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Marriage Markets and the Price of Masculinity

MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY. By June Carbone & Naomi Cahn. New York, N.Y.: Oxford University Press, 2014. 272 Pages. $27.50.

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Introduction

Obergefell v. Hodges,[1] the recent Supreme Court decision recognizing gay Americans' right to marry, demonstrates that the United States continues to promote marriage in both direct and subtle ways. *Obergefell* is one of the government's less subtle recent efforts to market marriage. The decision makes it clear that from the State's perspective, marriage remains a near ideal form of social union. As *Obergefell* explains, marriage in the United States is an institution of "transcendent importance"; it is "essential . . . to the human condition."[2] Marriage is special because it "allows two people to find a life that could not be found alone."[3] The Supreme Court's romantic musings in *Obergefell* about the centrality of marriage will seem particularly ironic to readers of the book *Marriage Markets: How Inequality is Remaking the American Family*,[4] for the Court's words stand in stark contrast to the account the book's authors provide of the marriage market in the United States. Specifically, June Carbone and Naomi Cahn reveal that we live in an era of plummeting marriage rates, a time when increasing numbers of children are born out of wedlock[5] and increasing numbers of men and women never enter into what

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1. 135 S. Ct. 2584 (2015).

2. *Id.* at 2594.

3. *Id.*

4. JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY (2014).

5. *See* Kaaryn Gustafson, *Breaking Vows: Marriage Promotion, the New Patriarchy, and the Retreat from Egalitarianism*, 5 STAN. J. C.R. & C.L. 269, 277 (2009) (finding that, as of 2000, families headed by single mothers grew to represent 31% of all American families, 26% of white families, and 61% of black families).

the Supreme Court describes as America's most "sacred" union.[6] If marriage is the central institution that the Supreme Court claims, and if the government still regards marriage promotion as a key activity,[7] the time has come for policy makers to take stock and determine why the American marriage market is failing.

Although presented as a law and economics inquiry, *Marriage Markets* is not a typical market analysis, as market studies tend to move rapidly from the descriptive to the prescriptive.[8] The goal of a market analysis is to determine whether and how government might fix a particular supply and demand problem.[9] Cahn and Carbone's descriptive account is extraordinarily compelling. *Marriage Markets* offers a comprehensive, detailed explanation for why increasing numbers of Americans fail to marry. The book's key contribution is that it shatters the myth of a single marriage market and reveals the operation of discrete, class-specific marriage markets.[10] Also, the authors reveal in striking terms how these class-specific markets feed on one another and work together to spur greater income inequality.[11]

Specifically, Carbone and Cahn show that marriage rates are high and divorce rates are low in wealthy communities, where relatively wealthy women choose to marry wealthier men and form stable unions.[12] For the working class and poor, the converse is true. Marriage rates are low, divorce rates are high, and in the poorest sectors marriage is so rare that it seems a largely irrelevant social institution. The authors fault a postindustrial economy that leaves working-class men under or unemployed and therefore makes them less attractive marriage partners to their working-class and poor female peers.[13] Poor and working-class women face powerful economic disincentives to marry, as coupling with economically vulnerable men does not seem a rational economic choice.[14]

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6. *Obergefell*, 135 S. Ct. at 2594. In 1982, 4% of white high school graduates and 48% of black high school graduates had children out of wedlock; by 2008, those figures had increased to 34% and 74%, respectively. CARBONE & CAHN, *supra* note 4, at 18.

7. *See* Gustafson, *supra* note 5, at 287–90 (discussing the range of state and federal programs designed to promote marriage); Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CALIF. L. REV. 1647, 1650–52 (2005) (same).

8. *See, e.g.*, Peter McDonald, *An Assessment of Policies that Support Having Children from the Perspectives of Equity, Efficiency and Efficacy*, *in* VIENNA YEARBOOK OF POPULATION RESEARCH 232–33 (2006) (discussing the spectrum of fertility rates in different societies and proposing policies to promote safe societal fertility rates).

9. *See id.* at 215 (stressing the need for governmental institutions to be structured in a way that allows people to fulfill their desire to have children).

10. CARBONE & CAHN, *supra* note 4, at 15–16, 62–63.

11. *Id.*

12. *Id.* at 62–63.

13. *Id.* at 4.

14. *Id.* at 3–4.

Cahn and Carbone also reveal the strong role that assortative mating plays in today's marriage market, a dynamic which makes men and women less likely to marry outside of their class group.[15] This dynamic locks poor and working-class women into a pool of men unlikely to become economically viable partner or husbands.[16] Class-segmented marriage markets spur inequality, the authors explain, because poor individuals remain single and get poorer, while wealthier individuals marry one another and are better situated to accumulate wealth.[17] Cahn and Carbone warn that there is no easy way to disrupt the inequality being produced by assortive mating trends.

The conditions Cahn and Carbone describe suggest that we are at a moment of market failure. Marriage produces public goods, but poor and working-class people no longer marry in sufficient numbers to produce the optimal level of these social goods from the State's perspective. Having diagnosed the causes of marriage-market failure, one would expect the authors to offer a solution designed to save the marriage market. However, Carbone and Cahn take a strikingly different turn with the prescriptive element of their project. They offer *no* suggestions for reforming *marriage* in ways that might revive the marriage market and make it a more alluring vehicle for coupling in poor communities. Instead, the authors seem content to abandon the marriage market for the working class and poor and instead produce the public goods that marriage would have produced from these couples through alternative legal structures.[18] The authors' decision not to reexamine and reform marriage is one of the most controversial aspects of the book, and their silence on this issue reveals their deep, unexplored ambivalence about marriage as an institution.

Gender studies scholars also will notice certain silences in *Marriage Markets*'s analysis, particularly scholars working in masculinity theory.[19] For these scholars, the book reads as a missed opportunity. Specifically, the authors' descriptive account, properly framed, reveals that the antiquated

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15. *Id.* at 4–5.

16. *Id.*

17. *Id.* at 62–63.

18. *Id.* at 145–46, 158–59.

19. Masculinity studies explore the ways in which dominant or hegemonic versions of masculinity shape men's lives by affecting intimate bargains, self-concept, and social behavior. *E.g.*, Lynne Segal, *Changing Men: Masculinities in Context*, 22 THEORY & SOC'Y 625, 628 (1993) (discussing masculinity as being always under threat and therefore requiring continuous gender performance); *see also* Camille Gear Rich, *Angela Harris and the Racial Politics of Masculinity: Trayvon Martin, George Zimmerman, and the Dilemmas of Desiring Whiteness*, 102 CALIF. L. REV. 1027, 1048 (2014) (arguing that hierarchical racialized concepts of masculinity spur conflict and violence between men of different races); Camille Gear Rich, *Innocence Interrupted: Reconstructing Fatherhood in the Shadow of Child Molestation Law*, 101 CALIF. L. REV. 609, 613–14 (2013) (explaining how masculinity constructs cause men who provide care to feel suspect and insecure).

male "breadwinner" construct plays a central, destructive role in the American marriage market as it renders under and unemployed working-class and poor men unmarriageable.[20] Breadwinner masculinity—or what I call "economic masculinity"—casts these men as failed men that cannot secure living-wage jobs.[21] Yet economists know that jobs for poor and working-class men are typically scarce in the postmanufacturing economy.[22] Additionally, properly framed, the data in *Marriage Markets* reveals the rise of the female marriage-market consumer. Women are now the primary drivers of large segments of the marriage market. For the first time, marriage markets are failing because *women* are not interested in buying into the particular long-term commitment marriage offers.[23]

When these shifts in gender relations are revealed, we learn that American marriage markets have evolved into masculinity markets. Female consumers of all wage classes are shopping for economic masculinity, but economic masculinity is a commodity that increasingly only wealthy women can secure. The gender frame also shows that the marriage-market crisis cannot be solved without considering the cost (or tax) that the traditional, economic model of masculinity currently imposes on men in the United States. The centrality of the male-breadwinner construct is now compromising men's ability to secure marriage partners. The gender frame additionally suggests that policy makers should target marriage-market changes to appeal to the newly emerged female marriage-market consumer. However, in making this appeal, policy makers should bear in mind that marriage and masculinity are symbiotic and conjoined. If we change marriage, we will likely see changes in masculinity. If masculinity changes in response to legal incentives or contemporary cultural conditions, marriage will change as well. One thing is clear: at present, marriage's association with economic masculinity is dysfunctional and must be resolved. If the relationship remains the same, poor women will continue to avoid long-term formal marriage commitments.

This Review reframes *Marriage Markets* using tools from economics and masculinity studies to surface the gender-market theory hidden within the class-based account provided in the book. Part I, subpart I(A) begins by documenting the emergence of the female marriage-market consumer and the consequences of this development. Subpart I(B) explores why the poor, female marriage-market consumer concludes that traditional marriage no longer serves her economic interests, namely because her desire for economic masculinity in a marriage causes her to reject most male suitors.

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20. CARBONE & CAHN, *supra* note 4, at 98–99.

21. *Id.*

22. *Id.* at 98 (mentioning the sizable gap in employment between working-class men and college-graduate men in the modern economy).

23. *Id.* at 98–102.

Subpart I(C) explores the complicated ways traditional masculinity has negotiated the economic downturn and continues to play a key role in working-class and poor women's coupling preferences. This subpart uses Rick Bank's concept of "swag," or traditional masculinity, to show that traditional masculinity has value even in the absence of earning power and that it may play a powerful sociocultural role in coupling markets by allowing economically marginal men to attract female partners.[24] Subpart I(C) also considers the dangerous path that men committed to economic masculinity can take when they are stripped of earning capacity by market conditions. Subpart I(D) explores the race and gender equality impact of the strong, female marriage consumer. Specifically, the assortative mating Carbone and Cahn complain of may merely be a side effect of marriage's evolution from an economically coercive institution for women to an economically and socially empowering one. Class-matched marriages (particularly for the wealthy) eliminate the severe forms of economic coercion that historically made marriage an exploitative arrangement for poor and working-class women. Class-matched marriages also can have racial-integration effects, as wealthy women of color are more likely to pair with men outside of their racial group when they determine that class or wealth are more privileged considerations rather than racial background.

Part II then considers whether marriage must change or masculinity must change in order to spur contemporary long-term coupling in working-class and poor communities. Subpart II(A) makes the case for why marriage should be saved, rather than pursuing some alternate vehicle for coupling. It argues that marriage's long, symbiotic relationship with traditional masculinity and femininity makes it a uniquely useful vehicle for responding to changes in the politics of heterosexual coupling. Subpart II(B) focuses on how we might change marriage to make it more attractive to a key pool of marriage-market consumers: poor women. I argue that poor women would be more likely to marry if we develop marriage models that minimize women's economic risk and maximize their access to economic resources in extended-kinship networks. Subpart II(C) explores how masculinity might change if marriage norms and rules remain in their traditional form. I show that female primary breadwinners are likely to domesticate masculinity in ways that track earlier versions of femininity: either as status signaling—sexually attractive but with little instrumental function—or as caretaking, desexualized masculinity associated with the domestic sphere. Part III concludes.

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24. RALPH RICHARD BANKS, IS MARRIAGE FOR WHITE PEOPLE? HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE 134–35 (2011) (discussing the strong appeal of a variant of traditional masculinity called "swag").

I. Understanding the American Marriage Market

A. The Rise of the Female Consumer

Cahn and Carbone have long been respected for their scholarship exploring the ways class, region, and politics shape American families.[25] *Marriage Markets* is a nuanced account of the ways coupling and family formation spur wealth inequality and therefore is a welcome addition to the family law corpus. The authors begin their analysis by noting that the American marriage market is experiencing market failure, at least for key segments of the market where marriage has all but disappeared.[26] Market failure occurs when parties refuse to engage in behavior that produces a social good or positive externality because the immediate private costs of the practice are higher than the private benefits produced.[27] As applied to marriage, this construct suggests that for the American working and nonworking poor, the immediate economic and social cost of being married is far higher than the benefits of the institution.[28] Working-class and poor couples, however, are agnostic as to the social goods produced by their marriages that are of benefit to the State.[29] As a consequence, the State must find ways to ensure that poor and working-class individuals find enough immediate and apparent private benefits from marriage to outweigh its perceived private costs. Carbone and Cahn leave this more extended description of marriage market failure out of their analysis, but this background is key to identifying the analytic problems in their approach.

As Carbone and Cahn explain, the original discussion of marriage markets, offered by Gary Becker, described something called the gender bargain—the division of familial roles into domestic sphere "labor" for

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25. *See generally, e.g.*, NAOMI CAHN & JUNE CARBONE, RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE (2010) (identifying distinct family orders in red and blue states, characterized by different marriage and childbearing behavior that tracks the states' dissimilar demographics, culture, and family law).

26. Carbone and Cahn do not use these terms, but argue that people are no longer marrying in sufficient numbers to provide the optimal amount of social good produced by this activity. CARBONE & CAHN, *supra* note 4, at 2.

27. Richard O. Zerbe Jr. & Howard McCurdy, *The End of Market Failure*, 23 REGULATION, no. 2, 2000, at 10, 11; *see also* Peter McDonald, *supra* note 8, at 215 (explaining that in the context of birth rates, "very low fertility is often seen as the cumulated outcome of individuals acting in their own interest"); Joseph E. Stiglitz, *Markets, Market Failures, and Development*, 79 AM. ECON. REV. (PAPERS & PROC.) 197, 202 (1989) (urging policy makers to identify the causes and consequences of market failure, the failure of private institutions to address the problems, and the role government can take to remedy these problems).

28. *See* Kathryn Edin & Joanna M. Reed, *Why Don't They Just Get Married? Barriers to Marriage Among the Disadvantaged*, FUTURE CHILD., Autumn 2005, at 117, 122 (explaining how the class-based concerns of the poor encourage skepticism to commitment).

29. *See id.* at 129 (detailing different theories about why childbearing increasingly happens outside of marriage, including positing that poor couples place a lower value on marriage than does the middle class).

women and public sphere "earning" for men.[30] This division of labor made coupling wise from a rational-actor perspective, as both activities were necessary to support families. However, as Carbone and Cahn explain, the gender bargain has broken down for many women in postindustrial America.[31] Plentiful female-gendered service economy jobs, coupled with women's greater labor-market participation, have made women newly economically self-sufficient.[32] By contrast, the scarcity of male-gendered living wage jobs in postindustrial America means poor and working-class men are under or unemployed and therefore, for independent women, represent a risk of economic dependency.[33] These men are not only incapable of finding a job sufficient to support a family, but they also may not be able to support themselves.[34] As a result, the newly empowered female marriage-market consumer often will reject poor and working-class men—even when she is pregnant and even when a man wants to marry her—because she is convinced she can support herself and a child but has no desire to support a man as well.[35]

The newly empowered female marriage-market consumer faces a second challenge—the unavailability of wealthy and middle-class men from the pool of eligible marriage partners, unless she is highly educated herself.[36] As Carbone and Cahn explain, marriage markets are now class sensitive.[37] Half a century ago, professional men often married their secretaries.[38] Today, these men are more likely to marry the female executive down the hall.[39] This trend is called "assortative mating": high-earning men are primarily interested in marrying high-earning women.[40] This dynamic makes rich men and women richer by marrying each other

30. CARBONE & CAHN, *supra* note 4, at 42.

31. *Id.* at 43–44.

32. *Id.* This self-sufficiency is in some ways a myth, as poor women draw on resources from extended family networks and often go without necessities in order to remain economically afloat when they raise children without a marital partner. *See* Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19, 28, 48 (1995) (discussing the difficulties of supporting a family as a single mother and the frequent need to rely on private sources of support such as extended families and friends).

33. CARBONE & CAHN, *supra* note 4, at 98–99.

34. *Id.*

35. *Id.* at 12.

36. *Id.* at 62–63.

37. *Id.* at 4–5.

38. *See* Donald M. Marvin, *Occupational Propinquity as a Factor in Marriage Selection*, 16 PUBLICATIONS. AM. STAT. ASS'N 131, 131 (1918) ("[M]en are now marrying the women whom they meet in their work.").

39. *See* Michael Kallenbach, *Bosses Are No Longer Marrying Their Secretaries*, HUFFINGTON POST (Apr. 19, 2014, 10:59 AM), http://www.huffingtonpost.co.uk/michael-kallenbach/bosses-are-no-longer-marr_b_4802769.html [http://perma.cc/C76G-LF7T] (quoting John Goldthorpe, who noted that in the 1960s "you would have a big sex difference—the nurse marrying the surgeon, the businessman marrying the secretary").

40. CARBONE & CAHN, *supra* note 4, at 62.

and leaves poor and unemployed women with increasingly scant marriage prospects, as they view the men in their own class as economically unstable.[41]

When the research in *Marriage Markets* is framed in this way, the rise of the female consumer seems clear to readers. However, Cahn and Carbone bury this story in service of an account that tries to devote equal time to the decision-making calculus of both male and female decision makers in the marriage-market equation.[42] This decision seems consistent with a liberal feminist impulse to always treat men's and women's concerns equally, as a way of modeling the equality desired in cross-gender relationships. While this is an admirable impulse, in this analysis it detracts from the precision of their work and muddles their findings. Carbone and Cahn would have provided a clearer analysis and clearer prescription for the marriage market's current problems if they conceded that, at least in the lowest economic tiers, women are the decision makers that control the terms of long-term coupling.

Moreover, rather than muting the story of the rise of the female marriage-market consumer, feminists should be celebrating this development. Women historically faced strong incentives to marry, but they no longer feel herded by these pressures.[43] Pregnancy and the stigma of single motherhood used to drive women into marriage; economic vulnerability and a lack of female-gendered, living-wage jobs kept them locked in unhappy marriages. However, changed social norms about nonmarital births, increased access to contraception, and economic opportunity made women less afraid to be single, even if they have children.[44] With these changes, women's marriage rates have slowed.[45] By contrast, economically marginal men stand to *benefit* from pairing with an employed poor or working-class woman.[46] These women provide a steady income and, for the most part, still provide all the private-sphere benefits of care and domestic labor.[47] Yet men find themselves moving from relationship to relationship, cast out and advised to move on whenever they have no income.[48]

Marriage Markets's failure to emphasize the rise of the female marriage-market consumer has huge consequences for the authors' analysis. First, they fail to recognize that the marriage market must adapt to appeal to

41. *Id.* at 97–101.

42. *Id.* at 42–43.

43. *Id.* at 43.

44. *Id.* at 17.

45. *Id.* at 17, 122 (noting statistics that show women of a lower socioeconomic status are increasingly less likely to commit to marriage).

46. *Id.* at 120–22.

47. *Id.* at 119–20.

48. *Id.* at 2–3.

this newly emerged, working-class female marriage-market consumer or the market will stagnate. Importantly, men historically have held primary buying power in the marriage market.[49] Locked out of the employment market or forced into low wage jobs, economically vulnerable women offered themselves in the gender bargain–exchange as lovers, mothers, and homemakers.[50] By contrast, the women who now hold buying power in the marriage market relative to working-class men typically do not see masculinity as providing any of the aforementioned private-sphere goods.[51] As a result, poor and working-class women are loath to invest in economically insecure male partners.[52] If the State is interested in marriage promotion, it must find ways to make it economically attractive for women to invest in economically marginal men or carry them through expected periods of unemployment in the postindustrial economy.[53]

Second, the authors fail to take stock of the costs traditional masculinity imposes on both female and male marriage-market consumers. As explained above, poor and working-class men are burdened by economic masculinity because economic masculinity is a key marriage-market qualification they cannot secure. However, at a broader level, men today are paying the price for a historical and legal context that encouraged the creation of male-gendered, manufacturing living-wage jobs and unstable, low-wage female-gendered service jobs for which men did not compete. Men currently are culturally predisposed to avoid these traditionally female-gendered service economy jobs, making men even more marginal in today's economy.[54] Also, women that now rely on these service economy jobs find these jobs do not truly produce a family wage; consequently, these women do not have sufficient additional income to support a male partner as well as their children.[55] By reframing the discussion in *Marriage Markets* as an inquiry into the needs of female marriage-market consumers, we gain interesting insights about how to reframe marriage and reframe masculinity, as well as new ways to move marriage markets in working-class and poor communities beyond stagnation.

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49. *Id.* at 43.

50. *Id.*

51. *Id.* at 120–21.

52. *See id.* at 59 (analyzing marriage prospects when the number of marriageable men declines in comparison with the number of available women).

53. Robin L. Jarrett, *Living Poor: Family Life Among Single Parent, African-American Women*, 41 SOC. PROBS. 30, 38 (1994). As one respondent explained, "I could do bad by myself." *Id.*

54. *See* CARBONE & CAHN, *supra* note 4, at 142 (discussing how women's labor-force participation has fueled the growth of the service section).

55. Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C. J.L. & SOC. JUST. 233, 235 (2014) (noting that a majority of fast-food workers are enrolled in one or more public assistance programs).

B. Market Failure and the Role of Poor Women's Market Preferences

When policy problems are described in market terms, analysts typically have identified a particular social practice or activity individuals engage in that produces a public good that accrues to society more generally.[56] Government's goal is to ensure that the "market," or social context, properly incentivizes individuals to engage in the practice to the near-optimal level so the State can reap the greatest amount of social good possible.[57] When the market—standing alone—fails to incentivize citizens to engage in the practice that produces social value for the State, the State devises incentives for parties to engage in the practice at a greater level.[58] In order to devise these incentives, the State must understand the private good that the practice produces for families and whether that good can be supplemented in a way that might encourage more of the desired practice.[59] Applied here, the market-failure framework requires us to ask: What do poor women like about marriage, and how can we shore up the private benefits they receive from marriage so more women enter this institution?

Curiously, Cahn and Carbone seem preoccupied with what the *State* gains from marriage and with identifying legal mechanisms they can create, other than marriage, to secure the public goods that are in the State's interest.[60] Specifically, Carbone and Cahn explain that the primary social good or function marriage provides to the State is that it facilitates poor parents' economic and emotional resource distribution to their children, as well as wealth transmission to the next generation.[61] This analytic misstep causes multiple problems in the book. First, the authors fail to engage with what poor women want for themselves from marriage: *immediate and long-term economic contribution for themselves and their children, as well as emotional support.* Second, because the authors fail to identify other existing social institutions that are providing the emotional and economic resources women receive in the absence of a marriage, they fail to determine whether these alternative sources should be built into marriage or become an effective replacement for marriage itself.

When we focus on the interest as stated by poor mothers, two issues become clear. First, poor women have lost interest in marriage because they still hew to the idea that a male breadwinner (or contributor) should be providing substantial resources to support his family. They will not couple

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56. *E.g.*, McDonald, *supra* note 8, at 214.

57. *See* Zerbe & McCurdy, *supra* note 27, at 10.

58. *Id.*

59. *See id.* (explaining that a market failure can be resolved by creating incentives that will allow the market failure to correct itself).

60. *See* CARBONE & CAHN, *supra* note 4, at 133–40 (discussing the marital presumption).

61. *See id.* at 189–92 (discussing the marital presumption's impact on parenting and child support).

with a man that does not possess economic masculinity, even though they recognize that marriage provides multiple other values. Second, the replacement for marriage—the place where poor women draw economic and emotional resources—is the kinship network.[62] Poor women have, for practical reasons, been forced to reject the nuclear-family model.[63] If Carbone and Cahn think there are special benefits from marriage, they should find ways to link this interest in kinship back together with marriage. With these two propositions in view, policy makers can determine whether marriage can be altered in ways that both disrupt the male-breadwinner construct and enable poor women to access their currently preferred kinship networks of economic support in a postindustrial economy. Each issue merits further discussion.

Historically, the State has constructed marriage and the nuclear family as a way for women to domesticate a male breadwinner to support a wife and children.[64] As Carbone and Cahn explain, in the postmanufacturing economy, women realize that this arrangement is extremely unlikely and have modified their gender scripts to accept a modified form of economic masculinity: men that can support themselves and occasionally contribute to household expenses.[65] However, this modified form of masculinity is not a meaningful change for most working-class and poor men, as it is still economic masculinity—a construct that defines men, first and foremost, by their earning capacity. Cahn and Carbone provide evidence that waiting for true economic masculinity causes poor women to enter a holding pattern with economically insecure male partners while the two wait for their economic fortunes to stabilize, rather than marrying earlier.[66] However, rather than disrupt this construct, Carbone and Cahn seem to double down on it in their analysis. First, their discussion of sex-role ratios, which judges the number of women in relation to marriageable men, is based on economic masculinity. Men who are unemployed, have been imprisoned, or suffer other obstacles that prevent them from being earners are largely written off and rendered invisible in their analysis. Second, Carbone and Cahn urge the government to create more living-wage jobs for men to assist men in assuming the modified breadwinner role.[67]

When we remove the masculine-breadwinner construct from poor women's economic calculations, we can see that their true interest is to

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62. Naomi Gerstel, *Rethinking Families and Community: The Color, Class, and Centrality of Extended Kin Ties*, 26 SOC. F. 1, 13–15 (2011) (explaining that the focus on the nuclear family renders invisible the very kinship-network resources necessary for poor people's survival).

63. *Id.*

64. *See* Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848, 854 (2004) (discussing the author's specialization thesis).

65. CARBONE & CAHN, *supra* note 4, at 110–11.

66. *Id.* at 111.

67. *Id.* at 142–43, 152–53.

secure additional economic contribution to support themselves and their children, regardless of its source.[68] Consequently, they may cycle through men employed on a short-term basis, retaining them only as long as they can perform economic masculinity.[69] However, the primary adaptive strategy single, poor women have turned to in the absence of a marital partner is tapping their kinship networks for economic and emotional support.[70] When framed in this manner, one realizes that the key to incentivizing marriage is to demonstrate that it enhances kinship networks.

The discussion of the benefits that poor women derive from marriage, as well as their adaptive responses to marriage-market failure, prioritizes their interest in private benefits—concerns about immediate economic value and support. This analysis does not prioritize the concerns Carbone and Cahn raise as public or social benefits that are in the State's interest, including intergenerational wealth transmission and the distribution of economic and emotional resources between immediate parents and their children. However, the State can devise marriage models that still produce these benefits while emphasizing kinship benefits. The key point is that if the goal is to incentivize women, we must respond to their current preferences, not simply legally enforce obligations through alternative vehicles.[71]

If marriage is reformed to respond to women's current adaptive behaviors and private-benefit considerations, policy makers will have to effect a serious change in the cultural understanding of marriage. They will have to encourage women to see marriage as kinship building rather than as a vehicle for hoarding resources within the nuclear family.[72] This shift is key, as old understandings of marriage no longer hold true for the poor. In a postmanufacturing, service-based economy, women typically cannot use

68. *See* Cherlin, *supra* note 64, at 855–56 (discussing how low-income individuals view marriage). By "regardless of their source," I am referring to legal, altruistic, or trading opportunities for emotional and economic contribution. *See* Jarrett, *supra* note 53, at 41–44 (discussing alternatives to conventional marriage that some poor mothers seek in order to achieve economic stability for their families).

69. *See* Cherlin, *supra* note 64, at 855 (explaining that poor women may express an end goal of marriage but will not marry until they find someone with economic stability).

70. *See* Jarrett, *supra* note 53, at 41–43 (discussing "single" mothers' reliance on grandmothers, sisters, and daughters for advice and childcare and describing poor women's ability to call on a network of male relatives to provide paternal support in the absence of a child's father).

71. Again, a traditional market analysis counsels that the first response should be to assess and shape existing incentive structures rather than create new institutions. *E.g.*, McDonald, *supra* note 8, at 216.

72. Young-Il Kim & Jeffrey Dew, *Marital Investments and Community Involvement: A Test of Coser's Greedy Marriage Thesis*, 58 SOC. PERSP. (ONLINE FIRST), Aug. 22, 2015, at 1 (discussing research suggesting that certain understandings of the nuclear family discourage resource sharing outside of the nuclear unit).

marriage to domesticate and secure a male breadwinner or life partner.[73] What they can do through marriage is seal themselves and their children to a larger biological and nonbiological social network that can provide economic, emotional, and social resources. This approach returns marriage to its preindustrial foundation.[74] Indeed, in the preindustrial era, marriage was the mechanism that tied nonbiologically linked kin networks to other networks, helping extended families function as a collective and thereby build a strong economic foundation. In the industrial era, marriage shifted to support the hoarding of resources within a nuclear family unit, but this model is no longer economically sustainable for many families.[75] What today's economy requires is a vehicle that encourages poor and working-class women to invest in economically marginal male partners who present an economic risk; they are more likely to do so if they see greater potential gain by accessing the husband's family network. The rational female consumer realizes that this family network can continue to support her even if her husband fails to secure employment. Also, her economic investments in the male partner are more likely to be recognized, rewarded, and repaid by the husband's kin and therefore incentivize her investment.

Additionally, a marriage model that focuses on kinship networks deemphasizes the understanding of marriage as a childrearing institution, recognizing that resource redistribution can benefit vulnerable adults as well. This approach to marriage as kinship resolves a fundamental and unnecessary split within the family law literature that has tended to either stress the importance of networked family arrangements or, alternatively, the need to strengthen the nuclear family. For marriage does not by definition render networked families and kinship invisible; this is simply marriage's modern form.[76] If the State reframed marriage as a device that extends kinship rather than a device that creates a nuclear family, it would

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73. *See* Gustafson, *supra* note 5, at 296 (explaining that women already receiving welfare are likely to marry men who are also low wage earners, and therefore marriage alone will not move women out of poverty).

74. EVELYN NAKANO GLENN, FORCED TO CARE: COERCION AND CAREGIVING IN AMERICA 12 (2010) (describing preindustrial gender relations as more fluid, with women participating in economic activity as well as providing family care).

75. *Id.* at 17–19 (arguing that men advocated for a family wage as industrialization increased and that they ultimately came to be seen as the only family laborer, thus rendering women's continuing economic contributions invisible). As Glenn explains, after the mid 1800s, "[i]ncreasingly a living wage was seen as enabling men and their families to enjoy an 'American Standard of Living.' This living standard included not only consumer goods but also an idealized family form with clearly differentiated gender roles." *Id.* at 22–23.

76. *But see* Gerstel, *supra* note 62, at 10–12 (arguing that marriage is a greedy institution and that research shows married persons are *less* likely to maintain kin relations). Kinship may in fact encourage unions to become more stable. *See, e.g.*, Susan G. Timmer & Joseph Veroff, *Family Ties and the Discontinuity of Divorce in Black and White Newlywed Couples*, 62 J. MARRIAGE & FAM. 349 (2000) (explaining that when a wife's parents were divorced or separated, the couple's closeness with the husband's family reduced their risk of divorce).

fundamentally change female marriage consumers' economic calculations. Rather than waiting for a male partner to gain true economic strength,[77] his female partner would make her decision about marriage by considering whether his family could and would be willing to provide assistance with her costs and the costs of her children.

C. *Law's Role in Constructing Masculinity*

The second problem occluded by the discussion in *Marriage Markets* is the central role breadwinning, or economic masculinity, plays in depressing marriage rates among the working class and poor. Cahn and Carbone rightly note that gender scripts have changed in light of economic realities that make it impossible for most working-class and poor men to assume the traditional male breadwinner role.[78] Yet their research suggests that women have simply modified the original breadwinner construct into a new iteration of economic masculinity; they will only consider a man who can financially contribute to the household and independently support himself.[79] Additionally, women understand economic masculinity to include certain values and understandings, including: maturity, fiscal responsibility, and goal setting.[80] Economic power and agency, however, remain key to mate selection.[81] Poor women refuse to marry men that are in their class group and will avoid men that threaten their already vulnerable position.[82]

Carbone and Cahn believe they should stop here in outlining the new gender dynamics of contemporary marriage markets. They argue that masculinity fights are too fraught for them to offer any prognosis or advice beyond these observations in how gender might change.[83] In this way,

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77. *See, e.g.*, Kevin M. Roy et al., *Together but Not "Together": Trajectories of Relationship Suspension for Low-Income Unmarried Parents*, 57 FAM. REL. 198, 207 (2008) (noting that, at present, "the period of waiting for men's economic potential to emerge is seen as the first steps to marriage").

78. CARBONE & CAHN, *supra* note 4, at 75–81.

79. *See, e.g.*, *id.* at 100–01 (emphasizing how men's financial contributions to the family unit, or lack thereof, factor into the calculus of working-class women's marriage decisions).

80. *See* Pamela C. Regan et al., *Partner Preferences: What Characteristics Do Men and Women Desire in Their Short-Term Sexual and Long-Term Romantic Partners?*, 12 J. PSYCHOL. & HUM. SEXUALITY, no. 3, 2000, at 1, 9, 11, 15 (finding that in long-term mate selection, women emphasize social status more than men do, but that mate criteria such as ambition and higher education were more important than wealth).

81. *Id.*

82. This desire for economically strong masculinity is particularly pronounced in poor, African-American communities. Richard A. Bulcroft & Kris A. Bulcroft, *Race Differences in Attitudinal and Motivational Factors in the Decision to Marry*, 55 J. MARRIAGE & FAM. 338, 345 (1993).

83. *See* CARBONE & CAHN, *supra* note 4, at 73 (rejecting the argument made by some scholars that changes in marriage rates must be addressed through cultural changes as opposed to economics or employment).

however, their analysis is somewhat naïve about their project, and this desire to stay out of the fray makes them offer proposals with conflicting visions of masculinity. Both of the key reforms they offer readers are tied to visions of masculinity—one refuting the need for men to define themselves through economic power, the other holding true to the traditional definition. They first offer a kinder, gentler version of masculinity that emphasizes the ethics of care.[84] Under this model, fathers' emotional support is seen as a true contribution, equally important as financial resources.[85] This change primarily will affect child-support enforcement regulations, as fathers' investments in child care would be valued.[86] The authors also want to encourage men to claim male children that are not biologically their own.[87] Asking men to abandon biology-based property relationships to their children and those of other men is a major departure from traditional masculine understandings.[88] Finally, they propose to rewrite gender scripts in ways that stress values of interdependence, care, and collaboration—all values that are associated with female-gendered norms.[89]

Their second set of proposals seems to double down on economic masculinity in something close to its original form. Urging government to engage in job creation to ensure that poor and working-class men have adequate jobs still assumes that these men must offer economic value to be considered attractive marriage partners.[90] It does little to disrupt the gender scripts currently in place, except to forecast economic arrangements that allow for more egalitarian economic relationships in marriage.[91] For the masculinities scholar, however, the authors' shallow and sometimes accidental engagements with changing male gender constructs merely tease

84. *See id.* at 110–11 (describing a new model of marriage that emphasizes spousal interdependence, joint responsibility, and a lack of gender-assigned roles). To the extent their model rests on a version of masculinity that can perform functions traditionally gendered as female, the authors are deeply challenging traditional masculinity norms.

85. *See* Cherlin, *supra* note 64, at 856 (noting that among lower income women a family-first commitment is as important as a reliable income, and noting further that most young adult women view marriage as centered more on love than on practical matters). Despite these views about the importance of love, many still are unwilling to enter into formal marriages in the absence of perceived financial security.

86. *See* CARBONE & CAHN, *supra* note 4, at 117 (noting the inverse relationship between a father's time spent with the child and his financial child-support obligations).

87. *See id.* at 191–93 (arguing for recognition of "functional" or "potential" parents in family law systems).

88. There is some evidence that working-class women value men that can achieve this new masculine ideal. Jarrett, *supra* note 53, at 43.

89. *See* CARBONE & CAHN, *supra* note 4, at 110 (noting that their understanding of equitable marriage "implicitly rests on the new social script that replaces specialized marital roles . . . with spousal interdependence").

90. *Id.* at 150–53.

91. *Id.* at 110–11.

at what their powerful analytic minds might have generated had they embraced the full challenges of engaging with masculinity in a more forthright manner.

Gender studies scholars have long argued that traditional masculinity constructs impose costs on men, requiring compliance with often unattainable ideals and in this way breeding anxiety and conflict.[92] These concerns have become more acute in a postindustrial economy that compromises men's ability to achieve breadwinner status. Indeed, some have characterized the current era as a period of "masculinity crisis" or alternatively as "the end of men."[93] Yet evidence suggests that rather than being in crisis, traditional masculinity will survive postindustrial economic changes, but in modified form.[94] Traditional masculinity continues to carry high value in the dating market, despite its low instrumental function.[95] In his book *Is Marriage for White People?*, Richard Banks provides an account that suggests one version of masculinity, characterized by its prominent display of traditional masculinity markers, is so powerful that it disrupts the current assortative mating trend in some racial communities.[96] Specifically, he notes that wealthy and middle-class black women are partnering with working-class black men, defying the assortative-mating trend, in part because there are too few middle-class black men to match their numbers, but also because they are attracted to working-class men's display of "swag"— a particular affected version of traditional masculinity that is common in working-class communities.[97]

Banks describes swag as "confidence, brashness, bravado, charisma."[98] He notes that swag is projected through "appearance," and "style and demeanor as well."[99] The man with swag "leads rather than follows. And he's not afraid to let others know it."[100] Banks's interview subjects characterized the man with swag as "part leader and part outlaw"; he "sets his own agenda and refuses to abide by anyone else's."[101] For his African-

92. *See, e.g.*, TODD W. REESER, MASCULINITIES IN THEORY: AN INTRODUCTION 27 (2010) (describing the idealized versions of masculinity currently circulated in American culture and the inability of most men to realize or approximate these versions of masculinity in their own lives).

93. *See generally id.* at 51–53 (describing the crisis of masculinity as a tension between men's subjective experiences and pervasive cultural ideologies); Hanna Rosin, *The End of Men*, ATLANTIC (July/Aug. 2010), http://www.theatlantic.com/magazine/archive/2010/07/the-end-of-men/308135/ [http://perma.cc/B3TV-KJZC].

94. *See* Reeser, *supra* note 92, at 78–85 (describing masculinity as a continuum, with certain masculine characteristics increasing and decreasing in importance according to time period and cultural context).

95. *See* BANKS, *supra* note 24, at 134–36.

96. *Id.*

97. *Id.* at 44, 47–48.

98. *Id.* at 134.

99. *Id.* at 135.

100. *Id.*

101. *Id.*

American women interview subjects, this gender performance retains great appeal.[102] Still, while Banks introduces the concept of swag in his discussion of African-Americans, his research also suggests it is common in all working-class ethnic communities, including Italian, Irish, and Latino communities.[103]

Swag is intriguing because it suggests that this uber performance of traditional masculinity has value even when it is coupled with economic dependency. Also, swag is interesting because it is a cultural artifact reflective of a period of male power in the 1970s and 1980s when labor market conditions still to some degree allowed men to valorize physical labor, factory work, and law enforcement functions.[104] Also, swag masculinity retains its allure in part because it is valorized in public media. Popular culture is filled with examples of higher earning or more successful female marriage partners falling for swag and returning to abandoned, economically weaker husbands after the husband engages in some heroic display of swag.[105] Banks is dubious about mixed-class marriages based on the allure of swag, and perhaps with good reason.[106] His account suggests, however, that certain stylized performances of traditional masculinity can function as the grease that eases economically marginal men back into the dating mainstream. Swag provides men with no resources something of value to high-earning and working-class women, making them take on an economically risky partner they would otherwise avoid.

Recent psychological data indicates that women, when exercising short-term preferences in dating markets, tend to prefer traditionally masculine men rather than the men with qualities that might make them more suitable for family life, including an interest in and talent for care and emotional support of children.[107] Again, this group of traditionally

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102. *Id.*

103. *Id.* at 142 (linking the concept of intraracial relationships to the need to sustain group identity, which "is often felt most acutely by those who have been historically marginalized or stigmatized").

104. *See* THE TOWN (Warner Bros. Pictures 2010) (depicting men in these various roles).

105. *See, e.g.*, DIE HARD (Twentieth Century Fox 1988) (showcasing a police officer using masculine prowess to win back his estranged corporate-executive wife); INDEPENDENCE DAY (Twentieth Century Fox 1996) (following a failed scientist trying to reclaim his masculinity in order to win back an estranged wife serving in the President's cabinet).

106. BANKS, *supra* note 24, at 87–95.

107. *See* Daniel J. Kruger, *Male Facial Masculinity Influences Attributions of Personality and Reproductive Strategy*, 13 PERS. RELATIONSHIPS 451, 453 (2006) ("[P]otential genetic investment [as displayed by masculine physical features] may be more highly valued for a short-term relationship, whereas potential paternal investment may be more highly valued for a long-term relationship."). This preference for evidence of masculinity when choosing short-term relationships is demonstrated by a preference for physical characteristics *as well as performative behaviors*. *See generally* Nadine Hugill et al., *The Role of Human Body Movements in Mate Selection*, 18 EVOLUTIONARY PSYCHOL. 66 (2010) (explaining that women judge physical displays to assess masculinity and relatedly genetic potential including dancing ability, voice, gait, body movements, and other actions).

masculine men (men with swag) are likely the ones disadvantaged in today's female-gendered service economy.[108] If women remain focused on short-term unions with men of this ilk, they may find themselves pairing off short-term with men that cannot function well in long-term unions.

The discussion of traditional masculinity's role in marriage markets, however, should not be regarded as an uncritical celebration. Rather, sociologists and psychologists have also documented that some men do not fare well when stripped of the economic component of traditional masculinity.[109] Men that are frustrated by their inability to serve as breadwinners are at great risk for criminal activity, substance abuse, and domestic abuse.[110] Notably, Carbone and Cahn think that men who engage in this kind of behavior are unmarriageable, and they understand poor women's desire to avoid them.[111] However, these problems again are dysfunctional male reactions to the breadwinner construct and are deeply tied to traditional masculinity. Men that fall prey to this behavior are not, and indeed cannot, be cordoned off from the general pool of eligible men because men float in and out of destructive states based on the stresses they experience and the options available to them. Indeed, the high risk economically marginal men face for engaging in destructive behavior suggests that, simply for public health reasons, the law has a role to play in helping men address the loss of economic masculinity. All of these observations suggest that policy makers should, rather than avoid consideration of masculinity, actively consider how law incentivizes certain approaches to masculinity and which masculinity forms benefit state interests the most.

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108. *See* Douglas Schrock & Michael Schwalbe, *Men, Masculinity, and Manhood Acts*, 35 ANN. REV. SOC. 277, 286 (2009) (recognizing that compensatory manhood acts by marginalized men often create a style that can "undermine employment relationships").

109. *Id.*; *see also* Kevin M. Roy & Omari Dyson, *Making Daddies into Fathers: Community-Based Fatherhood Programs and the Construction of Masculinities for Low-Income African American Men*, 45 AM. J. COMMUNITY PSYCHOL. 139, 147 (2010) (explaining that men in low-income communities with little sense of control or mastery over their own lives develop "street masculinities" as a form of resistance to the stigma of past economic failure).

110. *See* Schrock & Schwalbe, *supra* note 108, at 286 ("[I]t is impossible, however, for all men to meet the hegemonic [masculine] ideal, [and] adjustments must be made, not only individually, but also subculturally."). Schrock and Schwalbe further explain: "We thus find some working-class men creating bar and music cultures in which they signify masculine selves through heavy drinking and aggressive posturing; economically marginalized men of color relying on sports, fighting, and sexual conquests . . . ." *Id.* (citations omitted).

111. CARBONE & CAHN, *supra* note 4, at 59.

D. *Assortative Mating and the Rise of the Female Marriage-Market Consumer*

Finally, Carbone and Cahn are largely critical of the assortative mating trend because it serves as a driver of economic inequality.[112] However, when we shift our attention to the female marriage-market consumer, we see that some women's interests are improved by assortative trends. Specifically, as the authors note, because people are marrying within their class group, some of the most economically coercive marital unions between poor women and much wealthier men have been eliminated.[113] Newly educated and wealthy women can make greater demands for equal treatment within marriages in a way their less wealthy peers in the past could not have.[114] Much of the divorce and alimony law that feminists struggled for was based on addressing this imbalance.[115]

Additionally, the assortative mating trend may have strong positive effects for female marriage-market consumers that previously would have faced substantial racial bias.[116] Cahn and Carbone note how strong racial barriers historically have been in marriage markets.[117] As they explain, in the golden era of mixed-class marriages—when daughters of carpenters did marry engineers—race was the big divide.[118] However, Rick Banks urges that African-American women in particular should not assume these racial barriers are a given and would be better served by cross-racial dating.[119] Angela Onwuachi-Willig, in her discussion of interracial marriage, documents what sociologists have long observed: persons with higher income and more education are more likely to date outside of their racial category.[120] Consequently, assortative mating may have racial integration

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112. *Id.* at 33–35.

113. *Id.* at 33–35, 112.

114. *Id.* at 112.

115. *See id.* at 114–15 (explaining the history behind alimony and no-fault divorce and their function of giving women economic independence).

116. The authors offer some additional reading of race in their work, but they tend to focus on the working-class market. They identify numerous structural variables that upset gender ratios in poor African-American communities, including mass incarceration. Also, they note that assortative mating happens within racial groups as well. *Id.* at 70–72.

117. *Id.* at 58.

118. *Id.*

119. *See* BANKS, *supra* note 24, at 106–07 (explaining that the disparity in education level is generally much greater between African-American men and women than it is in other racial or ethnic groups).

120. *E.g.*, ANGELA ONWUACHI-WILLIG, ACCORDING TO OUR HEARTS 9 (2013) (describing studies that indicate that partners in interracial and multiracial couples are generally well educated, regardless of race); *see also* WENDY WANG, PEW RESEARCH CTR., THE RISE OF INTERMARRIAGE: RATES, CHARACTERISTICS VARY BY RACE AND GENDER 14 (2012), http://www.pewsocialtrends.org/files/2012/02/SDT-Intermarriage-II.pdf [http://perma.cc/EUL2-RATW] (noting slightly higher income levels and similar educational levels for married interracial couples in general, but higher income and educational levels for specific racial dyads).

benefits in intimacy markets that thus far have not been appreciated. Importantly, all of these issues come into focus when we are willing to analyze markets from the perspective of the newly empowered female marriage-market consumer. Having made her interests the priority in understanding market dynamics and market demand, the discussion now turns to whether and how we should respect the preferences of this consumer. For if poor and working-class women are no longer interested in marrying, putting aside the State's independent interest in marriage, the case needs to be made for why marriage is an institution worth saving.

II. Remaking Marriage Markets

Cahn and Carbone's disinterest in saving marriage for the poor forces the question: Why should we value marriage? If the goods we seek can be produced outside of marriage using alternate legal mechanisms, then perhaps marriage is not worth saving. Part II explores the question of why we should value marriage and then considers how we might change marriage or masculinity to better address the postindustrial economy and the needs of the female marriage-market consumer.

A. Whither Marriage: The Case for Marriage in the Postindustrial Economy

Cahn and Carbone's less-than-passionate defense of marriage may be a product of the recent series of critiques of marriage from prominent family law scholars.[121] These scholars' work reveals marriage's dark history—including its role in disciplining sexual relations and regulating the grounds on which minorities felt legitimated in the eyes of the State.[122] Some would argue that it is misguided to try to encourage marriage, as the historical origins of the institution and its strong gender-role norms make it an

121. *See, e.g.*, NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (2008) (arguing for alternatives to marriage with respect to determining whether key interpersonal relationships should be recognized); ROBIN WEST, MARRIAGE, SEXUALITY, AND GENDER 205–11 (2007) (advocating for universal civil union framework); Gustafson, *supra* note 5, at 296–97 (questioning whether marriage qua marriage actually is sufficient to lift people out of poverty); R.A. Lenhardt, *Marriage as Black Citizenship?*, 66 HASTINGS L.J. 1317, 1335–42 (arguing that "marriage-related laws and policies have married African America to second-class citizenship"); Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387, 433 (2012) (discussing how marriage causes certain family forms to be seen as legitimate and others to be seen as deviant).

122. Lenhardt, *supra* note 121, at 1343 (arguing that marriage "constitutes the primary normative frame for affective relationships" and therefore "shapes not just the lives of those who formally enter into it, but also the lives of those who do not"); *id.* at 1324 ("Nonmarriage and nonmarital parenting are on the rise in the United States. In some communities, these options for configuring intimate relationships and family have become increasingly accepted as legitimate, viable alternatives; but for African America, they remain a mark of pathology and familial dysfunction.").

institution stubbornly resistant to reform.[123] They argue we should move on to consider new models.[124] They point to the stalled revolution in marriage. Specifically, they note that men have not fully responded to feminists' urging that they take up caretaking obligations; as a consequence, the traditional gender split in marriage arrangements has ossified in ways that are challenging.[125] Others have argued that we should celebrate the new array of marriage alternatives, as these approaches let us imagine new ways of understanding family formation and coupling.[126] Additionally, some scholars argue that the centrality of marriage threatens to deprioritize and delegitimize other worthwhile relationships and enforce an overly restrictive understanding of the nuclear family as the cultural norm.[127] These dangers are all real. These concerns about marriage and the striving towards something new seem quite understandable. There is, however, another way of understanding marriage's fraught history.

Marriage should be understood as a battleground where hard-fought struggles for gender and racial equality have created space for new opportunities. Critics' work sometimes seems to ignore or minimize the seismic changes that have been effected in marriage since its origins; however, the reality is, when viewed over a long time horizon, marriage is malleable and responsive to change.[128] Marriage struggles have shifted from discussions about issues related to "coverture" to ones that challenge the cultural default of gendered-family caretaking norms. The changed nature of marriage debates, when compared from era to era, suggest that marriage does change, and that marriage as an institution bears the markers

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123. POLIKOFF, *supra* note 121, at 84 (arguing that marriage "is not a sensible approach toward achieving just outcomes for the wide range of family structures in which LGBT people, as well as many others, live").

124. *See* Elizabeth S. Scott, *A World Without Marriage*, 41 FAM. L.Q. 537, 551–54 (2007) (envisioning a world in which civil unions replace marriage); Edward Stein, *Looking Beyond Full Relationship Recognition for Couples Regardless of Sex: Abolition, Alternatives, and/or Functionalism*, 28 LAW & INEQ. 345, 349 (2010) (surveying three alternative approaches for full recognition of nonmarital relationships). *But see* Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1772–73 (2005) (arguing that marriage actually provides couples interested in partnership far more flexibility than newer forms of legally recognized partnerships).

125. *See* Scott, *supra* note 124, at 546 ("Marriage has been a source of oppression to women who continue to be disadvantaged by gendered marital roles that shape the behavior of contemporary spouses.").

126. *See, e.g.*, *id.* at 557 (noting that civil unions, which do not have the same "patriarchal influences" of traditional marriage, are mainly "an innovation of the past decade" and have "been offered primarily to gay and lesbian couples").

127. *Id.* at 558.

128. Case, *supra* note 124, at 1766 (tracing the implications of marriage's evolution as an institution, noting that marriage was initially a private transaction under early English law that evolved into a religious bond sanctified by the church, before shifting in the early modern era back towards private contract); Oriel Sullivan, *Changing Gender Practices Within The Household: A Theoretical Perspective*, 18 GENDER & SOC'Y 207, 208–09 (2004) (arguing that these gender relations are subject to slow, gradual change in response to political pressures, discursive conditions, and microlevel interactions).

of each historical epoch and antidiscrimination concern that has faced us.[129] In short, our views about marriage require some updating. Marriage is not the coercive institution associated with coverture, marital rape, and economic subordination that it was for the first century and a half of its operation in the history of coupling in the United States. Instead, marriage is the product of multiple feminist incursions and assaults; civil rights protests on behalf of feminists, blacks, gays of all races, Asians, and immigrants; and, even now, those who would extend its bounds beyond the two-person dyad that has long characterized this form of union. It would seem senseless to abandon marriage now or decry its operation without recognizing that these changes have occurred.

Some argue that, even after recognizing the changes in marriage, there is still a strong need to consider new forms.[130] They argue a blank slate works best for imagining new coupling possibilities.[131] There is some value to this approach, but marriage should remain an important part of the conversation about heterosexual coupling. It must remain a source of concern because marriage is the actualization of traditional gender roles and changes, and complaints about marriage allow us to create a genealogy of social expectations regarding heterosexual coupling.[132] Indeed, Andrew

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129. *See* Scott, *supra* note 124, at 546–47 (detailing the progression of our society's understanding of marriage). Cases such as *Loving v. Virginia*, 388 U.S. 1 (1967), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which expanded the right to marry to mixed-race and same-sex couples, respectively, are prime examples of the way marriage bears the mark of civil rights struggles. Additional struggles include granting women stronger custody rights over their children, as well as the connection between marriage and sexual expression. *See* Kerry Abrams, *Immigration Status and the Best Interests of the Child Standard*, 14 VA. J. SOC. POL'Y & L. 87, 97–98 (2006) (discussing the role a parent's immigration status plays in child custody cases); Ariela R. Dubler, *Sexing* Skinner*: History and the Politics of the Right to Marry*, 110 COLUM. L. REV. 1348, 1370 (2010) (arguing that in striking down state eugenics laws on the basis that marriage and procreation is a fundamental civil right, the Supreme Court intertwined the origin of marriage rights with sexual expression); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights To Earnings*, 1860–1930, 82 GEO. L.J. 2127, 2130–32 (1994) (describing how statutory reform modernized common law marriage to fit industrial-era gender roles); Ariela R. Dubler, Note, *Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 YALE L.J. 1885, 1888–95 (1998) (explaining how common law marriage became a majority position in the nineteenth century).

130. Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 619–21 (2013) (advocating for the recognition of an administrative alternative to marriage that permits greater flexibility but worrying about the reinforcement of gender inequality).

131. Stein, *supra* note 124, at 360–61 (suggesting that marriage could be but one item on a so-called "menu" of regulatory options from which couples can choose when seeking governmental recognition of their relationship).

132. This comment should not be read to erase the role that gay couples now play in shaping marriage. However, the primary concern that family law scholars have about gay marriage is that marriage's strict gender-role rules, produced in the context of heterosexual relationships, will come to shape gay marriage. These scholars suggest that the norms of gay couples will not come to shape marriage, but rather that they will be surrendered by couples in the rush toward marital legitimacy. For discussion of a pop-culture examination of this phenomenon, see Camille Gear Rich, *Making the Modern Family: Interracial Intimacy and the Social Production of Whiteness*,

Cherlin's concerns about the deinstitutionalization of marriage and the unraveling of gender scripts in marriage show this genealogy is currently developing.[133] Complaints in feminist literature about the "second shift" and women's continuing large share of housework, despite their labor market participation, represent masculinity's resistance to emotional and domestic labor.[134] There will be additional complaints and pressures on marriage. These pressures allow us to determine how far we have come and how far we need to travel to create equitable forms of heterosexual coupling. Concerns about the residual oppressive dynamics in marriage must be seriously analyzed lest they reappear in the new marriage vehicles we create to replace traditional marriage, as well as other coupling arrangements that might be folded into the traditional marriage form.[135]

From the State's perspective, also, there is something special about marriage that produces value. Studies suggest parties that cohabitate unfortunately do not produce the social goods produced in traditional marriages.[136] For example, they do not buy property or engage in other consumption patterns associated with married couples and instead act more like single individuals.[137] They do not produce the same stable environment for children because there is low trust, low investment, and consequently low commitment to each other.[138] Alternative long-term commitment models may replicate the same benefits, but they would be gesturing towards marriage. Until some meaningful alternative takes hold, it is worthwhile to continue to reform and rework marriage—to view marriage as a constantly evolving work in progress as we determine what is necessary to build stable social unions.

My argument for this forward-looking evolutionary understanding of marriage should not be read to suggest that marriage's historical role must

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127 HARV. L. REV. 1341, 1349 & n.9 (2014) (reviewing ANGELA ONWAUCHI-WILLIG, ACCORDING TO OUR HEARTS: *RHINELANDER V. RHINELANDER* AND THE LAW OF THE MULTIRACIAL FAMILY (2013)).

133. Cherlin, *supra* note 64, at 849; *see also* CARBONE & CAHN, *supra* note 4, at 33–34 (discussing Cherlin).

134. *See* CARBONE & CAHN, *supra* note 4, at 33–34, 99–100 (discussing Cherlin, the deinstitutionalization of marriage, and eroding marital scripts).

135. *See* Case, *supra* note 124, at 1772–79 (arguing marriage could be reformed in ways to provide for more options and greater flexibility). Case suggests that without an understanding of how marriage has operated, we might simply end up creating new models that are equally oppressive as marriage in its original form. *See id.*

136. *See* Cherlin, *supra* note 64, at 854–55 (describing how marriage creates "enforceable trust," which lowers the transaction costs of enforcing agreements between partners and contributes to various social goods produced by marriage).

137. *Id.*

138. *See* CARBONE & CAHN, *supra* note 4, at 125 ("These relationships are built on short-term, transactional exchanges about parenting . . . . The partners have made no long-term commitment to each other, and their continued mutual involvement with the child depends on successfully negotiating the relationship with the other adult.").

be forgotten. Rather, the steps taken to modify the institution and end its role in the economic erasure and disempowerment of women are important parts of its history.[139] Also, we must understand that the desire for marriage is not some trick or illusion produced by hegemony or false consciousness; marriage is a source of pleasure for instrumental reasons, because it provides for a unique promise of economic and emotional stability between two partners. It also produces status-based pleasures because it is a vehicle for social recognition of what one views as a primary, essential relationship. We must recognize that if we eliminated marriage tomorrow, some similar marriage-like institution would rise in its place. Consequently, instead of representing that we intend to wholly scrap marriage and begin anew, we should also look back at marriage's history to try to reclaim some of its earlier productive value.[140]

Additionally, much of the discussion provided here invites us to return back to a kinship understanding of marriage and decentralize the account of the nuclear family in family relations. The focus on kinship networks attempts to tap into the positive aspect of marriage's early history in a way that is attendant to contemporary political and economic realities in the United States. The sociological literature reveals that in poor and working-class communities, families sustain themselves through hard times by exchanging financial resources through extended kinship networks. In the absence of effective state financial assistance, the least policy makers can do is facilitate—rather than hinder—this exchange of benefits. Some will argue that these voluntary kinship relationships develop between families that are not "married" to one another when an unmarried couple has a child. While this may be true, disputes about connection, paternity, and other matters often hinder these relationships from forming.[141]

Finally, scholarly debate about marriage stands in marked contrast to the poor and working class's actual views about marriage. Marriage still has great appeal for the marriage-market consumer.[142] Women are not entering marriage because they *idealize* marriage, but because they want

139. *See supra* notes 130–32 and accompanying text.

140. *See, e.g.*, Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 223 (2015) (stating that the goal of state involvement in relationships should be to strengthen the relationship of coparents and that while this valuable purpose is sometimes served by marriage, it could also be accomplished through other means).

141. *See* CARBONE & CAHN, *supra* note 4, at 128–31 (discussing how unmarried fathers' relationships with their children are dependent on the relationships with their mothers); Laura M. Argys & H. Elizabeth Peters, *Interactions Between Unmarried Fathers and Their Children: The Role of Paternity Establishment and Child-Support Policies*, 91 AM. ECON. REV. (PAPERS & PROC.) 125, 126 (2001) (comparing fathers' involvement in their children's lives with whether paternity has been established).

142. *See* Cherlin, *supra* note 64, at 855–56 (describing marriage among low-income individuals as a "sought-after but elusive goal").

their partners to be fully economically prepared for the union.[143] Most still want to get married at some point in their lives, but marriage has become an aspiration—a dream deferred. Although these women have a profound desire for long-term unions, norms regarding out-of-wedlock births have substantially evolved, and therefore women will not tie themselves to marriage blindly in a desperate desire to attain social legitimacy.[144] Rather, female marriage-market consumers are more concerned for their personal economic and emotional welfare—as well as the welfare of their children—and will not commit to men that may not be able to hold up their end of the marital bargain.[145] Rather than framing this hesitancy about marriage as a problem, it should be understood as a positive feature of American coupling. The problem is that despite marriage's symbolic appeal, the institution is not an attractive economic option for financially marginal women in the *short term*. If we can address these economic concerns, we may find that marriage markets become quite attractive markets after all. The next section explores some of these options and prioritizes the economic, kinship, and gender-construction issues that have made the current marriage market falter.

1. Affective Marriage.—The marriage market may improve if we introduce forms of *initial* marriage, models that minimize women's economic risk but facilitate the building of emotional ties that will make women willing to take on the economic burden posed by a potential marital partner. This form of marriage, which I have termed "affective marriage," offers one option. Affective marriages are marriages based on romantic, sexual, or coparenting arrangements. Heterosexual persons and gay persons can use this vehicle to express their desire to be emotionally tied to a partner, even though both partners know they cannot support one another financially. Affective marriages need not be state recognized. They can take the form of religious or cultural ceremonies.[146] States, however, may want to allow these couples to legally register affective marriage to avoid multiple affective marriages, as well as to formalize when these voluntary collaborative relationships are at an end. Administrative recognition is particularly important if state governments intend to grant economic support or social services to couples that are in affective marriages. The

143. CARBONE & CAHN, *supra* note 4, at 122–23; Jarrett, *supra* note 53, at 34–36.

144. Kathryn Edin et al., *A Peek Inside the Black Box: What Marriage Means for Poor Unmarried Parents*, 66 J. MARRIAGE & FAM. 1007, 1012 (2004) ("For the typical low-income unmarried parent we studied, a prerequisite for marriage is a set of financial assets that demonstrate that the couple has 'arrived' economically.").

145. *Id.*

146. *See, e.g.*, Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161, 1163 (2006) (arguing for the abolishment of civil marriage and a shift to a religious and cultural institution with no legal status).

affective marriage model has multiple benefits. It harnesses the contemporary cultural understanding that marriage is an opportunity for self-realization, personal expression, status, and symbolic commitment.[147] Additionally, it disrupts the most troubling masculinity construct that informs contemporary marriage by denying that breadwinner status or economic masculinity is required in a marital partner.

Last, affective marriage returns marriage to its cultural or religious roots to emphasize that marriage is about kinship—building relationships of community between two nonbiological families to allow for the exchange of care and resources in times of need. Couples that enter into affective marriage may see it as a transition point to a more traditional marriage; however, it can provide for long-term commitment as well.

Affective marriage also responds to what some feminists have called the "disciplinary power" of traditional marriage on poor women.[148] Cohabitating, unmarried women sometimes feel illegitimate, yet affective marriage represents their hopes and aspirations for a long-term commitment. By providing women with a less economically risky entry point into marriage, women get to enjoy the symbolic benefits and emotional resources provided by marriage. Also, the economic norms of affective marriage are designed to ensure that women feel secure continuing to make investments in their own education and social capital, rather than surrendering all resources to the control of a husband or to being pooled for the common good. For these reasons, affective marriage is likely to be quite popular in some quarters, as studies show a significant number of poor couples are caught in an informal, extended limbo stage in which they long for more permanent commitment but are prohibited from entering into a more formal arrangement because of the economic barriers to marriage.[149] The paradigm shift offered by affective marriage could have a dramatic effect on marriage perceptions in poor communities. Instead of treating marriage as an ideal status available only to economically stable persons, these communities are encouraged to see marriage forms as vehicles that can assist them in achieving emotional and social stability, while maintaining a commitment to individual economic stability as a first step and a reasonable and worthwhile goal. Yet by offering a path to kinship networks, it encourages them to have less fear about economic interconnectedness.

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147. *See* Cherlin, *supra* note 64, at 853 (observing that marital decisions have become based on an individual's personal choice and self-development rather than a desire to fulfill more traditional spousal and parental roles).

148. *See, e.g.*, Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 56–60 (2012) (arguing that marriage has also been seen as a disciplinary measure to ensure fidelity among participants).

149. *See* Cherlin, *supra* note 64, at 855–56 (describing the attitude of low-income individuals toward marriage as an "elusive goal" obstructed by financial and commitment barriers).

Importantly, affective marriage is by design intended to subtract legally enforceable economic obligation from the marriage equation. States that allow for these arrangements to be recorded as an administrative matter should be warned not to use them to enforce legal support obligations between the parties involved. Child support law has already had deleterious effects on family formation in poor communities for men without resources, and affective marriage should not create similar pressures.[150] If the government wants to build positive supports into affective marriage, it can provide tax deductions or credits to facilitate this result rather than assigning penalties. For example, men and women could receive something akin to an Earned Income Tax Credit that increases in value over a series of years if they remain in an affective marriage that exchanges resources. Alternatively, state and federal authorities could credit members of a legally recognized kinship network with tax credits for money they donate to other family members and give exemptions to relatives for income from other family members when it is distributed in this fashion. These kinship financial transfers should not be considered in the determination of the public-assistance benefits that the State awards to poor families, or kinship resources will become a liability rather than a net positive. Numerous policy options will emerge if lawmakers adopt the understanding that affective marriage is designed to create a context for growing trust between husband and wife that may lead to economic interdependence and a way for extended family members to exchange resources without compulsion.

2. The Defeasible or Expiring Marriage.—Economically gun-shy, working-class, and poor women also might be more inclined to marry if they believed that a marriage would automatically expire or presumptively dissolve after a given period. Therefore, the State could offer what I have termed "defeasible," or presumptively expiring, marriages with a set five-year term. During that five-year term, however, parties are responsible to one another for basic economic support but are not obligated to assume responsibility for consumer debt or other long-term financial obligations. Five years is chosen as a default because children born at the start of such marriages would be beyond their tender years and better able to cope emotionally with potential estrangement from their parents. This five-year term, however, could be fashioned in a flexible manner. For example, parties could restart the five-year term with the birth of each child. They could also renew this five-year term as many times as they like, or they could graduate into a marriage with a presumed lifetime term.

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150. *See* Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991, 1016–22 (2006) (proposing a child support system that does not just focus on financial contributions that "deadbroke" fathers are unable to make, but also nonfinancial contributions that reward these fathers for participating in their children's lives, thereby benefitting each member of the family).

During the five-year term of the defeasible marriage, parties could assume mutual credit or debt obligations with mutual consent, and all other debts would be individually assumed. The parties' only obligations to each other are basic support and living expenses, with the hope that a context develops in which each party learns whether they could become financially stable in a shared living arrangement. They have an opportunity to consider whether they both share the same economic values or whether one partner is willing to acculturate the values of the more economically stable partner. Defeasible marriage, similar to affective marriage, is designed to address economic uncertainties in a postindustrial economy, but it does so differently. This model instead provides for a limited test bubble in which the parties can try out economic obligations of support before committing long-term. Importantly it allows members in the collective to keep their economic resources separate and to avoid imposing debt on the other, even as it requires them to temporarily support one another. This model addresses men's concern or distrust of relationships because they fear being discarded in times of economic peril. Last, the defeasible marriage prioritizes the establishment of long-term kinship obligations, designed to continue past the five-year term. This issue merits further discussion.

Often marriage to an economically marginal man will compromise a woman's economic interest in the short term if she views financial matters through the frame of the nuclear family; however, the access to the spouse's larger kin network—relationships that survive the expiration of the marriage—may make this short-term setback seem worthwhile. Consequently, defeasible marriages should also include mechanisms to incentivize kin to establish and maintain emotional and economic ties with the marital partner.[151] Finally, the emphasis on a larger kin network, which is recognized as a legally constituted relationship, takes the emphasis off the nuclear family and the breadwinner construct to place emphasis on a more extended, broader understanding of family that inures to both men and women.

While the defeasible, limited-term marriage seems to contradict the traditional notion of becoming one household, this economic separation may actually be the hidden reality of most "successful marriages" in wealthier groups. Some sociologists have noted that, even in successful marriages, the symbolic function of marriage takes precedence over the concrete sharing of economic resources between the two members of the marriage at a given point in time.[152] A limited-duration marriage gives the marrying partners breathing room to try to negotiate fair terms within the marriage but also allows for an expected escape mechanism if the

151. *E.g.*, Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 256–60.

152. Cherlin, *supra* note 64, at 855, 858.

parties determine they are emotionally or economically ill-suited for one another. The set time period of five years encourages them to make some limited economic investments in their partners and to work on strengthening the partner's economic standing during that period. However, the partner also has strong incentives to productively use these investments because he recognizes the relationship can automatically end.

The automatic expiration or defeasibility option is designed to facilitate the exit of partners trapped with abusive partners.[153] The party that desires to exit can simply disappear or become noncommunicative and unavailable during this period, and the relationship will end. The end period also signals the State for the partners' potential need for support or protection from an abusive mate during this period, and procedural and social-service protections could be built into the framework to protect women from being coerced into agreeing to a second term. Also, women and men could also file an administrative motion to accelerate termination of a defeasible marriage upon certain conditions including: domestic violence, nonresidence of a certain duration, and in some cases imprisonment.[154]

This suggestion will seem particularly unpalatable to those that view marriage as primarily an emotional bond, as traditional femininity counsels that women fear "abandonment" by a man and being displaced by another woman. However, poor and working-class women increasingly face harsh economic realities that poison emotional connections with a partner. Economic realities force them to terminate relationships or compel them to tolerate male partners that periodically exit the relationship in favor of another, more economically stable partner that does not pressure him for economic contribution. Defeasible marriages therefore render visible

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153. Gustafson, *supra* note 5, at 294 (arguing that promoting marriage without addressing domestic violence is deeply problematic).

154. Mere imprisonment should not be a basis for terminating a marriage given the seismic impact that mass incarceration has had on poor and black communities. It has been estimated that 1 in 3 African-American men will spend some time in prison at some point during his lifetime. Christopher J. Lyons & Becky Pettit, *Compounded Disadvantage: Race, Incarceration, and Wage Growth*, 58 SOC. PROBS. 257, 257 (2011). Recent initiatives stress the need to bring men touched by the criminal justice system back into the social mainstream, rather than cordoning them off as a special class to be avoided. *See, e.g.*, Ian B. Petersen, Note, *Toward True Fair-Chance Hiring: Balancing Stakeholder Interests and Reality in Regulating Criminal Background Checks*, 94 TEXAS L. REV. 175, 180 (2015) (urging for reform of the use of criminal background checks for ex-offenders seeking employment, in part because employment reduces recidivism); Press Release, The White House, Fact Sheet: President Obama Announces New Actions to Promote Rehabilitation and Reintegration for the Formerly-Incarcerated (Nov. 2, 2015), https://www.whitehouse.gov/the-press-office/2015/11/02/fact-sheet-president-obama-announces-new-actions-promote-rehabilitation [https://perma.cc/8EGK-9ZS7] (announcing several programs intended to help reintegrate ex-offenders into society, including increasing access to education and reducing obstacles to employment). Ex-offender reintegration and inclusion should be a social goal. However, in my view imprisonment for committing a violent crime should always provide the other marital partner with a basis for automatically dissolving a defeasible marriage.

dynamics that already exist, while simultaneously attempting to bring temporary stability. The five-year term also disincentives destructive short-term relationship churning spurred by economic pressures.

3. Companion Marriage: Same-Sex Marriage Redux.—Some women may determine that marriage should be based on shared economic vision, economic values, and earning power, rather than romance or sexual attraction. Women of this view will find companion marriage attractive; namely, coupling with a female or male friend in an economic and intimate union.[155] For these women, companion marriage provides the most stable ground for resource acquisition and accumulation, as well as a steady supply of emotional and caregiving resources.[156] Companion marriage simply outsources sex, romance, and physical attraction to other temporary or ancillary relationships, with the understanding that marriage is based on deep friendship and economic union.[157]

The concept of companion marriage initially may seem strange; however, contemporary marriage—which treats romance, physical attraction, and sexual chemistry as the primary basis for a long-term union—seems particularly strange given that marriage originally was understood as a primarily economic arrangement. Parents in certain classes historically selected men for their daughters based on the prospective male partner's ability to earn a family wage and provide useful social connections. When viewed in this manner, poor women's current reluctance to marry their romantic and sexual partners is not dysfunctional; rather, it is an expression of rational-actor skepticism. They rightly reject the notion that romantic and sexual attraction would be the main criteria for beginning a long-term economic partnership with another person. Often, a cohabitating poor woman in a dating relationship with her child's father understands that the masculinity performance she desires romantically and sexually is not dispositionally suited to the employment prospects available in postindustrial America.[158] These same women typically live in a

155. *See* Cherlin, *supra* note 64, at 851–52 (discussing the original understanding of companion marriage and describing the shift to individualist marriage in the United States).

156. *See id.* at 856 ("[T]he demands low-income women place on men include not just a reliable income, as important as that is, but also a commitment to put family first, provide companionship, be faithful, and avoid abusive behavior.").

157. Companion marriage should of course strive to be an egalitarian form of union. However, companion marriage between women has a mixed history in other countries, sometimes offering a refuge from the male violence women faced in traditional marriage and, at other times, forcing one woman to be dominated by another economically powerful woman. *See, e.g.*, *Woman to Woman Marriage in Nigeria (Customary Marriage)*, ONLINE NIGERIA, http://www.onlinenigeria.com/marriages-in-nigeria/Other-Types-Of-Customary-Marriage/woman-to-woman-marriage.asp#ixzz3mPuj2z3a [http://perma.cc/TPE4-RGXG].

158. Schrock & Schwalbe, *supra* note 108, at 289 (noting that compensatory masculine behavior compromises employment prospects).

community of friends (or potential companion marriage partners) that share their economic values but do not have romantic or sexual appeal.

My concept of companion marriage is inspired by the work of family law scholars that expressed concern about the same-sex marriage movement, arguing that the drive to fold gay relationships into traditional marriage structures squandered the radical opportunity that queer couples and families offered for us to rethink the current heteronormative and gendered family norms in nuclear families.[159] *Obergefell*, they worry, will escalate the rate at which gay marriages replicate the marital norms of traditional heterosexual married couples or, as Melissa Murray argues, make all nonmarital relationships appear less significant or valued.[160] The companion marriage concept is also inspired by the work of progressive family law scholars, such as Robin Lenhardt, as they have asked us to consider how poor families and families of color hold radical potential for rethinking family law norms.[161] Poor women, both gay and straight, could reconstruct the cultural meaning of marriage if they chose marital partners based on friendship and economic trust. Companion marriage allows these women to render legally visible certain informal non-kin network relationships that consistently provide economic support. Companion marriage also responds to the so-called sex-ratio problem in many poor communities, where there is a shortage of "marriageable" men relative to women.[162]

Companion marriage solves many of these problems by stressing that economic strength and stability are key virtues of coupling, but that economic coupling is different than romantic marriage. The institution allows poor women and men to leverage and redistribute economic assets within newly designed, functional family units. Also, companion marriages may, over time, serve some of the symbolic or identity needs Martha Nussbaum notes that traditional marriage provides.[163] Companion marriage

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159. *E.g.*, Gustafson, *supra* note 5, at 300; Murray, *supra* note 121, at 436; *see also* MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION & CONSTITUTIONAL LAW 162–63 (2010) (questioning whether government, in light of the same-sex marriage movement, should perpetuate marriage as it currently exists or instead disaggregate the benefits associated with it).

160. Murray, *supra* note 121, at 436.

161. Lenhardt, *supra* note 123, at 1354–57 (arguing for an analysis of and attempt to leverage the special capacities Black families have developed in the absence of marriage); *see also* Jarrett, *supra* note 53, at 45 (arguing that instead of labeling poor African-American families as deviant for not complying with the nuclear family model, we should try to identify the precise family dynamics that allow these families to survive).

162. June Carbone & Naomi Cahn, *The End of Men or the Rebirth of Class?*, 93 B.U. L. REV. 871, 873 (2013).

163. MARTHA C. NUSSBAUM, SEX & SOCIAL JUSTICE 201 (1999) ("Emotionally and morally, being able to enter a legally recognized form of marriage means the opportunity to declare publicly an intent to live in commitment and partnership.").

still allows a person to publicly declare her commitment to construct a life in concert with another person—a key event in self-realization.

Certainly, companion marriage may create some problems. Scholars such as Laura Rosenbury discuss the arguments against legally recognizing friendships and using them as a basis for government recognition and support. As she explains, one admittedly gives up a certain amount of flexibility by allowing state intervention in friendship; yet, as government engages with these newly formed companion families, it will be forced to rethink certain family norms.[164] Critics may conversely argue that the construction of companion marriage offered here is too traditional, as it essentially mimics the nuclear family by providing two earnings and two caregivers.[165] This, however, oversimplifies the structure of the family, as it will naturalize the idea that procreation leads to greater connection with other networked families, rather than simply hoarding resources within a traditionally three- or four-person family unit.[166] Indeed, states that invest in companion marriage should recognize that this marriage model is intended to facilitate the development of larger kin networks for emotional and economic support. We may find that once marriage is relieved of its obligation to provide for primary sexual and romantic fulfillment, we have more stable, long-term, wealth-producing, and care-providing marriages than we enjoyed when traditional marriage was common.

B. Changing Masculinity to Preserve Marriage

The marriage proposals described in subpart II(A) change marriage by attempting to build intimate relationships between couples that are not based on breadwinner or economic masculinity. By minimizing or mitigating the effects of the economic masculinity construct, marriage can evolve in ways that allow couples to prioritize other values in marital relationships such as friendship, intimacy, and shared economic goals and values. Some may believe, however, that it is more realistic to assume that marriage will remain the same and that law should use other mechanisms to guide traditional economic masculinity into forms better suited for the postindustrial economy. This subpart considers various paths masculinity

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164. Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 216–17 (2007) (critiquing family law's refusal to treat friendship as a significant basis for recognizing family structure and caregiving relationships); *see also* Sasha Roseneil, *Why We Should Care About Friends: An Argument for Queering the Care Imaginary in Social Policy*, 3 SOC. POL'Y & SOC'Y 409, 411 (2004) (making similar arguments).

165. Aloni, *supra* note 130, at 612.

166. Gerstel, *supra* note 62, at 5. The primary challenge companion marriage faces is how to manage the support of children produced through extramarital sexual relations. However, family law has already managed ways to ensure that nonmarital fathers and mothers share in the cost of raising and caring for their children. Moreover, if one marriage partner produces an inordinately large number of children without the consent or acquiescence of a partner, this issue could stand as grounds for divorce, and the partner might be able to contest any obligation to provide support.

might take if we continue to operate under a traditional, breadwinner marriage model, but we assume that women take the place of men as primary breadwinners in marital relationships. I suggest we will still find that marriage domesticates masculinity by bringing men into stable family relationships that produce greater caretaking resources and social wealth. However, there is also cause for great concern as traditional marriage could merely reproduce the coercive power of the single-breadwinner framework. Also, it may reinstantiate the gendered separate-spheres approach that distinguishes public earning and private care. In short, traditional marriage may domesticate men in disturbing and familiar ways, pushing them down the same course that effectively marginalized and disempowered women.

To some readers, the mere idea that *law* should be used to incentivize and structure certain masculinities will be off-putting, as they will claim that gender identity is not an appropriate space for government intervention. This position proves untenable when one considers that we have lived in a culture shaped by state-sponsored gender constructs for generations. Evelyn Nanko Glenn and other legal scholars have documented how property laws, voting laws, census laws, criminal law, and huge silences in family law rendered women legally invisible and economically dependent on their husbands.[167] These conditions fostered the male breadwinner construct that now threatens marriage markets.[168] We cannot now claim innocence in these matters and allow the state-created version of economic masculinity to control. Indeed, even though they do not intend to engage in these debates, both of Carbone and Cahn's proposals give the State a role in subsidizing a modified version of masculinity—both caregiving and economic masculinity constructs.[169]

If marriage remains premised on one person with economic power participating in the world of work and the weaker economic partner

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167. *E.g.*, GLENN, *supra* note 74 *passim* (collecting scholars' work and describing various legal structures that codified women's economic dependence, private-sphere caregiving obligations, and general invisibility before the law); *see also* Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law*, *in* FEMINIST LEGAL THEORY: FOUNDATIONS 9, 13 (D. Kelly Weisberg ed., 1993) ("The law has operated directly and explicitly to prevent women from attaining self-support and influence in the public sphere, thereby reinforcing their dependence on men. At the same time, its continued absence from the private sphere to which women are relegated not only leaves individual women without formal remedies but also devalues and discredits them as a group.").

168. *See* GLENN, *supra* note 74, at 21–22, 91 (illustrating how the census reified the dual spheres of the breadwinner and the housewife by "severely undercounting women's labor and economic contributions" and contending that marriage and family law codified wives' duty to provide domestic services).

169. Sectors of the religious community have already recognized these pressures and taken steps to promote what is described as a "soft" patriarchy, in which men do more emotional-care work of children, previously coded as female work, to strengthen the family. *See* Gustafson, *supra* note 5, at 284–85 (explaining that "soft" patriarchy involves men engaging in "emotional work" with and for their families and that this may encourage men to become more engaged with their children).

attempting to negotiate new space in the gender bargain, masculinity has two established courses and one uncharted domain. In some couples, we will see the emergence of "caretaker masculinity"; men with less economic power will attempt to satisfy the gender bargain by providing care to women and their children.[170] Feminists have discussed the emergence of caretaker masculinity with some degree of optimism, yet there is also cause for concern. The second track that masculinity may take is what I call "status masculinity," a form of masculinity with little instrumental function but greater aesthetic appeal and desirability. Status masculinity's primary value to women comes from signaling their ability to secure a hypermasculine partner and in the form of aesthetic and sexual desirability. The third version of masculinity is a partner that is treated as an economic equal, even though he may not have significant earning power. This version of masculinity represents the uncharted course for masculinity and, hopefully, can emerge through some of the alternative marriage forms offered in subpart II(A). It represents the most promise given the pitfalls of the two other courses for masculinity.

1. Caretaker Masculinity.—One of the biggest hurdles to men taking on caretaker masculinity is the diminished status they enjoy in many people's eyes for taking on private-sphere obligations. To be sure, there is a double standard here. Economically powerful men are often celebrated for leaving the world of work to provide care.[171] By contrast, economically vulnerable men are often regarded as freeloaders unwilling and unable to perform their primary intended role as breadwinners.[172] Poor and working-class women still strongly embrace economic masculinity and therefore are likely to express frustration and even anger at caregiving men, making this path more difficult, particularly in poor and working-class communities. Still, research suggests that many fathers, recognizing that they cannot provide economic resources, are interested in and willing to provide care.[173]

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170. This can only occur if current efforts to improve wages paid for service-industry jobs continues, as most service jobs at present do not pay a family wage.

171. *E.g.*, Jodi Kantor & Jessica Silver-Greenberg, *Wall Street Mothers, Stay-Home Fathers*, N.Y. TIMES (Dec. 7, 2013), http://www.nytimes.com/2013/12/08/us/wall-street-mothers-stay-home-fathers.html?pagewanted=all [http://perma.cc/TAS2-F46C] (describing how a successful architect's decision to become a full-time father enabled his wife to succeed as an investment banker).

172. *See, e.g.*, Reginald Mombrun, *An End to the Deadbeat Dad Dilemma?—Puncturing the Paradigm by Allowing a Deduction for Child Support Payments*, 13 FORDHAM J. CORP. & FIN. L. 211, 226–31 (2008) (describing the use of "deadbeat dad" imagery to describe fathers that do not contribute financially to family units); *Why Do Women Go Out with Deadbeat Losers?*, FIN. SAMURAI (Apr. 22, 2015), http://www.financialsamurai.com/why-do-women-go-out-with-deadbeat-losers/ [http://perma.cc/ATE5-EYTR] (describing men who "never hold[] on to a job for more than a year" as "deadbeat losers").

173. *See* Jarrett, *supra* note 53, at 42–43 (discussing the expansion of poor fathers' view of proper paternal behavior to cover care as a key part of the role); Roy & Dyson, *supra* note 109, at

Men that can get past the status problems associated with entering the private sphere may still face challenges from women's maternal gatekeeping instincts. Some women may disqualify men from providing care because these men do not meet the ideal motherhood standards they hold for themselves.

As I have explained in my other work, masculine caretaking has great feminist potential. Although some feminists suggest it will ideally replicate feminine caretaking, the more positive alternative is that men will renegotiate understandings of what is required to provide domestic care. These renegotiated understandings of care may allow us to disrupt the currently intensely high labor demands made on mothers to achieve ideal motherhood or maintain an ideal household. Indeed, part of Cherlin's concerns about the deinstitutionalization of marriage stem from men's reluctance to embrace fully domestic responsibilities in a marriage, and this reluctance stems from gender stereotypes as well as a recognition of the intense labor demands of ideal mothering.[174] Additionally, men's entrance into the caretaking realm promises to destabilize the desexualization process that shapes our understanding of women that provide care. This demand of desexualization has had pernicious effects on women and men who provide care, resulting in fears of child molestation whenever a parent's sexual persona becomes visible, as that sexual persona is seen as a threat to care. Caretaking fathers' will struggle with this desexualization phenomenon as well, hopefully to a more progressive end than women have historically faced in this area. However, at present, ideal motherhood remains a desexualized status, making mothers that display any interest in prioritizing adult, sexual relationships code as dysfunctional and distracted from their primary role as caretakers. At least initially, caretaking fathers will face the same desexualization phenomenon as they try to gain credibility as proficient caretakers.

2. Status Masculinity.—Rick Banks's discussion of swag gives us a preview of another form of masculinity that may emerge: status masculinity. Banks shows that economically successful women often opt to partner with men that cannot actually perform economic masculinity, and instead these men draw on women's economic resources to feed entrepreneurial projects of their own. The emergence of status masculinity is apparent when we see wealthy women, from Cher to Jennifer Lopez, partner with economically weak men who exhibit a particular masculine

142 (describing impoverished fathers attempting "a different model of fatherhood, based less on biological status than social commitment to children and extended families").

174. *See* Cherlin, *supra* note 64, at 857–58 (suggesting future directions for the deinstitutionalization of marriage, concluding that the direction requiring a return to more "gender-typed family roles" is very unlikely and noting that even the most likely direction for deinstitutionalization is not suited for everyone, as it best fits childless adults).

aesthetic or perform masculinity in traditional ways that are deemed alluring.[175] Wealthy women's treatment of status masculinity is very similar to that of wealthy men who historically partnered with highly attractive women with few caretaking or employment-related skills. Status masculinity, analogous to status femininity, creates economic risk as both forms have high consumption demands and may drain resources.

The role of status masculinity in working-class communities has been less discussed, but it seems to play a role here as well. Working-class women may be willing to support men that display uber markers of masculinity for a short period and trade these men off to other temporarily economically stable women when they can no longer afford to partner with these men. Importantly, both status masculinity and caretaker masculinity will experience the same economic vulnerability that corollary versions of femininity experienced when men were the primary marriage-market consumers. Ironically, many of the family law structures, in particular divorce law and alimony obligations, may come to serve the interests of these men if the traditional family model continues to endure.

The last option for masculinity, a true equality-based masculinity, provides space for men to provide value outside of the breadwinner construct entirely. It would reject the dependency created by the masculinity models described above by remaining meaningfully involved in the economic sphere, but perhaps not in a manner that will ever be described as economic independence or breadwinning. This path represents a new exciting option, but it can only be explored if we open up marriage in ways that allow couples to consider how to construct new gender relations. By restructuring marriage in ways that eliminate breadwinning pressures, we allow parties to find their own solutions and their own norms that will make marriage meaningful in the decades to come.

Conclusion

Although family law researchers and theorists have documented that marriage rates in the United States are on the decline, these accounts largely ignore the role that traditional breadwinner masculinity has played in this cultural shift. Carbone and Cahn enter into this debate to provide a finely tuned, nuanced, class-sensitive account of the marriage market, but their analysis will appear to some scholars as needlessly thin. Class concerns undoubtedly play a key role in the marriage market, but it is really gender

175. *See, e.g.*, Jessica Chandra, *Celebrating Jennifer Lopez's Birthday with a Look at the Men She Has Loved*, POPSUGAR (July 24, 2013), http://www.popsugar.com.au/celebrity/Jennifer-Lopez-Dating-History-Past-Boyfriends-Husbands-24127128#photo-24127127 [http://perma.cc/J5VV-KK6U]; Claudia Connell, *The Many Loves of Cher: As the Pop Star, 66, Prepares to Marry a Hell's Angel 24 Years Her Junior, Is There Anyone She Hasn't Bedded?*, DAILY MAIL (Aug. 24, 2012), http://www.dailymail.co.uk/tvshowbiz/article-2193266/As-Cher-66-prepares-marry-Hells-Angel-24-years-junior-bedded.html [http://perma.cc/QF8V-N8QA].

constructs *shaped by class constructs* that drive the marriage market, leaving accounts that focus primarily on class with limited analytic weight. Yet Carbone and Cahn's book, along with the sociological literature that informs their analyses, suggests that women's cultural embrace of traditional masculinity has played a key factor in marriage's demise, at least in poor and working-class marriage pools.

If we are to save marriage and masculinity, we must shift to models that free men from being regarded merely as economic contributors to broader contributors of emotional and social support. We can also decenter the nuclear family in our account of marriage and return marriage to its preferred status as a facilitation device for the expansion of kinship networks. Carbone and Cahn do some of the work to free men from limiting gender constructs, but supplementation is required to realize fully the promise produced by understanding women's economic interests and the parallel interests of the State. However, their book is a necessary addition to any gender-studies scholar's library and the library of anyone interested in addressing patterns of equality in the postindustrial United States. The detailed, nuanced account they provide of marriage markets is unparalleled, and it is a testament to their extraordinary analysis that *Marriage Markets* invites new areas of inquiry and new questions. For this reason, this Review may be the first of many lodged of their unquestionably admirable work. However, each new claim scholars make about what should be added to their analysis is merely evidence of the deep engagement and critical thinking their work inspires on this extremely important topic.

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