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## Book Review - A Parent-Partner Status for American Family Law

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**A PARENT-PARTNER STATUS FOR AMERICAN FAMILY LAW by Merle H. Weiner. New York, New York: Cambridge University Press, 2015. 637 pp. \$150.00 hardcover.**

Family law can be paradoxical. It regulates the most fundamental personal relationships, yet is formulated largely without meaningful interrogations of its underlying principles. Rather than considering what principles of family and relationships society holds dear, legal reform tends to make sedimentary additions and subtractions to anachronistic foundations. *A Parent-Partner Status for American Family Law* is a bracing and provocative counterexample. Merle Weiner proposes a new legal relationship between parents arising from their shared child, an obligation that would fill what she persuasively characterizes as a curious void in current law (pp. 32–33).

Unsurprisingly, such a bold proposal has far-reaching implications that speak to the essence of parental relationships. This review reflects upon how the parent-partner status might underscore a sense of fatherhood as created through relationships with women rather than children. Part One summarizes the parent-partner status and its duties, which creates a significant web of responsibilities that would last for the duration of the shared child’s minority. Part Two pushes the implicit messages of the parent-partner status, particularly how it intersects with the accidental procreation argument against marriage equality, positing that heterosexuals (particularly heterosexual men) should be regulated by family law. The accidental procreation argument in the context of marriage equality proposed marriage as the regulating structure.<sup>1</sup> By rejecting marriage as the regulatory framework and replacing it with a link created through a shared child, the parent-partner status is practical and progressive. Weiner also refutes one strand of accidental procreation’s perspective by complicating the stereotype that men are uninterested in fatherhood.<sup>2</sup> The broadest ambitions of the parent-partner status, however, underscore a second strand of accidental procreation: that in order to make men fathers, they should be legally bound to mothers.<sup>3</sup>

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1. See generally Kerry Abrams & Peter Brooks, *Marriage As A Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 YALE J.L. & HUMAN. 1 (2009) (discussing how courts justified excluding same-sex couples from marriage on the basis that the institution was designed to provide a safe space for accidental procreation, which was not an issue for same-sex couples).
  2. See, e.g., Nancy E. Dowd, *Fatherhood and Equality: Reconfiguring Masculinities*, 45 SUFFOLK U. L. REV. 1047 (2012) (explaining through use of masculinities theory why manhood is seen as incompatible with nurturing fatherhood).
  3. See Edward Stein, *The “Accidental Procreation” Argument for Withholding Legal Recognition for Same-Sex Relationships*, 84 CHI.-KENT L. REV. 403, 421 (2009) (examining

Some of the goals of the parent-partner status therefore push and pull at cross-purposes and will no doubt spark further reflection and discussion.

### THE PARENT-PARTNER STATUS

Weiner begins her book with a thought-provoking inquiry: having a child brings pivotal changes in the lives of his or her parents, including legal responsibilities running from parent to child (pp. 14–23). This prompts the question of why such a significant event does not also change the legal responsibilities running between the parents. Having a child together changes the practical relationship between the parents, regardless of whether the parents are married, in a relationship, or living together—why not change the legal relationship as well? Weiner provides a persuasive and sensible explanation resting upon the historical centrality of marriage to family law (pp. 40–54). Even the legal obligations between parent and child used to turn upon whether the child’s parents were married, particularly whether the child’s biological father had any obligation or responsibilities for the child (pp. 56–57). The marital presumption, now a rebuttable presumption rather than dispositive rule, assumes that the husband of a married woman who gives birth is the father of the child (pp. 46–54). As Weiner chronicles in a few striking cases, the marital presumption’s continued viability occasionally operates to exclude a biological father from seeking recognition as legal father (pp. 47–50). On the flip side, a child whose parents were not married was in early American history considered “*filius nullius*,” child of no one, and therefore lacked the protection that the obligations of legal parenthood could give (pp. 56–57). Although children of unmarried parents are no longer subjected to such clear legal discrimination, the fathers of such children must satisfy different legal procedures in order to be recognized as the legal father in contrast with the near-automatic recognition they would receive if married to the child’s mother.<sup>4</sup>

In order to remedy this absence, Weiner proposes a set of legal reforms creating the status of parent-partner (p. 135). Parent-partnership originates when two people become parents to the same child (p. 133). Weiner notes that the status applies whether the conception takes place through sexual reproduction or adoption, so it seems clear that any method of reproduction can also generate parent-partner status, such as assisted reproductive technologies (p. 133). Just as the obligation to support one’s child arises regardless of the circumstances of the child’s conception,<sup>5</sup> so too would the obligations of parent-partnership, whether the conception took place in the context of a longstanding committed

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arguments suggesting that “marriage plays an important role in reducing the likelihood that men will abandon the women with whom they have sex”).

4. See *infra* p. 394 and note 50.

5. I have previously written, for example, about the near-uniform rejection of arguments that a man who never consented to sexual intercourse should not be liable for support of a child from a resulting pregnancy. Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 FLA. ST. U. L. REV. 645, 664–67 (2014).

relationship or a one-night stand (p. 133).

Although Weiner presents the tangible proposals in the latter half of the book, following explanations of existing law and arguments for why her proposals are desirable, this review will outline the specifics first. The new parent-partner relationship would trigger five new or expanded legal obligations: a duty to aid one's parent-partner, a duty not to abuse one's parent-partner, an obligation to at least learn about the benefits of relationship work<sup>6</sup> with one's parent-partner, an increase in legal scrutiny that would make it much harder for parent-partners to contract with one another, and an obligation to compensate one's parent-partner for any disproportionate caregiving (p. 135). These proposals are not meant to be an exhaustive list of the rights and obligations of the parent-partner status, nor does Weiner claim that they are necessary for the status—she notes that they should be understood as “a starting point for a conversation” to eventually be encoded into law by legislatures, which may or may not adopt her proposals (p. 320). Indeed, as will be discussed below, Weiner hopes the parent-partner status will have societal consequences far beyond what her specific proposals might imply (p. 275).

### The Duty to Aid

The first two duties are likely the least objectionable and are understandably grouped together. As many first-year law students are surprised to discover, there is no generalized duty to aid another person in danger.<sup>7</sup> A duty to aid has historically been recognized “only in relationships of the greatest intimacy and dependence” (p. 322). Accordingly, the only people you must attempt to protect or help are those in your immediate family: your spouse and your children (p. 322). The duty to protect your children is so strong that women are regularly prosecuted for failing to protect their children from abuse inflicted by another person, even where the mother herself is also a victim of the same abuse.<sup>8</sup> Weiner proposes expanding the duty to aid to include parent-partners, on the logic that parent-partner relationships are characterized by the “intimacy and dependence” of spousal and parent-child relationships (pp. 322–23). Parent-partners often depend on one another, in the same way spouses do, and will often “have a close relationship because of their child” (p. 323). Parent-partners, like spouses, have also typically been sexually intimate (p. 323). Weiner also argues the duty should be extended to parent-partners because it closely resembles the

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6. Weiner uses the term “relationship work” to refer to counseling and therapy of parent-partners, aimed to prepare them for parenthood, negotiate an amicable partnership in the absence of a romantic relationship, or to save a deteriorating romantic relationship. *See infra* pp. 384–85.

7. *See* Jennifer M. Collins et al., *Punishing Family Status*, 88 B.U. L. REV. 1327, 1335 (2008).

8. *See* Michelle S. Jacobs, *Requiring Battered Women Die: Murder Liability for Mothers Under Failure to Protect Statutes*, 88 J. CRIM. L. & CRIMINOLOGY 579, 586–87, 613 (1998) (describing how a mother's liability for her child's death where her abuser caused the child's death is “increasingly based on a ‘failure to protect’ or omissions theory”).

duty each person already has to the existing child (p. 327). Lastly, such an expansion, Weiner contends, would signal the importance of the parent-partner bond (p. 327).

### The Duty Not to Abuse

A duty not to abuse one's parent-partner similarly expands an existing regime. It is already illegal, obviously, to harm another person, and physically attacking a stranger can result in both criminal and civil penalties.<sup>9</sup> Domestic violence statutes recognize the particularly severe and pernicious consequences of harming a family member, and provide more avenues of punishing and preventing such actions in addition to general criminal statutes and penalties.<sup>10</sup> Weiner focuses on two—civil protection orders and more serious legal consequences for physical violence—and suggests making them available to parent-partners (p. 329).

Weiner's discussion of domestic violence integrates her parent-partner status into existing law and suggests further expansions drawn from broader debate around strategies to combat and prevent domestic violence generally, firmly placing the parent-partner status amidst ongoing reform efforts. Civil protection orders (also called temporary restraining orders), protection from abuse orders, and other similar terms, give an abuser various specific directions: not to continue abuse, not to contact or go near his or her victim, to move out of the residence they share, and so on.<sup>11</sup> Such orders are useful to victims of abuse for a number of reasons. Most obviously, in ideal circumstances a legal directive is itself enough to change an abuser's behavior, but violation of the order's instructions will trigger additional sanctions.<sup>12</sup> Such orders can also include topics that a victim cannot secure through other legal proceedings, such as "provisions for child custody, maintenance, counseling, reduced filing-fees, and provisions requiring an abuser to vacate a shared residence."<sup>13</sup>

Civil protection orders are only available when the abuser and victim share

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9. *United States v. Hayes*, 555 U.S. 415, 427 (2009) ("[D]omestic abusers were (and are) routinely prosecuted under generally applicable assault or battery laws.").
  10. See Margaret E. Johnson, *Changing Course in the Anti-Domestic Violence Legal Movement: From Safety to Security*, 60 VILL. L. REV. 145, 155–64 (2015) (describing and evaluating the current "safety paradigm" which focuses on physical and sexual violence, immediate crises, separation of parties, and state discretion in how to best address domestic violence); Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1993) (surveying developments and trends in civil protection order statutes and state appellate opinions throughout the United States).
  11. Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 100 (2005).
  12. *Id.* at 101–02 ("In most states, violations of protection orders are punishable at least as misdemeanors. Most also provide that a violation of a civil protection order is grounds for charges of civil or criminal contempt. In some states, a repeat violator of protection orders can be charged with a felony and be subjected to both fines and jail time.").
  13. *Id.* at 95.

a connection that fits into a list specified by the relevant statute (p. 330). Sharing a child in common is explicitly included in all but two states' laws, and the remaining two include relationships such as "dating partners" that likely encompass many such parent-partners (p. 330).<sup>14</sup> Weiner also recommends including expectant parents in protective laws, which would similarly protect the prospective parent-partners who are not already included in statutes covering dating partners (pp. 331–33). While her initial proposal to include parent-partners in such statutes thus closes a relatively small loophole, it would extend coverage to some people who are not currently eligible for civil protection orders. Weiner proposes two additional reforms to protective statutes that have much broader implications: including psychological abuse alone as a trigger for protective orders and allowing for protective orders that do not require the abuser to stay away from his or her victim (pp. 333, 340–41, 346). As Weiner acknowledges, both reforms are part of current discussions of how to best combat domestic violence more generally, and thus implicate questions much broader than Weiner's parent-partner status (pp. 329–30, 341).<sup>15</sup> Current law does not include psychological or emotional abuse consistently in domestic violence statutes,<sup>16</sup> although emotional abuse of children is acknowledged as immensely harmful.<sup>17</sup> Civil protection orders allowing continued contact

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14. Weiner cites Judith Smith's article to discuss whether people she would consider parent-partners to be eligible for civil protection orders under existing law (pp. 330). When Smith's article was published, Vermont and Mississippi did not specifically allow protective orders to be issued in the context of parents sharing a child in common, but did issue such orders "for members of past or current dating relationships. Smith, *supra* note 11, at 103. Vermont now includes persons who "have engaged in a sexual relationship" in its definition of "household members" eligible for such orders, which would include a couple who had a child through sexual reproduction. VT. STAT. ANN. TIT. 15, § 1101(2) (2016). Mississippi has amended its domestic violence statute to include "a person with whom the defendant has had a biological or legally adopted child." MISS. CODE ANN. § 97-3-7(3)(a) (2016). Louisiana now includes both former cohabitants and "dating partners" in its definition of domestic abuse, although whether two people were "dating partners" depends upon a qualitative analysis of the length, type, and frequency of interaction between them. See 46 LSA-R.S. § 2132, 2151. The inquiry into the seriousness of a dating relationship, which would include co-parents who had been in a long-term non-cohabitating relationship but not parents who created a child following a one night stand, appears to have been triggered by concerns from the National Rifle Association that "dating partners" was too broad a category to use when the consequences included banning an abuser from owning firearms. See Emily Lane, *Here's What the NRA Got Stripped from Louisiana's Anti-Domestic Violence Bill*, THE TIMES-PICAYUNE, May 18, 2015, [http://www.nola.com/politics/index.ssf/2015/05/heres\\_what\\_the\\_nra\\_get\\_strippe.html](http://www.nola.com/politics/index.ssf/2015/05/heres_what_the_nra_get_strippe.html).
  15. See, e.g., Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107 (2009) (proposing that a broader definition of domestic violence to include forms which are physical, sexual, psychological, emotional, or economic would allow the civil legal system to craft better and more specific remedies for victims); Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1519–23 (2008) (evaluating the advantages and disadvantages of stay-away orders for victims).
  16. Joy M. Bingham, *Protecting Victims by Working Around the System and Within the System: Statutory Protection for Emotional Abuse in the Domestic Violence Context*, 81 N.D. L. REV. 837, 838–44 (2005).
  17. Jessica Dixon Weaver, *The Principle of Subsidiarity Applied: Reforming the Legal*

between abuser and victim are more controversial, although supporters of the concept persuasively argue that such orders acknowledge the reality that abusive relationships can arise within a context of love.<sup>18</sup>

Weiner's proposals regarding increased punishment of crimes against a parent-partner are more in line with simply expanding protections from domestic violence to parent-partners not currently covered by existing law. Weiner argues that existing criminal prohibitions of physical violence against any other person, such as charges of assault or battery, "do[] not account for the unique harms from parent-partner abuse or send a strong message about the unacceptability of such behavior" (p. 343). Although much of her justification for increased criminal sanctions turns upon the harm to a child who witnesses such abuse, she argues that specifically prohibiting abuse of a parent-partner would also make parent-partner relationships "more visible" and thus presumably regarded as more important than at present (p. 344). Whether or not a reader is persuaded by the parent-partner status more broadly, it is difficult to imagine an argument against the message that harming a co-parent is particularly reprehensible.

### The Duty of Relationship Work

Weiner's proposal of a "relationship work obligation" is further afield from existing family law, but speaks to a growing concern among scholars for the practical harms of contentious relationships (or the lack of any productive relationship) between parents.<sup>19</sup> Current law rarely requires counseling in the context of family law proceedings—the most common mandated counseling is in the context of covenant marriages, in which the spouses voluntarily entered into a union that is more burdensome to enter and exit.<sup>20</sup> Several scholars, notably Clare Huntington, have written of the need to reform child support regimes to

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*Framework to Capture the Psychological Abuse of Children*, 18 VA. J. SOC. POL'Y & L. 247, 265–67 (2011) (“[I]ncreasing sociological and psychological research documents the detrimental effects on children, regardless of the child’s own direct victimization.”).

18. See Tamara L. Kuennen, *Love Matters*, 56 ARIZ. L. REV. 977, 1011–12 (2014) (“[Civil protection] orders are not a viable remedy if the petitioner is not ready or does not want to terminate the relationship. If the law valued love more, and separation less, these orders could be tailored to allow contact but prohibit abuse.”).
19. See, e.g., Linda C. McClain, *Is There A Way Forward in the “War over the Family”?*, 93 TEX. L. REV. 705, 738–39 (2015) (reviewing CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* (2014)); Rebecca Love Kourlis, Melinda Taylor, Andrew Schepard & Marsha Kline Pruett, *laals’ Honoring Families Initiative: Courts and Communities Helping Families in Transition Arising from Separation or Divorce*, 51 FAM. CT. REV. 351, 362 (2013); Jeffrey C. Melick & Karen W. Stuntz, *The Role of Child Counsel in the Attorneys Representing Children Programs in the Probate and Family Courts*, 95 MASS. L. REV. 223, 233 (2013); Peter Salem, Irwin Sandler & Sharlene Wolchik, *Taking Stock of Parent Education in the Family Courts: Envisioning A Public Health Approach*, 51 FAM. CT. REV. 131, 137–38 (2013); Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317 (2004).
20. See Katherine Shaw Spaht, *Covenant Marriage Seven Years Later: Its As Yet Unfulfilled Promise*, 65 LA. L. REV. 605, 612–13 (2005) (describing mandatory pre-marital counseling under Louisiana covenant marriage statute).

decrease conflict between parents by providing counseling services to parents.<sup>21</sup> Huntington writes approvingly of Australia's Family Relationship Centres, which aim to "help parents address relationship issues so they can stay together or otherwise help parents in the initial transition as they separate, whether they were married or not."<sup>22</sup>

Weiner suggests providing similar counseling, timed to two key moments: when the partners become parents and the dissolution of the parent-partners' romantic relationship (p. 347). She is forthright that the goal of counseling at the end of the relationship should be to save the romantic relationship, writing that parents "should at least try to align their own happiness with their children's interests" and "fix their unhappiness within the context of their relationship (perhaps by adjusting their own expectations)" (p. 376). Only if such reconciliation counseling fails should the goal then move to what Weiner calls "friendship counseling," aiming to ensure that the parent-partners have an amicable friendship rather than romantic monogamy (p. 381). Weiner stops short of actually requiring a parent-partner to attend such counseling, recognizing that a parent in court-mandated counseling would be unlikely to result in productive therapeutic work (p. 361). Instead, Weiner proposes mandatory attendance at an "informational session" educating the undecided parent-partner about the benefits of counseling and relationship work (pp. 361-63). Helping parents to work together more amicably for the benefit of their child is an excellent idea, although Weiner acknowledges that counseling forced upon an unwilling parent would likely be worthless (p. 361).

As will be discussed further below, however, counseling parents with the goal of saving a romantic relationship is more problematic. Even if we assume that some couples could be pulled back from the brink of ending their romantic relationship by such counseling, it is not clear that co-parents in an imperiled romantic relationship is better for the child than an amicable separation. Moreover, even assuming some benefits to stability or other factors that might positively impact children, bringing government's coercive power to bear in service of such marginal advantages is a drastic and likely unwarranted measure. The modern trend of family law has largely been to give couples more freedom to privately arrange their personal lives, and Weiner's relationship work obligation swims against that current.<sup>23</sup>

### **The Duty of Contractual Fairness**

The final two recommendations are financial, and Weiner acknowledges that they are likely more controversial than the first three (p. 393). Weiner is first

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21. Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 *STAN. L. REV.* 167, 229 (2015).

22. *Id.* at 232.

23. See, e.g., Jeffrey Evans Stake et al., *Roundtable: Opportunities for and Limitations of Private Ordering in Family Law*, 73 *IND. L.J.* 535 (1998).



concerned with the intersection of family and contract law, proposing that contracts between parent-partners receive greater scrutiny by courts tasked with enforcing them (p. 394). The most familiar form of contract between romantic partners is the premarital agreement, drawn up before marriage in order to opt out of default legal rules (p. 395). The focus of a premarital agreement is typically to specify property division and other financial terms should the couple later divorce, although couples occasionally draft more creative contracts attempting to govern spousal behavior.<sup>24</sup> Legal enforcement of private agreements between couples has been a key step in modern family law's move from status to contract, even though a relatively small number of couples actually enter into such contracts.<sup>25</sup> Furthermore, although allowing customization of legal relationships is often seen as a liberalizing reform, such agreements often have the effect of disadvantaging the economically weaker party—in practice, usually the woman in a heterosexual pairing.<sup>26</sup>

Weiner illustrates the danger of such contracts with the colorful case of *Mallen v. Mallen*,<sup>27</sup> a staple in many family law casebooks (pp. 395–97). Peter Mallen successfully enforced a premarital agreement that gave his ex-wife Catherine almost none of his \$14 million fortune, even though Catherine had spent almost twenty years as a stay-at-home mother (p. 395). Catherine had dramatic facts on her side—she had become pregnant with Peter's child and was sitting in a waiting room at a clinic intending to terminate the pregnancy when Peter called her, promised to marry her and support her, and asked her not to have an abortion (p. 395). She agreed, and the two were married ten days later after Peter presented her with a premarital agreement that she signed, despite having no time to consult with an attorney to review the document (p. 395). Two decades later, a Georgia court rejected a number of objections Catherine raised to the agreement's validity, pointedly commenting that the urgency of her pregnancy could not constitute duress since she had “demonstrated her willingness to terminate the pregnancy.”<sup>28</sup>

The case is a bit of an outlier, in that Georgia does not consider an engaged couple to be in a confidential relationship.<sup>29</sup> A confidential relationship essentially means that the two people act reasonably when they trust one

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24. See Laura P. Graham, *The Uniform Premarital Agreement Act and Modern Social Policy: The Enforceability of Premarital Agreements Regulating the Ongoing Marriage*, 28 WAKE FOREST L. REV. 1037, 1043–49 (1993); see also Jonathan E. Fields, *Forbidden Provisions in Prenuptial Agreements: Legal and Practical Considerations for the Matrimonial Lawyer*, 21 J. AM. ACAD. MATRIM. LAW. 413 (2008).

25. See, e.g., Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293, 311 n.72 (2015) (noting small percentages of marrying couples with premarital agreements).

26. See Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 201–03 (1998).

27. *Mallen v. Mallen*, 622 S.E.2d 812 (Ga. 2005).

28. *Id.* at 816.

29. *Id.* at 815.

another.<sup>30</sup> As a consequence, they are excused from expectations that would otherwise arise in contractual negotiations, such as reading over a premarital agreement skeptically rather than believing your fiancé's promise to take care of you.<sup>31</sup> The case thus tees up several practical problems with private agreements between people who are in a familial relationship: in the throes of optimistic love, it is unlikely that someone like Catherine Mallen is capable of the rational, skeptical decision making we might expect if she were buying a used car. As a young, newly-pregnant woman, she was unlikely to predict what her life might look like and what her needs might be almost twenty years later, when the agreement was ultimately enforced. And she certainly had a strong moral argument that the result was unfair.

Weiner addresses all three of these concerns by recommending extremely rigorous examination of any private agreement between parent-partners. First, she suggests that "courts should scrutinize carefully" any agreement between parent-partners if the agreement was formed after pregnancy with the shared child, by presuming that the agreement was *not* entered into voluntarily and by placing the burden of proof on the party seeking enforcement (p. 400). Weiner also tentatively suggests that parent-partners have a duty to disclose full and complete information about their financial assets and obligations, as well as the legal consequences of the proposed agreement (p. 402). Even if voluntariness and disclosure are satisfied, she further argues that courts should assess the fairness of agreements at the time of potential enforcement in order to demand that "parent-partners. . . exhibit fondness and empathy toward each other at all times." (p. 410). According to Weiner's recommendations, courts should refuse to enforce substantively unfair provisions (p. 410).

### The Duty to Provide Caregiving

Finally, Weiner argues for an obligation that she labels "to give care or share" (p. 411). The concept is straightforward: "A parent-partner should be obligated to pay compensation to the other parent for any unfairly disproportionate caregiving that the other parent has provided to their child . . ." (p. 411). The practical questions and hurdles to implementing a duty of caregiver payments are evident and numerous, and Weiner published an entire article devoted to the proposal in 2014.<sup>32</sup> Her basic concern is that one parent-partner can become a "freeloader," in the sense that one parent is unjustly enriched by the other parent's caregiving in place of market work or compensation (pp. 413–14). Weiner defines the unfairness that she hopes to remedy as "some wrong" the

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30. *Id.*

31. *Id.* ("A majority of jurisdictions which have addressed the issue have recognized a special relationship between persons engaged to be married that imposes a higher duty with regard to contracts between the parties than exists between other contracting parties.").

32. Merle H. Weiner, *Caregiver Payments and the Obligation to Give Care or Share*, 59 VILL. L. REV. 135 (2014).

other party committed, and clarifies that the unfairness is not “a conclusion that would rest on generalizations” about women’s status in relationships (p. 413). In practice, however, unfairness would be evaluated as an objective standard, regardless of whether the caregiving parent chose to take on the caregiving work or had any expectation of compensation for it (pp. 413–17). As Weiner explains, “[t]he martyrdom of these caregivers may be noble, but it would be wrong to legitimize such an asymmetrical arrangement simply because the caregiver has unselfish instincts” (p. 416).

Instead, Weiner proposes that a judge award compensation for past and future caregiving after assessing four factors: each parent’s work in the market and the home; the allocation of market and nonmarket work between the two; their sharing behavior; and their agreement regarding allocating work and economic resources, although the existence of an agreement would not be dispositive as to whether the arrangement was fair (pp. 431, 441).

The parent-partner status obviously fundamentally changes the legal relationship and responsibilities between parents. Weiner proposes the status with an eye to specific benefits to the children of such parent-partners, although she also justifies her proposals as serving broader principles of equity and fairness between parents. The next section expands upon the normative analysis underlying the parent-partner status, particularly Weiner’s concern for gender equality.

### **PARENT-PARTNERSHIP, ACCIDENTAL PROCREATION, AND FATHERS**

Weiner presents a number of reasons why her proposed parent-partner status is a good idea. Most directly, she outlines the multiple ways in which legal obligations between parents benefit the child in question. Weiner identifies both direct benefits, such as the financial support to a caregiving parent, and the intangible benefits, arguing that parents who have a more supportive and amicable relationship will be better able to co-parent their child, even if their romantic relationship has ended (pp. 201–06).

Weiner also offers benefits that her parent-partner status will yield to society at large. One concern clearly implicated by her “give care or share” obligation is that of fairness, looking to level the playing field between men and women and families structured by a marriage and those that are not (pp. 266–67). The regulation of the family was historically intensely gendered, and the replacement of explicitly sexist rules and norms in the law has been one of the great achievements of legal reform.<sup>33</sup> Weiner rightly points out, however, that merely shifting from gendered to gender-neutral statutory language has not been enough to eliminate gendered consequences of family structures and regulations

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33. *See, e.g., Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 958–60 (N.D. Cal. 2010) (“[M]arriage between a man and a woman was traditionally organized based on presumptions of a division of labor along gender lines,” but marriage “no longer requires specific performance of one marital role or another based on gender.”).

(p. 265). As she deftly summarizes, “[g]ender-neutral language can sometimes obscure the fact that a law may generally benefit one sex at the expense of the other” (p. 265). She candidly acknowledges that the parent-partnership’s concern for financial equity “would have a disparate gender impact, but only because [it is] meant to remedy unfairness that currently exists” (p. 266). Gendered inequality embedded within facially-neutral regulation is a rich subject in family law, and one that I continue to research myself.<sup>34</sup> Weiner should be applauded for constructing the parent-partner status with a reformist eye, benefiting children, parents, and society by encouraging more egalitarian parenting.

Submerged gendered roles, however, have roots that run deeply, and often lead to consequences quite the opposite of what a commentator intends. This is not meant as a criticism of Weiner’s project—to the contrary, it is a difficulty I have wrestled with myself. Family rights are not a zero-sum game, but are a difficult balancing act. For example, I have previously proposed a labor-based theory of parentage that would recognize pre-birth parental labor as creating a substantial relationship with a child for purposes of assessing an unwed biological father’s constitutional rights.<sup>35</sup> My aim is explicitly feminist, aspiring to encourage male caregiving and nurturing in order to eliminate the deep heritage of gendering caregiving work as female. In discussions with other feminist scholars, however, a common and fair criticism was that strengthening the parental claims of fathers undermines the autonomy of mothers who likely have very good reasons for excluding biological fathers from their children’s lives.<sup>36</sup> Weiner acknowledges this very point in a discussion of “bad dads,” who might as the result of the parent-partner status become more involved in the lives of the mothers and their children in a way that would harm them (p. 222).

In this same counterintuitive spirit, some of the benefits Weiner proposes for society and civic virtue simultaneously push and pull at societal perceptions of fathers. First, Weiner argues that the parent-partner status will “discourage childbearing by uncommitted partners,” or as her section heading describes it, “ill-advised conception” (p. 237). She argues that the parent-partner status would deter such undesirable childbearing by communicating a “moral judgment: it is wrong to conceive unless both parties are committed to supporting each other for the next eighteen years” (p. 238). Her hope is that creating a parent-partner status will “encourage abstinence, the careful use of contraceptives, or sexual behavior that does not risk pregnancy” (p. 240). Even more aspirationally, Weiner believes “a parent-partner status should help assess whether having sex . . . with a particular person is a good idea” (p. 254).

Obviously, this moral judgment will only have an effect on heterosexual and bisexual people who are capable either of becoming pregnant or of

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34. Dara E. Purvis, *The Rules of Maternity* (unpublished manuscript) (on file with author).

35. Purvis, *The Origin of Parental Rights*, *supra* note 5, at 680.

36. *See e.g.*, Jennifer S. Hendricks, Assoc. Prof., Univ. of Tenn. College of Law, Remarks at the Assoc. of Am. Law Schools Workshop: Family Law Panel #1 – Mothers and Fathers (2011).

impregnating someone else. If you cannot conceive a child, or if you are considering a sexual relationship with someone of the same gender, you will not worry about the moral hazards of ill-advised conception—such parents who gain their parental status through adoption or assisted reproductive technologies would still automatically enter the parent-partner status upon being identified as the legal parents of a child, but they make an affirmative decision to become parents (p. 133). They would thus at least implicitly choose to become parent-partners as well. An opposite-sex couple who intends only to engage in sexual intercourse and accidentally conceives a child has no similar moment of choice. This distinction is not new—people who have sexual relationships with people of the same gender have never had to worry about unplanned pregnancy—but it indicates that Weiner would agree that heterosexuals are the population whose decisions regarding childbearing would be primarily affected by the parent-partner status.<sup>37</sup> In this sense, by hoping to reduce the numbers of unintended pregnancies the parent-partner status echoes an interesting focus on controlling sexual behavior that arose in debates about marriage equality.

The first judicial articulation of the need to control the behavior of opposite-sex couples arose in 2003, when the Massachusetts Supreme Court held that limiting marriage to opposite-sex couples violated the state constitution.<sup>38</sup> Justice Robert Cordy dissented, and added a new justification for discriminatory marriage laws resting upon the threat of accidental pregnancies:

So long as marriage is limited to opposite-sex couples who can at least theoretically procreate, society is able to communicate a consistent message to its citizens that marriage is a (normatively) necessary part of their procreative endeavor; that if they are to procreate, then society has endorsed the institution of marriage as the environment for it and for the subsequent rearing of their children; and that benefits are available explicitly to create a supportive and conducive atmosphere for those purposes. If society proceeds similarly to recognize marriages between same-sex couples who cannot procreate, it could be perceived as an abandonment of this claim, and might result in the mistaken view that civil marriage has little to do with procreation: just as the potential of procreation would not be necessary for a marriage to be valid, marriage would not be necessary for optimal

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37. Again, I stress that “heterosexuals” is underinclusive, in that the category of “people who have sexual intercourse with someone of the opposite sex” includes bisexuals and people who identify with other orientations. As will become clear below, the distinction between people who might accidentally conceive a child during their preferred sexual behavior and everyone else is made in the context of arguments around marriage equality, generally by advocates who believe opposite-sex marriage should be protected in order to protect norms of monogamy that bisexuality also threatens. Cf. Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000) (explaining that heterosexuals and homosexuals have a shared interest in bisexual erasure in order to protect norms of monogamy).

38. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (Cordy, J., dissenting).

procreation and child rearing to occur.<sup>39</sup>

This logic has come to be known as the “responsible procreation”<sup>40</sup> or “accidental procreation” argument.<sup>41</sup> As Kerry Abrams and Peter Brook concisely summarized, it is “the argument that states may rationally restrict marriage to straight couples because gay people are too responsible to need it.”<sup>42</sup> It turns on its head the older assertion that same-sex couples were harmful to children, and instead portrays irresponsible heterosexuals as the “unstable and unhealthy” parents whose sexual behavior has to be controlled.<sup>43</sup> After Justice Cordy’s dissent, the argument was regularly included in court opinions upholding (or dissenting to say they would uphold) state marriage statutes restricting marriage to opposite-sex couples.<sup>44</sup>

Accidental procreation has two troubling implications regarding fatherhood—and interestingly, parent-partner status counteracts one while underscoring the other. The first implication of accidental procreation involves a societal problem: that the obligations and responsibilities of fatherhood must be imposed upon men who, if left to their own choices, will often abandon their children.<sup>45</sup> The second implication proposes the solution: that the best way of imposing paternity upon unwilling men is to legally tie them to the mother of their child. Marriage, in other words, is conceived of as solving the problem that men generally do not want to have children, nor will they willingly accept the obligations of fatherhood in the same way that women often accept the responsibilities of motherhood following an unplanned pregnancy.

Weiner’s parent-partner status lacks any hint of the accidental procreation argument’s line-drawing between opposite-sex and same-sex couples. The parent-partner status would apply to all parents, regardless of their gender, rather than accidental procreation’s use of marriage as carrot and stick to regulate

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39. *Id.* at 1002 (Cordy, J., dissenting).

40. Melissa Murray, *What’s So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL’Y & L. 387, 417–18 (2012); Lynn D. Wardle, *Multiply and Replenish: Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J. L. & PUB. POL’Y 771, 781–82 (2001).

41. See Abrams & Brooks, *supra* note 1. In my own classes, I stress the moral judgment further by labeling it the “irresponsible heterosexuals” argument, usually accompanied by a joke about college students on spring break.

42. *Id.* at 2.

43. See Courtney G. Joslin, *Searching for Harm: Same-Sex Marriage and the Well-Being of Children*, 46 HARV. C.R.-C.L. L. REV. 81, 90 (2011).

44. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2613 (2015) (Roberts, C.J., dissenting) (“Procreation occurs through sexual relations between a man and a woman. When sexual relations result in the conception of a child, that child’s prospects are generally better if the mother and father stay together rather than going their separate ways. Therefore, for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond.”); Julie A. Nice, *The Descent of Responsible Procreation: A Genealogy of an Ideology*, 45 LOY. L.A. L. REV. 781, 814 (2012); Edward Stein, *The “Accidental Procreation” Argument for Withholding Legal Recognition for Same-Sex Relationships*, 84 CHI.-KENT L. REV. 403, 416–17 (2009).

45. Stein, *supra* note 44, at 421.

heterosexual sexual activity (p. 133). The parent-partner status would thus do some of the work that proponents of the accidental procreation argument believed marriage performed without the discriminatory distinction. Weiner acknowledges this in the context of explaining why the parent-partner status is necessary, noting that incentivizing marriage as a channeling function is “simply not working to the extent it once did” (p. 66). A regime including parent-partner status might thus win supporters from the accidental procreation wing, viewing the status as a second-best option to enforcing responsibilities of parenthood in a post-*Obergefell* world.

Weiner refutes elements of the first problematic implication of accidental procreation: namely, that men are largely neutral or negative toward the prospect of fatherhood. Edward Stein summarized accidental procreation’s skepticism towards the paternal instinct as informed by sociobiology: “because men sometimes abandon their female sexual partners and because sex between men and women can sometimes lead to unintended procreation, women who have sex with men will often be left to care for their accidentally-produced offspring alone.”<sup>46</sup> The seeds of this argument were present from Justice Cordy’s dissent:

[T]here is no process for creating a relationship between a man and a woman as the parents of a particular child. The institution of marriages fills this void by formally binding the husband-father to his wife and child, and imposing on him the responsibilities of fatherhood. The alternative, a society without the institution of marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic.<sup>47</sup>

In this view of the world, men’s biological drive leads them to promiscuous sexual intercourse with as many partners as will have them, and by the time of birth the father is long gone. Women’s maternal instincts (and the practicality of birth) leave them with raising the child, whereas men feel neither an emotional nor a moral obligation to have any relationship with their progeny.

Weiner complicates this picture in her discussion of the benefits of parent-partnerships. She identifies one set of what she terms “direct benefits” to the child as a result of the parent-partner status (pp. 188). These arise from the specific proposed obligations, most dramatically if one parent saves the other’s life as a result of the duty to aid (pp. 187, 188). In addition, Weiner identifies various indirect benefits, which are more attenuated positive consequences of parents who cooperate raising their child (pp. 193–235). One such effect briefly explains at least some absent fathers (p. 198). Weiner also spells out a few ways in which a more amicable relationship between co-parents facilitates better parent/child relationships (pp. 194–98, 201–06). She cites several researchers

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46. *Id.*

47. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 996 (Mass. 2003) (Cordy, J., dissenting) (citations omitted).

and surveys indicating that unmarried mothers, who are more likely to have primary physical custody of their children, have considerable control over the father's relationship with the child (pp. 201–03). Many unmarried fathers report feeling deliberately excluded from their child's life—even that the mother acted as a gatekeeper to prevent them from taking an active paternal role (pp. 201–02). At the same time, however, the mother's choice does not take place in a vacuum, and her willingness to allow or even encourage the father/child relationship is affected by whether the father has been supportive of her (pp. 202–03). Weiner thus challenges the one-sided narrative of men as uninterested in fatherhood. Instead, the relationship (or lack thereof) between the parents can lead to frustration on both sides, which inhibits noncustodial fathers from taking as engaged a parental role as they might otherwise.

So far, so good: the parent-partner status acknowledges that many fathers would like to take a more active role in their child's life, and works to further a paternal role through a better relationship between the parents. Some of the more aspirational and abstract effects of the parent-partner status, however, amplify the second problematic implication of accidental procreation: that fatherhood is a profoundly relational status, and relational to the mother rather than to the child.

If one accepts the notion that men are driven by sexual desire to have intercourse with women, and feel no instinctive bond to any resulting children, the solution to deadbeat dads is to tie them to the mothers, rather than to the children directly, as Weiner proposes. For example, Lynn Wardle wrote in a 2001 article voicing one of the early articulations of accidental procreation:

The power of marriage to strengthen the connection and commitment of prospective parents to their offspring has long been acknowledged by social science in the case of men, for in our culture “men's relations with their children are dependent to a significant extent on their relations with the child's mother. . . . the prevailing cultural assumption in the United States is that fatherhood and marriage are . . . a ‘package deal.’” Men in contemporary society tend to relate to their children through their wives, and when that tie to their wives is severed or nonexistent, their commitment to their children is weakened.<sup>48</sup>

This perspective is expressed in current constitutional doctrine regarding unwed fathers. As mentioned above, one of the key facts determining whether a man is recognized as a child's legal father is whether he is married to the child's mother (p. 46). The marital presumption assumes that the parents of a child born to a married woman are the two spouses, and although the strength of the marital presumption has waned considerably, it remains a common starting point for parentage determinations.<sup>49</sup> By contrast, if the parents are unmarried, the father

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48. Lynn D. Wardle, “*Multiply and Replenish*”: *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL’Y 771, 792 (2001) (citations omitted).

49. See Purvis, *The Origin of Parental Rights*, *supra* note 5, at 661.



must utilize state-specified procedures to assert his parenthood (p. 516). Sometimes this is a straightforward procedure, such as signing a Voluntary Acknowledgment of Paternity form.<sup>50</sup> Sometimes the father would like to evade his parental status and ensuing obligations, and is made the subject of a child support action establishing his paternity.<sup>51</sup> But in some circumstances, a father is unable to gain recognition as a legal parent because he has failed to or cannot fulfill the requirements.<sup>52</sup> A handful of such fathers have challenged their nonrecognition as violations of their constitutional rights before the Supreme Court, with varying degrees of success. Weiner mentions two such examples in the context of the centrality of marriage to current family law: *Stanley v. Illinois*, in which a father successfully challenged an Illinois law making non-marital children wards of the state upon the mother's death,<sup>53</sup> and *Michael H. v. Gerald D.*, in which the Court held that a father whose child was born as the result of an extramarital affair had no constitutional right to disturb the presumption that the mother's husband was the legal father.<sup>54</sup> A trio of further cases from the 1970s can further illustrate a general rule as to the constitutional rights of unwed biological fathers: such men do not have any constitutional interest in their relationship with their children unless and until they form a substantial relationship with the child.<sup>55</sup> As I, among other scholars, have pointed out, this makes a man's parental status dependent upon his relationship with the mother:

The only way for a man to ensure parental rights before birth is to marry the biological mother, a marriage-based classification that the Supreme Court has explicitly held raises no equal protection concerns. And the only way for an unwed man to ensure parental rights after birth is to create a functional relationship with the child, which is dependent on the biological mother's willingness to allow such a bond to develop.<sup>56</sup>

In one way, the parent-partner status begins to level this playing field. At least under such a regime the mother owes some duties to the father, and Weiner's proposed relationship work would facilitate the kind of relationship that might help to cement a biological father's status as legal father. The parent-partner status only arises, however, once parentage is determined. It does not affect the process by which legal parentage is identified at all.<sup>57</sup> It thus

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50. Katharine K. Baker, *Legitimate Families and Equal Protection*, 56 B.C. L. REV. 1647, 1686–87 (2015).

51. Purvis, *The Origin of Parental Rights*, *supra* note 5, at 664.

52. *Id.* at 677.

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

54. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

55. *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246, 255–56 (1978).

56. Purvis, *The Origin of Parental Rights*, *supra* note 5, at 679 (citing *Lehr*, 463 U.S. at 269–71 (White, J., dissenting)).

57. Weiner criticizes the current centrality of marriage to legal responsibilities between parent and child (pp. 46–54), but does not directly address determination of parental status other than to discuss the impact of the parent-partner status on determinations of biological

underlines the relational nature of paternity—not only does a father’s constitutional rights depend on either marriage to or an amicable relationship with the mother, but now if an unmarried biological father seeks recognition as legal father, he must bind himself through legal obligation directly to the mother for the duration of the child’s minority.

This raises two additional consequences that might harm fathers. The first is relatively direct, and one that Weiner acknowledges directly: parents who want nothing to do with one another might not want to have the father recognized as the legal father if doing so creates a legal bond between them (p. 516). She rejects this possibility for three reasons. First, unmarried fathers typically acknowledge paternity at the time of their child’s birth, when she believes “the unmarried parents are usually on good terms with one another” (p. 516). Second, even if one parent attempts to evade parental status, procedures exist by which paternity can be established, either because the mother or state seeks to establish paternity for purposes of child support, or because the father affirmatively seeks a declaration of paternity (p. 517). For the majority of families this may be accurate, although different demographics have very different rational choices with respect to establishing paternity. For example, June Carbone and Naomi Cahn’s research into the classed dimensions of family law indicate that parent-partner status could have the precise opposite effect among lower-class parents.<sup>58</sup> They have written that formal orders to pay child support alienate low-income fathers from both mother and child, so it seems likely that a further obligation—particularly a further financial childcare obligation—would magnify that effect.<sup>59</sup> Fathers might strongly refuse to sign a Voluntary Acknowledgment of Paternity if doing so brought both child support and childcare payments.<sup>60</sup> Additionally, imbalanced ratios of “marriageable” poor men and women have led not only to lower marriage rates, but to lower numbers of committed relationships in general.<sup>61</sup> Men use their relative scarcity

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paternity (pp. 516–18). She describes the parent-partner status as “aris[ing] upon the birth or adoption of their child” (p. 133), implying that her proposal would affect the significance of legal parentage as it is currently determined. The parent-partner status would not, in other words, find legal parents where currently state law does not recognize a second parent. For example, a single woman who chooses to have a child using donor sperm is a single parent in the eyes of the law, as state statutes uniformly exclude the genetic donor father from recognition as parent so long as the mother used some form of medical intervention during the process. See Purvis, *The Origin of Parental Rights*, *supra* note 5, at 667.

58. See June Carbone, Naomi Cahn, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 1185, 1223–24 (2013).

59. *Id.* (“Insistence on formal child-support enforcement, on the other hand, tended to alienate the fathers. They often became angry at the mothers, and they became less likely to see the mothers or contribute informally to the children. Leslie Harris concludes that while formal orders increased support from fathers who would otherwise not have contact with their children, they were counterproductive for the larger group of dads who did have a continuing relationship with their children.”)

60. *Id.* at 1225.

61. June Carbone & Naomi Cahn, *The End of Men or the Rebirth of Class?*, 93 B.U. L. REV. 871, 890 (2013).

to justify casual relationships with multiple women with relatively little financial or other contributions, whereas women “exercise their greater societal power and independence to forgo committed relationships altogether.”<sup>62</sup> Such women seem unlikely to seek out further legal entanglement with the fathers of their children.

The third reason Weiner rejects the possibility that the parent-partner status will lead to fewer legal fathers is because she believes the parent-partner status will decrease births for unmarried and uncommitted couples (p. 517). This is because Weiner’s ambitions reach further than merely improving cooperation between biological parents. She also proposes that the parent-partner status will foster love by “increas[ing] the likelihood that people who have a child together will love each other and continue to love each other” (p. 275). Weiner believes the parent-partner status can foster both passionate and companionate love, explaining that conceiving a child through sexual intercourse “sets the stage” for both (p. 280). Love, Weiner writes, is a cognitive decision that increases commitment in both parties, citing the success of arranged marriages in India as evidence that deciding to love another person can in fact produce love and devotion (pp. 285–86).

The deep affection and regard represented by companionate love is certainly an appropriate emotion to be shared between parents. But Weiner believes the parent-partner status will foster passionate love as well (p. 289). As discussed above, one reason for the obligation to engage in relationship work is to make clear that a couple with a child should put forward their best efforts to stay paired in a romantic relationship (pp. 372–81). Weiner argues society should expect such parents to stay together, and should consider it irresponsible to break up unless they have “gone all out” to save the relationship (p. 376).

In some ways, this sounds appealing. Perhaps the nuclear family is old-fashioned, but didn’t it have a pretty good run? Might it not be worth trying to encourage? Perhaps, but two objections come immediately to mind. First, family law has begun to progress along a brave new frontier of acknowledging how families look in the real world. Plenty of families are not headed by a couple in love—there are single parents; de facto or psychological parents who create their status by forming a significant relationship with the child; open adoptions that maintain links between the child and his or her family of origin; children created when one couple uses a friend as a sperm donor who then maintains a quasi-parental relationship with the child; even three parents recognized on birth certificates.<sup>63</sup> Weiner certainly does not criticize such families, but neither does she convince the reader that a family headed by a couple in passionate love is the best model, either. She is quite persuasive that two parents who get along and cooperate in raising their child are better than two parents who can’t bear to be in the same room. But cooperation, respect, and platonic love can be present even if

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62. *Id.*

63. Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 *YALE J.L. & FEMINISM* 210, 222–30 (2012).

the parents are no longer in passionate love.<sup>64</sup>

More abstractly, there is a danger that conflating the parent/child relationship with the parent/parent relationship highlights the relational nature of paternity. As a constitutional matter, men are already told that the simplest way of cementing their status as father is to marry the mother.<sup>65</sup> The parent-partner status continues this message: if you want to be a father, you should really be in love with the mother. Certainly, Weiner implies, if you want to be a *good* father, you would still be in a romantic relationship with the mother.

Again, this is pushing the implications of the parent-partner status beyond what Weiner explicitly articulates. And she would send the same message to mothers: that the responsible thing to do would be to try to save the romantic relationship with the father. Context matters, however—the legal recognition of mothers does not turn on their relationship with the father.<sup>66</sup> The valence of the relational message sent to fathers is deeper and more skeptical of their parental instincts.

### CONCLUSION

As is clear from the above, the parent-partner status is a thought-provoking project along many dimensions. Weiner's concern for the realities of modern families, and how fractured adult relationships affect children and parenting, has generated an original proposal for legal reform intervening directly in an area of complex problems. As a set of policy recommendations, the parent-partner status is specific, actionable, and constructive. Weiner's rich discussion of the motives and intended effects of the status add stimulating questions of the normative priorities of family law. The broader implications of her proposal, moreover, illustrate the thorny puzzle of unearthing and addressing gender stereotypes. It will take ambitions as commendably high as Weiner's to shape family law to fit modern families and values.

*Dara E. Purvis*

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64. A harder question is whether two parents are better than one in all circumstances. Two parents double the potential support for a child – both financial and emotional – but in practice may not, and many parents choose to be single parents. The expressive power of the parent-partner status, if the message is conveyed as clearly as Weiner proposes, could unintentionally imply that such parents are second-best to a parent in any relationship with a co-parent.

65. Purvis, *The Origin of Parental Rights*, *supra* note 5, at 679.

66. See Mary Patricia Byrn & Jenni Vainik Ives, *Which Came First the Parent or the Child?*, 62 RUTGERS L. REV. 305, 333 (2010).