

# Framing Preglimony: Exploring the Implications of Pregnancy Support Models through Family Law Values

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## INTRODUCTION

*If two people equally contribute to a risk-taking endeavor, should they equally divide the risk?*

In the summer of 2012, University of Richmond law professor Shari Motro ignited a media firestorm over one word: “preglimony.”<sup>1</sup> In a New York Times column, Motro argued that unmarried lovers who conceive should share economic responsibility for the woman’s pregnancy. The financial burden of pregnancy should be shared in proportion to each party’s relative assumption of risk that a pregnancy would occur—which is to say, equally.<sup>2</sup> Motro coined the term “preglimony” to encapsulate this concept in a single word by conjuring the similar and more familiar concept of alimony (the shared economic responsibility between former spouses at divorce).<sup>3</sup>

Her proposal was met with outrage, indignation, skepticism or, at the very least, debate over implementation of such a new concept.<sup>4</sup> The thing is, despite

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1. Shari Motro, *Responsibility Begins at Conception*, N.Y. TIMES, July 7, 2012, at A17, available at [http://www.nytimes.com/2012/07/07/opinion/time-for-pregnancy-support-alimony.html?\\_r=0](http://www.nytimes.com/2012/07/07/opinion/time-for-pregnancy-support-alimony.html?_r=0). Motro originally developed the concept of preglimony through a series of law review articles. See Shari Motro, *The Price of Pleasure*, 104 NW. U. L. REV. 917 (2010) [hereinafter *Price of Pleasure*]; Shari Motro, *Preglimony*, 63 STAN. L. REV. 647 (2011) [hereinafter *Preglimony*].

2. See Motro, *supra* note 1.

3. See *id.*

4. It only took one day for news agencies, father’s rights advocates, feminist groups, and a large number of bloggers to begin posting their challenges or support for Motro. See Motro: *Men Pay Alimony, Why Not Preglimony?*, TAXPROF BLOG (July 7, 2012), [http://taxprof.typepad.com/taxprof\\_blog/2012/07/motro-men-pay-.html](http://taxprof.typepad.com/taxprof_blog/2012/07/motro-men-pay-.html); James Taranto, *Shotguns Without Weddings: A NEW YORK TIMES Plan for Encouraging Illegitimate Births*, WALL ST. J., (July 9, 2012, 4:36 PM), <http://online.wsj.com/article/SB10001424052702303343404577516864197211988.html>; W.F. Price, *Law Professor Proposes “Preglimony”*, THE SPEARHEAD (July 9, 2012), <http://www.the-spearhead.com/2012/07/09/law-professor-proposes-preglimony/> (calling preglimony “a bid to further expand wealth transfer from males to females”); Katie Roiphe, *Preglimony and Pro-Choice Rhetori: If We Make Fathers Pay for Pregnancies, Aren’t We Calling the Fetus a Baby?*, SLATE (July 10, 2012, 6:32 AM), [http://www.slate.com/articles/double\\_x/roiphe/2012/07/preglimony\\_and\\_how\\_it\\_affects\\_the\\_pro\\_choice\\_movement\\_.html](http://www.slate.com/articles/double_x/roiphe/2012/07/preglimony_and_how_it_affects_the_pro_choice_movement_.html) (labeling Motro’s op-ed as “eminently sensible and humane” but expressing concern about whether preglimony admits that a fetus is “life”); Glenn

critics' denouncement of preglimony as "laughable,"<sup>5</sup> "stupid,"<sup>6</sup> "inequitable,"<sup>7</sup> or "another front . . . in never-ending gender wars,"<sup>8</sup> preglimony is not that novel of an idea. For example, unwed fathers are sometimes required to reimburse pregnancy-related expenses under current child support regimes, such as doctor's visits and delivery costs.<sup>9</sup> However, those child support models do not account for all of a pregnancy's impact on the mother. Motro reinforces her call for preglimony by demonstrating ways in which existing child support schemes are inequitable to unmarried pregnant women because the financial burden of a pregnancy is unevenly divided between the responsible parties. Because these women have no legal entitlement to support and are not benefitting from an assumed shared economic union of marriage, unmarried pregnant women are effectively disadvantaged by their marital status. Preglimony would correct for this inequity by requiring fathers, equal contributors to the pregnancy, to take responsibility for an equally-divided portion of the pregnancy's costs.

If legislators were planning to adopt a preglimony scheme, they would have to decide whether to frame preglimony as an obligation to the mother or as an obligation to the child-to-be. There are different implications for each frame. Motro argues for the former,<sup>10</sup> justifying preglimony along similar grounds as alimony rather than as an extension or augmentation of current child support obligations. The alimony framework generates strong resistance from some

Reynolds, Comment to Katie Roiphe, INSTAPUNDIT (July 11, 2012, 7:55AM) <http://pjmedia.com/instapundit/146394/> (arguing that fathers should have rights "[b]esides the right to cough up the cash"); Cassandra, *Preglimony & Sex Lead To Equal Opportunity Silliness, Part I*, VILLAINOUS COMPANY (July 11, 2012, 4:16 AM), [http://www.villainouscompany.com/vcblog/archives/2012/07/preglimony\\_sex.html](http://www.villainouscompany.com/vcblog/archives/2012/07/preglimony_sex.html) (critiquing both Motro's proposal and subsequent commentary); Cassandra, *Preglimony: the Insanity ContinuesFalsePart Deux*, VILLAINOUS COMPANY (July 11, 2012, 8:31 AM), [http://www.villainouscompany.com/vcblog/archives/2012/07/preglimony\\_the.html](http://www.villainouscompany.com/vcblog/archives/2012/07/preglimony_the.html) (questioning whether abortion rights can survive after preglimony); Robert Franklin, *'Preglimony': The Latest Front in the 'Mothers' Rights/Fathers' Responsibilities' War*, FATHERS AND FAMILIES (July 12, 2012, 9:03 AM), <http://www.fathersandfamilies.org/2012/07/12/preglimony-the-latest-front-in-the-mothers-rights-fathers-responsibilities-war/> (arguing against preglimony from a father's rights perspective); Staff Reporter, *Is Preglimony a Good Idea?* ANNOTATIONS: A JONES MCCLURE PUBLISHING BLOG (Aug. 10, 2012), <http://annotations.jonesmcclure.com/2012/08/10/is-preglimony-a-good-idea/> (calling Motro's column an "eyebrow-raising piece").

5. Gamerp4, Comment to *Law Professor Proposes "Preglimony"*, THE SPEARHEAD (July 9, 2012, 3:14 PM), <http://www.the-spearhead.com/2012/07/09/law-professor-proposes-preglimony/>.

6. Reficul, Comment to *Law Professor Proposes "Preglimony"*, THE SPEARHEAD (July 9, 2012, 4:01 PM), <http://www.the-spearhead.com/2012/07/09/law-professor-proposes-preglimony/>.

7. Taranto, *supra* note 3.

8. Shady Grady, Comment to *Preglimony: A Really Bad Idea??*, URBAN POLITICO, (July 18, 2012, 11:46 AM), <http://www.theurbanpolitico.com/2012/07/preglimony-really-bad-idea.html#comment-591113293>.

9. See discussion, *infra*, Part II. Although the specifics of pregnancy-related expense reimbursement varies by state, a common theme among child support statutes is that only a subset of total pregnancy-related expenses are eligible for reimbursement.

10. *Price of Pleasure*, *supra* note 1, at 919 ("Child Support obligations should kick in only once a child is born: until and unless this happens, a man's economic responsibility should be conceptualized as a responsibility towards the woman herself."); *Preglimony*, *supra* note 1, at 648 - 59; see also discussion, *infra*, Part V.B-C.

members of the public, who consider preglimony unfair to men.<sup>11</sup> Other internet commentary about preglimony indicates that the purpose of alleviating an unequal burden on unmarried pregnant women is more controversial than promoting the development of healthy babies. It is unclear, however, if public opinion would shift in favor of preglimony even if it were framed as an extension of current child support obligations, because some individuals express a moral hesitancy to incentivize unmarried women for getting pregnant by “rewarding” them with money.<sup>12</sup>

This note explores the implications of framing preglimony to be more similar to alimony or to child support.<sup>13</sup> Trends in American family law, such as the focus on equality and enhanced accommodation for myriad forms of caregiving beyond the nuclear family, make the eventual implementation of a pregnancy support scheme seem inevitable. Understanding the subtle differences between the two preglimony frameworks will help legislators and other policy-makers decide which model best promotes the goals and values of their state.

### I. CARE AND EQUALITY: VALUES AT THE FRONTIER OF FAMILY LAW

Family law is always evolving to reflect the values of the day. These values are shaped by the realities of life. For example, the legal presumptions regarding child custody have shifted over time to reflect changing values about parenting. During colonial times, there was little separation between work and home. A man was the head of a family, and his wife and children, as his property, contributed to his livelihood while he was responsible for the home.<sup>14</sup> This patriarchal value—with a man holding the ultimate responsibility for his family’s economic and domestic success—led to a custodial presumption in favor of fathers even though women cared for their young children’s daily needs.<sup>15</sup>

Industrialization brought many changes as the separation of work and home led to a new social conception of family. Because men’s economic duties were physically separated from the home, women took over as head of the domestic sphere.<sup>16</sup> As the female role morphed into nurturer and homemaker, courts responded by reconsidering the automatic award of child custody to

11. Taranto, *supra* note 3 (“Motro proposes to place new burdens on men without requiring women to give up anything in return.”). *See also* Franklin, *supra* note 4 (“[E]ffectively, fathers’ ‘rights’ are in mothers’ hands.”).

12. *See* Taranto, *supra* note 3 (“Women would be encouraged to get pregnant.”).

13. *See* discussion, *infra*, Parts V and VI.

14. *See* Steven Mintz, *From Patriarchy to Androgyny and Other Myths: Placing Men’s Family Roles in Historical Perspective*, in *AMERICAN FAMILIES PAST AND PRESENT: SOCIAL PERSPECTIVES ON TRANSFORMATIONS* 11, 11–12 (Susan M. Ross, ed., 2006).

15. *See id.* at 12.

16. *See id.* at 18. (“The physical separation of the household and the workplace also contributed to a new conception of the family and of men’s familial roles. . . . During the early nineteenth century, family roles were reorganized around the idea of sexual difference, with men and women increasingly occupying separate spheres. Prior to the nineteenth century, women had been active participants in commerce, farming, and many business pursuits, assisting their husbands, keeping books, overseeing apprentices and journeymen, and manufacturing many goods for sale.”).

men.<sup>17</sup> This resulted in what became known as the tender years presumption, which assumed that mothers were the best caretakers for children unless proved to be unfit.<sup>18</sup>

The modern trend is to base custody decisions on factors other than gender, such as a gender-neutral primary caretaker presumption or best interest of the child standard.<sup>19</sup> While the factors may appear biased in favor of women over men, this is a reflection of the reality that many women take on the majority of childcare responsibilities.<sup>20</sup> In a family where a father is the primary caregiver, the factors would likely fall in his favor. The determination of child custody is just one example, but it illustrates how the state offers rights and privileges to families according to the societal values of the day.<sup>21</sup> History teaches us that each generation will change what it means to be a family and how families take care of each other. Granting legal rights to families according to outdated values in an attempt to resist modernization is futile. Rather than stubbornly ignoring the signs of change, legislators should instead focus on how to adapt laws to continue promoting public policy while accounting for the new realities of American family life.

The reality of family life in America today is that marriage is losing its primacy as the creator of familial connections. Marriage rates have been dropping since the 1960s,<sup>22</sup> and married households are no longer in the majority in the United States.<sup>23</sup> In the meantime, nontraditional family structures are becoming more and more common: there are blended families,<sup>24</sup> childless-by-choice families,<sup>25</sup> cohabiting families,<sup>26</sup> same-sex families,<sup>27</sup> single-parent

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17. Lisa J. McIntyre, *The Civil Contract and Family Life in the United States*, in AMERICAN FAMILIES PAST AND PRESENT: *supra* note 14, at 155, 161 (“[J]udges took notice of society’s attachment to children and women’s superiority in the domestic arena and began to rethink their expectations about the relationship of children to their parents—especially with respect to the issue of custody.”).

18. Ariel Ayanna, *From Children’s Interests to Parental Responsibility: Degendering Parenthood Through Custodial Obligation*, 19 UCLA WOMEN’S L.J. 1, 9–10 (2012) (“Because it was presumed to be right and natural that women raise young children, the idea of taking a child away from the care of the woman who had been raising the child proved not only impractical but distasteful.”).

19. *See id.* at 12–13 (listing typical factors of the best interest of the child standard) and 17–19 (describing problems with the ostensibly gender-neutral primary caregiver standard).

20. *See id.* at 36 (noting that “primary caregiver” factors disadvantage men because they are less likely to be the primary caregiver).

21. SUSAN M. ROSS, AMERICAN FAMILIES PAST AND PRESENT, *supra* note 16, at 3 (noting that the history of transformations of family life make future transitions “inevitable”).

22. *See generally* ANDREW J. CHERLIN, THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY 63–115 (2009).

23. DAPHNE LOFQUIST, ET AL., U.S. CENSUS BUREAU, 2010 CENSUS BRIEFS: HOUSEHOLDS AND FAMILIES 5 (2012), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf> (describing a drop in married households from 52% of all U.S. households in 2000 to only 48% of all households in 2010).

24. ALICE K. BUTTERFIELD, CYNTHIA J. ROCHA & WILLIAM H. BUTTERFIELD, THE DYNAMICS OF FAMILY POLICY 289 (2010) (noting blended families as one of many new family forms in the United States and emphasizing the need to focus on family function over structure, such as childcare functions).

25. ROSS, *supra* note 21, at 4.

26. In the early 1980s, Martha Fineman argued for repeal of criminal laws punishing

families,<sup>28</sup> networked families,<sup>29</sup> multigenerational families and families with non-parent caregivers.<sup>30</sup> These families perform many of the same caretaking functions as “traditional” nuclear families and with the same sense of commitment and durability over time. Yet without a marital or blood bond, some of these family forms have the same legal standing as friendship—none.<sup>31</sup> Sociologist Judith Stacey points out that legal recognition for marriage but no other family form is a zero-sum result: “[t]he more eggs and raiments our society chooses to place in the family baskets of the married, the hungrier and shabbier will be the lives of the vast numbers of adults and dependents who, whether by fate, misfortune, or volition, will remain outside the gates.”<sup>32</sup> Making legal marriage the trigger for state recognition of family perpetuates inequalities. Some families get benefits that they do not need while other families that need those benefits are not entitled to them.<sup>33</sup> This discrepancy between the reality that families come in many forms versus the family forms that are recognized and subsidized by the state leads to a privileging of some families over others.

### A. Caretaking

A family’s main function is to take care of each other. In order to facilitate the caretaking function, laws must be structured in a way that bestows the same rights, privileges, and subsidies on all caregivers in all types of family structures. This value of caretaking is at odds with calls for protection of traditional marriage because caretaking is independent of marriage. There are many non-

cohabitation and creation of regulations comparable to marriage laws to protect the cohabiters themselves. Martha L. Fineman, *Law and Changing Patterns of Behavior: Sanctions on Non-Marital Cohabitation*, 1981 WIS. L. REV. 275, 276. To see the evolution of the cohabitation argument, see also MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA’S POLITICAL IDEALS* 111 (2010) (exploring whether the rights and privileges reserved for marriage should be extended to both same sex couples and cohabiting couples).

27. ROSS, *supra* note 21, at 4.

28. EICHNER, *supra* note 26, at 92–101 (arguing that the state should be careful not to privilege two-parent families over single-parent families).

29. See generally KAREN V. HANSEN, *NOT-SO-NUCLEAR FAMILIES: CLASS, GENDER, AND NETWORKS OF CARE* (2005) (exploring the dynamics of interdependent “networks of care” that help parents balance child-rearing, work, and other responsibilities and pointing out that even two-parent families are not independent, self-reliant units). See also JENNIFER ROBACK MORSE, *LOVE & ECONOMICS: WHY THE LAISSEZ-FAIRE FAMILY DOESN’T WORK* 89 (2001) (arguing that “[t]here is literally no such thing as a ‘single parent’” because “[s]ome third party is always in the background, helping the [single parent]”).

30. BUTTERFIELD, ROCHA, & BUTTERFIELD, *supra* note 24, at 382 (calling baby boomers the “sandwich generation” because they “provide care for dependent children and aging parents at the same time”).

31. SANFORD N. KATZ, *FAMILY LAW IN AMERICA* 10 (2003) (noting that state legislatures opt to regulate marriage but consider other committed adult relationships more like friendship than family, with none of the privileges or protections of marriage).

32. Judith Stacey, *Toward Equal Regards for Marriages and Other Imperfect Intimate Affiliations*, 32 HOFSTRA L. REV. 331, 344 (2003); see also EICHNER, *supra* note 26, at 97–98 (acknowledging that individuals lacking the “wherewithal and happenstance” to be in committed relationships are more likely than married individuals to need social support funneled toward marriage).

33. Stacey, *supra* note 33, at 343.

marital family forms that would benefit from the legal recognition and support provided to marital family forms. There are opposing arguments about the best way to encourage the caretaking function within families. Some traditionalists call for a strong push toward marriage as the only way to protect families.<sup>34</sup> They cite statistics indicating that marital families are more strongly correlated with stability than non-marital families.

On the other side of the debate is the argument that awarding legal privileges and entitlements to marital families is arbitrary and does not accurately reflect the distribution of caretaking across other family forms. These arguments against marriage as the trigger for legal benefits arise from the fact that dependency and vulnerability are universal human experiences. At the very least, all of us are born vulnerable and dependent, and many of us will have illness, injury, or other life events that require caretaking. Those who choose to accept a caretaking role should be given the same legal benefits and entitlements without arbitrary limits on what families are recognized and what families are excluded.

At first, it appears that there is no common ground between proponents of either side. But both sides share the value of caretaking—they just debate the optimum way for the law to reflect this value.<sup>35</sup> Policy makers may disagree over the best form for a family, but the primacy of care is relatively undisputed.

The current trends for family law seem to be slowly moving away from a marriage-centric approach. The value of care began to shift into public focus in the early 1990s. Leading into the 1992 election, Vice President Dan Quayle verbally attacked sitcom character Murphy Brown and other single mothers, calling for a return to “traditional family values.”<sup>36</sup> Candice Bergen, in her role as

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34. See generally ALLAN CARLSON, *CONJUGAL AMERICA: ON THE PUBLIC PURPOSES OF MARRIAGE* 37 (2007) (insisting that the health and survival of our nation rests on recovery of the understanding of marriage as the natural reproductive and economic unit).

35. See JUNE CARBONE, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW* 129 (2000) (“Parenthood may play the part marriage once did of initiating young men and women into a socially sanctioned role . . . parenthood is a permanent relationship; it is also one of dependence and trust.”); EICHNER, *supra* note 26, at 61 (“[F]amilies should bear responsibility for the day-to-day caring for (or arranging the care for) children and others with dependency needs. Meanwhile, the state should bear the responsibility for structuring institutions in ways that help families meet their caretaking needs . . .”); Martha Albertson Fineman, *Grappling With Equality: One Feminist Journey*, in *TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY* 47, 52 (Martha Albertson Fineman, ed., 2011) (“Vulnerability is universal and constant. As embodied individuals, we are all just an accidental mishap, natural disaster, institutional failure, or serious illness away from descending into a dependent state.”); Robin West, *Jurisprudence and Gender* 55 U. CHI. L. REV. 1, 71 (1988) (“[M]en can connect to other human life. Men can nurture life. Men can mother. Obviously, men can care, and love, and support, and affirm life.”);

36. Andre Dechert, *Family Man: The Popular Reception of Home Improvement, 1991-1992, and the Debate About Fatherhood*, in *INVENTING THE MODERN AMERICAN FAMILY: FAMILY VALUES AND SOCIAL CHANGE IN THE 20TH CENTURY UNITED STATES* 265, 267 (Isabel Heinemann, ed., 2012). Quayle supported his argument that “marriage is probably the best anti-poverty program of all” by saying, “Bearing babies irresponsibly is simply wrong. . . . It doesn’t help matters when primetime TV has Murphy Brown, a character who supposedly epitomizes today’s intelligent, highly paid professional woman, mocking the importance of fathers by bearing a child alone and calling it just another lifestyle choice.” MICHAEL A. COHEN, *LIVE FROM THE CAMPAIGN TRAIL: THE GREATEST PRESIDENTIAL CAMPAIGN SPEECHES OF THE TWENTIETH CENTURY AND HOW THEY SHAPED MODERN AMERICA* at 451-

Murphy Brown, responded to Quayle's attack by saying, "Perhaps it's time for the Vice President to expand his definition and recognize that, whether by choice or circumstance, families come in all shapes and sizes."<sup>37</sup>

In contrast to Quayle's view, presidential candidate Bill Clinton pushed for government solutions to some of the biggest problems facing women and mothers, married or not. He earned women's votes by promising to address these problems for many types of families, ultimately winning the election.<sup>38</sup> Clinton's support for women led to better recognition of the value of caretaking because his political initiatives brought attention to the large number of women struggling under the burden of caring for children and others: the State Children's Health Insurance Program;<sup>39</sup> the Family and Medical Leave Act;<sup>40</sup> the Violence Against Women Act;<sup>41</sup> the Freedom of Access to Clinic Entrances Act;<sup>42</sup> expansion of the Earned Income Tax Credit, which helped non-parental caregivers;<sup>43</sup> and enhanced federal child-support enforcement laws, which presuppose a lack of marriage.<sup>44</sup> By making support for caregivers regardless of marital status the purpose of so many government initiatives, Clinton helped shift the public's concern from the traditional structure of a family to its functionality—a functionality centered around care.<sup>45</sup>

## B. Equality

While promotion of caretaking may be a core purpose of the family law system, there are many paths toward that goal. The corollary value of equality provides a measure to select which path to travel. Equality is a central concept to American identity. It shapes many aspects of our legal system beyond family law. Awareness of gender equality problems in family law are credited to the civil rights and women's rights movements.<sup>46</sup> One of the first examples of the

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51 (2008).

37. Isabel Sawhill, *20 Years Later, It Turns Out Dan Quayle Was Right About Murphy Brown and Unmarried Moms*, WASH. POST. (May 25, 2012), available at [http://articles.washingtonpost.com/2012-05-25/opinions/35457123\\_1\\_father-moves-marriage-biological-parents](http://articles.washingtonpost.com/2012-05-25/opinions/35457123_1_father-moves-marriage-biological-parents).

38. MONA HARRINGTON, CARE AND EQUALITY: INVENTING A NEW FAMILY POLITICS 46-47 (1999) (highlighting the gender gap as a key piece of Clinton's victory). It should be noted, however, that the Defense of Marriage Act (DOMA) was also passed during Clinton's administration.

39. State Children's Health Insurance Program, Pub. L. No. 105-33, tit. XXI, 111 Stat. 251; see also Elisabeth H. Sperow, *Redefining Child Under the State Children's Health Insurance Program: Capable of Repetition, Yet Evading Results*, 12 AM. U.J. GENDER SOC. POL'Y & L. 137, 139 (2004) (relaying that when SCHIP was enacted it was considered "a landmark opportunity to improve children's health" for poor families that failed to qualify for Medicare).

40. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6.

41. Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1902.

42. Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, 108 Stat. 694.

43. Todd S. Purdum, *Clinton Defends Income Tax Credit Against G.O.P. Cut*, N.Y. TIMES, Sept. 19, 1995, available at <http://www.nytimes.com/1995/09/19/us/clinton-defends-income-tax-credit-against-gop-cut.html?src=pm> ("Mr. Clinton has long cited the expansion of the credit as a major underappreciated accomplishment of his Administration . . .").

44. HARRINGTON, *supra* note 38, at 47.

45. *Id.*

46. See KATZ, *supra* note 31, at 6-7 (noting that during the 60s and 70s an impressive number of

infiltration of gender equality norms into family law was the passage of the Married Women's Property Acts in the 1850s. Before their passage, a woman's personal property, legal rights, and even legal existence were all transferred to her husband upon marriage under the doctrine of coverture.<sup>47</sup> The Married Women's Property Acts allowed married women to hold property separately from their husbands.<sup>48</sup> Nonetheless, remnants of coverture remained into the 1970s, when voter registration rules and other requirements denied women certain rights and privileges for refusing to adopt their husband's surnames.<sup>49</sup> When women brought complaints about these requirements, some judges (wrongly) believed that it was not only permissible to force women to change their name, but also that it was sometimes required.<sup>50</sup> These movements solidified the importance of equality in family law and policy.

Equality is not just central to family law, it is also an important value in American culture as a whole. For example, a "new" civil rights movement has emerged promoting equal recognition for gay and lesbian families.<sup>51</sup> Laws like the Lilly Ledbetter Fair Pay Act of 2009<sup>52</sup> show that the fight for gender equality is still being waged in the workplace. And 2012 was heralded as the "New Year of the Woman" after the most recent election raised the total number of female senators to twenty.<sup>53</sup> From the workplace to politics, equality is such an

cases dealing with family law and relationships came before the Supreme Court). Same-sex issues are bringing new attention to gender equality; the concept that children need both a mother *and* a father has been criticized as an outdated concept of gender complementarity. EICHNER, *supra* note 26, at 95 (arguing that the gender of parents is inconsequential to the success of the child). Martha Albertson Fineman argues that touting heterosexual marriage as necessary for children's welfare demonstrates the public "willingness to sacrifice women's interests for children's." *Id.* at 97.

47. Patricia J. Gorence, *Women's Name Rights*, 59 MARQ. L. REV. 876, 883 (1976).

48. KATZ, *supra* note 31, at 62. Despite the passage of the Married Women's Property Acts, however, most women remained "Nonpersons" because courts narrowly interpreted their new rights. See Lisa J. McIntyre, *The Civil Contract and Family Life in the United States*, in AMERICAN FAMILIES PAST AND PRESENT, *supra* note 17, at 159 ("[T]he acts were deemed not to erode the husband's right to control the family assets; nor did they provide married women the right to control their own earnings or to contract without their husband's consent.").

49. See generally, Gorence, *supra* note 47, at 886-94, 896-97 (detailing "recent" case law on the issue of married women's legal name requirements and speculating that "requirements compelling women to adopt their husbands' surnames . . . will raise serious constitutional questions and will be subject to careful scrutiny by the courts").

50. See *id.* at 890 (noting that several cases, in dicta, state that a woman automatically assumes her husband's name upon marriage).

51. See, e.g., DAVID MOATS, CIVIL WARS: A BATTLE FOR GAY MARRIAGE 31 (2004) ("The [Vermont Supreme Court's] frequent reference to the nation's landmark civil rights cases made clear the issue of marriage for gays and lesbians represented an important new chapter in the broader movement for civil rights in America."); THE NEW CIVIL RIGHTS MOVEMENT, <http://thenewcivilrightsmovement.com/> (last visited March 25, 2013) (labeling itself as "A Journal of News & Opinion on Gay Rights & Marriage Equality").

52. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

53. Jena McGregor, *With Senate Wins for Elizabeth Warren and Others, a New Year of the Woman?*, WASH. POST. (Nov. 7, 2012), available at [http://articles.washingtonpost.com/2012-11-07/national/35506839\\_1\\_women-leaders-center-for-american-women-republican-deb-fischer](http://articles.washingtonpost.com/2012-11-07/national/35506839_1_women-leaders-center-for-american-women-republican-deb-fischer). Note that "new" references the original Year of the Woman in 1992, when a then-unprecedented seven women were in the Senate. *January 3, 1993: "Year of the Woman"*, UNITED STATES SENATE HISTORICAL MINUTES, [http://www.senate.gov/artandhistory/history/minute/year\\_of\\_the\\_woman.htm](http://www.senate.gov/artandhistory/history/minute/year_of_the_woman.htm) (last

important principle in America that it shapes laws across all areas of life.

### C. Time to Recenter?: The Intersection of Caretaking and Equality

Together, caretaking and equality are reshaping the frontiers of family law. Feminist scholars have argued for the past four decades that a marriage-centric family law system must be reformed because it is not compatible with the value of equality if it leaves so many caregivers disadvantaged by their marital status.<sup>54</sup> They argue that horizontal relationships (“relationships between generally able adults, in which both persons are interdependent and perform caretaking tasks for one another”)<sup>55</sup> such as marriage are the wrong trigger for family law protections. For example, feminists point out that marriage-centric policies lead to a constant need to tweak family laws in order to better promote equality goals. There have been numerous attempts to fix gendered inequities at the termination of a marriage by developing a variety of formulations for equitable division and alimony.<sup>56</sup> Alimony was first conceptualized as maintenance for a dependent wife, then tweaked with an eye toward compensation, retribution, or rehabilitation for dependent spouses. Changes in formulas and exceptions for the equitable division of marital property prevent some type of inequity. Divorce law has seen dramatic changes over the past fifty years, all in the name of equality.<sup>57</sup>

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visited March 25, 2013).

54. See, e.g., SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 135–36 (1989) (“[M]arriage and the family, as currently practiced in our society, are unjust institutions. They constitute the pivot of a societal system of gender that renders women vulnerable to dependency, exploitation, and abuse.”); see also Laura T. Kessler, *New Frontiers in Family Law*, in *TRANSCENDING THE BOUNDARIES OF LAW*, *supra* note 35, at 226 (“Earlier feminists questioned the marital family’s central place in our country’s law and social policy and exposed the costs of this framework to women, children, and other vulnerable people. As such, they helped us imagine sex, intimacy, care, and reproduction outside marriage and the nuclear family.”). I should note here that Fineman is quite outspoken against the use of “equality” as a goal for family law and explicitly prefers to focus on “dependency and vulnerability” instead. See Martha Albertson Fineman, *Grappling With Equality: One Feminist Journey*, in *TRANSCENDING THE BOUNDARIES OF LAW*, *supra* note 35, at 47, 51–52 (“[T]he family, as our most gendered institution, was not susceptible to the imposition of a formal equality model.”). Fineman suggests, however, that her theory of dependency and vulnerability is just substantive equality in sheep’s clothing. See *id.* (“In 1991, I hoped we might fashion a more substantive or result-sensitive version of equality in the family context . . . . While I still believe in the justness of the substantive equality outcome, my vocabulary and arguments are less focused on gender and more inclusive of those whose family . . . is not valued in a formal equality regime. I now discuss need in terms of dependency and vulnerability.”).

55. EICHNER, *supra* note 26, at 71. The term horizontal relationship is typically used to describe marriage and romantic relationships, but Eichner suggests the value of care should lead to state recognition of a broad range of horizontal relationships that involve caretaking. Examples include “two elderly sisters who live together and take care of one another, a nonmonogamous homosexual couple, a commune of five adults who live together with their children, and a heterosexual married couple.” *Id.* at 105.

56. See generally, MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 1–75* (1991) (arguing that application of “neutral” rules in the family law context perpetuates unequal outcomes).

57. See generally KATZ, *supra* note 31, at 76–130 (reviewing the history of divorce law since the 1950s).

Those same feminist scholars that advocate for caretaking and equality propose re-centering the current family law system to better accommodate both of these values. A better trigger for the entitlements of family law would be a system based on vertical relationships.<sup>58</sup> A vertical relationship is one based on vulnerability or dependency, such as when one person cares for an ill parent or young child.<sup>59</sup> A vertical relationship-based family law system would maximize protection and support for caretakers while minimizing discrimination based on family structure, marital status, gender, and sexual orientation. Preglimony is an example of one such protection triggered by a vertical relationship. A pregnant woman is not only in need of care due to her enhanced vulnerability from the pregnancy but also a caregiver to the fetus she carries. Motro's proposal to accommodate some of the vulnerabilities of pregnancy for unmarried women would naturally fit into this re-centered family law system.

## II. THE SITUATION FACING UNMARRIED PREGNANT WOMEN

About a third of all children born in the United States are born into unmarried families.<sup>60</sup> An unmarried woman who becomes pregnant is most likely in her early twenties.<sup>61</sup> Only fifteen percent of unwed mothers are under eighteen at age of birth.<sup>62</sup> Non-marital pregnancies are most likely to occur between couples in ongoing or long-term relationships.<sup>63</sup> Based on her financial situation, an unmarried pregnant woman is likely to struggle with the economic burden of pregnancy.<sup>64</sup>

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58. Anne Bottomley & Simone Wong, *Shared Households: A New Paradigm for Thinking about the Reform of Domestic Property Relations*, in *FEMINIST PERSPECTIVES ON FAMILY LAW* 39, 51–52 (Alison Diduck & Katherine O'Donovan, eds., 2006) (“A focus on caring takes us beyond sexual relationships and raises the issue of protecting those who have become economically vulnerable through home sharing and especially through the role of caring.”).

59. EICHNER, *supra* note 26, at 71 (“[O]ne person is dependent on the other to meet fundamental needs for caretaking and human development. Although the parent-child relationship serves as the paradigm of this type of connection, other relationships, including those between an adult child and their aging parent, also fit into this category.”).

60. *Leave No Family Behind: How Can We Reduce The Rising Number of American Families Living in Poverty?: Hearing Before the J. Econ. Comm.*, 110th Cong. 67 (2008) [hereinafter *Leave No Family Behind*] (statement of Robert Rector, Senior Research Fellow, Heritage Foundation).

61. *Id.* at 73 ((statement of Robert Rector, Senior Research Fellow, Heritage Foundation).. Half are cohabiting, another 25% are in a relationship. And nearly all of the unmarried fathers are employed and earning enough more than the moms to help get above poverty level.

62. *Id.*

63. Only 12% of women getting an abortion reported that they had not been in a relationship with the man with whom they conceived. RACHEL JONES, LAWRENCE B. FINER, & SUSHEELA SINGH, GUTTMACHER INSTITUTE, *CHARACTERISTICS OF U.S. ABORTION PATIENTS*, 2008 at 5(2010).

64. Women with income less than 200% of the poverty line account for 70% of unwanted pregnancies, see Lawrence B. Finer & Mia R. Zolna, *Unintended Pregnancy in the United States: Incidence and Disparities*, 2006, 84 *CONTRACEPTION* 478, 481 tbl.1 (2011), and 60% of abortions, Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 *PERSP. ON SEXUAL & REPROD. HEALTH* 110, 112 (2005). After birth, single mothers are likely to continue to face economic hardship, including not having enough income to pay bills or utilities, having phone service disconnected, hunger, eviction, utility shut-offs, homelessness and insufficient medical care. Ariel Kalil & Rebecca M. Ryan, *Mothers' Economic Conditions and Sources of Support in Fragile Families*, 20 *FUTURE OF CHILD.*, no. 2, 2010, at 39, 41-42.

Unfortunately, statistics on non-marital pregnancy are correlated with statistics on abortion. Nearly three-fourths of women who choose to terminate a pregnancy cite finances as a reason for the abortion.<sup>65</sup> Both married and unmarried pregnant women may feel it is irresponsible to go forward with a pregnancy and instead choose to terminate it.<sup>66</sup> However, pregnancies of unmarried women are more frequently aborted than pregnancies of married women.<sup>67</sup> Regardless of one's politics about the morality of abortion, most can agree that the decision to terminate a pregnancy should never be due to a lack of financial resources to care for or gestate the child.

Family law contributes to the financial issues that are correlated with abortion. Inadequate child support laws leave unmarried pregnant women with most of the financial burden of the pregnancy even though a policy goal of child support is a child's supported from both parents, regardless of marital status.<sup>68</sup> Current child support laws promise a single mother reimbursement for some pregnancy-related expenses after the child is born, but that reimbursement is not a workable solution for many single mothers. A reimbursement scheme assumes the unmarried woman has enough resources to front the costs of her pregnancy in the first place.<sup>69</sup> Further, only a small portion of total pregnancy-related costs are eligible for reimbursement under child support systems, which still leaves a majority of a pregnancy's financial burden on the mother.<sup>70</sup>

The disproportionate financial burden placed on an unmarried pregnant woman can be exacerbated by her employment situation. Only fifty-eight percent of all employees are covered by the Family and Medical Leave Act (FMLA).<sup>71</sup> Many pregnant women lose their jobs altogether.<sup>72</sup> Even if an unmarried pregnant woman is eligible for FMLA leave, her financial reality (low income and lack of a second earner's support) may make it impossible to take time off of

65. See *Finer et al.*, *supra* note 64, at 113 tbl.2 & 117 (“[O]ur data suggest that after carefully assessing their individual situations, women base their decisions largely on their ability to maintain economic stability and to care for the children they already have.”). On average, cohabiting and single mothers earn just \$11,000 per year compared to \$26,000 for married mothers working the same time. *Kalil & Ryan*, *supra* note 64, at 42.

66. *Id.* at 117 (“The concept of responsibility is inseparable from the theme of limited resources; given their present circumstances, respondents considered their decision to have an abortion the most responsible action.”).

67. *Finer & Zolna*, *supra* note 64, at 482.

68. *Preglimony*, *supra* note 1, at 651.

69. See *Price of Pleasure*, *supra* note 1, at 931–32 (noting that “pregnancy-related liability attaches only after paternity has been established” meaning that the woman must bear all of the costs upfront and wait for reimbursement).

70. Lost wages, birthing classes, prenatal care, counseling, maternity clothes and other expenses not directly related to medical aspects of the pregnancy or delivery have all been rejected by courts as unreasonable expenses for reimbursement. *Preglimony*, *supra* note 1, at 652–53 nn.16 & 18–20.

71. DAVID CANTOR, ET AL., WAGE & HOUR DIV., DEP’T OF LABOR, BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS, 2000 update at 3-2 (2001), available at <http://www.dol.gov/whd/fmla/chapter3.pdf>.

72. See *Dina Bakst, Pregnant, and Pushed Out of a Job*, N.Y. TIMES, Jan. 31, 2012, at A25, available at [http://www.nytimes.com/2012/01/31/opinion/pregnant-and-pushed-out-of-a-job.html?\\_r=0](http://www.nytimes.com/2012/01/31/opinion/pregnant-and-pushed-out-of-a-job.html?_r=0) (providing examples of pregnant women terminated for requesting minor accommodations such as more frequent bathroom breaks to maintain healthy pregnancies).

work without pay.<sup>73</sup>

In short, an unmarried woman typically faces an uphill battle when it comes to providing for herself during a pregnancy. Most economic protections for pregnant women are insufficient because only the born child's needs are considered. An unmarried pregnant woman who needs more financial support during the pregnancy must rely on the father's goodwill or sense of moral obligation to her or the unborn child; she is not legally entitled to pregnancy support payments. A method to evenly divide the costs of a pregnancy is important to ensure that unmarried pregnant women are not unfairly disadvantaged by their marital status. Importantly, as the number of married families dwindles, the potential benefits of preglimony become more widespread.

### III. PREGLIMONY, PATERNITY TESTING, AND FATHER-CHILD BONDING

Preglimony's benefits extend beyond helping the mother through requiring an unmarried father-to-be to keep up his share of the financial obligations of pregnancy. Not only might the men benefit, but the children also stand to benefit from the increased likelihood of a positive, long-term, father-child relationship.<sup>74</sup>

Recently, an unmarried pregnant woman in Seattle had trouble encouraging either of two potential dads to help her during her pregnancy.<sup>75</sup> Neither man was willing to invest his time, money, or emotions without confirmation that he was the genetic father.<sup>76</sup> After a prenatal paternity test established one of the men as the father, he attended the delivery and supported the child.<sup>77</sup>

Another woman had a brief sexual encounter with a friend shortly after breaking up with a boyfriend.<sup>78</sup> When she found herself pregnant, she did not know which man was the father. After the prenatal paternity test confirmed that her friend was the father, they were able to agree to child support before the baby was even born.<sup>79</sup> He remains connected and continues to send gifts and child support to the now two-year-old daughter, even though the mother has

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73. Melissa Brown, *The "State" of Paid Family Leave: Insights from the 2006 and 2007 Legislative Sessions*, in *INNOVATIONS IN CHILD AND FAMILY POLICY: MULTIDISCIPLINARY RESEARCH AND PERSPECTIVES ON STRENGTHENING CHILDREN AND THEIR FAMILIES* 191, 193 (Emily M. Douglas, ed., 2010) ("[M]any of those who qualify for FMLA cannot utilize it, despite having a need to, because they cannot afford the loss of income that would result.").

74. See Robert I. Lerman, *Capabilities and Contributions of Unwed Fathers*, 20 *FUTURE OF CHILD.*, no.2,2010,, at 76-77 (highlighting a number of studies that have established a relationship between strong child support enforcement policies and increased engagement from fathers). *But see id.* at 77 (noting one study that suggests child support enforcement does not increase total financial support because any gains in formal support payments are offset by reduced informal support payments).

75. Andrew Pollack, *Before Birth, Dad's ID*, *N.Y. TIMES*, June 20, 2012, at B1, available at <http://www.nytimes.com/2012/06/20/health/paternity-blood-tests-that-work-early-in-a-pregnancy.html?pagewanted=all>.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

since married another man.<sup>80</sup>

The ability to test for paternity before birth has been available for years, but previous procedures were expensive, inaccurate, and risky.<sup>81</sup> Collection of amniotic fluid or chorionic villi from the womb could injure the fetus, induce labor, or cause a miscarriage.<sup>82</sup> A new, noninvasive method of genetic testing uses fragments of the fetus's DNA present in the mother's blood and provides a safe way to determine paternity as early as eight weeks after conception.<sup>83</sup> For women who need pregnancy support, this new test makes preglimony more feasible because paternity can be reliably and safely established much earlier than ever before.<sup>84</sup>

Establishing paternal engagement before the birth of a child is ideal, according to Maura Corrigan, former chief justice of the Michigan Supreme Court and current director of the state's Department of Human Services. The children of involved fathers benefit from improved self-esteem and fewer behavioral or academic difficulties compared to children who miss out on the opportunity to develop a relationship with their father.<sup>85</sup> Based on her experience overseeing Michigan's child support enforcement system, Corrigan believes that encouraging men to establish a relationship with their child as early as possible increases the likelihood that they will stay involved.<sup>86</sup> She also notes that if a child support "tab" gets too large before a father has the opportunity to connect with his child, he might remain disconnected and shirk paternal responsibilities.<sup>87</sup>

Judge Corrigan may be on to something. One group of social science researchers are attempting to figure out why some men thrive as fathers despite the fact that they seemed unlikely to build strong relationships with their

80. *Id.*

81. *Id.*

82. See *Amniocentesis*, AMERICAN PREGNANCY ASSOCIATION, <http://www.americanpregnancy.org/prenataltesting/amniocentesis.html> (last visited March 26, 2013) (stating that miscarriage is the primary risk related to amniocentesis, ranging from 1 in 400 to 1 in 200); *Chorionic Villus Sampling: CVS*, AMERICAN PREGNANCY ASSOCIATION, <http://www.americanpregnancy.org/prenataltesting/cvs.html> (last visited March 26, 2013) ("Miscarriage is the primary risk related to CVS occurring 1 out of every 100 procedures.").

83. Pollack, *supra* note 75.

84. There are concerns about misuse of a paternity test in relation to abortion. For example, some worry that a woman with several sexual partners may choose to terminate a pregnancy if paternity was linked to a non-preferred father. But supporters of the new test respond that a woman could still order an invasive test under the old technology, and that such situations are too rare to justify blocking access to the new test. *Id.*

85. Solangel Maldonado, *Recidivism and Paternal Engagement*, 40 FAMILY L.Q. 191, 194 (2006).

86. See Maura D. Corrigan, *A Formula for Fool's Gold: The Illustrative Child Support Formula in Chapter 3 of the ALI's Principles*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 409, 419 (Robin Fretwell Wilson, ed., 2006) ("[W]e should take steps that will encourage all parents to 'buy in' to the process and their children's futures.").

87. *Id.* ("Barring a lottery win or pro sports contract, the long-absent father almost certainly will not have the ability to pay the accrued arrearage . . . giv[ing] him a strong incentive to hide within a large city or flee to another state. . . . until it is too late for normal father-child bonding.").

children.<sup>88</sup> The researchers have been tracking men who do better than expected as fathers and explore what factors may have contributed to their paternal success. One of those “better than expected” fathers, named Carl, is their exemplar.<sup>89</sup> Carl was a high-school dropout with a diagnosed conduct disorder and substance abuse problems when he found out he was going to be a father.<sup>90</sup> When the researchers interviewed him two years after the birth of his first child, they were surprised to learn that Carl was very involved and working two jobs to take care of his two kids.<sup>91</sup> Carl said that he used to spend his money on “flashy clothes . . . going to shows, partying” but that he gave that lifestyle up to spend more time with his children.<sup>92</sup> Describing himself as a “very good” father, Carl explained that he forced himself to mature because he “can’t live without” his kids.<sup>93</sup>

The researchers studying Carl and eighteen other high-risk fathers posit that one important factor in making a successful transition to fatherhood is having a supportive co-parent—one that communicates with the father and is open to his participation.<sup>94</sup> Interestingly, the romantic success of a couple was not necessarily a predictor of the father’s success or failure as a co-parent.<sup>95</sup> And some better-than-expected participants described the experience of becoming a father as transformative in itself.<sup>96</sup>

Preglimony might have a strong impact on the type of men who become “better-than-expected” fathers because the fatherhood experience could “begin” even earlier. Additional research shows that once men become engaged with their child, they remain engaged.<sup>97</sup> One respondent who found herself single and pregnant by a former boyfriend was surprised to discover how involved the

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88. Paul Florsheim & Le Q. Ngu, *Fatherhood as a Transformative Process*, in FRAGILE FAMILIES AND THE MARRIAGE AGENDA 211, 213–14 (Lori Kowaleski-Jones & Nicholas H. Wolfinger, eds., 2006).

89. *See id.* at 213–15 (noting that Carl initially “did not seem like a good bet for a positive outcome” based on his background and circumstances).

90. *Id.* at 213–14.

91. *Id.* at 214. Statistics show that unmarried men do tend to increase earnings after becoming fathers—22% gain in income within the first year of the child’s birth and a total 30% gain within three years. Lerman, *supra* note 74, at 63, 67. Unmarried fathers do this through a combination of small hourly wage gains and larger increased in total hours worked, moving from 46 weeks of full-time work to 50 weeks of full-time work within five years. *Id.*

92. Paul Florsheim & Le Q. Ngu, *Fatherhood as a Transformative Process*, in FRAGILE FAMILIES AND THE MARRIAGE AGENDA, *supra* note 88, at 214–15 (describing his old lifestyle and saying, “I can’t do that now, I got kids so I got to be there with them . . .”).

93. *See id.* at 214 (“Ain’t a time when I ain’t around them. When I wake up, they see my face, when they go to sleep, they see my face. So, as long as they see my face then and there, I’m alright. It’s like they are a very special part of me and it’s just something I can’t live without.”).

94. *Id.* at 215, 225–29.

95. *Id.* at 229 (noting that relationship quality matters more than presence or lack of marriage in terms of co-parenting).

96. *Id.* at 223.

97. Lerman, *supra* note 74, at 75 (“Unwed fathers who participated at the time of the birth in parenting and providing financial support were more likely to remain involved with their children.”). This is especially true for black fathers, who are more likely than both white and latino fathers to maintain relationships with their children, even if the father has no ongoing relationship with the mother. *Id.*

father became over the years.<sup>98</sup> Although he had initially expressed his intent to avoid a relationship with the child-to-be, the respondent stated that after the birth he “fell in love” with the child to the point where he now asks for daily reports about their son.<sup>99</sup> Preglimony may increase the likelihood of father-child bonding by giving unmarried men the transformative experience of fatherhood early enough in the pregnancy that they feel permanently connected to the child. Men stand to gain from meaningful relationships that they may have otherwise avoided, women benefit from a more evenly divided financial burden of the pregnancy, and any resulting children benefit from the increased opportunity for positive relationships with both parents.

#### IV. MOTRO’S PROPOSAL AND GOALS

“Preglimony.” Shari Motro coined this term to describe her proposed method for pregnancy support. It sounds familiar because this neologism is a phonetic and conceptual derivative of the much more well-known concept of alimony.<sup>100</sup> Unsurprisingly, Motro models her support for preglimony on the justifications for alimony. She aims for preglimony to change norms so that unmarried partners who conceive are socially, morally, and legally expected to share the burdens of pregnancy that currently fall disproportionately on the women in these relationships. But Motro’s argument breaks down when she suggests creating a pregnancy-support tax deduction to reward pregnancy support payments and thus encourage preglimony rather than mandate it.

##### A. Motro’s Justifications for Preglimony

Motro parallels her justifications for preglimony with four of the rationales that support alimony: reasonable reliance, rehabilitation, equitable distribution, and compensation. Alimony based on reasonable reliance entitles a dependent spouse to financial support for reasonably relying on a broken marital promise to share economic resources for life. Similarly, Motro suggests that sex can be viewed as an implied “promise” whereby each partner accepts shared responsibility if a pregnancy results. Unless the partners clearly agreed to a “no strings attached” relationship, preglimony holds partners to their promise.<sup>101</sup>

Alimony from a rehabilitation perspective is provided to a dependent spouse who needs support until he or she is economically rehabilitated. The support payments are a temporary measure until the spouse becomes self-supporting, such as after completion of an academic or vocational training program and securing full-time employment. Viewing preglimony through the lens of rehabilitation, Motro emphasizes that preglimony is *temporary* assistance to help a woman through one of the most vulnerable and dependent periods of

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98. ROSANNA HERTZ, *SINGLE BY CHANCE, MOTHERS BY CHOICE: HOW WOMEN ARE CHOOSING PARENTHOOD WITHOUT MARRIAGE AND CREATING THE NEW AMERICAN FAMILY* 81–82 (2006).

99. *Id.*

100. *Preglimony*, *supra* note 1, at 648.

101. *See id.* at 648–50, 658, and 668 (emphasizing that the “lovers-as-strangers” rule is only appropriate when they had previously agreed to no-strings-attached sex).

her life.<sup>102</sup> By sharing the financial cost of a pregnancy between the partners, preglimony would help an unmarried woman get back on her feet more quickly after a pregnancy.

The third justification for alimony is that it prevents financial losses from being unequally distributed between the spouses. Alimony redistributes losses from the divorce so that each spouse carries an equal portion of the burden. By the same token, preglimony prevents the financial costs of a pregnancy from being unequally distributed by evenly sharing those costs between the partners.<sup>103</sup>

Alimony provided from a compensation perspective acknowledges one spouse's sacrificed career opportunities or noneconomic contributions to the family. Those lost opportunities may never be recoverable, so the other spouse is expected to pay alimony as restitution. Similarly, preglimony resembles compensatory alimony in that it compensates unmarried women for lost wages, career delays, and other nonmonetary contributions to the pregnancy.<sup>104</sup> By showing how closely the justifications for preglimony track the justifications for alimony, Motro demonstrates why she believes preglimony is better characterized as an alimony framework than a child support framework.

#### A. Motro's Goals

Motro clearly states her belief that preglimony should be characterized as an obligation to the woman, not to the fetus.<sup>105</sup> She advocates against a child-support model for three reasons.<sup>106</sup> First, Motro demonstrates that current child support reimbursements for pregnancy-related expenses are insufficient and unfair. Fathers are only expected to pay for expenses that are reasonable, necessary, customary, and directly linked to the child—typically doctor visits and the costs of delivery. Any other unavoidable costs of pregnancy—lost wages, childbirth classes, maternity clothes—are not included on the list of reimbursable expenses.

Even if preglimony perfectly divided the financial costs of pregnancy, it is still an imperfect solution. As the physical carrier of the fetus, a woman carries all of the physical costs of pregnancy such as sickness, fatigue, discomfort and pain, a risk of medical complications, and healing after the birth or cesarean. Moreover, as the evidence of her pregnancy expands, an unmarried pregnant woman may feel stigmatized and experience changes to her social or professional identity.<sup>107</sup> It is inherently unfair if two partners are equally responsible for

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102. See *id.* at 670 (“Preglimony will also ensure that a pregnant woman who is temporarily unable to provide for herself will be taken care of during a transitional period.”).

103. *Id.*

104. See *id.* at 669–70 (analogizing “[a] man’s obligation towards his pregnant lover . . . to the support obligations of a breadwinner towards a dependent spouse”).

105. *Id.* at 651–58 (reviewing how current child support laws provide insufficient support to unmarried pregnant women).

106. *Id.* at 659 (calling the child-support model “unfair, unwise, and untrue to human experience”).

107. Dear Prudence received a question from a mother concerned that her daughter would “get

conception, but only one faces the burdens of the pregnancy. Women carry all of the physical burdens by operation of nature and most of the economic costs by operation of law.<sup>108</sup>

Additionally, Motro hopes preglimony will incentivize more responsible behavior among sexually-active men. Motro argues that holding men financially responsible for any resulting pregnancy, whether terminated or not, will raise the stakes enough to make them think twice about “what happens in the bedroom.”<sup>109</sup> She points out that stronger child support enforcement correlates with changes to male sexual decision making, specifically increased contraception use and fewer sexual partners.<sup>110</sup>

Lastly, Motro argues that a lovers-as-strangers paradigm for non-marital conception is the wrong legal default because it represents only a small percent of pregnancies outside of marriage:

Unmarried partners who conceive respond to pregnancy in a range of different ways. Some get married. Others face pregnancy and its repercussions—whether it ends in abortion, miscarriage, or childbirth—together without marrying. A third group views conception as the woman’s private affair. The law effectively treats all sexual partners who are not married as falling into the third category.<sup>111</sup>

According to Motro, preglimony would establish a more realistic default, one which recognizes that a non-marital conception has, at the very least, “existentially bound” the couple during gestation.<sup>112</sup> If the law acknowledges that marriage is not a realistic or attractive solution for every couple who conceives,<sup>113</sup> it must create new legal statuses, with non-marital conception as

the impression that single motherhood is acceptable” because the daughter’s fourth grade teacher was unmarried and pregnant. The mother had questioned the teacher about her intent to keep the baby, to which the teacher responded that her choice and marital status was a private matter, and the mother wanted to know if she should take the issue to the principal. Dear Prudence’s response was that the mother’s question was “so far over the line” that she might as well have “inquire[d] as to her favorite sexual position.” Emily Yoffe, *My Daughter’s Teacher is Unwed and Knocked Up*, SLATE (Feb. 27, 2012, 3:05 PM), [http://www.slate.com/articles/life/dear\\_prudence/2012/02/knocked\\_up\\_single\\_teacher\\_will\\_she\\_corrupt\\_my\\_daughter\\_.html](http://www.slate.com/articles/life/dear_prudence/2012/02/knocked_up_single_teacher_will_she_corrupt_my_daughter_.html).

108. *Preglimony*, *supra* note 1, at 653–56 (“[W]hen the man is not forthcoming and the pregnancy is complicated (both physically and in its impact on a woman’s work life), the law leaves a single pregnant woman to shoulder most of the burdens alone.”).

109. *Id.* at 656–57; *see also* discussion, *infra*, Part VI.A. (exploring implications of the preglimony-as-support-for-the-woman framework in terms of abortion rights of men).

110. *Id.* at 656.

111. *Id.* at 697; *see also* Motro, *supra* note 1 (“A man and a woman who conceive are intimately connected. They are not spouses, and they may not even continue to be lovers, but they are not strangers either.”).

112. *Preglimony*, *supra* note 1, at 689 (“Conception is a marriage of sorts. It is the union of two individuals’ bodies to create a third potential life. While this potential life is in gestation . . . a man who supports the woman carrying it is different from a man supporting a stranger, a friend, or a sister. He is supporting a person—the woman—who is bearing his own flesh, including if the woman ultimately terminates the pregnancy. During the weeks or months of the pregnancy, man and woman are existentially bound.”).

113. *See* HARRINGTON, *supra* note 38, at 88–89 (noting a trend among single women who chose

just one of many diverse family types. Motro argues that this is a better legal default because it acknowledges the breadth of human relationships leading to conception and the unique challenges faced by unmarried pregnant couples.<sup>114</sup>

### B. Motro's Tax Incentive Plan

Instead of mandating preglimony, Motro would institute a tax deduction that encourages pregnancy support payments by deducting the total amount of support payments from the payor's income.<sup>115</sup> Under current laws, economic support provided to an unmarried pregnant woman is taxed to the payor. Individuals are prohibited from shifting their income to others because of concerns that such shifts could allow the income to be taxed in a lower bracket.<sup>116</sup> The income-shifting prohibition lifts for married couples, who receive a tax benefit when one spouse financially supports the other spouse through attribution of the total marital income as evenly divided between the two.<sup>117</sup> A single individual who earns \$100,000 has a higher tax burden than two individuals who each earn \$50,000. But a married couple in which one spouse earns \$100,000 and the other earns nothing is taxed as if they had each earned \$50,000, lowering their combined tax burden below what it would have been as individuals.<sup>118</sup> As a result, because of the couple's filing status pregnancy support in the context of a marriage has an inherent tax benefit that is unmatched for unmarried couples because of the couple's filing status.<sup>119</sup>

Without a deduction, an unmarried man who pays preglimony will be taxed as if the money he gives to the woman was still his income. Characterizing preglimony as "child support" or as a "gift" to the woman for tax purposes will not change this outcome for the payor, although it would prevent the recipient from also paying a tax as if the payment were her income.<sup>120</sup> Motro notes that the worst-case tax treatment scenario would be if pregnancy support payments could not be characterized as either gifts or child support and were thus taxable to both parties, similar to how payments to a housekeeper are taxed.<sup>121</sup>

Looking at the language of the tax code, it is not clear how preglimony would be characterized for tax purposes absent an express pregnancy support deduction. Payments made out of "the constraining force of any moral . . . duty"

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not to marry the fathers of their children because the men were undependable, irresponsible, or unwilling to fully commit to marriage—in short, that the women had rejected traditional assumptions that a mother's role was to tolerate her husband's apathy to family matters). *See also* discussion, *supra*, Part \_\_\_ (discussing arbitrariness of marriage as the trigger for family law entitlements).

114. *Preglimony*, *supra* note 1, at 657–58 (“[U]sing the lovers-as-strangers paradigm as the baseline governing all nonmarital conceptions flies in the face of most people’s reality.”).

115. *Id.* at 672–73.

116. *Id.* at 676–78.

117. *Id.* at 676.

118. *Id.* at 676 n.112.

119. *See* MORSE, *supra* note 30, at 96 (noting that married fathers contribute about \$30,000 per year on average to their children and noncustodial fathers contribute about \$3,000 per year).

120. *See Preglimony*, *supra* note 1, at 678–82.

121. *Id.* at 680–81.

are not considered gifts for tax purposes, suggesting that preglimony paid out of a man's sense of moral obligation to the woman with whom he conceived may very well not be considered a gift.<sup>122</sup> In contrast, courts have classified monetary transfers between sexual partners as gifts in the past, which would keep the recipient from being taxed on the support payment.<sup>123</sup> Motro's proposal simplifies these issues and treats preglimony as a deduction similar to alimony.<sup>124</sup> The payor would be permitted to deduct the payments and the recipient would include the payments as income.<sup>125</sup> Although this means a woman could have a higher tax burden, she benefits overall by receiving more total economic support.

Motro believes that the opportunity to deduct preglimony payments will incentivize men to provide pregnancy support. Over time she thinks that enough men will be incentivized to pay preglimony that social norms will change regarding each sex's responsibility in a non-marital conception.<sup>126</sup> According to her, viewing the very word "preglimony" on tax forms will create a mental link between "pregnancy [and] financial obligation in the minds of taxpayers."<sup>127</sup> Motro believes this link will create a norm in which pregnancy support becomes "socially mandatory," and that the new norm will influence sexual decision-making to ultimately reduce the number of unintended pregnancies.<sup>128</sup>

Interestingly, Motro refrains from suggesting preglimony be implemented as a legal right or mandatory requirement. She states that her incentive plan avoids the "thorny enforcement issues" that come with mandating pregnancy support and sanctioning men for failing to comply with the new requirements.<sup>129</sup> But as a result of her incentive plan, couples who already treat pregnancy as a shared responsibility will benefit from tax incentives. Other men might decide to make preglimony payments if the tax incentives were strong enough. The reality that Motro brushes aside is that most of the men who would not have provided support before the tax incentives were available would probably not provide support after the plan was implemented either.<sup>130</sup> A man must have enough taxable income in order to make the deduction worthwhile. Even if he has enough income, it takes a fairly high level of sophistication to understand the tax system in a way that leads to deliberate behavior change *ex ante*.

122. *See id.* at 680 n.125 (citing to *Bogardus v. Comm'r*, 302 U.S. 34, 41 (1937)).

123. *Id.* at 680.

124. *Id.* at 682–83.

125. *See id.* at 682 ("The remaining choice . . . is to move from the status quo . . . to an income shifting option . . .").

126. *See id.* at 689 ("[T]he policy will encourage support for pregnant women. . . . [and] sham[e] those who leave their pregnant lovers to fend for themselves..").

127. *Id.* at 689–90.

128. *See id.* at 691 ("[T]he fear of such responsibility may incentivize men who do not want to become fathers to be more vigilant about birth control..").

129. *See Preglimony, supra* note 1, at 672 (suggesting a reward program for men who already provide pregnancy support to "encourage[] cooperation rather than conflict"); *see also id.* at 650 ("I also recognize that imposing a mandatory pregnancy-support obligation on unmarried men presents both administrative and philosophical challenges . . .").

130. *See id.* at 673 (recognizing that her solution "provides no help to poor couples, equal-earner couples . . . and most young couples").

Motro acknowledges that the only women who benefit from this scheme are the ones who are already in relationships with “good” men: “[t]he solution I offer . . . begins with relatively low-hanging fruit—high income men already predisposed to contribute to their pregnant lovers’ welfare—pursuing a viable, symbolically potent first step towards breaking the silence on this issue.”<sup>131</sup> This solution seems to conflict with her characterization of the situation necessitating preglimony in the first place. Motro cited a man’s lack of legal obligation to a woman with whom he conceives as problematic because it leaves the woman with no legally enforceable entitlement should the father refuse to support her during the pregnancy.<sup>132</sup> But her proposed solution is all carrot and no stick, leaving unmarried pregnant women in nearly the exact same situation she seeks to change. The benefits of preglimony would remain out of reach for a pregnant woman unable to convince her partner to take advantage of the tax deduction.

## V. IMPLICATIONS OF PREGLIMONY AS AN ALIMONY MODEL

Unmarried fathers will still benefit from preglimony under this framework because they still have an extended opportunity to demonstrate commitment to their child, and unmarried pregnant women will still benefit from the accelerated economic support rather than having to wait until after the birth to be reimbursed for pregnancy-related expenses.<sup>133</sup>

### A. Questions about Preglimony and Abortion

Motro notes that the most frequently and vehemently debated implications of her proposal regard abortion.<sup>134</sup> None of the abortion-related criticisms of preglimony are new arguments; the same questions about abortion have already been asked and answered in the context of conception within marriage. For example, father’s rights groups and pro-life advocates fear that a man could be required to pay to terminate a pregnancy against his will. This fear is not completely unprecedented—medically-indicated abortions have been upheld as reasonable and reimbursable expenses.<sup>135</sup>

However, the same safeguards protecting a married woman who chooses to abort without the consent or notification of her husband would still be in place for an unmarried woman who chooses to abort without consent or notification of her partner.<sup>136</sup> Despite the social goal of encouraging men and women to make

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131. *Id.*

132. *See id.* at 649–50 (noting that the status quo “implicitly endorses a view of lovers as legal strangers”).

133. *See* discussion, *supra*, Parts II and III.

134. Motro, *supra* note 1 (“The most frequent objection I hear to this idea is . . . over abortion.”).

135. *C. v. L.*, 305 N.Y.S.2d 69, 72 (N.Y. Fam. Ct. 1969) (“It appears clear to us that the costs of a therapeutic abortion can be included within the statutory definition of ‘such reasonable expenses in connection with her pregnancy as the court in its discretion may deem proper.’ . . . [W]e see no reason why such expenses should be treated in a fashion different from the expenses of a stillbirth.”)(internal citations omitted).

136. *See Price of Pleasure*, *supra* note 1, at 937 (“[T]he law in all fifty states recognizes that a wife’s

choices regarding abortion together and openly, a married woman's preference to end the pregnancy over the objection of her husband gets the slightest weight over a man's because she is the one who carries and incubates the child.<sup>137</sup> There is no reason to think that an unmarried man would have or should have more influence over a woman's decision to keep or terminate their pregnancy than a married man. Just as married couples may discuss the decision to keep or end a pregnancy, unmarried couples can engage in those conversations, but the choice ultimately rests with the woman.<sup>138</sup>

A more positive gloss on preglimony's abortion implications is that unmarried fathers might benefit by being able to participate in decisions of which they may have not otherwise been aware, which gives them an opportunity to share their feelings and preferences before the woman decides.<sup>139</sup>

Another potential benefit of preglimony is that it may lead to fewer abortions. Abortion rates are documented as declining as child support enforcement improves.<sup>140</sup> Women who expect future economic support are more likely to continue with the pregnancy, which makes sense given the high percentage (nearly seventy-five percent) of women who terminate pregnancies for financial reasons.<sup>141</sup> Although this effect was noted in relation to child support enforcement, Motro notes that preglimony and child support are sufficiently similar that it would be reasonable to expect a further decrease in abortion rates if preglimony was implemented and enforced.<sup>142</sup> Indeed, the immediacy of pregnancy support may weigh more heavily in a woman's decision to keep the pregnancy than the distant promise of child support if a pregnancy is carried to term.

## B. Marital Status Equality

Preglimony will promote equality by providing more economic support for unmarried pregnant women. Pro-marriage advocates criticize preglimony as unnecessary because "[t]here is already a system where the man has paid for the

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right to choose does not cancel her spouse's duty of mutual support. . . . A similar logic applies in the nonmarital context.")

137. See *id.* at 946–47 (“[W]hen the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.”) (citing *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 71 (1976)).

138. Motro notes a concern of domestic violence or pressure as a reason to keep men out of the abortion decision. There is a concern that men may pressure women to have an abortion, but she asserts that the speculative worry that this would happen *as a result of preglimony* is no reason to deny all other women the economic support they need during pregnancy. *Preglimony*, *supra* note 1, at 671. A Guttmacher Institute study suggests that Motro is correct: less than 1% of women who had an abortion stated that their parents' or partners' influence was the most important reason they chose to terminate the pregnancy. Finer et al., *supra* note 64, at 118.

139. See *Preglimony*, *supra* note 1, at 671 (“[O]nce men have to pay they will be brought into the conversation and have an opportunity to share their feelings and preferences.”).

140. *Preglimony*, *supra* note 1, at 671 & n.92.

141. See discussion *supra*, Part II.

142. *Preglimony*, *supra* note 1, at 671 & n.92.

pregnancy for decades. It is called marriage.”<sup>143</sup> Motro and other family law scholars have pointed out, however, that the institution of marriage has a long history of gendered assumptions and is an arbitrary determinate of social and governmental benefits.<sup>144</sup> In contrast, the state of pregnancy is a binary option—conception either occurred or it did not—and it creates an ineradicable connection between two people. In other words, marriage is defined by culture, whereas pregnancy is defined by nature. Yet in a culture that purports to value equality, pregnancy outside of marriage is not celebrated, protected, or supported to the same extent as pregnancy within marriage.<sup>145</sup>

Those who share the value of caretaking will agree that a pregnant woman needs support due to her increased vulnerability during the pregnancy. The value of equality suggests that the man with whom she conceived, as an equal contributor to the pregnancy, should offer that support regardless of the status of the couple’s relationship. Preglimony promotes equality goals by formalizing a legal obligation between sexual partners who have conceived that is independent of marital or relationship status. The new legal obligation redistributes the cost of a pregnancy to reflect each partner’s equal assumption of risk and contribution to the pregnancy.<sup>146</sup>

### C. Gender Equality

Although some men believe preglimony is unfair to them,<sup>147</sup> preglimony’s redistribution of responsibility actually has the potential to benefit men seeking more parental time with their offspring.<sup>148</sup> In the nineteenth century wives and children were legally considered to be the property of men, which gave fathers uncontested decision making about child custody.<sup>149</sup> Over time, courts reversed

143. Javert, Comment to *Law Professor Proposes “Preglimony”*, THE SPEARHEAD (July 9, 2012, 7:22 PM), <http://www.the-spearhead.com/2012/07/09/law-professor-proposes-preglimony/>; see also Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 995 (Mass. 2003) (Cordy, J., dissenting) (“[A]n orderly society requires some mechanism for coping with the fact that sexual intercourse commonly results in pregnancy and childbirth. The institution of marriage is that mechanism.”)

144. See discussion *supra* Part II.C; see also EICHNER, *supra* note 26, at 93 (“[T]he fact of the matter is that marriage is a social institution that is subject to societal control.”); OKIN, *supra* note 54, at 111 (“[T]he family is undeniably political because it is the place where we *become* our gendered selves . . . the division of labor within the gender-structured family raises both practical and psychological barriers against women in all the other spheres of life.”).

145. See Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 229 (2004) (claiming that it is easier to regulate marriage because it is more stable than other relationships and informal unions).

146. See *Price of Pleasure*, *supra* note 1, at 919 (“This relational default would come with certain obligations . . . a woman would be expected to communicate the fact of a pregnancy to the man with whom she conceived, and a man would be required to help support her during pregnancy and recovery.”).

147. See Franklin, *supra* note 4, (“Now Motro . . . want[s] to add a huge new layer to that current shameful inequality [between mothers and fathers] while giving nothing to fathers in return.”)

148. See *id.* (claiming that he would agree to pay preglimony in exchange for a presumption of equal parenting time but would refuse to pay without an increase in parental rights); see also JULIA LUYSTER, A FATHER’S RIGHT TO CUSTODY 225 (2009) (assuring fathers who feel like their rights “are not equally honored by the court” by affirming that this is “not an unreasonable feeling”).

149. Ayanna, *supra* note 18, at 9–10.

that trend and acknowledged the maternal role in caretaking for children, leading to a presumption that children of “tender years” (usually under age seven) could only be cared for properly by their mothers.<sup>150</sup>

The tender years presumption persisted until the 1970s, when it was replaced by ostensibly gender-neutral schemes such as the “best interest of the child” standard or the joint custody presumption in child custody decisions.<sup>151</sup> However, despite the insertion of the gender neutral language there is great evidence that unconscious bias against fathers as caregivers continues to impact custody decisions: “[f]amily law, in significant ways, continues to frame fathers as breadwinners, emphasizing the importance of their economic role but not their care role.”<sup>152</sup> A still widely-held belief that the maternal bond is unique and irreplaceable works to advantage women over men in custody decisions.

Preventing fathers from caring for their children can have a negative effect on the father’s well-being.<sup>153</sup> One way for fathers to demonstrate their commitment to caretaking is to accept parental duties from the start of a pregnancy as mothers have to do. A pregnant woman does not have the luxury of waiting until birth or later to decide whether she will opt-in as a mother. Even if she does not choose to raise the child, once conception occurs a woman who chooses to carry the pregnancy to term must already begin her parenting duties. Before a child is even born, she has amassed evidence demonstrating her connection to the child, while the father may not even be aware of the pregnancy. In this way, biology works against an unmarried father who may want full or shared custody of his child.

A recent North Carolina case illustrates how difficult it can be for an unmarried father to demonstrate sufficient commitment to the child to veto an adoption.<sup>154</sup> Once the father learned of the pregnancy, he took a number of steps in preparation for the child. He left college and moved to be closer to the mother, started working, bought a larger vehicle in anticipation of transporting the child, discussed potential names with the mother, and offered to take the baby if she did not want it.<sup>155</sup> Later in the pregnancy, the mother lied and told him she

150. JOCELYN ELISE CROWLEY, *DEFIANT DADS: FATHERS’ RIGHTS ACTIVISTS IN AMERICA* 28–29 (2008) (“Society viewed the mother as holding a special place in the family, and in particular as the parent who ‘specialized in addressing the needs of children of tender years[.]’”).

151. *Id.* at 29–30.

152. See, e.g., Nancy E. Dowd, *Fatherhood and Equality: Reconfiguring Masculinities*, 45 *SUFFOLK U. L. REV.* 1047, 1071 (2012); see also Edward Greer, *Custodial Relocation and Gender Warfare: Thinking About Section 2.17 of the ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION*, 13 *J.L. & FAM. STUD.* 235, 244–45 (2011) (“[T]he dominant family law discourse continues to conceptualize [child custody] conflicts as though current American families were basically the same as those of the 1950s. It treats the shift in the nature of fathering as something that *might* occur in the indefinite future, and not as a contemporaneous *fait accompli*. This matters because the dominant discourse among family law professors . . . infuses the behavior of our nation’s domestic relations courts.”).

153. Kelli K. Garcia, *The Gender Bind: Men as Inauthentic Caregivers*, 20 *DUKE J. GENDER L. & POL’Y* 1, 36–37 (describing the stress experienced by fathers whose actual level of childcare involvement is less than their ideal level of involvement).

154. *A Child’s Hope, LLC v. Doe*, 630 S.E.2d 673 (N.C. Ct. App. 2006).

155. *Id.* at 673–77.

miscarried.<sup>156</sup> Doubting her claims, the father called social services to see if he might be the biological father of a baby abandoned at a local hospital the same weekend the mother claimed she had a miscarriage.<sup>157</sup> He also contacted her doctor but was turned away due to confidentiality concerns.<sup>158</sup>

Despite all of these efforts, the court determined that termination of his parental rights was appropriate because he had failed to satisfy strict statutory elements demonstrating his assumption of parental responsibilities.<sup>159</sup> In the interest of establishing stable parentage, even egregiously thwarted fathers have no entitlement to veto adoptions of their biological children in North Carolina.<sup>160</sup>

Preglimony helps these fathers in two ways. First, it gives women an incentive to notify potential fathers as early in the pregnancy as possible to receive economic support. This is a significant step up from the wait-and-see type of solution offered by putative father registries.<sup>161</sup> Second, unmarried men will have the opportunity to assume parenting responsibilities long before the child is born, which could affect their receipt of more parenting time by leveling the playing field between unmarried fathers and mothers in custody or adoption disputes.

Thus, a support-for-the-woman framework will promote gender equality for both men and women. This model of preglimony emphasizes the equal assumption of risk between unmarried sexual partners and seeks to equalize the costs of pregnancy. Equalization benefits unmarried pregnant women through shared economic resources, and it benefits unmarried fathers by solidifying their parental rights through the sharing of pre-birth responsibilities.

## VI. IMPLICATIONS OF PREGLIMONY AS A CHILD SUPPORT MODEL

Under a support-for-the-child framework, preglimony's normative goals of gender equality and shared responsibility disappear because the focus of preglimony rests entirely on contributing to the healthy development of a child. But unmarried pregnant women will not receive *as much* of an economic benefit under this framework because many costs of a pregnancy, such as maternity

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156. *Id.* at 675.

157. *Id.*

158. *Id.*

159. *Id.* at 678 (“Despite the fact that respondent may have acted consistently with acknowledging his paternity, the statute is clear in its requirements . . . and the trial court made no findings that respondent, prior to the filing of the termination petition, a) established paternity judicially, b) legitimated the juvenile either through judicial process or c) marriage to the mother, or d) provided the biological mother with substantial financial support or consistent care.”)

160. See generally, *In re Adoption of Byrd*, 552 S.E.2d 142 (N.C. 2001) (“While respondent did acknowledge his paternity in accordance with the statute, he failed to provide tangible support to mother and child within his financial means . . . . All requirements of the statute must be met in order for a father to require his consent to an adoption. While respondent demonstrated remarkable resolve and a commendable sense of responsibility and concern for a seventeen-year-old father, he did not meet his statutory burden in this case. . .”).

161. For a discussion on some of the problems of putative father registries, see generally Lisa M. Simpson, *Adoption Law: It May Take a Village to Raise a Child, But It Takes National Uniformity to Adopt One*, 3 PHOENIX L. REV 575 (2010).

clothes, cannot be directly attributed to the needs of the fetus.<sup>162</sup>

Comparing the two alternatives, the full economic burden of pregnancy is split under the woman-centered framework but only certain child-centric expenses are divided under this child-centered framework—just as they are under current child support systems. Unmarried pregnant women who, by virtue of their sex, will always carry the full physical burden of pregnancy continue shouldering an unequal portion of the financial burden as well. This unequal sharing contradicts Motro's stated goals for preglimony and also violates family law principles of equality in general.

Establishing a man's relationship with his child-in-utero can also facilitate adoption decisions. Current adoption laws provide an opportunity to an unmarried father to veto an adoption if he has demonstrated a desire to support or connect with the child. A father who never had an opportunity to demonstrate his connection to a child or put himself on a putative father registry may lose his opportunity to block the adoption.<sup>163</sup> Preglimony creates an incentive for pregnant women in financial distress to connect with the father-to-be early in the pregnancy, even if she plans to place the baby with an adoptive family after birth. Without a preglimony scheme in place, the father may have never learned of the pregnancy until after his paternal rights were nearly lost.<sup>164</sup> If a woman decided that she was unable to keep her baby, her partner's support of the pregnancy could evidence that he can take on full caretaking responsibilities.

Alternatively, a father-to-be's lack of compliance with preglimony requirements could be used as a clear signal that a father abandoned his parental rights. A father's failure to meet preglimony requirements could facilitate a speedy adoption once the child was born, while still giving the father ample opportunity throughout the length of the pregnancy to demonstrate his desire to assume parental responsibilities. Either way, the child benefits when legal parentage is established as quickly and as stably as possible. States do not want to see a repeat of the debacles of the 1990s, when children that had been raised in adoptive families for years were returned to their thwarted biological fathers.<sup>165</sup>

The concept of preglimony as support for the child may be less controversial to the public because it eliminates the issue of whether a man would have to pay to terminate a pregnancy against his will. If there is no fetus, then he has no obligation to ensure it develops into a healthy child. This controversy arises even though the same abortion-related criticisms have already

162. *See id.*

163. NANCY E. DOWD, *REDEFINING FATHERHOOD* 122 (2000) (“[F]athers are required to be attentive to the mother during her pregnancy or diligent once the child is born if they wish to assert their paternity. For fathers this can mean that, unless they remain in an ongoing relationship with the mother or are informed of the pregnancy, the law gives them very limited time to learn of, or to be notified of, the existence of their child before their rights are terminated.”).

164. *See* discussion, *supra*, Part V.C. (reviewing the harsh bright-line rule for unmarried fathers to establish parental rights in North Carolina).

165. *See* Laura Oren, *Thwarted Fathers or Pop-Up Pops?: How to Determine When Putative Fathers Can Block the Adoption of Their Newborn Children*, 40 *FAM. L.Q.* 153, 163-67 (2007) (highlighting two cases where children were returned to biological parents after long legal battles that received significant media attention in the 1990s).

been addressed in the context of marriage.<sup>166</sup> It might be faster and easier to convince states to augment current child support guidelines than to implement what the public may see as a completely new and morally troubling scheme. Motro needs to make a clear choice: is it more important to use preglimony to promote her normative goals? Or is it more important to get unmarried pregnant women more economic support as soon as possible?

#### CONCLUSION

Preglimony has the potential to benefit mothers, fathers, and children through more stable finances during pregnancy, more efficient and accurate custody and adoption decisions, and increased likelihood of father-child bonding. The importance of these benefits and the fact that preglimony has the potential to create positive outcomes with limited corresponding cost (because financial costs are *shifted* but not *created*) only enhances the attractiveness of Motro's proposal. Whether framed as an obligation to the child or to the mother, preglimony is likely on the horizon. Even when the current system does provide support to unmarried pregnant women through child support reimbursement, the checks are too little and they arrive too late to do much good for the child-to-be.

Characterizing preglimony as a father's obligation to his potential child—an extension of already established child support guidelines—might make it easier to gather public support for its implementation even if the obligations are mandatory. It has become relatively uncontroversial to require noncustodial parents to provide for their children. But the potential loss in terms of upholding equality principles makes a child-centered framework unappealing. A straight application of the child support framework for preglimony would still force unmarried women to carry the bulk of the financial cost of the pregnancy, perpetuating both marital status discrimination and gender inequalities. In contrast, the alimony framework, which emphasizes support for the pregnant woman herself, responds to her particular financial needs due to pregnancy. The alimony model thus better respects core family law principles of equality and care, making it the more appropriate framework.

Motro is clear that she intends preglimony to be modeled after alimony. However, in the face of the criticisms of the alimony framework she attempts to temper this characterization by suggesting preglimony be implemented through a tax incentive plan rather than mandated. This plan is insufficient because it forces an unmarried pregnant woman to hope that the father is willing to make preglimony payments rather than giving her legal entitlement to such payments. For the woman who conceives with a man who views pregnancy as her problem, mandatory preglimony is the only way to guarantee that she will receive much-needed support. Isn't she exactly the type of woman Motro is trying to help?

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166. See discussion, *supra*, Part VI.