inequality that accompanies it, may cost society upward of \$42 billion a year in program expenditures to address its effects.<sup>8</sup>

A new parent-partner status should minimize these externalities by deterring reproduction among uncommitted couples. "Uncommitted" as used here does not refer to marital status. Rather it refers to couples who are unwilling, uninterested, or unable to have an eighteen-year supportive parenting partnership. The parent-partner status should lower the rate of reproduction among uncommitted couples through three mechanisms. First, the parent-partner status would send a message that it is wrong to have unprotected intercourse unless the two people are willing and able to be in an eighteen-year supportive partnership. This message should be more effective than the government's out-of-step message about the importance of "abstinence until marriage." Second, the parent-partner status would communicate information about the traits that make a person a successful parent-partner. The recent decoupling of



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marriage and childbearing has left a lacuna: there are no socially defined criteria for an acceptable reproductive partner. Even married couples could use norms to better guide reproductive decision making. For example, some married couples conceive to improve their low-quality relationships or low-quality partners. Third, the legal status would trigger some legal consequences that should discourage reproduction by parties who do not want the legal duties tied to the new status.

Chapter 7 also argues that the status would help make society a more just place. The law at present unfairly disadvantages groups of people. Specifically, the status would improve the law's treatment of men and women as groups because two of the status's obligations would address areas in which the law impacts women disproportionately in a problematic way (i.e., prenuptial agreements and caregiving compensation). In addition, by imposing a core set of legal obligations on all parents, the law would treat more fairly parents with various types of relationships as well as children born inside and outside of marriage. The fact that unmarried parents and strangers have the same *inter se* legal obligations demeans and disrespects unmarried parents' relationships. It is as if the government cannot be bothered to craft a core set of legal obligations appropriate for their relationships, even though their children would benefit if the government did so. The absence of a status derives, in part, from a history of discrimination against nonmarital children, and perpetuates certain social disadvantages for these children.

The status should produce other favorable outcomes too. Love and civic responsibility are two lofty topics that Chapter 8 tackles. Chapter 8 makes this book's most ambitious claims about the potential impact of the new parent-partner status. It argues that the status might help people fall and stay in love as well as become more civically virtuous. Admittedly, both of these claims rest on some assumptions and causal relationships that are not scientifically established. Nonetheless, these potential benefits are so spectacular and follow so logically from existing research that it is worth imagining "what if?"

Research on the biological and cognitive components of love provides the foundation for the argument that the parent-partner status would increase the parents' love for each other. Sex and childbirth create a milieu in which love can flourish. Because love is partly a cognitive process shaped by culture, the status should make it easier for parents to commit to love their parent-partners. Such a commitment typically prompts behavior that can, in turn, influence the other parent's willingness to engage in loving behavior. Because there are different types of love, and because love need not be sexual or even romantic, parent-partners could love each other without shame even if they subsequently entered other romantic relationships. Game theory suggests that the status might also minimize or eliminate parents' selfish behavior by reducing uncertainty about societal expectations for

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the parent-partner relationship. To the extent that selfish behavior occurred in the parties' coexisting relationship (such as marriage), the boundaries demarcating the new parent-partner status might insulate the co-parenting relationship from the corrosive effect that selfish behavior can otherwise have.

The argument about civic virtue builds on the long-standing belief that the family is an important setting in which to inculcate civic virtue in citizens. In many respects, the parent-partner status would provide a better analogy than marriage for demonstrating the reasons for civic obligation. Marriage today is predicated on self-fulfillment and requires ongoing, active consent, but the permanent parent-partner status would rest on notions of indirect consent, responsibility, and gratitude. Also, parents would model for their children the qualities associated with civic virtue as they acted as good parent-partners. Good parent-partners exhibit many of the same qualities as virtuous citizens. In addition, the parent-parent status should produce more children with the capacity to participate constructively as adult citizens. The parents' high-quality relationship would spill over to enhance their parenting and benefit their children. Increasing civic virtue should inure to the benefit of society.

With the potential advantages of a new status explained, Chapters 9 through 11 describe the five core legal obligations that might make up the status. The obligations that could be part of a parent-partner status are numerous, but the five proposed obligations should be a sufficient number and type to create a status. These five legal obligations would create the social role, guide behavior in the areas that they address, transmit the message that the relationship should be a cooperative and supportive partnership, increase interactions with people who would reinforce the role, and cause individuals to take notice of the new status. As the status takes hold, new parents should recognize that they are parent-partners.

The five proposed obligations are mere possibilities: the selection of them is not a *fait accompli*. Legal statuses develop over time, and the specific legal obligations that would ultimately constitute the parent-partner status would be the result of the democratic lawmaking process after discussion and debate. Consequently, the description of the specific obligations is intended to prompt a conversation about whether parenthood should have any repercussions for parents' *inter se* relationships and what the nature of those rights and obligations should be. Some of the recommendations represent small departures from legal doctrine and should be relatively uncontroversial. Others represent original approaches to family obligation and should spark a deeper exploration of the law's possibilities and limits. Some of the obligations already exist between spouses and would be extended to unmarried and divorced parents; other obligations would be new for all parents regardless of marital status.

Chapter 9 describes the two obligations that relate to parents' physical and psychological integrity. The first obligation would require a parent to aid a