



2022

The Price of Exit

Eleanor M. Brown

Naomi Cahn

June Carbone

Follow this and additional works at: https://elibrary.law.psu.edu/fac_works



Part of the [Law Commons](#)

THE PRICE OF EXIT

ELEANOR BROWN, NAOMI CAHN & JUNE CARBONE*

ABSTRACT

The price of exit influences the terms of intimate relationships—and constitutes an important factor in distinguishing committed from contingent relationships. With or without legal recognition of the relationship itself, the dissolution of an intimate relationship requires disentangling any joint assets, determining who stays and who leaves a joint residence, and arranging the terms of continuing involvement with any children. Marriage establishes bright-line rules for these determinations and a formal legal process for administering them. Unmarried relationships involve different default terms and no automatic legal process for resolving the terms of exit. The terms of exit, however, may frame relationship choices.

This Article will argue that, inside or outside of marriage, the critical choice couples make is between committed relationships, with a high degree of financial and emotional interdependence, and contingent relationships, in which the parties keep their identities, assets, and arrangements separate. Committed relationships inevitably entail high exit costs as the practicalities of splitting shared assets or determining the new terms for emotionally charged relationships such as childrearing can exact a high toll. Contingent relationships in contrast are easier to end precisely because of their contingent nature; couples often see each determination, whether about how to share rent or who picks the child up after school, as a separate transaction. Perceptions about the price of exit often shape the nature relationship choices and while today's relationships exist on a continuum between those which are so interdependent that the parties effectively function as one, and so independent that an intimate couple may have no greater entanglements than college roommates, the distinctions between committed and contingent relationships often fall on the fault lines of class, race, and gender.

The typical unmarried relationship in reported decisions is a committed one, in which the parties have substantial assets and a degree of interdependence that makes existing law appear inequitable. These

* Eleanor Brown is Professor of Law and International Affairs, Penn State Law. Naomi Cahn is the Justice Anthony M. Kennedy Distinguished Professor of Law, the Nancy L. Buc '69 Research Professor in Democracy and Equity at the University of Virginia School of Law. June Carbone is the Robina Chair in Law Science and Technology at the University of Minnesota Law School. Our thanks to the Nonmarriage Roundtable, where this was first presented.

relationships differ, however, from the more numerous but less visible contingent relationships in which the parties have relatively few assets and a less equal and less intertwined assumption of relationship responsibilities. This Article, prepared for a symposium on nonmarriage, explores the price of exit as an analytical factor. By examining how the cost of exit influences family decision-making, the Article remakes understandings about the law that governs nonmarriage. Expectations about exit profoundly influence decision-making concerning partnering, regardless of socioeconomic class, yet expectations often differ by socioeconomic class. The legal frameworks applicable to conventional married families presume interdependence and shared parenting, which reflect terms that the couples would presumably choose themselves. These terms, however, are ill-suited to many nonmarital families.

Accordingly, the Article concludes that conflicting norms, particularly in the communities in which cohabitation is most common, complicates the imposition of uniform rules that presume dependency—or the obligations associated with it.

TABLE OF CONTENTS

I. THE POWER OF EXIT	1905
A. <i>The Traditional Bargain</i>	1905
B. <i>Today’s Relationship Bargains</i>	1907
III. SOCIETAL INEQUALITY AND THE ECONOMICS OF COHABITATION..	1912
A. <i>The Economics of Committed Bargains</i>	1914
1. <i>The Single Earner Committed Bargain</i>	1915
2. <i>The Dual-Earner Committed Bargain</i>	1917
B. <i>The Economics of Contingent Bargains</i>	1919
IV. MOVING FORWARD.....	1924
A. <i>Ending the Relationship</i>	1925
B. <i>Property Division and Support</i>	1926
C. <i>Parenthood</i>	1927
D. <i>Child Custody and Support</i>	1927
CONCLUSION.....	1928

“I don’t believe in divorce—that’s why none of the women in my family are married.”

– Mother explaining why she didn’t marry the father of her child.¹

INTRODUCTION

Historically, a defining element of marriage was its permanence. Family law strictly limited the ability to exit marriage and accepted, as the price for those limits, the implicit restriction of women’s voice within marriage.² With the slow rise of the family of the separate spheres in the mid-nineteenth century, women’s role within marriage began to change, with women gaining greater status and authority—although they continued to have few options to leave the married home. By the middle of the twentieth century, however, the fight for no-fault divorce was cast in part in terms of women’s quest for the right to self-definition—self-definition that did not need to include a man at all.³

1. KATHRYN EDIN & MARIA KEFALAS, *PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE* 9 (2005).

2. See SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 7–8, 167–68 (1989) (describing the ways in which women’s inability to exit marriage, for legal and practical reasons, limited their voice within marriage); Karin Carmit Yefet, *Divorce as a Formal Gender-Equality Right*, 22 U. PA. J. CONST. L. 793, 803 (2020) (describing the importance of exit to gender equality).

3. See Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 87 (2004).

Today, in the aftermath of liberalized divorce and greater ability to enter into intimate relationships of choice, the terms of exit from intimate relationships remain critical to values associated with autonomy and gender equality.⁴ The legal cost of exit from an intimate relationship—the expense and inconvenience of the proceedings, the possibility of being subject to continuing financial obligations, and the risk of loss of control over children or assets—influences the way that differing communities approach family formation.⁵ The classic work by Albert Hirschman, which focused on business enterprises, organizations, and states, treats the ability to exit as “the right to withdraw or refuse to engage, simply to ‘leave.’”⁶ In an era in which marriage has become optional and unmarried relationships range from the casual to the deeply committed, the consequences of exit from an intimate relationship affect the willingness to enter various types of relationships in the first place.⁷

The connections between entry and exit reinforce each other. Even without legal recognition of the underlying relationship, the dissolution of an intimate relationship requires disentangling any joint assets, determining who stays and who leaves a joint residence, and arranging the terms of continuing involvement with any children affected by the relationship’s dissolution. Marriage establishes bright-line rules for these determinations and a formal legal process for administering them. Unmarried relationships involve different default terms and no automatic legal process for resolving the terms of exit. Inside or outside of marriage, however, the critical distinction is between committed relationships, with a high degree of interdependence, and contingent relationships, in which the parties keep their identities, assets, and arrangements separate. While today’s relationships exist on a continuum between those which are so interdependent that the parties effectively function as one, and so independent that an intimate couple may have no greater entanglements than college roommates, the distinctions between committed and contingent relationships often fall on the fault lines of class, race, and gender.

4. *Id.* at 79.

5. *See infra* notes 15–20 and accompanying text.

6. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 4 (1970); *see* Frantz & Dagan, *supra* note 3, at 86 (applying this concept to family law). Hirschman contrasts exit with the ability to express dissatisfaction through “voice.” HIRSCHMAN, *supra*, at 4. A third option is “loyalty,” acceptance based on the other party’s terms. *See* Eleanor Marie Lawrence Brown, *Why Black Homeowners Are More Likely to Be Caribbean American than African American in New York: A Theory of How Early West Indian Migrants Broke Racial Cartels in Housing*, 61 AM. J. LEGAL HIST. 3, 31 (2021). Hirschman notes: “The voice option is the only way in which dissatisfied customers or members can react whenever the exit option is unavailable. This is very nearly the situation in such basic social organizations as the family.” HIRSCHMAN, *supra*, at 33.

7. Where the goal is to change the relationship, the possibility (or threat) of exit may cause changes that make exit less desirable. *See, e.g.*, Frantz & Dagan, *supra* note 3, at 90.

The modal (that is, the most common) *committed* intimate bargain is one in which the parties intermingle their lives, based on principles of interdependence, reciprocity, and equal respect.⁸ These committed relationships can take one of two forms. The first type pairs a higher earning (typically, but today not inevitably, a man) with a lower-earning spouse who assumes responsibility for the family's nonmarket activities.⁹ The second involves two-earner households in which the parties trade off responsibilities for work and family as circumstances change. At the core of these arrangements, whether inside or outside of marriage, is an implicit bargain that makes sense: the combination of the parties' joint efforts in both market and nonmarket investments that create interdependence and a payoff in terms of the accumulation of wealth and investment in the well-being of the next generation. A higher price of exit, whether in terms of shared ownership of family assets, barriers to divorce, or simply a higher implicit price in the form of shared custody rights, accordingly reflects not only the couple's commitment to each other, but the vulnerability that arises from interdependence.

The modal *contingent* relationship, in contrast, is one in which the parties cohabit, raise children together, or share an intimate relationship without either a long-term commitment to each other or economic interdependence. In many communities, couples organize their relationships to ensure subsistence; they may move in together to save on rent or to make it easier to care for a joint child. And in a world where employment has become less secure and income more volatile, the idea of a reliable single "breadwinner" has disappeared. Instead, many families depend on both parties' incomes, or one party may both earn the more reliable income and assume the primary responsibility for the family's care work, with the other playing a lesser role in each sphere. The implicit bargain reflecting these realities is contingent rather than committed, that is, the partners have not emotionally or practically made an unqualified commitment to each other to stay together. They are less likely to commingle their limited resources, assume equal childcare responsibility, or forego opportunities for individual advancement

8. JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 118 (2014) (emphasizing that the new marital script involves "interdependence," "comparable, if not always equal, investments in the relationship," and "unqualified trust.")

9. These relationships continue to be shaped by workplace gender disparities. Couples, for example, are most likely to elect a single earner, primary caretaker model if one of the partners earns over \$250,000 per year, and these relationships are more likely to involve a male breadwinner, female homemaker in part because men are dramatically more likely to women to have opportunities to earn that much. See discussion *infra* note 74 and accompanying text.

in reliance on the other partner's earnings.¹⁰ In the context of these relationships, easier access to exit is critical for the party taking greater responsibility for dependents. Shared ownership and shared custody imposed from without not only increase the cost of exit; they remake the underlying bargain in ways that undercut support for caretaking.

While intimate relationships generally have become more varied, the distinctions between committed and contingent modal forms often reflect differences in class and race, particularly in a more unequal and insecure society. In the bottom 40% of couples, there is no reliable surplus.¹¹ Even among middle-income couples, income volatility destabilizes relationships¹² and shared ownership in couples with few assets really means sharing the limited resources of the better-off partner at the time the split occurs. When the unions end, community-based custody norms reflect the realities on the ground: a second parent's continuing contact with the children depends on the ability to establish a working relationship with the custodial parent—still overwhelmingly mothers rather than fathers.¹³

These realities—and the associated legal costs of exit—frame relationship choices, including choices to marry. The average age of first

10. For cohabitants who are between the ages of eighteen and twenty-nine and are not high school graduates, under half of the women (47%)—but two-thirds (67%) of the men—state that they expected to marry their current partner. KAY HYMOWITZ, JASON S. CARROLL, W. BRADFORD WILCOX & KELLEEN KAYE, *KNOT YET: THE BENEFITS AND COSTS OF DELAYED MARRIAGE IN AMERICA* 28 (2013), <http://nationalmarriageproject.org/wordpress/wp-content/uploads/2013/04/KnotYet-FinalForWeb-041413.pdf> [<https://perma.cc/YBA3-Z56Q>]. See also Amanda J. Miller, Sharon Sassler & Dela Kusi-Appouh, *The Specter of Divorce: Views from Working- and Middle-Class Cohabitators*, 60 *FAM. REL.* 602, 613 (2011) (observing that “[w]orking-class cohabitators—particularly the women—were more than twice as likely to express concerns regarding how hard marriage was to exit than were middle-class respondents, emphasizing the legal and financial challenges of unraveling a marriage”); Richard V. Reeves, *Parenting, Cam Newton, and Marriage vs. Cohabitation*, BROOKINGS INST. (Jan. 12, 2016), <https://www.brookings.edu/opinions/parenting-cam-newton-and-marriage-vs-cohabitation/> [<https://perma.cc/3US3-HEVR>] (stating that it “seems likely that the decision to marry is a signal of [] commitment”).

11. FED. RSRV. BD., *REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2018* 2, 21 (2019), <https://www.federalreserve.gov/publications/files/2018-report-economic-well-being-us-households-201905.pdf> [<https://perma.cc/VQ88-FEM6>] (indicating that four of ten adults would have trouble covering an unexpected \$400 expense and would have to run up credit card debt or borrow from family or friends, if they could cover the debt at all).

12. See, e.g., PAUL R. AMATO, ALAN BOOTH, DAVID R. JOHNSON & STACY J. ROGERS, *ALONE TOGETHER: HOW MARRIAGE IN AMERICA IS CHANGING* 14 (2007) (describing increased tensions due to economic distress in families after 2000 compared to twenty years earlier).

13. In such families, mothers may act as “gatekeepers,” protecting children by “maintaining a modicum of control over family life by avoiding a formal paternity determination and acting as primary breadwinners and caregivers for their children.” Serena Mayeri, *Foundling Fathers: (Non-)marriage and Parental Rights in the Age of Equality*, 125 *YALE L.J.* 2292, 2296 n.3 (2016); see June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 *MICH. ST. L. REV.* 1185, 1207 (2013) (discussing such families). For analysis of maternal “gatekeeping” norms in impoverished urban communities, see KATHRYN EDIN & TIMOTHY J. NELSON, *DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY* 169–74 (2013).

marriage has steadily increased¹⁴ and become more closely correlated with income and education as greater levels of emotional maturity and financial security have become necessary for egalitarian relationships to work.¹⁵ In contrast, as one study states, “adults in cohabiting-couple families are more likely to work in poorly compensated jobs; are younger, on average; are more likely to be African American or Latino; and are less likely to have a bachelor’s degree or higher.”¹⁶ These couples are more likely to have contingent rather than committed relationships and less likely to have unions that produce a surplus for division. In addition, the same factors that produce wariness about commitment and in fact contribute to relationship instability, such as relationship conflict, infidelity, violence, and criminality, also undermine the foundation for shared parenting following a break-up.¹⁷ Therefore, while imposing a status akin to marriage might be appropriate for a committed, interdependent couple, it is not appropriate for contingent relationships, particularly where there is no surplus and where one party is both the primary caretaker and the more reliable breadwinner.

The legal implications of exit thus have a differential impact based on race, sex, and class. We see particularly clearly the inapplicability of the committed model when we consider Black women. Black women are by far the most likely women to be the primary economic support for their families both because a higher percentage are single mothers, and because even when they marry, they are more likely to earn as much as or more than their husbands.¹⁸ Status-based approaches, which focus on the fact of

14. See Shelly Lundberg, Robert A. Pollak & Jenna Stearns, *Family Inequality: Diverging Patterns in Marriage, Cohabitation, and Childbearing*, 30 J. ECON. PERSPS. 79, 81 (2016) (“Between 1956 and 2013, the median age at first marriage rose by over six years for both men and women, increasing from 21.1 to 27.5 years for women and from 22.5 to 29.2 years for men.”).

15. CARBONE & CAHN, *supra* note 8.

16. Shawn Fremstad, *Partnered but Poor*, CTR. FOR AM. PROGRESS (Mar. 11, 2016), <https://www.americanprogress.org/article/partnered-but-poor/> [<https://perma.cc/UYR4-FVNR>].

17. Laura Tach & Kathryn Edin, *The Compositional and Institutional Sources of Union Dissolution for Married and Unmarried Parents in the United States*, 50 DEMOGRAPHY 1789, 1815 (2013) (observing that sociologists report “certain conditions—such as extreme economic marginality, frequent conflict, involvement in crime, incarceration, or even infidelity—can be dealt with in a nonmarital union but would virtually mandate a divorce if they were married”) (citations omitted). They also report, “More than one-third of unmarried fathers have been incarcerated, compared with less than 10% of married fathers.” *Id.* at 1799. See also EDIN & KEFALAS, *supra* note 1, at 81 (indicating that over half of poor mothers they interviewed indicate that they are no longer with the fathers of their children because of domestic violence).

18. Sarah Jane Glynn, *Breadwinning Mothers Continue to be the U.S. Norm*, CTR. FOR AM. PROGRESS, fig.3b (May 10, 2019), <https://www.americanprogress.org/article/breadwinning-mothers-continue-u-s-norm/> [<https://perma.cc/G5K6-6TKA>]; see Marta Murray-Close & Misty L. Heggeness, *Manning Up and Womanizing Down: How Husbands and Wives Report Their Earnings When She Earns More* 6 (U.S. Census Bureau, Soc., Econ. & Hous. Stat. Div., Working Paper No. 2018-20, 2018), <https://www.census.gov/content/dam/Census/library/working-papers/2018/demo/SEHSD-WP2018->

cohabitation, are unlikely to be helpful to Black women who are primary earners. Community understandings in poor Black communities are more likely than in upper class arrangements to treat the mother as the primary custodian, absent an explicit understanding to the contrary. Accordingly, the implicit bargains underlying such arrangements may differ from implicit mainstream bargains. Indeed, such approaches may harm Black women if they are forced to share their assets with their partners (often men with less-stable incomes and who have engaged in less childcare) in the event of a relationship termination.¹⁹

This Article explores the price of exit as an analytical factor. The first section revisits the classic analysis treating restrictions on exit as essential to link superior male income to dependent women and children, and how the price for that bargain was male power within relationships. The Section also identifies the factors associated with dismantling that system and the emergence of a new upper middle-class system premised on promoting hyper investment in children. The new system fundamentally changed the price of exit from marriage. It simultaneously made it procedurally easier to secure a divorce and imposed on the spouses a new default model of shared asset ownership and shared custody, reinforcing the importance of equal respect, reciprocity, and trust as preconditions for making interdependent relationships worth entering. By changing the cost of exit, these changes remade the marital bargain.²⁰

Second, the Article reviews how the new terms of committed relationships make uncommitted ones more attractive. The sharing principles that govern committed relationship make no sense where there is no surplus and where sharing among the adults comes out of the resources on which children depend. In addition, the reciprocity norms that guide committed couples ring hollow in a relationship where a single partner assumes primary responsibility for caretaking and market work. They also make commitment more perilous when committed couples are “sharing” losses rather than gains.

Finally, the Article analyzes different reform proposals through an assessment of exit and concludes that almost all increase the cost of exit for unmarried partners, with differential effects by race, class, and gender. By examining how the cost of exit influences family law decision making, the Article remakes understandings about the law that governs nonmarriage. Expectations about exit profoundly influence decision-making concerning

20.pdf [https://perma.cc/B5P8-FKBH] (reporting that marriages in which wives earned more were almost twice as likely as marriages in which the husband earned more to be Black).

19. For those serving as both primary breadwinner and child caretaker, the cost of exit made marriage less desirable. See Carbone & Cahn, *supra* note 13.

20. *Id.*

partnering, regardless of socioeconomic class, yet expectations differ by socioeconomic class. The legal frameworks applicable to conventional married families presume interdependence and shared parenting, which reflect terms that the couples would presumably choose themselves. These terms, however, are ill-suited to many nonmarital families.²¹

Accordingly, the Article concludes that conflicting norms, particularly in the communities in which cohabitation is most common, complicate the imposition of uniform rules that presume dependency—or the obligations associated with it.

I. THE POWER OF EXIT

Economists treat contractual bargaining as a matter of Pareto optimality; that is, they assume it is worth it to the parties to enter into an agreement if the two parties end up better off than they would be without the agreement. In describing these bargains, economists take the initial distributions of resources as a given and assume pooled resources and stable preferences. They explicitly ignore market imperfections such as discrimination. We approach the matter of bargaining from a different perspective, one that makes visible both the initial distribution of resources and market imperfections that complicate bargaining.

In doing so, we start by identifying the traditional patriarchal bargain with the extension of the benefits of the male monopoly on resources and status to women and children only through marriage. Men in most of the developed world held a monopoly on access to wealth (such as land ownership in accordance with a system of patriarchal descent in the agricultural era), income (access to an explicitly “male” family wage making it possible to support a family), or privileged status (e.g., the ability to secure the “legitimate” status of offspring through marriage).²²

A. *The Traditional Bargain*

With the ability to raise children and assume a socially respectable role dependent on marriage, women historically have had limited ability to refuse to marry. Further, once married, women also had limited ability to

21. See generally Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225 (1998) (suggesting that marriage and divorce law reflect presumptive majoritarian default rules); Naomi Cahn & June Carbone, *Blackstonian Marriage, Gender, and Cohabitation*, 51 ARIZ. ST. L.J. 1247, 1250 (2019) (addressing the changed foundation for legal regulation of intimate relationships).

22. Naomi Cahn & June Carbone, *Uncoupling*, 53 ARIZ. ST. L.J. 1, 8, 11–12 (2021) (describing male monopoly on farm ownership and subsequent rise of the male family wage).

exit. Their financial and social dependence, which followed not just from the childbearing role, but from the lack of access to the resources that would allow financial independence, made it impractical to leave, even if they had the legal ability to divorce. Women's principal contributions to the marital exchange lay with their sexual attractiveness and childrearing capacity; older women or women who had already had children would find it difficult either to remarry or to support themselves outside of marriage.²³ Susan Moller Okin observed that the power asymmetry in marriage between men and women limited women's "voice" within extant relationships;²⁴ the inability to credibly threaten to leave increased male power.

This conception of marriage was intrinsically patriarchal. Traditional notions of sexual morality stigmatized adultery, nonmarital childbearing, and divorce, with women's sexual indiscretions treated more harshly than men's.²⁵ Choice about either entrance or exit was thus constrained. The historian of marriage, Stephanie Coontz, demonstrates that in the United States, as in much of the world until relatively recently, the idea that autonomous adults would choose who they would marry was inconceivable. And even when couples became freer to select their partners, class, race, and sexual orientation limited the acceptable choices, and loss of status and income limited the possibilities of exit.²⁶

Amartya Sen presents a different analysis. He offers a modified cooperative conflict paradigm in which members of the household face two different types of problems simultaneously, one involving cooperation (i.e., adding to the total resources available) and the other conflict (i.e., dividing the total resources available among members of the household).²⁷ Working with multiple studies on rural Indian women, the evidence was systematic and clear—women's contributions to the total resources available were systematically devalued, particularly when those contributions came in the form of household work, including child rearing. Moreover, in dividing resources among members of the household, women systematically received less (e.g., they ate less, they rested less). Utilizing examples that may seem somewhat extreme to modern eyes, he cites study after study in which women in traditional communities do not appear to distinguish

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

24. OKIN, *supra* note 2, at 7–8, 167–68.

25. See June Carbone, *Is the Gender Divide Unbridgeable? The Implications for Social Equality*, 5 J. GENDER, RACE & JUST. 31, 73 (2001); June Carbone, *Out of the Channel and into the Swamp: How Family Law Fails in a New Era of Class Division*, 39 HOFSTRA L. REV. 859, 871 (2011).

26. OKIN, *supra* note 2, at 167 (observing the "asymmetric dependence of wives on husbands affect[ed] their potential for satisfactory exit[s]").

27. See Amartya K. Sen, *Gender and Cooperative Conflicts*, in PERSISTENT INEQUALITIES: WOMEN AND WORLD DEVELOPMENT 123, 148 (Irene Tinker ed., 1990).

between personal welfare and familial welfare. Indeed, many wives find questions about their personal welfare unintelligible. Women in these families were the true altruists; they are the ones with utility preferences that integrated their own well-being with those of their families and particularly their children.

For Sen, this is why exit is important. Irrespective of what a woman may perceive her interests to be, as an objective matter, her personal welfare is still important. But there is a more fundamental point—that is “the lack of perception of personal interest combined with a great concern for family welfare is, of course, just the kind of attitude that helps to sustain the traditional inequalities.”²⁸ Sen argues that how women are perceived outside the home has huge implications for their bargaining power within the home. This is why he is so concerned about the inextricable connections between microeconomic gender stratification and broader social gender stratification.

This analysis sets up two important insights. The first is that women’s lack of power in traditional relationships stemmed from the societal devaluation of the services they provided. This is true because women’s lack of alternatives to patriarchal marriage shaped the nature of wives’ marginalized role. The second is that in traditional marriages, women often sacrificed their own interests for the benefit of their children. The continuation of the marriage often advanced children’s interests even if the mother would have been better off on her own.²⁹ Thus, the surrounding context, including changes in public policy or social norms, affects intra-couple dynamics and have implications for subsequent intimate partnering.

B. Today’s Relationship Bargains

These insights structure our examination of the bargains that inform today’s family relationships. The male monopoly on wealth, income, and status is gone. Gender differences nonetheless remain salient. The extent to which male partners earn dramatically more than female partners varies with race and class, and women’s altruistic concern for their families, particularly their children, while not as extreme as in rural India, continues to shape their perceptions of the advantages and disadvantages of alternative

28. Amartya Sen, *Gender and Cooperative Conflict* 7 (World Inst. for Econ. Rsch., Working Paper No. 18, 1987), <https://www.wider.unu.edu/sites/default/files/WP18.pdf> [<https://perma.cc/4HYU-6JLY>].

29. See Barbara R. Bergmann, *Becker’s Theory of the Family: Preposterous Conclusions*, 39 CHALLENGE 9, 9–12 (1996), <http://www.jstor.org/stable/40721661> (observing the empirical evidence suggests that, contrary to economic theory, wives are more likely to act on behalf of other family members than husbands).

family arrangements. In addition, only a relatively small part of the population can earn enough to support a family on a single income.³⁰ As a result, today's relationship bargains typically presume that both parties can be self-supporting, at least at the beginning of a relationship.

In the United States, these changes start with the economic circumstances that have changed the role of gender in the economy; they extend to the changing legal regulation of intimate relationships, and they include the class and racial differences that inform relationship norms in different communities. These factors frame the modal bargains at the core of different types of relationships and they start with the following changes:

First, women's economic opportunities began to expand after World War II and multiplied with women's increasing education and employment rights after passage of the Equal Pay Act of 1963 and the Civil Rights Act of 1964. Women gained greater economic independence and thus greater ability to say no to marriage.³¹

Second, divorce rates soared.³² Shotgun marriages had long held the line on nonmarital births. The number of brides who gave birth within eight and a half months of the nuptial reached a modern high of 30% in 1960, a percentage last seen in 1800. The early marriages of the fifties and sixties, with an average age of first marriage of eighteen for women and twenty for men (the youngest ages in a century), increased demand for divorce and divorce rates spiked as states liberalized divorce procedures through the seventies and eighties. Marriage per se no longer provided permanence or security, which in turn increased the importance of women's workforce participation.³³

Third, with greater access to contraception and abortion, childbearing changed from the inevitable consequence of heterosexual relations to a choice, whose timing *could* be (although is not always) planned. Couples thus gained the ability to postpone marriage.³⁴ The average age of marriage

30. Indeed, Laura Rosenbury has suggested that the partnership theory of marriage "is not a long-term strategy for eliminating gender-role oppression," and "may even play a role in reinforcing traditional gender expectations, including the expectation of wifely sacrifice." Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1289 (2005); see Naomi Cahn, *What's Wrong About the Elective Share "Right"?*, 53 U.C. DAVIS L. REV. 2087, 2124 (2020) (noting a similar dynamic in the elective share right of surviving spouses in common law states). Rosenbury also argued that "women who benefit most from the partnership theory of marriage are those who forego market work and are married to wealthy men." Rosenbury, *supra*, at 1284.

31. See CARBONE & CAHN, *supra* note 8, at 95 (discussing women's changing market roles); *id.* at 101 (linking these changes to greater reluctance to marry).

32. Lundberg, Pollak & Stearns, *supra* note 14, at 81 ("The prevalence of divorce, which had been rising gradually in the United States since the late nineteenth century, suddenly doubled between the mid-1960s and mid-1970s.").

33. For a summary of the developments, see CARBONE, *supra* note 23, at 86–91.

34. Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions*, 110 J. POL. ECON. 730 (2002).

rose into the late twenties and marriage changed from an institution necessary to channel the consequences of sex into a gendered assumption of family responsibilities to a new model.³⁵

We have termed these marriages of choice “blue marriage,” that is, marriage between two equal and mature adults who see marriage not as a societal command, but as an expression of their personal commitment to each other.³⁶ This blue strategy means investing in both boys’ and girls’ income capacity, postponing marriage until after the individuals establish financial independence and emotional maturity, holding the line on nonmarital births through embrace of contraception and, if necessary, abortion, and adopting more flexible attitudes toward gender and family roles.³⁷ The new terms involve an adjustment to the greater opportunities open to women and the greater fragility of intimate relationships. Mature couples with a financial cushion who choose partners who complement their station in life share a common enterprise.³⁸ They produce more stable families and have more resources to invest in their children, if they choose to have them.³⁹ The Supreme Court’s celebration of marriage in *Obergefell v. Hodges* embraced this model, praising the mutual support and interdependence—and protection from loneliness—that it provides.⁴⁰ What the opinion did not discuss, however, was how the new model of marriage emerged from the twentieth century changes in exit.

35. HYMOWITZ, CARROLL, WILCOX & KAYE, *supra* note 10, at 8 fig.II.

36. NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE (2010); CARBONE & CAHN, *supra* note 8, at 62; Naomi Cahn & June Carbone, *Growing Inequality and Children*, 23 AM. U. J. GENDER, SOC. POL’Y & L. 283, 291 (2015).

37. June Carbone & Naomi Cahn, *Red v. Blue Marriage*, in MARRIAGE AT THE CROSSROADS: LAW, POLICY, AND THE BRAVE NEW WORLD OF TWENTY-FIRST CENTURY FAMILIES 9, 11 (Marsha Garrison & Elizabeth Scott eds., 2013).

38. See, e.g., Christine R. Schwartz, *Earnings Inequality and the Changing Association Between Spouses’ Earnings*, 115 AM. J. SOC. 1524 (2010) (describing the increase in high-earning couples who marry each other, with the greatest gains in family income going to the women who marry high-earning men, increasing societal income inequality).

39. Lundberg, Pollak & Stearns, *supra* note 14, at 94 (“Increased returns to human capital and, hence, to intense child investments, may have kept marital surplus high for college graduates, who are more likely to make these investments. Because long-term commitment facilitates this joint investment, college graduates marry late and delay having children until marriage.”).

40. In Justice Kennedy’s words: “No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were.” *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015). The dissent objected that this marital model no longer embodies obligations that stem from childrearing. Instead, as Justice Alito has repeatedly noted in dissents, it is one with legally equal and mature participants who are economically secure. It makes no pretense of being a societally (much less Biblically) ordained institution with unchanging terms. *Id.* at 736, 740 (Alito, J., dissenting). The clash between the majority and the dissent involved a fundamental clash of values. Justice Kennedy’s majority opinion championed marriage as a system of individual expression; the dissent decried the rejection of marriage as an unchanging institution designed as the universal solution to the challenges of human reproduction.

Susan Moller Okin's classic critique of marriage focused on the consequences of women's practical (and often legal) inability to leave.⁴¹ She argued that marriage was a source of inequality because women's greater assumption of domestic responsibilities and lesser workforce participation made them less able to leave unhappy relationships.⁴² This not only made divorce difficult but limited women's power within ongoing relationships.⁴³ The greater possibility of exit in accordance with liberalized divorce did not, in itself, produce greater equality.⁴⁴ In subsequent years, other scholars maintained that the necessary foundation for relationships that could be dissolved at will was the creation of community, premised on equal respect.⁴⁵ Reviewing these changes, Carolyn Frantz and Hanoch Dagan argued that the "legal power to exit converts the daily life of marriage into a manifestation of a choice that positively reaffirms spouses' plural identity."⁴⁶ They also noted that the necessary complement to an institution premised on principles of community *and* autonomy in family relationships was shared ownership of the family's wealth; couples who truly commingled their lives and jointly assumed responsibility for the family's well-being should be seen as co-owners of the family's assets. And, indeed, married couples today differ from unmarried couples in their commingling and joint titling of property and bank accounts and in the degree to which they trust their partners to act in their interest and handle money responsibly.⁴⁷ The ease of exit makes trust a more critical factor to ongoing commitment.

The ability to exit, however, did not just change women's position in marriage. It also changed men's relationship with their children. Marriage and parenthood were once viewed as a "package deal" for men.⁴⁸ Men who married the mothers of their children automatically became legal parents; those who did not had no right to parental recognition at all. Moreover, in a gendered system of family responsibilities, the presumption was that

41. OKIN, *supra* note 2, at 135–36, 138–39 (arguing that marital division of labor "makes wives far more likely than husbands to be exploited").

42. See, e.g., Naomi R. Cahn, *The Moral Complexities of Family Law*, 50 STAN. L. REV. 225, 246–47 (1997) (observing how women's domestic responsibilities contribute to their exploitation).

43. OKIN, *supra* note 2, at 167. See also Frantz & Dagan, *supra* note 3, at 92 n.67 (observing that "[t]he asymmetric cost of divorce likely contributes to male dominance during marriage").

44. See, e.g., Cahn, *supra* note 42, at 254 (assessing the decreased standard of living for women following divorce under the no-fault regime).

45. Frantz & Dagan, *supra* note 3, at 79.

46. *Id.* at 87.

47. Juliana Menasce Horowitz, Nikki Graf & Gretchen Livingston, *Why People Get Married or Move in with a Partner*, PEW RSCH. CTR. (Nov. 6, 2019), <https://www.pewresearch.org/social-trends/2019/11/06/why-people-get-married-or-move-in-with-a-partner/> [<https://perma.cc/84JH-8RVB>].

48. EDIN & NELSON, *supra* note 13, at 85–86; Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 194 (2015); Cahn & Carbone, *Blackstonian Marriage*, *supra* note 21, at 1248 n.8.

children of “tender years” were better off with their mothers.⁴⁹ Restrictions on exit thus protected husbands’ status as fathers while liberalized divorce terms posed a threat to men who wished to maintain relationships with their children.⁵⁰ Women initiate roughly two-thirds of divorces⁵¹ and if they could do so while controlling access to their children and commanding child support, they could threaten fathers’ parental prerogatives.⁵² By the turn of the twenty-first century, a vigorous fathers’ rights movement challenged the notion that mothers should be free to unilaterally end a relationship, and walk away with half of the family’s resources and exclusive custody of the children.⁵³ Fathers fought for and won a right to shared custody at divorce, premised on the principle that children’s interests were best served by continuing contact with both parents following dissolution of their union. Empirical studies suggest that the change in custody terms dampened mothers’ willingness to file for divorce, readjusting the cost of exit.⁵⁴

These shifts in the terms of exit set the stage for Kennedy’s embrace of blue marriage in *Obergefell*. Within relationships of choice that can be dissolved at will, the risks of entering marriage are defined by the terms of exit: couples who marry enter into a system based on sharing principles. They surrender unilateral control of the assets they accumulate over the course of the marriage and relinquish unilateral control of children following termination of their union. No wonder marriage has become a relationship for the emotionally mature and financially stable.⁵⁵ The parties need genuine commitment to each other and trust and confidence in their partners to enter an institution premised on a “plural identity.” Managing reciprocal and shifting roles that produce interdependence is a very different matter from entering into a gendered and hierarchical institution premised on the assumption of assigned and invariable responsibilities. These

49. MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991).

50. Martin Halla, *The Effect of Joint Custody on Family Outcomes*, 11 J. EUR. ECON. ASS’N 278 (2013), <http://www.econ.jku.at/papers/2009/wp0909.pdf> [<https://perma.cc/T9UX-AKT3>] (concluding that shared custody increased fathers’ power within marriage, increased marriage rates, and lowered men’s suicide rates in Europe).

51. Margaret F. Brinig & Douglas W. Allen, “*These Boots are Made for Walking*”: *Why Most Divorce Filers Are Women*, 2 AM. L. & ECON. REV. 126, 126–28, 154 (2000).

52. See June Carbone, *The Futility of Coherence: The ALI’s Principles of the Law of Family Dissolution, Compensatory Spousal Payments*, 4 J.L. & FAM. STUD. 43, 75 (2002) (describing fathers’ perception of loss when mothers sought the divorce and were awarded custody).

53. Deborah Dinner, *The Divorce Bargain: The Fathers’ Rights Movement and Family Inequalities*, 102 VA. L. REV. 79, 113 (2016).

54. Brinig & Allen, *supra* note 51, at 155.

55. June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 80 (describing marriage as requiring high degrees of commitment, reciprocity and trust).

changes thus frame not just the terms of divorce, but the decisions to marry and stay married. The price of exit influences the choice of entry.

This analysis of the impact of exit, however, has not been systematically applied to unmarried relationships.⁵⁶ The assumption is that without marriage, couples are free to dissolve their relationships at will. To the extent that this is true, it is further assumed to empower men or, more specifically, to disadvantage partners dependent on a higher earning mate, particularly where the dependence stems from the assumption of a disproportionate share of domestic responsibilities.⁵⁷ As with the examination of divorce, however, this analysis requires an assessment of practical, emotional, and situational as well as legal factors; in turn, that shows the classed and raced nature of applying assumptions about marriage to nonmarriage. While it is certainly true that it is legally easier to end a cohabitation than a marriage, the consequences for the choice to enter into such relationships and the allocation of power within them depends on the interaction between legal and practical circumstances.

In the next section, we will address the circumstances that influence the gendered nature of power in these relationships and the potential consequences of proposed reforms.

III. SOCIETAL INEQUALITY AND THE ECONOMICS OF COHABITATION

An era of much greater income inequality frames modern relationship choices. The patriarchal model gave men, particularly white men, a monopoly on access to the better sources of wealth and income—and, in many societies, to the social status necessary to create socially respectable families.⁵⁸ Women enjoyed access to those resources for themselves and their children only by marrying and staying married.⁵⁹ Restrictions on exit and on women's voice within extant relationships were an integral part of the system.⁶⁰ Today, most women can earn enough to support themselves and children, at least on a subsistence level, based on their own resources. Moreover, with relaxation of the social taboos associated with nonmarital

56. *But see* CARBONE AND CAHN, *supra* note 8.

57. Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. 2139 (2019) (arguing that nonmarital relationships today replicate the disadvantages associated with coverture in failing to value domestic contributions outside of marriage).

58. Cahn & Carbone, *supra* note 22, at 8, 11–12 (describing male monopoly on farm ownership and subsequent rise of the male family wage).

59. *See* Carbone, *supra* note 25, at 73.

60. And arguably the silencing of independent voices is still a part of contemporary marriage, at least marriages after a crime to ensure applicability of the spousal evidentiary privilege. Steve Lash, *House Panel Weighs Bill to Strip Spousal Privilege from Post-Crime Weddings*, DAILY REC. (Feb. 22, 2022), <https://thedailyrecord.com/2022/02/02/house-panel-weighs-bill-to-strip-spousal-privilege-from-post-crime-weddings/> [<https://perma.cc/422R-5VQB>].

intimacy, family form per se no longer produces automatic social marginalization. Intimate bargains thus rest on different terms.

In asking therefore what the terms of commitment are, it is important to start with today's distribution of access to wealth and income. An era of much greater income inequality has dramatically increased the wealth available at the top of society's income ladder, marginalized those at the bottom, and squeezed the middle. This growing income inequality, in turn, frames relationship choices in starkly different terms for different socioeconomic groups in American society. Between 1979 and 2018, wages at the 95th percentile grew four times as much as median wages in the economy.⁶¹ During this same period, the gendered wage gap for the country as a whole shrank, primarily because working class men were the big losers in these developments.⁶² Yet, the global figures are misleading. In the top reaches of the economy, where the income gains have been greatest, women have lost ground. Indeed, the gender wage gap for college graduates as a whole has been increasing.⁶³ Take, for example, white college graduates between the ages of twenty-five and thirty-four who work full time. Among those who earn more than \$100,000 per year, men outnumber women by almost two to one.⁶⁴ Among Blacks, on the other hand, the numbers of both men and women in that income range are much smaller and the numbers of men and women in the high-income range are close to equal, with women at that level slightly outnumbering men.⁶⁵

For those who graduated from high school but did not graduate from college, by contrast, the gendered wage gap steadily shrank from 1980 to

61. Elise Gould, *Decades of Rising Economic Inequality in the U.S.*, ECON. POL'Y INST. (Mar. 27, 2019), <https://www.epi.org/publication/decades-of-rising-economic-inequality-in-the-u-s-testimony-before-the-u-s-house-of-representatives-ways-and-means-committee/> [<https://perma.cc/2EF7-4YC4>].

62. See Francine D. Blau & Lawrence M. Kahn, *The U.S. Gender Pay Gap in the 1990s: Slowing Convergence* 17 (IZA, Discussion Paper No. 2176, 2006) (finding that wage gains for married women in the 1970s and 1980s tended to be greatest for women married to middle- and high-wage men); Lundberg, Pollak & Stearns, *supra* note 14, at 98 (the decline in the gender earnings gap at lower levels of education is largely due to the decline in the real earnings of non-college men).

63. Elise Gould, *State of Working America Wages 2019*, ECON. POL'Y INST. (Feb. 20, 2020), <https://www.epi.org/publication/swa-wages-2019/> [<https://perma.cc/B3UY-Z6PU>].

64. CARBONE & CAHN, *supra* note 8, at 66–67. *Current Population Survey, 2021 Annual Social and Economic Supplement Chart PINC-03 Educational Attainment*, U.S. CENSUS BUREAU, https://www2.census.gov/programs-surveys/cps/tables/pinc-03/2021/pinc03_3_3_2_3.xlsx (women); https://www2.census.gov/programs-surveys/cps/tables/pinc-03/2021/pinc03_2_3_2_3.xlsx (men).

65. *Current Population Survey, 2021 Annual Social and Economic Supplement Chart PINC-03 Educational Attainment*, U.S. CENSUS BUREAU, https://www2.census.gov/programs-surveys/cps/tables/pinc-03/2021/pinc03_3_3_2_6.xlsx (women); https://www2.census.gov/programs-surveys/cps/tables/pinc-03/2021/pinc03_2_3_2_6.xlsx (men). (Which does not mean that there is not a gendered wage gap, only that the odds of a Black woman pairing with a higher earning Black man are smaller than for whites.)

2010 (though it inched up a bit with the financial recovery in 2018).⁶⁶ Perhaps as critically, male blue-collar income workers could no longer secure stable family life. Not only had wages for both working class men and women stagnated, but employment became less reliable. In 1960, over 90% of men were in the workforce and class-based differences in labor force participation were minimal. In 2011, on the other hand, 90% of college graduate males were employed in comparison with 76% of male high school graduates and 67% of high school dropouts.⁶⁷ And the unemployment rate for male high school graduates is consistently higher than for male college graduates.⁶⁸ The result changes the way that men and women match up with each other.⁶⁹

This economic backdrop frames the types of bargains within committed and contingent relationships.

A. *The Economics of Committed Bargains*

While commitment to a partner may take various forms, we are using the term “committed bargains” to refer to those relationships that involve an open-ended commitment to stay together, a commingling of financial assets, a joint assumption of responsibility for dependents within the family, and the resulting interdependence of the parties. Within these relationships, exit is not a simple matter—whatever the law is. Such parties typically have substantial intertwined assets and joint investment in the relationship with children. For one party simply to walk out the door would mean forfeiting the fruits of a substantial financial and emotional investment.

66. Elise Gould, *State of Working America Wages*, ECON. POL’Y INST. (Feb. 20, 2019), <https://www.epi.org/publication/state-of-american-wages-2018/> [<https://perma.cc/DK3B-Q7JR>].

67. Jonathan Rauch & National Journal, *The No Good, Very Bad Outlook for the Working-Class American Man*, THE ATLANTIC (Dec. 5, 2012), <https://www.theatlantic.com/business/archive/2012/12/the-no-good-very-bad-outlook-for-the-working-class-american-man/426288/> [<https://perma.cc/6H6H-X29P>]. Overall, male labor force participation continued to decline after 2011, leveled off with the recovery that started in 2015, and then declined further in 2020 with the COVID pandemic. *Male Civilian Labor Force Participation Rate in the United States from 1990 to 2020*, STATISTA (2022), <https://www.statista.com/statistics/191725/us-male-civilian-labor-force-participation-rate-since-1990/>. Women’s labor force participation, which peaked in 1999, also dropped some during the Great Recession, and then fell sharply with the pandemic. FRED, *Labor Force Participation Rate – Women*, U.S. BUREAU LABOR STAT. (2022), <https://fred.stlouisfed.org/series/LNS11300002>.

68. *Unemployment Rate 3.7 Percent for College Grads, 6.7 Percent for High School Grads in March 2021*, U.S. BUREAU LABOR STAT. (2021), <https://www.bls.gov/opub/ted/2021/unemployment-rate-3-7-percent-for-college-grads-6-7-percent-for-high-school-grads-in-march-2021.htm> [<https://perma.cc/9XQR-R2ZK>] (ten-year unemployment chart by educational attainment).

69. The results are particularly stark among the disadvantaged locked into the lower rungs of the economy. See Lundberg, Pollak & Stearns, *supra* note 14, at 91 (“Ethnographic work in severely disadvantaged communities suggests that [sic] some men’s economic prospects are so dire, due to a combination of low skills, labor market discrimination, criminal records, and substance abuse, that they are unable to make a positive contribution to a household.”).

Committed bargains reflecting this type of independence typically take one of two family patterns.

1. The Single Earner Committed Bargain

The first familial pattern involves the partners' coordination to support intensive investment in careers and children. Parental investment matters, particularly in an increasingly unequal society. The academic achievement gap tied to family income differences has widened appreciably since 1960 and now eclipses racial differences in achievement.⁷⁰ Today's achievement differences correspond to both dramatically increased expenditures on children⁷¹ and much more intensive parental interaction with children particularly in early childhood.⁷² Yet, in the upper reaches of the economy, where top incomes have skyrocketed, getting and keeping such jobs typically requires long hours. According to Daniel Markovits, "elites today work an average of 12 more hours per week than middle-class workers (the equivalent of 1.5 additional workdays)."⁷³ This both makes it possible to support a family on a single income and difficult for two parents to both stay in demanding jobs and care for children.⁷⁴ These circumstances make possible a neo-patriarchal model of breadwinners and homemakers for some high-income families. According to a 2012 study, husbands were most

70. Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, in *WHITHER OPPORTUNITY? RISING INEQUALITY, SCHOOLS, AND CHILDREN'S LIFE CHANCES* 91 (Greg J. Duncan & Richard J. Murnane eds., 2011) (finding that the income achievement gap is nearly twice as large as the Black-White achievement gap, and 30 to 40% higher than it was twenty-five years ago).

71. Greg J. Duncan & Richard J. Murnane, *Introduction: The American Dream, Then and Now*, in *WHITHER OPPORTUNITY? RISING INEQUALITY, SCHOOLS, AND CHILDREN'S LIFE CHANCES*, *supra* note 70, at 11 fig. 1.6 (showing that while in the seventies, high income parents spent three times as much as low-income parents on their children, today they spend nine times as much).

72. Robert D. Putnam, Carl B. Frederick & Kaisa Snellman, *Growing Class Gaps in Social Connectedness Among American Youth, 1975-2009*, HARV. KENNEDY SCH. GOV'T 10 (2012), https://hceconomics.uchicago.edu/sites/default/files/file_uploads/Putnam-etal_2012_Growing-Class-Gaps.pdf [<https://perma.cc/8UER-3HYK>] (indicating that the amount of interactive time parents have with children has increased substantially for both men and women and that while differences between college graduate and high school graduate only parents were small in the seventies, today the differences amount to over an hour a day).

73. Roge Karma, "The Meritocracy Trap," *Explained*, VOX (Oct. 24, 2019, 8:40 AM), <https://www.vox.com/policy-and-politics/2019/10/24/20919030/meritocracy-book-daniel-markovits-inequality-rich> [<https://perma.cc/ZL9H-X3MP>] (also observing that "[a] Harvard Business Review survey found that 62 percent of high-earning individuals work over 50 hours a week, more than a third work over 60 hours a week, and one in 10 work over 80 hours a week.").

74. Claire Cain Miller & Quoc Trung Bui, *Equality in Marriages Grows, and So Does Class Divide*, N.Y. TIMES (Feb. 27, 2016), <https://www.nytimes.com/2016/02/23/upshot/rise-in-marriages-of-equals-and-in-division-by-class.html> [<https://perma.cc/DLF8-Z7NZ>] (describing how high income jobs require longer hours and have less flexibility).

likely to out-earn their wives in the top quintile of families⁷⁵ and mothers of young children were least likely to be in the labor market if the fathers of their children earned over \$250,000 per year.⁷⁶

While this model continues to be deeply gendered, with one partner playing a caretaking, and the other a breadwinning, role, it is no longer limited to high earning men and stay-at-home women.⁷⁷ An increasing (if still small) number of fathers, paired with high earning mothers, also play such domestic roles, and many same-sex couples divide domestic responsibilities in a similar fashion between higher earning breadwinners and lower earning caretakers. Nonetheless, at the higher reaches of the economy, men are dramatically more likely than women to have access to the truly high income positions that facilitate a single earner model, and women are more likely than men to cut back on their own income opportunities because of family responsibilities.⁷⁸

Because these relationships occur in an era of legally-possible unilateral exit, where either party can end the relationship at will, some level of security and trust is necessary to the undertaking. An early study of no-fault divorce suggested that easier exit had the most destabilizing effects on the most traditional relationships; the restrictions on exit associated with fault had served to protect dependent women paired with high earning men.⁷⁹ A

75. Sarah Jane Glynn, *The New Breadwinners, 2010 Update*, CTR. FOR AM. PROGRESS (Apr. 16, 2012), <https://www.americanprogress.org/issues/labor/report/2012/04/16/11377/the-new-breadwinners-2010-update/> [<https://perma.cc/HND2-58C3>].

76. Robert VerBruggen & Wendy Wang, *The Real Housewives of America: Dad's Income and Mom's Work*, INST. FOR FAM. STUD. (Jan. 23, 2019), <https://ifstudies.org/blog/the-real-housewives-of-america-dads-income-and-moms-work> [<https://perma.cc/BP4U-8RBS>]. Among the top 1% childrearing and childcare provision appears to mirror very traditional divisions of labor. For example, although these couples can typically afford to pay for childcare, wives still do most of the childcare work. This is even if the work involves managing external childcare providers. See Claire M. Kamp Dush, Jill E. Yavorsky & Sarah J. Schoppe-Sullivan, *What are Men Doing While Women Perform Extra Unpaid Labor? Leisure and Specialization at the Transitions to Parenthood*, 78 SEX ROLES 715 (2018); Jill E. Yavorsky, Lisa A. Keister, Yue Qian & Michael Nau, *Women in the One Percent: Gender Dynamics in Top Income Positions*, 84 AM. SOC. REV. 54, 54–81 (2019).

77. *Raising Kids and Running a Household: How Working Parents Share the Load*, PEW RSCH. CTR. (Nov. 4, 2015), <https://www.pewresearch.org/social-trends/2015/11/04/raising-kids-and-running-a-household-how-working-parents-share-the-load/> [<https://perma.cc/B5QG-DFNC>] [hereinafter *Raising Kids and Running a Household*] (giving breakdown on men and women and indicating that even in dual-career families, mothers do more of the chores associated with childcare). See also Katie Newkirk, Maureen Perry-Jenkins & Aline G. Sayer, *Division of Household and Childcare Labor and Relationship Conflict Among Low-Income New Parents*, 76 SEX ROLES 319, 319–333 (2017) (indicating mothers do approximately twice as much of household tasks as fathers).

78. Miller & Bui, *supra* note 74 (showing marital earnings gap, with husbands most likely to earn more if they are dentists, lawyers, judges, and magistrates, chief executives, and legislators, but likely to earn less if they are bartenders).

79. Stephane Mechoulan, *Divorce Laws and the Structure of the American Family*, 35 J. LEGAL STUD. 143, 144–47 (2006) (comparing fault based and no-fault states and finding divorce rates initially rose most in the no-fault states but the divorce rates has since converged, with divorce risk falling in pure no fault states because of an increase in the the age of marriage and greater assortative mating).

more recent study suggests that higher capital assets such as homes that can be divided at the dissolution of the union, serve as a substitute for the prior legal constraint of fault.⁸⁰ That is, given the vulnerability of a dependent partner, shared property legal regimes coupled with the greater accumulation of capital assets may be necessary to encourage a division of marital responsibilities with an asymmetric distribution of the risks associated with dissolution of the relationship.⁸¹ The other response to these factors, however, has been greater care in partner selection; after the adoption of no-fault divorce, not only did the age of marriage increase but also couples engaged in greater assortative mating. Both factors contributed to declining divorce rates for the well-educated.⁸²

2. *The Dual-Earner Committed Bargain*

While a single-earner model remains common in the top reaches of the economy, the far more common arrangement throughout the economy is a dual-earner model. As with a single-earner model, these committed relationships involve partners who join together on the basis of equal respect, trading off workforce and domestic obligations, and creating shared investment in assets and children.⁸³

Couples at every income level have become more dependent on two incomes. By 2015, almost half of married families had two parents working outside the home.⁸⁴ An additional 17% had one parent working full time and a second parent (the mother) working part time.⁸⁵ Parents overwhelmingly report that balancing work and family is challenging and couples further report that balancing two careers is difficult. Couples in committed relationships premised on equal respect approach these balances by considering their joint investment in the two careers and their need to trade off responsibilities to vindicate their shared responsibilities for their children.⁸⁶

80. Jeanne Lafortune & Corinne Low, *Collateralized Marriage* 33 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27210, 2020), <https://ssrn.com/abstract=3609663> [<https://perma.cc/XWU2-KCC9>].

81. *Id.*

82. Mechoulan, *supra* note 79; Lundberg, Pollak & Stearns, *supra* note 14.

83. *See* Lundberg, Pollak & Stearns, *supra* note 14.

84. *Raising Kids and Running a Household*, *supra* note 77; *see* U.S. BUREAU OF LAB. STAT., *Employment Characteristics of Families – 2020* tbl.2 (2021), <https://www.bls.gov/news.release/pdf/famee.pdf> (comparable employment statistics for 2020).

85. *Raising Kids and Running a Household*, *supra* note 77.

86. *See, e.g.*, Lundberg, Pollak & Stearns, *supra* note 14, at 98 (attributing “the socioeconomic gradient in the timing of marriage and childbearing to diverging incentives to make intensive investments in children”).

The tradeoffs at the core of these exchanges vary by race and class and gender. Couples report varying divisions of responsibility, though mothers generally indicate that they take on more of the responsibilities for managing their children's care than fathers.⁸⁷ Given class differences in employment flexibility and security, these differences then influence the subsequent bargains. Middle-class parents tend to be supportive of each other's careers while working class couples are more likely "to believe that mothers should be more responsible for family work."⁸⁸ These attitudes influence perceptions of fairness and some studies indicate that parents are more likely to break up when they perceive the division of labor as unfair and less likely to do so when they can afford to hire additional help.⁸⁹ Among well-off couples, the extra income from a second wage earner often goes to pay for childcare, cleaning services, and restaurant meals.⁹⁰ Some studies find that marital satisfaction increases if neither spouse needs to clean the toilets.⁹¹ Employment shocks, such as moves and layoffs, moreover, require not just financial adjustments, but a reallocation of family roles.⁹²

More skilled employees, male or female, are better positioned to manage these trade-offs. They can negotiate for more flexible hours or part-time arrangements. Still, they may suffer greater career losses in cutting back in hours of work. In committed relationships, couples may share the respective gains and losses from these arrangements; for those in a position to earn high salaries, having a supportive spouse is critical to the ability to manage work-family conflicts.⁹³ Less-skilled workers may have little flexibility in balancing work and family needs, increasing the conflicts between the partners' respective employment opportunities. A number of researchers have shown, however, that what appears to be personal choice about "doing gender" is often a result of organizational and job constraints. Indeed, "institutional factors including institutionalized racism, gaps in wages, and

87. *Raising Kids and Running a Household*, *supra* note 77.

88. Newkirk, Perry-Jenkins & Sayer, *supra* note 77.

89. *Id.* (observing that middle-class families "are likely to have more resources, such as paid leave and higher incomes, making it possible for one parent to leave the work force and/or to buy services for family labor. These supports are rarely available for working-class couples").

90. *Id.*

91. Austin Frakt, *Fighting Over Chores? Spend Some Money, Save the Marriage*, N.Y. TIMES (Apr. 2, 2018), <https://www.nytimes.com/2018/04/02/upshot/fighting-over-chores-spend-some-money-save-the-marriage.html> [<https://perma.cc/9GVE-8DFH>].

92. See Lundberg, Pollak & Stearns, *supra* note 14, at 93 ("[A]ll marriages will face stochastic shocks to income, health, or affections, and reallocation within the marriage may require relationship skills that may be positively associated with education.").

93. See, e.g., Claire Cain Miller, *Women Did Everything Right. Then Work Got 'Greedy.'* *How America's Obsession with Long Hours Has Widened the Gender Gap*, N.Y. TIMES (Apr. 26, 2019), <https://www.nytimes.com/2019/04/26/upshot/women-long-hours-greedy-professions.html> [<https://perma.cc/XFZ9-5EX8>].

government poverty thresholds (e.g., health care, welfare) restrict individual decisions about how to allocate time (to work or housework) and especially disadvantage low-wage workers and workers of color.”⁹⁴

These factors make management of committed bargains more challenging. Committed couples may trade off responsibilities, permitting a partner to return to school, to accept a lower paying job that offers career advancement, or to move even if the move disadvantages the other partner. Alternatively, they may juggle childcare and other domestic responsibilities as needed to support each other’s continuing employment. The tradeoffs are worth it when the end result is greater well-being for the family as a whole. For many couples, however, these tradeoffs involve sharing losses rather than gains. Supporting one partner’s ability to work long or unpredictable hours may come at the expense of the other partner’s ability to stay employed—or their obligations to their children. Changing employment terms, job losses, illness, or increased expenses may destabilize the exchange, increasing perceptions of risk or unfairness.

B. The Economics of Contingent Bargains

The distinguishing feature between committed bargains and contingent bargains is interdependence. The section above described how committed couples commingle resources and share an intensive emotional and material investment in children.⁹⁵ This interdependence, even without legal recognition, increases the cost of exit as untangling joint undertakings can be complex and contentious.⁹⁶ Contingent bargains, in contrast, limit the degree of interdependence, which makes exit easier.⁹⁷ A partner who lacks confidence in the other partner is less likely to commit to the relationship,

94. Maureen Perry-Jenkins & Naomi Gerstel, *Work and Family in the Second Decade of the 21st Century*, 82 J. MARRIAGE & FAM. 420, 423–424 (2020) (internal quotation omitted).

95. See Lundberg, Pollak & Stearns, *supra* note 14.

96. Traditionally, economists have described these tradeoffs in terms of “specialization,” recognizing a gendered division of labor as the hallmark of shared investments. See GARY S. BECKER, A TREATISE ON THE FAMILY 31 (1981). As we argued above, however, today’s investments can be egalitarian in form with dual earners and shared investments in careers and children and still produce interdependence. The couples may trade off careers and domestic responsibilities and share assets and sacrifices without necessarily producing dependence. See *Blumenthal v. Brewer*, 69 N.E.3d 834 (Ill. 2016), as an example of such tradeoffs.

97. See Lundberg, Pollak & Stearns, *supra* note 14, at 89 (“Economic models of marriage and cohabitation have emphasized one key difference: the costs of dissolution are much higher for marriage than for cohabitation. Ending a marriage involves legal formalities to divide property and debt and, if there are children, to establish custody, visitation, and support arrangements. Divorce . . . remains a complicated, uncertain, and often expensive process in both time and money.”) (internal citations omitted).

which in turn produces greater wariness about joint undertakings.⁹⁸ Instead, the bargains tend to be transactional: the partners may agree to live together so long as there are joint contributions to the rent, to share childcare responsibilities so long as a partner is sober, respectful and responsible,⁹⁹ to remain together so long as both partners are employed and do not constitute an undue burden on the other's resources. In many cases, couples report that they are unwilling to enter into an open-ended commitment because they are unsure that these conditions can be met.¹⁰⁰ They accordingly position themselves for the possibility of exit.

Empirical research suggests that these expectations are realistic. Cohabiting unions remain unstable. Moreover, women's and men's job prospects and job quality influence the type of relationships they enter; the more precarious the job and the fewer fringe benefits, the more likely is cohabitation than marriage.¹⁰¹ Couples who barely meet their day-to-day expenses and experience frequent layoffs or job changes have little opportunity to acquire a surplus.¹⁰² A Federal Reserve Report, for example, indicated that close to 40% of Americans would have difficulty paying an unexpected bill of \$400.¹⁰³ According to the same report, 30% of American adults have income that varies from month to month, and a quarter of adults under the age of thirty receive financial assistance from someone outside of their household, typically parents.¹⁰⁴ Many couples, particularly young couples, have no cushion to weather unexpected expenses or income losses.¹⁰⁵ In addition, variable work schedules add to financial stress, with one-quarter of working adults indicating that they have such schedules.¹⁰⁶

98. See *id.* at 96 (“[W]omen have increased freedom to reject marriages to men with whom they have cohabited or who have fathered their children, and to exit relationships that are unrewarding or dangerous.”).

99. *Id.* at 97 (“Transitions into both marriage and cohabitation are associated with decreases in men's risky behavior, such as binge drinking and drug use, but the decreases associated with marriage are larger and more consistent than those associated with cohabitation.”) (internal citation omitted).

100. See *infra* notes 111, 116–17, 120–27 and accompanying text.

101. See Daniel Schneider, Kristen Harknett & Matthew Stimpson, *Job Quality and the Educational Gradient in Entry into Marriage and Cohabitation*, 56 DEMOGRAPHY 451, 771–72 (2019) (discussing this phenomenon).

102. See Yoonsook Ha, Margaret M.C. Thomas, Thomas Byrne & Daniel P. Miller, *Patterns of Multiple Instability Among Low-Income Families with Children*, 94 SOC. SERV. REV. 129, 130 (2020) (“[L]ow-income families experience the most frequent and largest negative income shocks.”). The study specifically found that: “About 70 percent of low-income families experienced income instability over the 20-month observation period, defined by an arc percentage change reduction of 25 percent or more in a given month from the average of the prior 3 months.” *Id.* at 158.

103. FED. RSRV. BD., *supra* note 11, at 2.

104. *Id.*

105. Ha, Thomas, Byrne & Miller, *supra* note 102, at 131–32, observe further “that nearly 70 percent of households with children in the bottom income quintile experienced a large negative income shock (defined as an income drop of 50 percent or more) compared with 46 and 39 percent of households with children in the second and third quintiles, respectively.”

106. FED. RSRV. BD., *supra* note 11, at 2.

For this group, commitment to a partner may be a source of vulnerability rather than strength. Pooling resources is an indicia of relationship trust,¹⁰⁷ and cohabiting couples are less likely to pool their money than are married couples.¹⁰⁸ Commingling resources means carrying the partner through layoffs and hard times.¹⁰⁹ Race intersects with the class differences. African American and Latinx families, for example, in comparison with whites and Asians, “are more often the target of growing precarious employment, lower wages, more erratic schedules, and greater job unpredictability.”¹¹⁰ And in the poorest groups, women may have more stable income than men. Indeed, in the bottom quintile of American families by income, wives earned more in 70% of the marriages.¹¹¹

These factors influence decisions about commitment. A frequent reason that couples give for wariness of open-ended commitment is that they are not financially ready.¹¹² Almost sixty percent of cohabiting adults who are not engaged but report that they would like to get married at some point explain that either they or their partner are not “ready financially as a major or minor reason why they are not engaged or married” to one another, and

107. Fenaba R. Addo & Xing Zhang, *Debt Concordance and Relationship Quality: A Couple-Level Analysis*, 41 J. FAM. ECON. ISSUES 405, 406, 408 (2020) (“Financial organization and management can serve as proxies for long-term investments in the relationship or indicate a degree of individuality or distrust that could reduce relationship quality.”).

108. E.g., D’Vera Cohn, *Cohabiting Couples and Their Money*, PEW RSCH. CTR. (2011), <https://www.pewresearch.org/social-trends/2011/11/22/cohabiting-couples-and-their-money/> [<https://perma.cc/4ZHL-2QAM>]; Joanna R. Pepin & Philip N. Cohen, *Nation-Level Gender Inequality and Couples’ Income Arrangements*, 42 J. FAM. ECON. ISSUES 13, 14 (2021) (noting, in survey of twenty countries, that “[t]he nearly universal tendency of cohabiting couples to exhibit lower levels of financial integration is surprising given the disparate trends in cohabitation.”); see Christina Gibson-Davis, Anna Gassman-Pines & Rebecca Lehrman, “His” and “Hers”: Meeting the Economic Bar to Marriage, 55 DEMOGRAPHY 2321, 2336 (2018) (analyzing the “economic bar” to marriage among low-income parents, and finding that bank accounts, health insurance, and not being on public assistance all were associated with the transition from cohabitation to marriage). But see Caroline Kitchener, *Why More Young Married Couples Are Keeping Separate Bank Accounts*, THE ATLANTIC (Apr. 20, 2018), <https://www.theatlantic.com/family/archive/2018/04/young-couples-separate-bank-accounts/558473/> [<https://perma.cc/7SJM-YARE>].

109. Addo & Zhang, *supra* note 107, at 409 (“Economic stability, such as being employed and having greater household income, has been associated with positive relationship quality, while experiencing material or economic hardships has been associated with lower relationship quality.”). They also note that “[a]nother factor significantly associated with decreased relationship satisfaction was having an increased number of economic and material hardships, which was associated with a 0.12-point decrease in relationship satisfaction.” *Id.* at 414. The study also observes that poor couples tended to experience such economic and material hardships.

110. Perry-Jenkins & Gerstel, *supra* note 94, at 421.

111. Glynn, *supra* note 75; see Benjamin Karney, *Socioeconomic Status and Intimate Relationships*, 72 ANN. REV. PSYCH. 391 (2021) (repeating statistic); Fenaba R. Addo & Sharon Sassler, *Financial Arrangements and Relationship Quality in Low-Income Couples*, 59 FAM. REL. 408, 411 (2010) (finding that married couples are more likely to pool income).

112. Horowitz, Graf & Livingston, *supra* note 47 (of cohabiting adults “who are not engaged but say they would like to get married someday” say their partner’s (29%) or their own (27%) lack of financial readiness is a major reason why they are not engaged or married to their current partner).

another quarter cite that as a minor reason.¹¹³ Women are more likely than men to say that “it’s very important for a person to have a steady job before getting married (67% vs. 58% of men) or moving in with a partner (66% vs. 54%).” They are also more likely to say that “it’s very important for a person to be financially stable before getting married” (48% vs. 40%) or “moving in with a partner” (53% vs. 44%).¹¹⁴ Income volatility as well as low income destabilizes these relationships.

At the same time, adults in lower income families are more likely to face challenges including health concerns and child-care costs that limit their work force participation. A Federal Reserve Study indicated that one-fifth of adults “had major, unexpected medical bills to pay in the prior year” and “[o]ne-fourth of adults skipped necessary medical care in 2018 because they were unable to afford the cost.”¹¹⁵ And all of this is before COVID. Mothers married to husbands making under \$25,000 a year were second only to mothers married to husbands earning over \$250,000 a year in the likelihood of not being in the labor force.¹¹⁶ While some women in these circumstances may therefore be dependent on a partner; others may depend more on child support from a former partner, kin support, or public benefits in ways that make it harder to enter into new relationships. These couples have to think carefully about including another adult in their household who imposes costs that may further strain household budgets already close to the edge.

A second reason for wariness about commitment involves the ability to find the right partner—one who shares the same values about a relationship. Couples generally prefer egalitarian relationships.¹¹⁷ Couples who see themselves as better off than their partners or see their partners as unreliable tend to be warier of open-ended commitments. Better-educated men are more likely to report concerns about relationships limiting their future opportunities, and to fear that a commitment to their current partner may hold them back.¹¹⁸ Men are more likely than women to say that if a couple

113. *Id.*

114. *Id.*

115. FED. RSRV. BD., *supra* note 11, at 2.

116. VerBruggen & Wang, *supra* note 76.

117. See Amanda Jayne Miller & Sharon Sassler, “Don’t Force My Hand”: *Gender and Social Class Variation in Relationship Negotiation*, 51 ARIZ. ST. L.J. 1369, 1371 (2019) (observing that adults desire egalitarian relationships); Amanda J. Miller, Daniel L. Carlson & Sharon Sassler, *His Career, Her Job, Their Future: Cohabitators’ Orientations Toward Paid Work*, 40 J. FAM. ISSUES 1509, 1510 (2019) (same).

118. KATHLEEN GERSON, *THE UNFINISHED REVOLUTION: COMING OF AGE IN A NEW ERA OF GENDER, WORK, AND FAMILY* 172 (2011).

cannot manage the tradeoffs necessary for a dual earner arrangement, their career should come first.¹¹⁹

Women, on the other hand, are more likely than men to emphasize steady employment¹²⁰ or responsible behavior as important from a partner.¹²¹ If they cannot find a partner supportive of their workforce involvement, they are more likely to choose to go it alone.¹²² Surveys of cohabitants between the ages of eighteen and twenty-nine reflect these concerns. Among those who have completed at least some college, 68% of women but only 46% of the men report that they expect to marry their current partner.¹²³ Among those who have not finished high school, the gender breakdown flips; it is the women rather than the men who express greater hesitation to commit to their current partners.¹²⁴ Amber Strader, in describing why she did not marry the father of her child, complained that the father was so dependent on her more regular income that “she had to buy his cigarettes.” She thought living with him was “like living with another kid.” Commitment was not on the table.¹²⁵

These circumstances influence the perceived fairness of the relationship bargain. Relationship quality tends to reflect the way the partners feel about the fairness of the division of responsibilities between the parents; that perceived fairness matters more than the actual division of labor itself.¹²⁶ Class in turn often influences the perception of fairness. Working class couples tend to be more traditional in their role preferences, expecting that in a committed relationship, women will assume greater responsibility for domestic responsibilities. If, as in Strader’s case, one partner is both the more reliable breadwinner and the primary caretaker, commitment to a relationship based on sharing assets and childcare responsibilities becomes a bad deal.

119. Perry-Jenkins & Gerstel, *supra* note 94, at 426; see Jaclyn S. Wong, *Aspiring Dual-Professional Couples’ Career Launch Plans and Childbearing Timing*, 42 J. FAM. ISSUES 1092, 1113 (2021) (finding that, among committed couples, “men’s career plans more directly shape women’s career plans than childbearing plans do because couples can implicitly prioritize men’s career launches”).

120. Wendy Wang & Kim Parker, *Record Share of Americans Have Never Married*, PEW RSCH. CTR. (Sept. 24, 2014), <http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married/> [<https://perma.cc/R96C-DY4G>].

121. Jason DeParle & Sabrina Tavernise, *For Women Under Thirty, Most Births Occur Outside Marriage*, N.Y. TIMES (Feb. 18, 2012), <https://www.nytimes.com/2012/02/18/us/for-women-under-30-most-births-occur-outside-marriage.html> [<https://perma.cc/36D8-Z4WW>] (discussing the example of a young woman who explained that “her boyfriend was so dependent that she had to buy his cigarettes” and that marrying him “never entered her mind” because it would be like “living with another kid.”).

122. Perry-Jenkins & Gerstel, *supra* note 94.

123. HYMOWITZ, CARROLL, WILCOX & KAYE, *supra* note 10, at 28.

124. *Id.*

125. DeParle & Tavernise, *supra* note 121.

126. Perry-Jenkins & Gerstel, *supra* note 94, at 426.

The distinction between committed and contingent bargains is sometimes just that: the difference between parties who have made formal, explicit, and deep emotional and financial commitments to each other and those who have not. Parties in these relationships are wary of commitment to partners they expect that someday they will have “to evict.”¹²⁷ In communities where financial security is a rare commodity, finding a partner worthy of commitment is more challenging. Domestic violence and substance abuse are more common and pregnancies are less likely to be planned.¹²⁸ The default norms in these communities are contingent ones, given economic instability and the greater incidence of risky behaviors. And when relationships end, the parties keep whatever assets they have titled in their own names, one partner typically leaves the shared residence, and the custodial parent following the separation remains the primary caretaker practically—and unless the parties go to court—legally. Because cohabitation has “lower exit costs than marriage, [it] allows individuals to realize many of the gains from co-residence with less commitment.”¹²⁹

IV. MOVING FORWARD

A variety of proposals seek to eliminate the legal distinctions between marriage and other intimate relationships. Approaches to parenthood, custody, and child support have already eliminated many of the distinctions. Yet, these proposals rarely evaluate the potential impact on the power of exit—and thus the balance of power within existing relationships. Nor do they fully consider the role of exit in existing decisions to marry, cohabit, or conduct a relationship without a shared residence. Doing so creates a different framework for evaluating these proposals, suggesting that imposing a one-size fits all on cohabiting relationships, assimilating them to marriage, may not be appropriate.¹³⁰ It fails to respect the ways in which these relationships are different from marriage, with implications for the different gender and class bargains at the core of those relationships.

In doing so, it is important to compare the existing costs of exit from marriage and cohabitation before considering how to move forward. These

127. Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Co-habitation*, 9 J. L. & FAM. STUD. 1, 12 (2007) (finding that low-income women report reluctance to marry men they may have to “evict”).

128. E.g., Jennifer S. Barber, Yasamin Kusunoki, Heather Gatny & Robert Melendez, *The Relationship Context of Young Pregnancies*, 35 L. & INEQ. 175 (2017).

129. Lundberg, Pollak & Stearns, *supra* note 14.

130. See Kaiponanea T. Matsumura, *The Marital Habitus*, 99 WASH. U. L. REV. (forthcoming 2022) (describing the pervasiveness of marital-based assumptions); Naomi R. Cahn, Clare Huntington & Elizabeth S. Scott, *Family Law for the One-Hundred-Year Life*, 132 YALE L.J. (forthcoming 2023), <https://ssrn.com/abstract=4038989> (discussing customizable marriage and customizable registration systems).

costs involve substantive, procedural, and circumstantial differences that involve the following factors:

A. *Ending the Relationship*

Marriage is a state-sanctioned status; it takes a judicial decree to end the option. Divorce actions can be expensive. The average divorce in the United States costs \$12–15,000, including attorneys' fees.¹³¹ Filing fees, which vary by jurisdiction, typically run several hundred dollars.¹³² Moreover, particularly for litigants without an attorney, court appearances can be “inconvenient, intrusive, and may even be traumatic.”¹³³ A study conducted in 2018 found that even routine cases could require multiple court appearances and take a substantial amount of time to resolve, with a quarter of the cases reopened for some kind of post-judgment modification.¹³⁴ Dealing with repeated hearings may involve taking time off from work, finding childcare, incurring transportation expenses, and frustration with judicial delays. In addition, couples without lawyers may not fully understand their rights and responsibilities, the proceedings which are sometimes complex, or the significance of the documents that they are asked to approve.¹³⁵ Yet, approximately 70% of family court litigants are *pro se*.¹³⁶

Since nonmarital couples have no recognized legal status in most jurisdictions,¹³⁷ no legal action is necessary to end their relationships. The

131. Erin McDowell, *The Average Cost of Getting Divorced is \$15,000 in the US – But Here's Why It Can Be Much Higher*, BUS. INSIDER (Aug. 1, 2019), <https://www.businessinsider.com/average-cost-divorce-getting-divorced-us-2019-7> [<https://perma.cc/JU28-XBG3>].

132. Jordan Barcus, *My Divorce Cost me \$17,696 – These Were the Most Surprising Expenses I Faced*, BUS. INSIDER (Dec. 31, 2019), <https://www.businessinsider.com/cost-of-divorce-unexpected-surprising-expenses-2019-8#it-cost-225-in-my-state-to-pay-for-the-actual-divorce-6> [<https://perma.cc/HK4P-WZ3L>]; Geoff Williams, *Cost Breakdown of a Divorce*, U.S. NEWS (Dec. 21, 2020), <https://money.usnews.com/money/personal-finance/family-finance/articles/cost-breakdown-of-a-divorce> [<https://perma.cc/Y8LB-SADP>].

133. Jane C. Murphy, *Rethinking the Role of Courts in Resolving Family Conflicts*, 21 CARDOZO J. CONFLICT RESOL. 625, 629 (2020).

134. *Id.* at 629 n.21, 630 (quoting FAMILY JUSTICE INITIATIVE, THE LANDSCAPE OF DOMESTIC RELATIONS CASES IN STATE COURTS 27 (2018), <https://iaals.du.edu/sites/default/files/documents/publications/fji-landscape-report.pdf>) (“The study ‘represents the first large, aggregate examination of how family court cases are litigated in the state courts.’”).

135. See Stacy Brustin & Lisa Martin, *Bridging the Justice Gap in Family Law: Repurposing Federal IV-D Funding to Expand Community-Based Legal and Social Services for Parents*, 67 HASTINGS L.J. 1265, 1267 (2016).

136. Murphy, *supra* note 133, at 633.

137. Common law marriage and registered domestic partnerships are notable exceptions. See Barbara Atwood & Naomi Cahn, *Nonmarital Cohabitants: The US Approach* (U. Va. Sch. Law, Pub. L. Working Paper, Paper No. 32, 2021).

parties need only agree that the relationship is over—or end their relationship in the absence of an agreement.

Ending both marriages and cohabitations also involves practical issues. If the parties are living together, one party could leave and not come back. If the party who wishes to stay in a joint residence wants to end the relationship, that party has to “evict” the other.¹³⁸ If one party owns the property or is the sole tenant on the lease, then that partner has the legally-enforceable right to ask the other to leave. Evicting a partner, however, particularly if the partner is abusive or threatening, can be emotionally wrought and physically dangerous.¹³⁹

Imposing additional obligations on cohabitating couples would be hard to administer without creating a divorce-like process, adding to the complexity and expense of dissolving a relationship.

B. Property Division and Support

When a marriage ends, most jurisdictions assume that all property accumulated over the course of the marriage will be divided between the two parties, irrespective of title. The presumption of joint ownership can be rebutted but doing so involves either the agreement of the other party or litigation to establish the facts necessary for the rebuttal. That division, which is necessary to separate the parties’ assets, is ordinarily part of the divorce proceedings.¹⁴⁰

When a nonmarital relationship ends, the assumption is that the party with title to that property owns it. The majority of unmarried couples do not have significant assets, and those who do are less likely than married couples to commingle their assets, which means that for most couples, there is no need to take any action to divide shared property.¹⁴¹ Instead, litigation

138. Bowman, *supra* note 127 (finding that low-income women report reluctance to marry men they may have to “evict”). Among married couples, for those with lower income who did not attend college, common reasons for dissolution of their relationship are physical and substance abuse, as well as “failure to contribute to the household.” Karney, *supra* note 111, at 17.

139. See *In re Elizabeth B. v. N.Y. State Off. of Children & Family Servs.*, 149 A.D.3d 8, 11 (N.Y. App. Div. 2017) (“it is well recognized that the most dangerous time in an abusive relationship occurs when the victim attempts to separate from the abuser.”); see also Barber, Kusunoki, Gatny & Melendez, *supra* note 128; Jennifer S. Barber, Yasamin Kusunoki, Heather H. Gatny & Jamie Budnick, *The Dynamics of Intimate Partner Violence and the Risk of Pregnancy During the Transition to Adulthood*, 83 AM. SOC’Y REV. 1020 (2018); Yasamin Kusunoki, Jennifer S. Barber, Elizabeth J. Ela & Amelia Bucek, *Black-White Differences in Sex and Contraceptive Use Among Young Women*, 53 DEMOGRAPHY 1399, 1403 (2016) (stating that low-income women are more likely to experience intimate-partner violence). As Lundberg and her co-authors observe, “women have increased freedom to reject marriages to men with whom they have cohabited or who have fathered their children, and to exit relationships that are unrewarding or dangerous.” Lundberg, Pollak & Stearns, *supra* note 14, at 96–97.

140. E.g., AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 4.09 (2002).

141. See *supra* notes 47, 107 and accompanying text.

typically occurs when one party wishes to assert a claim to property held in the other's name, for example, on the basis of contract or unjust enrichment.¹⁴² Restricting property claims to those asserting contract or unjust enrichment claims effectively limits cohabitation remedies to those couples who have accumulated a surplus on the basis of joint financial contributions, that is, the cohabitants most likely to have had committed relationships.

While most marriages end without awards of spousal support, family courts have the power to consider whether support is appropriate and, in many jurisdictions, can alter the property award to take support needs into account. In contrast, in most jurisdictions, courts lack the power to award support in cases of nonmarital cohabitation unless there is an express agreement providing for support.¹⁴³

C. Parenthood

Children born into marriage are presumed to be the children of the married couple; the spouses do not need to take any action to secure parental recognition.¹⁴⁴ A child born to an unmarried mother is treated as the child of the mother; to receive recognition, a second parent has to take an affirmative action such as signing an acknowledgement of paternity or adopting the child.¹⁴⁵

D. Child Custody and Support

Formal custody provisions typically follow the determination of parental status; parents generally enjoy equal rights to custody of their children, and a clear preference for deference to their views over the preferences of nonparents. In addition, child support awards typically follow state guideline amounts, with the courts that depart from the guidelines typically required to justify the deviation in writing. The real issues are administrative and procedural: how easy is it to get a custody order? With respect to married couples, few courts will grant a divorce without listing the children of the marriage and providing each parent with some opportunity to

142. See, e.g., *Cates v. Swain*, 215 So. 3d 492 (Miss. 2013).

143. See, e.g., N.J. STAT. ANN. § 25:1-5(h) (2018) (a promise of “support” by nonmarital partner must be in writing and with independent advice of counsel); *Friedman v. Friedman*, 24 Cal. Rptr. 2d 892, 888–90 (Ct. App. 1993) (rejecting claims for support in the absence of a contract); NAT’L CONF. COMM’RS ON UNIF. STATE LAWS, UNIF. COHABITANTS’ ECON. REMEDIES ACT § 7 cmt. (2021) (relief of the type ordinarily available in marriage is not applicable).

144. Carbone & Cahn, *supra* note 55, at 76, 116 (describing marriage as an “opt-out” system of paternity and nonmarriage as an “opt-in” system).

145. *Id.*

continue existing relationships with the child.¹⁴⁶ With unmarried couples, on the other hand, a noncustodial parent who wishes to continue the relationship with a child bears the burden of winning the cooperation of the primary parent¹⁴⁷ or of going to court and seeking a custodial order.¹⁴⁸ Increasing the ease of obtaining such orders for noncustodial parents, however, destabilizes the implicit bargain in many communities; it makes it harder for a primary parent to end a relationship without becoming subject to a custodial order from the other parent and easier for a nonresidential parent to end a relationship and secure custodial rights preserving a relationship with the child.¹⁴⁹ The upper middle-class model encourages two parent hyper investment in children by promoting shared custody following a split. Practically, this increases fathers' rights independently of the fathers' involvement in the intact relationship and violates community practices in less stable communities.¹⁵⁰

CONCLUSION

The relatively small number of reported cases addressing nonmarital cohabitation typically involve middle-class couples with assets, accumulated in the context of relatively committed relationships.¹⁵¹ In contrast, the far larger group of unmarried cohabitants are poor or working-class couples in contingent relationships. Any change in the terms of exit—by, for example, imposing automatic custody orders or financial obligations arising from the fact of cohabitation—would destabilize the implicit terms of these relationships and make exit harder. Working-class couples express concerns about the cost of divorce and custody fights as a reason not to marry.¹⁵² A shift that made the legal obligations of cohabitation more like marriage would redistribute the costs of exit. The least well-off women, who are the ones most likely to be in violent or abusive relationships, or to report concern about the ability to “evict” a partner who becomes a threat to their well-being, would be the most severely affected.

146. Carbone & Cahn, *supra* note 13, at 1191, 1221–22 (observing that the likelihood of shared custody correlates with marriage and income); *id.* at 1221 (“[D]ivorce decrees routinely recite whether children of the marriage exist and include orders that reflect mandatory child support guidelines.”).

147. *Id.* at 1218 (commenting that fathers' access depends on mothers' consent).

148. *Id.* at 1222 (describing low levels of shared custody awards outside of divorce proceedings and difficulties in obtaining custodial orders).

149. Huntington, *supra* note 48, at 179.

150. Lundberg, Pollak & Stearns, *supra* note 14, at 96 (“The vast majority of children living with one parent (87 percent) reside with the mother.”).

151. For a comprehensive collection of nonmarital contracts cases, see Albertina Antognini, *Nonmarital Contracts*, 73 STAN. L. REV. 67, 154 (2021).

152. Miller, Sassler & Kusi-Appouh, *supra* note 10, at 613.

Some courts have experimented with community mediation efforts to provide assistance to couples who want to resolve disputes informally, but any wholesale change in the terms of cohabitation would have the most negative effects on the most vulnerable caretakers. The way forward, therefore, has to be sensitive to the various types of modal cases and not just the cases most likely to end up producing reported opinions. In addition, any significant reforms should take into account the practical consequences of new procedures, not just changes in substantive legal doctrine.

What the existing system therefore does, in informal ways, is ratify the informal bargains underlying different communities. At the same time, however, the system does so without bringing these different assumptions about intimate bargains into direct conflict (or, sometimes, public view). Proposals to reform these procedures by presumptively changing the costs of exit for all such relationships threaten to disrupt the informal understandings. While such presumptions may be warranted for the modal committed relationships, they are not necessarily warranted for contingent relationships. The procedures thus have to be considered together with the formal provisions governing family law to do justice to different couples in different communities with different understandings about the nature of their relationships.