

Adventures in Co-Parenting: Charting a Course for Postmarital Families

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Clare Huntington, [Postmarital Family Law: A Legal Structure for Nonmarital Families](#), 67 *Stan. L. Rev.* 167 (2015).

Last year, [Obergefell v. Hodges](#) seized center stage as many family law scholars began evaluating the implications of the Supreme Court's decision recognizing gay Americans' constitutional right to marry. Other scholars, however, remained more interested in exploring the inverse phenomenon: the decreasing relevance of marriage and married life for many Americans. Specifically, research shows that many poor and working class Americans no longer find marriage to be a precondition for romantic relationships or parenthood. This group of Americans has formed what Huntington calls "postmarital families." In her wonderful article, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, Huntington explores the legal implications of this dramatic cultural shift.

Huntington begins by rendering visible the bifurcated world we currently inhabit now that marriage is no longer the institution that constitutively defines all families. One group of Americans, a relatively wealthier group, lives in marital families; the other, composed of less financially secure individuals, has formed nonmarital, or "postmarital," family units. Yet family law, she argues, still treats all families as though they are marital families. As a consequence, "postmarital" families are forced to navigate ossified legal presumptions, ill-fitting rules, and institutional structures designed around marriage. Huntington's discussion successfully renders visible postmarital families' specific, unique dynamics and further reveals the way existing family law aggravates these families' special vulnerabilities. She also shows how family law—its legal norms *and* institutions—must evolve to address postmarital families' unique problems.

One of Huntington's most compelling examples is her discussion of child custody. As she explains, the default presumption in many states is that when parties are unmarried, sole custody of a child is awarded to the mother. (P. 204.)¹ By contrast, when couples are married, *no determination* of custody is made and legal presumptions vest both parents with custodial rights and other parental prerogatives.² Huntington further shows that laws vesting sole, primary custody with unmarried mothers aggravate existing tensions in postmarital families. Specifically, they facilitate maternal gatekeeping, a dynamic in which mothers control nonresident fathers' access to their children. (P. 204-05.) To exercise their custody rights, fathers in postmarital families must petition the court for relief, a remedy that is far too complex and expensive for most postmarital fathers. Further aggravating matters, the only default regulations that actually affect postmarital fathers are child support regulations. Child support regimes focus solely on financial contribution, enforcing a *de facto* (male) breadwinner standard derived from marriage. This breadwinner standard sets up poor unemployed or underemployed fathers for failure. (P. 207-08.)³ Moreover, the law's emphasis on financial contributions from fathers, rather than ability to provide care, encourages even more resentment from mothers in postmarital families, fueling acrimony between the parties.

After describing how the current legal rules aggravate dynamics specific to postmarital families, Huntington points to research showing that children benefit when both parents are able to maintain engaged and loving relationships with them. (P. 173.) She also points to the growing cultural understanding that children require more than economic contribution from their fathers, and that paternal care has value as well. Huntington then offers a postmarital law solution: at the birth of their child both postmarital parents should be given enforceable legal and physical custody rights to the child. Equally important, they must be provided with a dispute mechanism that requires parties to cooperate and jointly work out custodial arrangements. (P. 209.)

Many of Huntington's suggested innovations for postmarital family law are bound to trigger pause. These proposals

include tying child support regimes to child custody and visitation regimes, and in this way securing postmarital fathers' consistent access to their children. Also, questions remain about how many of her custody and child support proposals would play out on the ground in poor and working-class communities. Yet, regardless of whether one agrees with all of her suggestions or specific calls for changes in the law, Huntington charts a course that allows us to bring postmarital families' key concerns to the fore.

Importantly, legal scholars should find value in the piece, even if they question her specific proposals, for Huntington also provides a way out of a key logjam in scholarly debates about family law norms. One camp seeks to strengthen the norm of marriage; the other camp proposes we shift to a family law model that concentrates more on strengthening and supporting parent-child relationships. (P. 172.) Huntington instead argues postmarital couples' post-union relationships cannot be disaggregated from the effects these relationships have on their children. When a couple's romantic connection wanes, postmarital families need an administrative or institutional mechanism that allows them to set rules and develop expectations around their mutual *co-parenting* roles. (P. 231.) Huntington explains that divorcing couples —putting aside the existing problems in divorce law and family law institutions⁴—know they can depend on an established structure for working through conflicts as they shift to a co-parenting relationship. Huntington seeks to provide the same benefits to co-parents in postmarital families.

Huntington also does an outstanding job pushing family law scholars to confront their deepest anxieties about how postmarital families operate — and she shows that we can do so without pathologizing the families involved. Specifically, Huntington openly and honestly engages with the churning dynamic that seems to affect modern postmarital families. (P. 195.) Many co-parents, particularly male parents, find it hard to maintain relationships with their children because the children's mother goes on to form a new relationship, and often a new postmarital family. When this second postmarital family is formed, the biological father of children from the first postmarital family tends to get crowded out of his children's lives. Also when a mother takes a new partner and has another child, her new partner may not devote the same care and attention to biologically-unrelated children in the family as he does to his own. A postmarital father with children may also form a second postmarital family, thus weakening his connection to his children from his prior relationship. Alternative dispute resolution agencies could serve an important role here, helping postmarital families develop co-parenting standards that manage these kinds of disruptive family changes. It is refreshing to read a family law analysis that deals with the problems caused by parents' shifting romantic allegiances without casting judgment on those involved.

In short, *Postmarital Family Law* is likely to become a key resource for family law scholars interested in charting the dynamics of family life outside of the traditional nuclear family. Huntington's careful, respectful, and creative approach to understanding postmarital families makes the article an exemplary piece of scholarship. Her work demonstrates the rich possibilities that are available when we shift our attention away from so-called traditional families and consider new family forms without pathologizing these alternative arrangements. She further shows that we can identify the core values that must be advanced to cultivate a nurturing and supportive family unit for children. Scholars can then use these values to imagine new legal structures that are more attentive to contemporary material and social conditions.

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1. Fifteen states have statutes that provide for this default rule. (P. 204 n. 204.) The maternal custody presumption continues to be enforced in these states despite the fact that these laws appear to violate basic equal protection standards. By contrast, some state statutes technically give both parents equal rights to a "parental relationship" when they have a child out of wedlock; however, these statutes still as a practical matter do not guarantee fathers' custodial rights. (P. 204.) Courts may recognize a party as a legal parent, but give that party no custodial rights until one petitions for relief. This regime often adversely affects nonmarital fathers. [2]
 2. As Huntington explains, courts assume that marital families have two emotionally invested parents deserving of legal rights, and nonmarital families have one, the mother. As a result, nonmarital fathers are forced to jump multiple hurdles to establish legal rights and authority over their children. (P. 203-04.) [2]
 3. Some would argue that child support law is actually a kind of postmarital law, as it has been historically used to ensure unmarried fathers support their children. [2]

4. Huntington recognizes that family law is far from ideal at present and that the divorce process presents challenges for marital families. However, she explains that these problems in family law are beyond the scope of this project. They are not relevant to her current concern: exploring the way laws premised on marriage create problems for unmarried persons. (P. 171 n. 17.) Scholars may disagree with her view, and see productive commonalities shared between divorcing and postmarital mothers. [2]

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