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## MARRIAGE EQUALITY AND ITS RELATIONSHIP TO FAMILY LAW

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I am honored to have this opportunity to respond to Professor Douglas NeJaime's important and insightful article, *Marriage Equality and the New Parenthood*.<sup>1</sup> In an earlier piece, *Before Marriage*,<sup>2</sup> NeJaime offers a comprehensive and detailed history of advocacy efforts to establish domestic partnership protections in California in the 1980s, 1990s, and 2000s. *New Parenthood* adds another layer to this historical account by exploring the evolution of legal protections for nonmarital, nonbiological parents in California during those periods. Given California's leadership in these areas, these state-specific case studies tell a valuable story about the evolution of families and family law more broadly.<sup>3</sup>

Other scholars have written about some of the cases explored in *New Parenthood*. But *New Parenthood* is not simply a description of court decisions. Instead, through historical research and first-person interviews, NeJaime offers a deeper, more nuanced story that explores who was working on these cases, what these advocates sought to accomplish, and the constraints against and within which they were working. Scholars and advocates alike are indebted to NeJaime for providing such a rich and detailed account of these developments.

In addition to documenting this history, NeJaime uses the uncovered material to offer critical insights about the marriage equality movement and its effects. First, *New Parenthood* shows how these evolving protections for nonbiological parents served as stepping stones in the march toward marriage equality.<sup>4</sup> Surprisingly, despite

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<sup>1</sup> Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185 (2016) [hereinafter NeJaime, *New Parenthood*].

<sup>2</sup> Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87 (2014) [hereinafter NeJaime, *Before Marriage*].

<sup>3</sup> For example, while some of the earliest second-parent adoptions were granted in California, this form of adoption is now available in about a third of the states by statute or appellate court decision. See Nat'l Ctr. for Lesbian Rights, *Adoption by LGBT Parents*, NCLR, [http://www.nclrights.org/wp-content/uploads/2013/07/2PA\\_state\\_list.pdf](http://www.nclrights.org/wp-content/uploads/2013/07/2PA_state_list.pdf) (last updated June 2015) [<http://perma.cc/2VDV-RAEC>].

<sup>4</sup> See NeJaime, *New Parenthood*, *supra* note 1, at 1187.

their central role in this process, few scholars have acknowledged, much less carefully explored, this connection.

Second, NeJaime uses his parentage case study to complicate the increasingly dominant narrative of marriage-equality skeptics.<sup>5</sup> Here, I am referring to a group of scholars and advocates who support LGBT rights but who express concerns about the way marriage equality was achieved.<sup>6</sup> These scholars suggest that the marriage equality movement derailed earlier efforts to unseat marriage from its privileged position.<sup>7</sup> Using the lens of parenthood, NeJaime provides a more complex understanding of the extent to which earlier parentage advocacy did indeed challenge marriage's privileged role in our society, as well as a more optimistic vision of the legal treatment of nonmarital children post-*Obergefell*.<sup>8</sup>

In this short Essay response, I have three goals. First, I hope to highlight some of the key contributions that *New Parenthood* offers. Second, I ponder why this important story about parentage law and its relationship to marriage equality has attracted less attention than it deserves. Third and finally, this Essay considers a critical possibility not addressed by NeJaime. NeJaime uses parentage law to show how *Obergefell* might facilitate rather than foreclose additional protections for nonmarital children. Here I posit an even more radical proposition: I argue that marriage equality might open up progressive possibilities not just for nonmarital children, but also for nonmarital *adult* relationships.

## I. PARENTHOOD AND MARRIAGE EQUALITY

*New Parenthood* offers a meticulously constructed history of advocacy on behalf of nonbiological parents in California from the mid-1980s through the mid-2000s. In most planned same-sex parent families, only one intended parent (if any) has a genetic connection to the resulting child.<sup>9</sup> These couples, of course, were also prohibited from

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<sup>5</sup> *Id.* at 1233 (“The case study in Part II sheds new light on some of these historical and normative claims, showing that the scholarly critique of marriage often overstates the marginalization of marriage in the past and thereby misapprehends some of marriage’s contemporary implications.”).

<sup>6</sup> Serena Mayeri, *Marriage (In)equality and the Historical Legacies of Feminism*, 6 CALIF. L. REV. CIR. 126, 134 (2015) (discussing “marriage skeptics”).

<sup>7</sup> See, e.g., Melissa Murray, *Obergefell v. Hodges and the New Marriage Inequality*, 104 CALIF. L. REV. (forthcoming Aug. 2016) (manuscript at 105) [hereinafter Murray, *Marriage Inequality*] (on file with author) (“Although the *Obergefell* decision is a victory for same-sex couples who wish to marry, it is likely to have negative repercussions for those — gay or straight — who, by choice or by circumstance, live their lives outside of marriage.”).

<sup>8</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>9</sup> See, e.g., COURTNEY G. JOSLIN, SHANNON P. MINTER & CATHERINE SAKIMURA, *LESBIAN, GAY, BISEXUAL, AND TRANSGENDER FAMILY LAW* § 5.2 (2015–2016 ed. 2015).

marrying prior to *Obergefell*. Because one of the two parents was unconnected to their child through either genetics or marriage, many of these children were “tragic[ally]”<sup>10</sup> cut off from, or denied benefits through, their nonbiological parents.<sup>11</sup>

LGBT activists,<sup>12</sup> alongside others, therefore worked to develop means of recognizing, protecting, and valuing the relationship between nonbiological parents and their children.<sup>13</sup> As NeJaime explains, today, these relationships can be protected through second-parent adoptions;<sup>14</sup> the expansion of rights for intended parents of children born through assisted reproductive technology;<sup>15</sup> and the “holding out” provision of the Uniform Parentage Act (UPA), which creates a presumption of parentage based on functional parental conduct.<sup>16</sup> These developments were and continue to be vitally important to many families, including but not limited to same-sex parent families. Where applicable, these protections ensure that children are not abruptly cut off from one of their parents simply because that person lacks a genetic connection.

To be sure, some family law scholars have written about (some of) the parentage developments discussed in *New Parenthood*.<sup>17</sup> What has received much less attention and what *New Parentage* explores is the relationship between these developments in parentage law and the path to marriage equality. Over the past several decades, those opposed to same-sex marriage relied primarily on arguments about children. These arguments mutated over time.<sup>18</sup> In recent years, the pri-

<sup>10</sup> *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 219 (Ct. App. 1991) (“We agree with appellant that the absence of any legal formalization of her relationship to the children has resulted in a tragic situation.”).

<sup>11</sup> See, e.g., NeJaime, *New Parenthood*, *supra* note 1, at 1202–06 (describing *Nancy S.*, 279 Cal. Rptr. 212); see also Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177 (2010) (discussing potential harms to children).

<sup>12</sup> I was one of these advocates. In addition to filing amicus briefs in a number of the cases chronicled in *New Parenthood*, I also represented Emily B., the biological mother, in *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005). In that case, we argued that Elisa B., Emily’s former same-sex partner, was a legal parent of the twin children born to Emily even though she was not biologically connected to them.

<sup>13</sup> See NeJaime, *New Parenthood*, *supra* note 1, at 1196–230.

<sup>14</sup> *Id.* at 1219–22.

<sup>15</sup> *Id.* at 1208–12.

<sup>16</sup> *Id.* at 1213–19, 1222–29. Currently, the California “holding out” provision provides that a person is presumed to be a child’s legal parent if the person “receives the child into his or her home and openly holds out the child as his or her natural child.” CAL. FAM. CODE § 7611(d) (West 2016).

<sup>17</sup> To be clear, however, no one else has produced an in-depth case study of these parentage developments.

<sup>18</sup> Elsewhere I explore the evolution of these arguments. See Courtney G. Joslin, *Searching for Harm: Same-Sex Marriage and the Well-Being of Children*, 46 HARV. C.R.-C.L. L. REV. 81 (2011).

During the 1990s, many opponents to same-sex marriage argued that children would be harmed if they were raised by gay and lesbian couples. In the early 2000s, marriage equality op-

mary argument went something like this: the exclusion of same-sex couples from marriage was permissible because same-sex couples cannot provide the ideal setting for the raising of children — a home with two biological parents.<sup>19</sup>

As a result of the legal changes documented in *New Parenthood*, however, this argument became “totally inconsistent . . . with the operation of . . . family laws.”<sup>20</sup> As Professor Joan Hollinger and I explained in a brief we filed on behalf of family law professors in *Obergefell*:

[State family] laws do not privilege parenting by biological parents who parent in “gender differentiated” ways over other forms of parenting. States afford full parental rights to legal parents who have no biological or genetic ties to a child. In many circumstances, a biological or genetic tie is neither necessary nor sufficient to establish a legal parent-child relationship.<sup>21</sup>

By taking away opponents’ primary defense, marriage equality was “enabled by . . . intentional and functional concepts of parenthood forged in earlier *nonmarital* advocacy.”<sup>22</sup>

## II. PARENTHOOD AND MARITAL SUPREMACY

The historical account documented in *New Parenthood* also provides an important lens for assessing past and future activism. In recent years, a growing number of scholars who support LGBT equality

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ponents relied on a “back-handed compliment” to lesbian and gay parents: It is permissible to exclude same-sex couples from marriage because they don’t need the protections of marriage; the protections of marriage are for those irresponsible heterosexual people who have unplanned children. Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 YALE J.L. & HUMAN. 1, 3 (2009). As noted above, the most recent variant relies on the importance of biological parentage to children. *Id.* at 26.

<sup>19</sup> See, e.g., Courtney G. Joslin, *Marriage, Biology, and Federal Benefits*, 98 IOWA L. REV. 1467, 1470–71 (2013) [hereinafter Joslin, *Federal Benefits*]; see also *Perry v. Brown*, 671 F.3d 1052, 1086 (9th Cir. 2012), *vacated and remanded sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (“The primary rationale Proponents offer for Proposition 8 is that it advances California’s interest in responsible procreation and childrearing. . . . This rationale appears to comprise two distinct elements. The first is that children are better off when raised by two biological parents and that society can increase the likelihood of that family structure by allowing only potential biological parents — one man and one woman — to marry.”).

<sup>20</sup> *Perry*, 671 F.3d at 1087.

<sup>21</sup> Brief of Amici Curiae Family Law Scholars in Support of Petitioners at 2, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556); see also Joslin, *Federal Benefits*, *supra* note 19, at 1470–75 (exploring the importance, or lack thereof, of biological parenting in the federal context).

<sup>22</sup> NeJaime, *New Parenthood*, *supra* note 1, at 1236; see also *id.* at 1238 (“With same-sex marriage, the functional and intentional principles of parenthood centered by nontraditional families become the governing principles for an understanding of parenting that includes both same-sex and different-sex couples.”); Cynthia Godsoe, *Adopting the Gay Family*, 90 TUL. L. REV. 311, 371 (2015) (“This story also posits parenthood as a more significant gateway to marriage and to civic recognition than previously understood.”).

have criticized the marriage-equality movement. Some of these marriage-equality skeptics suggest that earlier LGBT rights work largely (and rightly) challenged the primacy of marriage,<sup>23</sup> and that the more contemporary marriage-equality work strategically and regrettably jettisoned this goal by advocating for “same-sex-couple-headed families [only] to the extent that they replicate heterosexual, marital norms.”<sup>24</sup>

NeJaime is also concerned about the extent to which the law privileges and prioritizes marital relationships over nonmarital ones.<sup>25</sup> But while he shares this concern, NeJaime’s case study offers a more nuanced picture that suggests skeptics might have both overstated the extent to which earlier advocacy destabilized marital supremacy, and underestimated the future “progressive family law possibilities offered by marriage equality.”<sup>26</sup>

While it is surely true that many of the earlier LGBT activists sought to destabilize marriage, or at least make marriage matter less, they too — like the plaintiffs in *Obergefell* — were working within political and practical restraints. “Even if advocates wished to destabilize marriage — and certainly some did,” NeJaime writes, “they were constrained by a legal, political, and cultural framework that prioritized marriage in the recognition of familial and sexual relationships. . . . Ultimately, work often remembered for destabilizing marriage accepted and prioritized key elements of marriage.”<sup>27</sup>

This assessment was likewise true in the parentage context. While earlier LGBT advocates sought to expand notions of parenthood in a variety of ways, their work often stressed the extent to which the families at issue looked and acted like marital families.<sup>28</sup> This observation is not to detract from the importance of the work, or from its potential

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<sup>23</sup> See, e.g., NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 5–6 (2010) (“Early gay and lesbian rights advocates forced alliances with others who challenged the privacy of marriage. . . . Marriage was in the process of losing its iron-clad grip on the organization of family life, and lesbians and gay men benefited overwhelmingly from the prospect of a more pluralistic vision of relationships.”).

<sup>24</sup> NeJaime, *New Parenthood*, *supra* note 1, at 1189–90.

<sup>25</sup> *Id.* at 1191–92; see also Douglas NeJaime, Windsor’s *Right to Marry*, 123 YALE L.J. ONLINE 219, 246–47 (2013).

<sup>26</sup> NeJaime, *New Parenthood*, *supra* note 1, at 1235 (“Drawing a stark distinction between marriage and nonmarriage as both a historical and theoretical matter, scholarly critics at times both overestimate the progressive dimensions of nonmarital family recognition and neglect progressive family law possibilities offered by marriage equality. They assume that the contemporary rhetoric of marital family formation buttresses a traditional family law.”).

<sup>27</sup> NeJaime, *Before Marriage*, *supra* note 2, at 91.

<sup>28</sup> NeJaime, *New Parenthood*, *supra* note 1, at 1197–98 (“Seizing on the recognition of both unmarried, biological fathers and married, nonbiological parents, LGBT advocates made analogies to marital family formation to secure nonmarital parental rights.” *Id.* at 1197. “Critically, analogies to marriage were made in service of a new model of parenthood premised on intentional and functional relationships.” *Id.* at 1198.)

to protect a wider array of families and family forms. The point is more modest: while advocates pressed on some boundaries, their work nonetheless often took advantage of the similarities between these families and marital ones.<sup>29</sup> When one looks at this earlier activism through the lens of parentage cases, one can more clearly see the role that analogies to heterosexual marriage played in the work.

Using the lens of parentage also provides a more complex, and ultimately more optimistic, vision of the future. There has been an outpouring of scholarship in the wake of *Obergefell* suggesting that while the decision might be a victory for those same-sex couples who want to marry, it is a setback for nonmarital families.<sup>30</sup> While these critiques deserve thoughtful attention, they should not obscure the decision's progressive potential.<sup>31</sup>

To be sure, whether protections for nonmarital children will expand or contract going forward remains an open question. Professor Nancy Polikoff,<sup>32</sup> Professor Joanna Grossman,<sup>33</sup> and I<sup>34</sup> argue that some courts and policymakers may be less likely to protect nonmarital functional parenthood in the wake of marriage equality. The thinking would go something like this: In the past, same-sex couples were excluded from all of the protections of marriage, including the marital presumption of parentage. Thus, it was necessary for courts to apply

<sup>29</sup> These comparisons were made “not simply for the sake of conformity, but rather to unsettle norms that root parentage in biology, gender, and even marital status.” *Id.* at 1190.

To be clear, advocates were concerned about further marginalizing nonmarital families. Accordingly, in many cases advocates urged courts to adopt marital-status neutral rules. That said, as NeJaime documents, the briefing in these parentage cases often stressed the extent to which the family looked and functioned like a marital family. For an analysis of which arguments tend to get traction in litigation and whether to push arguments that do not get much traction, see Suzanne B. Goldberg, Essay, *Risky Arguments in Social-Justice Litigation: The Case of Sex-Discrimination and Marriage Equality*, 114 COLUM. L. REV. 2087 (2014).

<sup>30</sup> See, e.g., Clare Huntington, *Obergefell's Conservatism: Reifying Familial Fronts*, 84 FORDHAM L. REV. 23, 31 (2015) (“Justice Kennedy’s denigration of nonmarital families, even if unintentional, is deeply troubling. By reifying the social front of family as children with married parents, and by penning an unnecessary paean to marriage, Justice Kennedy made the lives of nonmarital families lesser.”); Murray, *Marriage Inequality*, *supra* note 7 (manuscript at 101) (“[B]ut there is also cause for serious concern — even alarm.”); Catherine Powell, *Up from Marriage: Freedom, Solitude, and Individual Autonomy in the Shadow of Marriage Equality*, 84 FORDHAM L. REV. 69, 69–70 (2015) (“The problem with *Obergefell*, however, is that in the majority opinion, Justice Kennedy’s adulation for the dignity of marriage risks undermining the dignity of the individual, whether in marriage or not.”).

<sup>31</sup> In a forthcoming piece, I explore the potential of *Obergefell*, and the gay rights canon more broadly, to support claims on behalf of nonmarital *adult* relationships. Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage* (unpublished manuscript) (on file with author).

<sup>32</sup> See, e.g., Nancy D. Polikoff, *The New “Illegitimacy”: Winning Backward in the Protection of the Children of Lesbian Couples*, 20 AM. U. J. GENDER SOC. POL’Y & L. 721, 723 (2012).

<sup>33</sup> Joanna L. Grossman, *The New Illegitimacy: Tying Parentage to Marital Status for Lesbian Co-Parents*, 20 AM. U. J. GENDER SOC. POL’Y & L. 671, 672 (2012).

<sup>34</sup> Courtney G. Joslin, *Leaving No (Nonmarital) Child Behind*, 48 FAM. L.Q. 495, 495–96 (2014).

equitable principles to avoid the harms this marriage exclusion would otherwise impose on children raised by these couples. Now that same-sex couples can marry, courts will be more reluctant to act in equity because same-sex couples can get protection if they want it — they just need to get married. In recent years, some courts have indeed followed this logic.<sup>35</sup>

While regression is possible, viewing the future through the lens of parentage makes it harder to overlook positive parentage developments that have occurred alongside marriage equality. As NeJaime reminds us, in the years leading up to permanent marriage equality in California, LGBT advocates successfully achieved a range of protections for nonmarital parenting.<sup>36</sup> Among other things, in 2013, California enacted legislation permitting courts to recognize more than two parents.<sup>37</sup> Just months after marriage equality returned to California, the Governor signed into law legislation that expanded the assisted reproduction provisions equally to married *and unmarried* couples.<sup>38</sup> Again, NeJaime argues that these developments were facilitated rather than hindered by marriage equality.

Thus, while marriage-equality skeptics raise significant and plausible concerns about the legal treatment of nonmarital families going forward, NeJaime's case study suggests how marriage equality may continue, rather than cut against, earlier developments recognizing and protecting greater family diversity. Or, as NeJaime says: "Perhaps paradoxically, then, marriage equality may further blur, rather than just redraw, the line between marital and nonmarital parental recognition."<sup>39</sup> It is important not to shut the door on these progressive possibilities.

### III. OVERLOOKING PARENTHOOD

As *New Parenthood* demonstrates, the evolution of parentage law is critical to an understanding of how marriage equality was achieved. Some courts did see and appreciate this connection.<sup>40</sup> The

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<sup>35</sup> See, e.g., *In re Madrone*, 350 P.3d 495, 501 (Or. Ct. App. 2015) ("Just as an opposite-sex couple may be fully committed to their relationship and family but choose not to marry, a same-sex couple, given the option to marry, could make that same choice — commitment without marriage. Because [the assisted reproduction provision] would not apply to an opposite-sex couple that made that choice, it follows that the statute also should not apply to same-sex couples that make the same choice.").

<sup>36</sup> NeJaime, *New Parenthood*, *supra* note 1, at 1241–42, 1261–62.

<sup>37</sup> 2013 Cal. Stat. 4630–31 (codified at CAL. FAM. CODE § 7612(c)).

<sup>38</sup> 2015 Cal. Stat. 4712 (codified at CAL. FAM. CODE § 7613(a)).

<sup>39</sup> NeJaime, *New Parenthood*, *supra* note 1, at 1250.

<sup>40</sup> While the *Obergefell* Court did not delve deeply into the evolution of parenthood, it did not entirely overlook changes in this area. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015) ("Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and

Ninth Circuit, for example, relied upon the discord between contemporary parentage law and the claims of marriage equality opponents. Opponents argued that the state had an interest in having children raised by their “two biological parents.”<sup>41</sup> This argument could not be credited, the Ninth Circuit explained, because it was simply inconsistent with California law. California law, the Ninth Circuit declared, “actually prefers a non-biological parent who has a parental relationship with a child to a biological parent who does not; in California, the parentage statutes place a premium on the ‘social relationship,’ not the ‘biological relationship,’ between a parent and a child.”<sup>42</sup>

But among the thousands, if not tens of thousands, of law review articles on same-sex marriage, there are surprisingly few that explore this interconnection between marriage equality and the evolution of parentage law.<sup>43</sup> Why is this the case? I suggest that at least a partial explanation is related to the devaluation of family law.

“Family law is extraordinarily consequential . . . .”<sup>44</sup> Family law rules affect with whom one can enter a legally recognized relationship. They affect whether one can access critical financial benefits, like spousal death benefits, or children’s social security benefits.<sup>45</sup> Family law rules may affect whether one is entitled to need-based benefits like welfare.<sup>46</sup> Yet despite their enormously consequential nature, family law matters are often unseen or at least underappreciated.<sup>47</sup>

As NeJaime notes, the devaluation of family law shaped even the LGBT rights movement itself. In the early years of LGBT rights advocacy, few LGBT organizations worked on, much less prioritized, custody and other parentage cases.<sup>48</sup> Indeed, the National Center for

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many adopted and foster children have same-sex parents. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.” (internal citation omitted).

<sup>41</sup> *Perry v. Brown*, 671 F.3d 1052, 1086 (9th Cir. 2012), *vacated and remanded sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

<sup>42</sup> *Id.* at 1087 (quoting *Susan H. v. Jack S.*, 37 Cal. Rptr. 2d 120, 124 (Ct. App. 1994)).

<sup>43</sup> Joslin, *Federal Benefits*, *supra* note 19, at 1469–70 (“[T]he vast majority of this commentary [about the constitutionality of marriage bans] considers the ‘thick’ constitutional claims raised in same-sex marriage cases . . . .” *Id.* at 1469.).

<sup>44</sup> JILL ELAINE HASDAY, *FAMILY LAW REIMAGINED* 1 (2014).

<sup>45</sup> See Courtney G. Joslin, *Federalism and Family Status*, 90 IND. L.J. 787, 795 (2015).

<sup>46</sup> See, e.g., Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276, 1285–99 (2014).

<sup>47</sup> See, e.g., Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073, 1111 (1994) (“Historically, family law has been devalued, both in theory and in practice. Although most people’s contact with the judicial system today occurs because of family law issues, the status of domestic relations in American law has not reflected its importance to society.”).

<sup>48</sup> Many leaders in the LGBT rights movement have come to understand the importance of these cases. See, e.g., *Protecting Families and Defending the Freedom to Marry*, LAMBDA LEGAL, <http://www.lambdalegal.org/issues/marriage-relationships-and-family-protections> [http://perma.cc/X9N5-2LC8] (“From protecting the freedom to marry to defending domestic partnership



Lesbian Rights (NCLR) “was founded to address family law issues, which were core lesbian concerns that NCLR’s founders saw as marginalized by other organizations at the time.”<sup>49</sup>

Today, many within the LGBT movement now appreciate the importance of family law issues. But in many other realms, family law matters continue to be devalued.<sup>50</sup> Family law matters are often excised from classes in which there are overlapping issues.<sup>51</sup> Family law jurisdictional rules are rarely a focus of civil procedure courses, for example, despite the fact that family law matters often involve a range of jurisdictional questions. The omission of family law cases from “core” courses like civil procedure reinforces the perception that family law matters are not important, or at least that they are less important.<sup>52</sup> And, indeed, this belief is sometimes expressed more overtly. Professor Judith Resnik, for example, has written about advice she received at the beginning of her academic career. “Be careful,” she was told. “Don’t teach in any areas associated with women’s issues. Don’t teach family law; don’t teach sex discrimination. Teach the real stuff, the hard stuff: contracts, torts, procedure, property.”<sup>53</sup> Resnik reports that

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benefits and securing parent-child relationships, Lambda Legal protects same-sex couples and their families through a broad range of litigation, education and advocacy strategies.”)

<sup>49</sup> NeJaime, *New Parenthood*, *supra* note 1, at 1198 n.58 (citing Telephone Interview with Roberta Achtenberg, Former Exec. Dir., NCLR (June 11, 2014) (on file with the Harvard Law School Library)); *see also* Godsoe, *supra* note 22, at 321 (noting, based on first-person interviews, that early LGBT activism focused primarily on “eliminating employment discrimination and de-marginalizing lesbian and gay sex, rather than on gaining family relationship rights,” and that “[t]he secondary attention paid to family law issues centered on marriage”); Ann Rostow, *NCLR Earns Its Stripes*, *THE ADVOCATE* (May 19, 2005, 12:00 AM), <http://www.advocate.com/news/2005/05/19/nclr-earns-its-stripes> [<http://perma.cc/SUN2-MNWX>] (“Some of the group’s earliest cases involved the legal travails of gay men, who turned to the NCLR at a time when few others in the young movement cared about either gender’s parental rights.”).

<sup>50</sup> A number of scholars have argued that the devaluation of family law is evident in legal doctrine as well. For example, Professor Judith Resnik argues that the domestic relations exception to federal diversity jurisdiction is “linked [to the] assumption that family law does not raise issues of sufficient import to merit federal attention.” Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 *UCLA L. REV.* 1297, 1399 (1998) (citing Judith Resnik, “*Naturally*” *Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 *N.Y.U. L. REV.* 1682, 1749–50 (1991)) (describing Resnik’s position); *see also* Cahn, *supra* note 47, at 1097 (discussing the perceived “[u]nimportance of [f]amily [l]aw” and asserting that “[f]amily law has a comparatively low status in the hierarchy of cases”); Courtney G. Joslin, *The Perils of Family Law Localism*, 48 *U.C. DAVIS L. REV.* 623, 636 (2014) (exploring other doctrinal implications).

<sup>51</sup> *Cf.* HASDAY, *supra* note 44, at 222 (suggesting that we often fail “to understand family law’s relationship to the rest of the law”).

<sup>52</sup> *Cf.* Meredith Johnson Harbach, *Is the Family a Federal Question?*, 66 *WASH. & LEE L. REV.* 131, 139 (2009) (arguing that the exclusion of family law matters from federal court “reinforc[es] the inferior status of family law issues vis-à-vis the federal courts, and assur[es] the continued marginalization of family law”).

<sup>53</sup> Judith Resnik, *Gender Bias: From Classes to Courts*, 45 *STAN. L. REV.* 2195, 2195 (1993).

she has heard similar stories from other female academics throughout her career, and that these stories are not simply relics of the past.<sup>54</sup>

When family law cases are studied in law school, their family law nature is often invisible. Many of the cases taught in constitutional law, for example, are family law cases.<sup>55</sup> But these cases typically are not seen or talked about as family law cases.<sup>56</sup> The invisibility of family law in constitutional law cases is perhaps most vividly illustrated by the persistence of the narrative of family law localism. The narrative posits that family law is inherently local, beyond the scope of the federal government or the federal courts.<sup>57</sup> The narrative of family law's localism pervades Supreme Court decisions,<sup>58</sup> textbooks,<sup>59</sup> case briefs,<sup>60</sup> and the mainstream media.<sup>61</sup> The narrative is widely accepted and repeated despite the fact that the Supreme Court itself has decided a wide array of family law cases<sup>62</sup> — cases ranging from the

<sup>54</sup> *Id.*

<sup>55</sup> And, to be sure, a significant portion of equal protection and due process jurisprudence indeed involves family law cases. HASDAY, *supra* note 44, at 40 (“As an initial matter, family law is a pervasive and significant part of the Court’s constitutional jurisprudence interpreting due process, equal protection, and other constitutional principles.”).

<sup>56</sup> Emily J. Sack, *The Burial of Family Law*, 61 SMU L. REV. 459, 476–77 (2008) (“Family law is invisible in federal law in another sense. Though it can be argued that the leading developments in modern constitutional law have been in the area of family law, the line of substantive due process and equal protection cases involving the right to privacy, including *Griswold*, *Eisenstadt*, *Loving*, and *Roe*, are rarely characterized as family law cases.”).

<sup>57</sup> HASDAY, *supra* note 44, at 17 (“[The family law] localist narrative . . . portrays family law as clearly beyond the federal government’s boundaries . . .”); *see also* Ankenbrandt v. Richards, 504 U.S. 689, 694–95 (1992) (affirming the domestic relations exception to federal diversity jurisdiction); Harbach, *supra* note 52, at 134 (“A longstanding legal narrative describes family law as a quintessentially state issue.”).

<sup>58</sup> *See, e.g.*, *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (“[D]omestic relations [is] an area that has long been regarded as a virtually exclusive province of the States.”).

<sup>59</sup> *See, e.g.*, LYNN D. WARDLE & LAURENCE C. NOLAN, FUNDAMENTAL PRINCIPLES OF FAMILY LAW 29 (2d ed. 2006) (“[F]amily law is inherently local.”).

<sup>60</sup> Indeed, marriage equality opponents relied on the narrative of family law localism in their briefing in *Obergefell*. *See, e.g.*, Brief of Louisiana, Utah, Texas, Alaska, Arizona, Arkansas, Georgia, Idaho, Kansas, Montana, Nebraska, North Dakota, Oklahoma, South Dakota, and West Virginia as Amici Curiae Supporting Respondents at 5, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556) (“This Court has long affirmed the centrality of domestic relations law to state sovereignty.”).

<sup>61</sup> George F. Will, *DOMA Infringes on States’ Rights*, WASH. POST (Mar. 20, 2013), [https://www.washingtonpost.com/opinions/george-f-will-doma-infringes-on-states-rights/2013/03/20/fa845348-90bb-11e2-bdea-e32ad90da239\\_story.html](https://www.washingtonpost.com/opinions/george-f-will-doma-infringes-on-states-rights/2013/03/20/fa845348-90bb-11e2-bdea-e32ad90da239_story.html) [http://perma.cc/5FFD-2UZf] (“DOMA ‘shatters two centuries of federal practice’ by creating ‘a blanket federal marital status that exists independent of states’ family-status determinations.’” (quoting Brief of Federalism Scholars as Amici Curiae in Support of Respondent Windsor at 29, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307))).

<sup>62</sup> *See* Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 882 (2004) (“The oft-repeated insistence that family law is exclusively subject to local jurisdiction and control similarly excludes federal judicial decisions interpreting the United States Constitution from the family law canon.”). The family law localism narrative also ignores the many federal statutes that

right to marry,<sup>63</sup> to the right to have children,<sup>64</sup> to the right not to have children,<sup>65</sup> to sex discrimination cases challenging family law rules and roles.<sup>66</sup> The cases can be reconciled with the narrative if they are seen as something else — fundamental rights cases or sex discrimination cases — rather than as family law cases. And, indeed, this is true of *Obergefell* itself. Many of the hundreds of important law review articles exploring marriage equality grapple with “the real stuff, the hard stuff” — principles of equal protection and due process. Few articles examine the marriage equality cases as family law cases, from a family law perspective.

*New Parenthood* reminds us of some of the critical legal insights that can be lost when we fail to see legal questions as family law questions or through the lens of the family.

#### IV. LOOKING BEYOND PARENTHOOD

NeJaime closes *New Parenthood* with the new and critical point that marriage equality may hold underappreciated progressive potential for nonmarital children. In so doing, NeJaime complicates the narrative of marriage-equality skeptics who offer more dire predictions about the future. In my remaining space, I also respond to the marriage-equality skeptics. But I make a different and arguably more radical claim. I argue that *Obergefell* may hold progressive potential for *adults* in nonmarital relationships.

Even if one accepts NeJaime’s claim that *Obergefell* may not stifle legal protections for nonmarital children, one may nevertheless push back on this claim about *Obergefell*’s progressive potential for the rights of unmarried adults. Skeptics may point out that in the past, increased protection for nonmarital children did not lead to significant protections for nonmarital *adult* relationships.<sup>67</sup> The illegitimacy cases of the 1960s and 1970s, for example, brought about important protec-

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regulate families. *See, e.g., id.* at 831–32 (discussing the prevalence of federal family law statutes); Joslin, *supra* note 45, at 787 (discussing “a long history of federal family status determinations”).

<sup>63</sup> *See, e.g.,* Turner v. Safley, 482 U.S. 78 (1987); Loving v. Virginia, 388 U.S. 1 (1967).

<sup>64</sup> *See, e.g.,* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

<sup>65</sup> *See, e.g.,* Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

<sup>66</sup> *See, e.g.,* Orr v. Orr, 440 U.S. 268 (1979) (striking down state law providing that husbands, but not wives, could be required to pay alimony); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (striking down federal statutes providing that the spouses of male military members were considered dependents for purposes of a range of benefits, but that the spouses of female members were eligible only if they proved actual dependency).

<sup>67</sup> Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277, 1280 (2015) (“The illegitimacy cases are often remembered as a triumph for nonmarital families . . . . But these decisions hardly championed the equal status of adults who lived outside the bonds of marriage.”); *see also id.* (“By focusing on the blamelessness of children, these decisions . . . obscured the constitutional harms of illegitimacy penalties’ detrimental impact on adults . . .”).

tions for nonmarital children.<sup>68</sup> In a series of cases, the Court struck down laws that denied nonmarital children the right to parental child support,<sup>69</sup> the right to intestate succession through their fathers,<sup>70</sup> and the right to sue for the wrongful death of their parents.<sup>71</sup> However, “these decisions hardly championed the equal status of adults who lived outside the bonds of marriage.”<sup>72</sup> This divide between the legal treatment of nonmarital children as compared to the legal treatment of their parents arose because of the way these cases were decided. The illegitimacy cases stand for the proposition that it is unfair to punish “‘innocent’ children for the ‘sins’ or ‘transgressions’ of their parents.”<sup>73</sup> Thus, even after these decisions protecting nonmarital children, it was generally permissible to punish unmarried cohabiting adults directly for their “sins.”

Some contend this principle was reinforced by the Court’s decision in *Obergefell*. In striking down marriage bans, the *Obergefell* Court relied in part on the notion that it was unfair to punish the innocent children of same-sex couples.<sup>74</sup> Marriage bans, the Court explained, “humiliate[d]”<sup>75</sup> the children of same-sex couples. “Without the recognition, stability, and predictability marriage offers,” Justice Kennedy declared, “the[] children [of same-sex couples] suffer the stigma of knowing their families are somehow lesser.”<sup>76</sup> Thus, there may be reason to hope that nonmarital children will continue to be protected, even post-*Obergefell*. But, one may continue, this language does not even gesture towards robust protections for the adults who choose *not* to accept “the recognition, stability, and predictability marriage offers.”<sup>77</sup>

Past experience and some of the language in *Obergefell* do indeed suggest that caution is warranted. There are other aspects of

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<sup>68</sup> See, e.g., *id. passim* (discussing cases); Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 351–52 (2011) (discussing cases).

<sup>69</sup> See, e.g., *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (per curiam) (holding unconstitutional state law that denied nonmarital children the right to obtain child support from their fathers).

<sup>70</sup> See, e.g., *Trimble v. Gordon*, 430 U.S. 762, 776 (1977) (holding unconstitutional state law that allowed nonmarital children to inherit intestate only through their mothers).

<sup>71</sup> See, e.g., *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (striking down state statute that precluded nonmarital children from suing for the wrongful death of their mothers).

<sup>72</sup> Mayeri, *supra* note 67, at 1280.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 1283.

<sup>75</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600–01 (2015) (citing *United States v. Windsor*, 133 S. Ct. 2675, 2694–95 (2013)).

<sup>76</sup> *Id.* at 2600; see also *id.* at 2600–01 (“They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.”).

<sup>77</sup> *Id.* at 2600.

*Obergefell*, however, that provide cause for optimism. Here I highlight one. In *Obergefell*, the Court reaffirmed a dynamic theory of constitutional law that takes account of “society’s evolving experience.”<sup>78</sup> Among other changes, the *Obergefell* Court took into account the evolving law of families. Indeed, it was by taking into account changes in the law of families that the Court was able to see and appreciate the constitutional violation at issue.

In the past, same-sex sexual conduct was often criminalized.<sup>79</sup> In such a world, excluding same-sex couples from marriage not only appeared constitutionally permissible, but also seemed like the only possible approach. The law has changed since then. Same-sex couples have a constitutionally protected right to engage in sexual intimacy.<sup>80</sup> Starting in the 1980s, cities and then states extended legal recognition and rights to individuals in same-sex relationships.<sup>81</sup> Due in part to these legal changes, more and more same-sex couples began living together openly. Today, there are hundreds of thousands of same-sex couples in the United States.<sup>82</sup> These couples are raising “hundreds of thousands of children.”<sup>83</sup> Many states legally recognize and affirm these families.<sup>84</sup> In light of these evolving protections, it becomes more difficult to explain why same-sex couples should be excluded from marriage. These changes, the Court explained, bring to the fore a constitutional violation that had previously been invisible. Or, as Justice Kennedy put it, by examining society’s evolving experience, “new dimensions of freedom become apparent to new generations.”<sup>85</sup>

These principles can and must be applied to those in nonmarital families. As was true for same-sex couples, nonmarital relationships

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<sup>78</sup> Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 27 (2015); see also *id.* at 19 (“Justice Kennedy’s opinion strongly argues that a government practice that limits the options available to members of a particular group need not have been *deliberately* designed to harm the excluded group if its oppressive and unjustified effects have become clear in light of current experience and understanding.”).

<sup>79</sup> See *Obergefell*, 135 S. Ct. at 2596 (“Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law.”).

<sup>80</sup> See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

<sup>81</sup> See NeJaime, *Before Marriage*, *supra* note 2.

<sup>82</sup> GARY J. GATES, THE WILLIAMS INST., DEMOGRAPHICS OF MARRIAGE AND UNMARRIED SAME-SEX COUPLES: ANALYSES OF THE 2013 AMERICAN COMMUNITY SURVEY 3 (2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Demographics-Same-Sex-Couples-ACS2013-March-2015.pdf> [http://perma.cc/F9N5-6ALF] (noting that the 2013 National Health Interview Survey “indicate[s] that . . . there are approximately 690,000 same-sex couples” in the United States).

<sup>83</sup> *Obergefell*, 135 S. Ct. at 2600.

<sup>84</sup> *Id.* (“Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents.”).

<sup>85</sup> *Id.* at 2596.

were wholly criminal in the past.<sup>86</sup> Marriage was the only legally sanctioned relationship available to intimate couples. Not surprisingly, most couples who could marry, did marry. In such a world, marriage was indeed a core “building block of our national community.”<sup>87</sup>

But, as is true with parentage and same-sex couples, the law has changed. Today, adults have a constitutionally protected right to form nonmarital relationships,<sup>88</sup> and to engage in sexual intimacy with a nonmarital partner.<sup>89</sup> In the past, most courts held that agreements between nonmarital partners were void as against public policy.<sup>90</sup> Today, almost all states enforce these agreements, and many will also allow equitable claims upon the dissolution of the relationship.<sup>91</sup> Children that result from these nonmarital relationships are entitled to equal treatment.<sup>92</sup> As the law has changed, so has society. A large and ever-growing segment of the U.S. population is living in nonmarital families. In 2008, just over half (fifty-two percent) of American adults were married.<sup>93</sup> This rate is down from seventy-two percent in 1960. Over forty percent of all children born in the United States are born to unmarried women.<sup>94</sup>

As a result of changes in law, “[m]arriage is not what it used to be.”<sup>95</sup> Marriage, once a largely if not almost universally shared norm,

<sup>86</sup> CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 13 (2010); see also Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1268 (2009) (noting that most states criminalized sex outside of marriage until the late twentieth century).

<sup>87</sup> *Obergefell*, 135 S. Ct. at 2601.

<sup>88</sup> The exact nature of this right is in dispute. See, e.g., Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1103 (2004) (“The Supreme Court’s decision in *Lawrence v. Texas* is easy to read, but difficult to pin down.” (footnote omitted)).

<sup>89</sup> See generally *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>90</sup> See, e.g., *Blumenthal v. Brewer*, 24 N.E.3d 168, 176 (Ill. App. Ct. 2014) (discussing an earlier case that “referred to the ‘traditional’ rule in effect in ‘all jurisdictions’ that enforcing property rights between former cohabitants amounts to enforcing a bargain in which all or part of the consideration has been illicit sexual intercourse” (quoting *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1208 (Ill. 1979))); Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309, 311 (2008) (“The principle that cohabitation in itself — a ‘meretricious relationship’ as the courts put it during this time period — created no legal rights or obligations flowed from several different public-policy concerns.”).

<sup>91</sup> See Garrison, *supra* note 90, at 315.

<sup>92</sup> See, e.g., *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175–76 (1972) (“Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where — as in this case — the classification is justified by no legitimate state interest, compelling or otherwise.”). But see Maldonado, *supra* note 68 (exploring the ways in which nonmarital children are still treated unfairly).

<sup>93</sup> PEW RESEARCH CTR., THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES 1 (2010), <http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf> [http://perma.cc/E24E-ZK2Y].

<sup>94</sup> *Id.* at 54.

<sup>95</sup> R.A. Lenhardt, *Marriage as Black Citizenship?*, 66 HASTINGS L.J. 1317, 1344 (2015).

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has been joined by other family forms. Along with marriage, these other, nonmarital family forms now serve as critical building blocks of society. In some communities, nonmarital families constitute the dominant family form.<sup>96</sup> Despite these changes, many of our family law rules continue to privilege marital families.

In assessing the constitutionality of rules that exclude or even penalize those who live outside of marriage, *Obergefell* teaches that our “evolving experiences” must be considered. When these “evolving experiences” — including both the legal changes, as well as the social changes they spur — are brought to the fore, it becomes clearer that rules that privilege marital relationships over nonmarital ones may present a “claim to liberty [that] must be addressed.”<sup>97</sup>

### CONCLUSION

Scholars and advocates alike are indebted to Professor NeJaime for bringing attention to this overlooked and underappreciated body of parentage law. NeJaime uses this lens of parenthood to offer new and critical insights into both the path to marriage equality, and the future ahead. And importantly, his story complicates the increasingly dominant narrative that success for the LGBT movement may mean regression for those who do not marry. Marriage equality, NeJaime argues, may result in greater protections not just for marital parents but also for nonmarital parents.

I agree with NeJaime. But I think that *Obergefell*'s progressive potential need not stop there. By embracing a constitutional theory that requires consideration of our evolving experience, *Obergefell* opens up the possibility of rethinking the marriage/nonmarriage divide that continues to shape the law not only of parentage, but also of adult nonmarital relationships.

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<sup>96</sup> In 2008, the marriage rate among African Americans was thirty-two percent. PEW RESEARCH CTR., *supra* note 93, at 9.

<sup>97</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).