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The Legal Meaning of Sex (and Romantic Relationships)

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Legal changes in the regulation of sexuality and domestic relationships have contributed to public perceptions that partnerships accompanying the act of sex are a wholly private matter. In the era of no-fault divorce and increased privatizing of sexual relationships, scholars have recognized a shift from traditional marriage and morality in family law and "changes in the way law and society view humans and human relationships" (Schneider, 1985, p. 1803). The United States Supreme Court echoed this sentiment when striking down Texas' homosexual sodomy laws in *Lawrence v. Texas* (2003), when it held that the "right to liberty under the Due Process Clause gives…the full right to engage in [private, consensual sexual] conduct without intervention of government" (p. 560). "Liberty," the Court said, "protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home" (*Lawrence v. Texas*, 2003, p. 562).

And yet, lasting regulations and court opinions regarding marriage and marital dissolution suggest otherwise. In reality, the act of sex is the defining consideration separating relationships that carry duties and receive legal recognition and those that do not. Sex matters inside marriages to the dissolution of relations and annulment of marriages (Goldfarb, 2016). It matters to the creation of parent-child relationships even where the adult seeking rights is neither the biological nor the legal adoptive parent (Wilson, 2019). It matters to whether the state will protect the expectations partners have for each other and the investments made during the relationship (Hunter, 2012).

This chapter looks deeper into various laws and regulations that demonstrate the lasting significance of having sex across marriage, cohabitation, and parent-child relations.

LEGAL IMPLICATIONS OF SEXUAL BEHAVIOR AND INFIDELITY IN DISSOLUTION

Now an option in every state, no-fault divorce allows the dissolution of a marriage without any showing of wrongdoing (Nicolas, 2011). The Uniform Marriage and Divorce Act (UMDA) of 1970 provided the template by "provid[ing] unambiguously that both allocation of marital property and determinations of spousal maintenance [are to] be made 'without regard to marital misconduct'" (American Law Institute, 2002). Public opinion has moved with this trend. A survey conducted among Americans waiting for jury duty in Arizona found that the majority (65.3 percent) reported allocation of assets should be equal after a divorce, even in cases of adultery (Braver & Ellman, 2013). Despite this shift, sexual relations remain a condition of marriage, impacting marriage and marriage dissolution in a number of ways.

Having Sex Remains a Condition of Marriage

At the core of heterosexual marriage is the notion that it serves the primary purpose of procreation (Tuskey, 2006). Although this sounds dated to the modern ear, Chief Justice Roberts in *Obergefell v. Hodges* (2015), the Supreme Court's landmark decision recognizing same-sex marriage, stated that marriage, in the eyes of the state, "encourages men and women to conduct sexual relations within marriage rather than without" (pp. 689–690).

State laws engrave the centrality of sex in marriage into their code. For example, section 944.15 of the Wisconsin Statute (1973) explicitly states: "Although the state does not regulate the private sexual activity of consenting adults, the state does not condone or encourage any form of sexual conduct outside the institution of marriage."

The inability to have sex permits one to file a divorce in many states. Under the Illinois Marriage and Dissolution of Marriage Act (2015), a marriage can be declared invalid if "a party lacks the physical capacity to consummate the marriage by sexual intercourse and at the time the marriage was solemnized the other party did not know of the incapacity[.]"

In a similar vein, the failure to make oneself available for the act of sex is grounds for a fault-based divorce. It constitutes constructive abandonment, meaning that the married couple continues to live together while seeking a divorce. To constructively abandon the other, the at fault party must rupture the entire relationship – no talking to each other, no eating together, no vacationing together, and, crucially, no sex (*Lyons v. Lyons*, 1992). In *Lyons v. Lyons* (1992), the New York Supreme Court held that constructive abandonment may be granted when a spouse "repeatedly and unsuccessfully request[s] a resumption of sexual relations" for at least a year (p. 416).

A scaffold of laws reflects the view that marriage channels sexuality. From the Comstock Act and state Comstock laws banning contraceptive use among married couples, the last of which was struck in 1965 in *Griswold v. Connecticut* (1965), to sodomy and fornication laws, sex and the regulation of sex have long mattered to family law (Bailey et al., 2012; Feinberg, 2012). The court's decision in *Lawrence v. Texas* (2003) was widely seen as a shift from this traditional significance of sex, ruling that states cannot regulate private sexual relationships "absent injury to a person or abuse of an institution the law protects" (p. 6). And yet many of these adultery and fornication laws still operate today. Fornication laws banning sex outside of marriage have shrunk in number from twenty-nine states at the high-water mark to three states in 2022 (Connor, 2009; Sweeny, 2019). Adultery laws prohibiting married couples from having sexual relations outside of marriage remain good law in seventeen states (Sweeny, 2019).

To be sure, enforcement of such laws is rare but not nonexistent. In New York, one of the states with remaining adultery laws, thirteen people have been charged with this crime, only five of whom were convicted (McNiff, 2010). The thirteenth case occurred in 2010 when Suzanne Corona and Justin Amend were reported to the police for having sex in a public park in New York. Both were charged with public lewdness for this public act of fornication, and Suzanne, a married woman, received an additional charge of adultery (McNiff, 2010). This charge was only possible due to a third-party witness to the act because adultery charges cannot be made based on the testimony of either married individual. The charge was likely influenced by the public nature of the sexual infidelity (McNiff, 2010).

Although enforcement of adultery as a crime is rare, laws around adultery are more commonly enforced in divorce proceedings and alimony decisions. A weaker earning spouse's adultery is a complete bar to alimony, without regard to any other facts of the case, in a number of states like Georgia, North Carolina, and South Carolina (American Law Institute, 2002).

Six states allow alienation of affections lawsuits, which act as a back door to fault. These suits, brought upon a third party by a spouse, require the spouse to prove that their marriage had been loving and "the malicious acts of the defendant produced the loss of that love and affection" (*Pharr v. Beck*, 2001, p. 271). Proof of a loving marriage is often "documented by photographs, cards, notes, and the testimony of friends and family," while defendants in these cases attempt to show damage to the marriage prior to their affair, such as lack of a sexual relationship between the married couple (Poyner Spruill LLP, n.d.).

In *Ammarell v. France* (2018), Megan France filed a motion to dismiss the alienation of affections suit brought against her for having an affair with a married man. Ms. France's motion to dismiss was based on claims that North Carolina's "heartbalm" statutes are unconstitutional, citing *Lawrence v. Texas* (2003) as protecting her "right to private intimate conduct … with Mr.

Ammarell" (*Ammarell v. France*, 2018, p. 3). North Carolina's District Court rejected this motion, holding that "the tort claims for alienation of affection and criminal conversation pass constitutional muster" (p. 1). In this case, the liberty interests extended in *Lawrence* do not apply because the sexual relationship in question both caused "injury to a person … [and] abuse[d] an institution which the law protects: marriage" (*Ammarell v. France*, 2018, p. 4). Because the affair violated the "fundamental right to exclusive sexual intercourse between spouses," the court held that "[t]he fundamental place held by the institution of marriage justifies the protection afforded here" (*Ammarell v. France*, 2018, p. 5).

Having sex is such a significant act that resuming sexual relations will have the effect of wiping clear the other spouse's past fault. It counts as proof of condonation. Thus, when a spouse who has been cheated on, physically abused, or otherwise "faulted" against agrees to sex, it forgives the misconduct of the offending spouse. In *Littlefield v. Littlefield* (1972), the Superior Court of Waldo County held that "the parties' engaging in acts of sexual intercourse while the divorce action was pending was not condonation per se but raised a rebuttable presumption that such actions represented forgiveness and mutual intention for restoration of all marital rights" (p. 204).

No-Fault Divorce in Sexual Violence Cases

States have walked back to no-fault divorce, recognizing that emptying fault out entirely allows deeply immoral results. Consider the case of Crystal Harris, who was raped by her husband, Shawn Harris, and was ordered to pay her husband alimony upon divorce because she earned considerably more money than he did (Chang & Litoff, 2012; *People v. Harris*, 2012). The court essentially forced her to become a debtor to her rapist, prolonging contact with him. Ms. Harris's experience prompted her to take action to reform the law in her state so that other female victims who are the breadwinners of their households do not have to pay their aggressors alimony into the future. After Ms. Harris shared her story with Assemblywoman Toni Atkins, the California Assembly amended §4324.5 of California's Family Code so that, in addition to considerations of whether a spouse "attempt[ed] to murder the other spouse or of soliciting the murder of the other spouse," a judge may take a conviction "of a specified violent sexual felony against the other spouse … in ordering spousal support" (A.B. 1522, 2012 Cal. Legis. Serv. Ch. 718 (Cal. 2012); see also Hackbarth, 2013). When it comes to spousal support, in order to achieve the most equitable result courts need to reintroduce fault back into the equation when it comes to sexual felonies.

California is not alone; other states have passed similar laws by requiring judges to consider 'marital misconduct' when awarding spousal support (Wilson, 2009). New York's common law also considers a broad range of misconduct, notwithstanding its no-fault scheme, when the fault is of an

extraordinary nature (*McCann v. McCann*, 1993). This is judicially determined, and courts have found it in cases of rape, kidnapping, and extensive physical abuse (*Howard S. v Lillian S.*, 2009; *McCann v. McCann*, 1993).

For example, in the famous case where Aftab Islam beat his wife Theresa brutally with a barbell, requiring her to have hundreds of thousands of dollars of reconstructive surgery, the defendant contended that "a spouse's egregious conduct should not be considered as a factor in equitable distribution" under no-fault divorce laws (*Havell v. Islam*, 2002, p. 343). At the time of the attack, Ms. Havell was the family's sole earner. As this case shows, at times, it is the wealthier spouse who is wronged but still has a lot to lose upon dissolution (Wilson, 2009). Here, the courts sided with Ms. Havell, awarding her over 95 percent of the marital estate. The court applied precedent from *Blickstein v. Blickstein* (1984), which allowed for consideration of fault when "the marital misconduct is so egregious or uncivilized as to bespeak of a blatant disregard of the marital relationship…compelling [the court] to invoke its equitable power to do justice between the parties" (p. 292).

Whereas domestic violence has provided just cause to wipe an abuser out financially, adultery poses a much thornier set of questions. If the law sanctioned adultery as harshly as it did Mr. Islam's domestic violence – wiping out adulterers financially – this could create incentives for the offending spouse to continue in the marriage to avoid the potential penalty of fault divorce. At some point, the penalty could become so high that people feel compelled to remain in a failing marriage lest they become insolvent. Fault in this instance could still be considered not as a mechanism for financially wiping out the adulterer but as grounds for departure from the presumptive division of marital property that would have occurred in the absence of adultery – for example, in a typical long-term marriage, grounds for departing from a 50/50 split. This disincentive to adultery would not trample on anyone's sexual liberty. The spouse who defies monogamy can always obtain a divorce on a no-fault basis before taking on new sexual partners, thereby avoiding the financial penalty entirely.

HAVING SEX CREATES DUTIES BETWEEN ADULTS

Whether social perceptions around the act of sex led to legal change or followed it has been a perennial debate in family law. Legislation has shifted with changing norms to be more inclusive of couples who live together and conduct their relationship outside of marriage, which we refer to in this chapter as cohabitation. Such legislative shifts create new rights and obligations between two people (i.e., inter se) and against third parties. In determining who has standing and who gets tagged with duties in cases involving intimate relationships, the act of sex still plays a significant role. Quite simply, those having sex can go after another for possible remedies and recourse against each other. Those without sex cannot.

Beyond Conjugality Cases

There is extensive literature and a growing number of cases that recognize the ability of non-marital couples at dissolution to recover from one another. Courts have recognized breach of contract claims as long as the contract did not "explicitly rest upon the immoral and illicit consideration of meretricious sexual services" (see seminal case, *Marvin v. Marvin*, 1976, p. 669). Courts have recognized claims in equity based on the doctrine of unjust enrichment (see *Marvin v. Marvin II*). States like Washington have created a status remedy for those even in a meretricious relationship. In *Connell v. Francisco* (1995), the Supreme Court of Washington defined a meretricious relationship as "a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist" (p. 346) and awarded the cohabited petitioner the right to share in property acquired during the relationship. In 2021, the Uniform Law Commission adopted the Uniform Cohabitants Economic Remedies Act to standardize the economic rights of cohabitants and ensure consistency across states (Uniform Law Commission, 2021).

Cohabitation between two people is defined by the courts as "a relationship between two persons … who reside together in the manner of husband and wife, mutually assuming those rights and duties usually attendant upon the marriage relationship" (American Jurisprudence Proof of Facts, 1989). Many states include sexual relations in these "rights and duties" as they do in a marital relationship. For example, the Supreme Court of Delaware held that cohabitation "has a common and accepted meaning as an arrangement existing when two persons live together in a sexual relationship when not legally married" (*Gertrude L.Q. v Stephen P.Q.*, 1983, p. 1217). Some courts have expanded this definition to include both sexual and financial aspects, defining cohabitation as "an arrangement that is ostensible, in which the man and woman engage in sexual relations with each other, and where they enjoy a measure of financial benefit from the relationship" (*Quisenberry v. Quisenberry*, 1982, p. 276). The Iowa Supreme Court went so far as to outline six factors to determine cohabitation, the first of which is "sexual relations…while sharing the same living quarters" (*State v. Kellogg*, 1996, p. 517).

It is important to note that, although the act of sex "may be a persuasive indicium of cohabitation, it is not everything" (*Taylor v. Taylor*, 1983, p. 478). In most jurisdictions, the entire content of the cohabiting relationship has to be more than just having sex. Couples must "function as would a husband and wife, either sexually or otherwise" to constitute cohabitation (*Fuller v. Fuller*, 1988, p. 1169). Many courts have emphasized the importance of shared finances over sexual relations. One court suggested that the factors that mark cohabitation – namely, "the normally accepted attributes of a marriage – a common residence which each party regards as his or her home, a common household to which each contributes, and a personal relationship that is more

than casual and has significant meaning to each" – can be "measured…by living arrangements, by shared assets and expenses, and by how the parties and the community view their relationship" (*Fisher v. Fisher*, 1988, p. 1169).

Still, it is highly unlikely that couples will establish this sort of intimate and financial relationship akin to marriage in the absence of a sexual relationship. Ultimately, the act of sex serves as a sorting function to differentiate between cohabitating couples and mere roommates for whom there is nearly no legal responsibility to the other and no recognition from the state. Familial relationships are no exception. In the case of *Burden v. The United Kingdom* (2008), two sisters who lived together for thirty-one years took issue with the fact that, in the case of one of their deaths, the surviving sister "would be required to pay inheritance tax on the dead sister's share of the family home, whereas the survivor of a married couple or a homosexual relationship registered under the Civil Partnership Act 2004 would be exempt from paying inheritance tax" (pp. 2–3). In essence, they were upset because they were being treated differently simply because they did not have a sexual relationship. The Grand Chamber ruled against the sisters, finding that it does not violate Article 14 for States (protection against discrimination) to treat marriage and civil partnerships differently than relationships based on consanguinity or other cohabiting relationships (*Burden v. The United Kingdom*, 2008).

Upon learning of this case, Baroness Deech, sought to extend civil partnerships to include caretakers and cohabitees, such as these sisters. Baroness Deech argued that those who have "chosen to live together [such as these sisters] would expect a hand of equality to be offered to them" (House of Lords Debate, 2013, c.6108, para. 3). Baroness Barker took an opposing stance, saying that Baroness Deech's proposal "equates two fundamentally different sorts of relationship: those entered into freely and voluntarily as adults, and consanguine, family relationships. Those two types of relationship[s] have always been treated differently in law, for very good reason … You have relationships with people in that family which are wholly different, and your obligations to those people are wholly different, from those in the families which you create" (House of Lords Debate, 2013, c.1611, para. 2).

Unlike inter se cases where rights and obligations between two people are at issue, third-party cases, especially against the state, are more complicated. States basically use sexual behavior to distinguish fraudulent claims from real ones in cases implicating health insurance and social benefits. This is to prevent the issue of "moral hazard" in which protected parties undermine the effectiveness of an intervention already in place, or governmental costs outweigh the benefits it intended to provide. Individuals with insurance are prone to put themselves more at risk or frequently visiting hospitals than is needed. Similarly, one's marital and fertility behavior may be affected by welfare and the level of benefits one could receive as a single parent or a married dependent (Moffitt, 1998).

The distinction of using sexual behavior to screen for cohabitation was also raised in Canada's Beyond Conjugality report (The Law Commission of Canada, 2001). In particular, the report opens debate regarding the government registration scheme in the province of Nova Scotia, which limits registration to "two individuals who are cohabiting in a conjugal relationship" (p. 119) and restricts familial or blood relationships such as adult siblings. In a post on the comments board, "thirty-six-year-old twin sisters who have never been married or had children and who live together" lamented being denied access to government tax benefits awarded to married and cohabiting couples (p. 119). These sisters raised the question about the importance of sexual behavior to governmental schemes and family law: "Should the possibility of sexual relations between two co-habitating[sic] adults…really be the yardstick by which the government, the law, and the corporation measure a citizen's entitlement to social and economic rights?" (The Law Commission of Canada, 2001, p. 119).

But many scholars would answer yes: sexual relations, or at least romantic relations, are fundamentally different from any other type of relationship. People are especially vulnerable in cohabitating relationships compared to platonic roommate relationships because "the role of intimacy involved in romantic relationships is typically deeper and more pervasive" (Kansky, 2018, p. 2). Attachment theory, traditionally applied to the child-parent relationship, can explain the increased vulnerability present in a romantic relationship. Scholars theorize that "adults may develop analogous attachment patterns to romantic partners" (*Marvin v. Marvin*, 1976, p. 684). The legal distinction between cohabitants and roommates is responding to the vulnerability and interdependency that sex and romance create in relationships.

Parent-Child Relations

The cost of having sex is greater when the person you are having sex with is a parent. Family structures in the United States have morphed since a decade ago, raising numerous questions about the nature of parentage: What features make the adult-child relationship worthy of respect and obligations under the law? Should the live-in partner of a child's adoptive or biological parent (together, "legal parent") be able to force visitation or shared custody over the legal parent's objection after the adults break up? How long should the adult have been in a child's life for the state to respect that tie when the legal parent objects? (Wilson, 2019).

Sexual Relationship and Relational Parentage

Notions of a child having two heterosexual parents to whom they are biologically related are no longer the exclusive basis of modern-day court decisions concerning parent-child relationships (Shanley, 2001). Approximately

3 million cohabiting-partner households include children in the household who are the offspring of only one partner (U.S. Census Bureau, 2021a). Other households are "mixed," containing children who are the biological or adoptive children of both parents, as well as children who are the legal child of only one of the adults (U.S. Census Bureau, 2021b). A great number of children live with only one legal parent, usually the child's mother. As a result of these many different household types, children often come into contact with adults who are transient in the legal parent's life. Twenty-nine percent of children in the United States "experience two or more mother partnerships (either marriage or cohabitation)" by the time they turn fifteen (Deal, 2021).

With seismic shifts in how families comprise themselves, courts have been presented with questions of first impression. "Who counted as one's family" was predicted by biology for mothers, biology in the case of men married to birth mothers via a nearly irrebuttable marital presumption, and adoption. Now, legal parentage has lost its value as a sole determining factor in court's determinations concerning parent-child relationships. States have used a cluster of doctrines to decide when to award rights of association, care, decision-making, and even full custody for a child to relational parents, doctrines undergirded by very different intuitions. Some rest on the nature of the bond, recognizing relationships the preservation of which will be in the child's best interests (American Law Institute, 2002); some rely on the concept of psychological parent (*McAllister v. McAllister*, 2010); and others stress the harm that will follow from disrupting the bond that has developed between the claimant and the child, often captured in the idea of "irreparable harm" to the children (*Kulstad v. Maniaci*, 2009). These claims to be legally determined the child's parent – or to receive rights in the child like those given to parents – can be grouped under the heading of "relational parentage."

There can be a number of different fact patterns giving rise to an individual claiming to continue contact with the child. However, to have standing in these types of cases, one has to have had a sexual relationship, or at least a romantic relationship, with the parent.

The United States Supreme Court has not established clear or comprehensive guidelines for states' conferral of initial legal-parent status (Meyer, 2016). However, courts, legislators, and others have used four doctrinal "hooks" – psychological parenthood, In Loco Parentis, Parent by Estoppel, and de facto parenthood – to permit an adult to press a claim for legal status as a relational parent (Meyer, 2013).

Psychological parenthood test varies by jurisdiction, but it generally requires a day-in-day-out job of parenting, which is unlikely to be fulfilled unless the parent lives with the child. In *In re Clifford K.* (2005), the West Virginia Appellate Court defines a psychological parent as "a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and

provides for the child's emotional and financial support" (p. 157). In addition, the relationship "must have begun with the consent and encouragement of the child's legal parent or guardian" (p. 157). The same rationale applied in a case involving a same-sex couple when the Supreme Court of New Jersey granted visitation rights to a former partner of the legal mother (*V.C. v. M.J.B.*, 2000). Other than kinship, the only time these claims will happen between two legal strangers is when the two have had sex and opened up to each other. *In Loco Parentis* gives standing to an adult who literally has stood in the place of a parent. It requires the assumption of parental status and the fulfilment of parental duties (*TB v. LRM*, 2001). *Parent by Estoppel* prevents a person from evading an obligation or asserting a right that contradicts what they previously said or agreed to by law. It also requires the interested party's reliance. For example, in *L.S.K. v. H.A.N.* (2002), when a same-sex partner filed a complaint for custody against her former partner, the children's biological mother, she was estopped from denying child support in a subsequent suit filed against her by the children's mother.

The *de facto parenthood test*, which the Uniform Parentage Act ("UPA") and thirty-one states have adopted in some version, acknowledges an individual's rights of the child as long as the parents cohabited and had a codependent relationship in the caretaking of the child. In *In Re Parentage of L.B.* (2005), when a woman brought an action against the biological mother of a minor, seeking to establish her co-parentage, who was conceived by artificial insemination during the woman's twelve-year intimate domestic relationship with the mother, she was granted the right for visitation. The case was initially dismissed due to her lack of standing as a psychological parent. However, the Court of Appeals later established her de facto parent status based on the parent-like relationship she had prior to separation. Similarly, in *Rubano v. DiCenzo* (1988), when the Supreme Court of Rhode Island was presented with the question of whether an agreement between the parents allowing the nonbiological parent to have visitation with the child after separation was enforceable, the Court answered in the affirmative recognizing the nonbiological parent as a de facto parent (i.e., holding a "parent-like relationship" with the child).

Legally inserting oneself into a parent-child relationship as a live-in partner is easier than one may assume. The three-part "de facto parent" test proposed by the ALI in the *Principles* is indicative of the low bar. The test requires residency, caretaking, and an agreement of equal share in caretaking, which can be implied (American Law Institute, 2002). With the belief that conforming to the lived experience of children is critically important to children's welfare (American Law Institute, 2002), the ALI's test substantially enlarged parental rights to live-in partners who share equal caretaking duties for a child for as little as two years (Wilson, 2010). This not only diminished the right and encroached on parenting decisions of the legal parent who are mothers,

in most cases, but also constrained the ability of mothers to decide who has access to their children – with some potentially devastating repercussions for at least some of the children involved (Wilson, 2008). The costs of considering the parentage claims of relational parents – both to the legal parent and to the child – have received inadequate weight to date.

Some of these decisions are controversial in that outcome creates a parent-child relationship against a would-be-presumed parent's will (Harvard Law Review, 2006). Being wary of such negative outcomes, not every court has sided with the claimant. For example, in *Janice M. v. Margaret K.* (2008), a partner of a legal parent prayed for the visitation rights of her child after ending eighteen years of her romantic relationship. Maryland Court of Appeals refused to recognize "de facto parenthood" despite the fact that she jointly took care of the child for more than four years. The court was reluctant to regard her parenting role as an exceptional circumstance overriding the legal parent's liberty interest in deciding custody and care of the child. This decision was in line with legislative and court decisions to protect parents' desires to control children's upbringing without the oversight by any state agency. This holding is also consistent with the Maine Supreme Court's holding in *Pitts v. Moore* (2014), stating that "forcing a parent to expend time and resources defending against a third-party claim to a child is itself an infringement on the fundamental right to parent …." The only time you can really get tied for child support is if you were cohabiting with your partner when a child was born.

Even so, only the people who had sex with the child's parent will meet the criteria to assert a parentage claim. No other relationship will have the same standing as a live-in partner in these cases. A recent ruling granting "tri-custody" for one child shows a good example. In 2018, the Suffolk County Supreme Court granted tri-custody to a Long Island couple and a neighbor with whom they had a threesome for eighteen months (Marsh, 2017). Before conception, the three had an agreement that all would raise the child together: they went to the doctor's appointments together, fed the baby taking turns, and the son knew the two women as his mothers. New Jersey also had a similar case involving a gay male couple and a straight woman where the court recognized the partner of the biological father as a "psychological parent" (*D.G. & S.H. v. K.S.*, 2016). As a parent, sexual behavior incurs costs, and the legal effect is not insignificant to potentially impact romantic relationship decisions for single parents.

Rights without Obligations?

Although a person can demand physical custody of a child or stay in the relationship until the child emancipates by inserting themselves into a parent-child relationship that already existed, they can also get tagged for parental duties. Quite simply, because of the sexual relationship they had with their partner, they can be made to pay for a child that is not theirs. Relational parentage, in

that sense, has both protective and exacting qualities. Just like legal parentage, whoever has rights has responsibilities. For example, in *Elisa B v. Superior Court* (2005), when two mothers dissolved their relationship during which they artificially inseminated and gave birth to a child, both were legally obligated to the child. Emily B., Elisa's ex-partner, who discontinued financial support, had to resume payment under the common law principle, de facto parentage. The fact that Emily consented to and participated in the insemination, causing the child's birth, held the child as her own, and co-parented the child for a substantial period of time all corroborated the decision-making. Courts preclude one from ejecting themselves from a potential risk of becoming a parent as they form a romantic and sexual relationship with another.

On the other hand, with similar facts, in *T.F. vs. B.L.* (2004), where a mother sought child support from her ex-partner who agreed to co-parent the child conceived by artificial insemination while they were together, the Massachusetts Supreme Court denied the request holding that enforcing an implied agreement to co-parent is against public policy and parenthood by contract is not in their law. However, had the petitioner argued the establishment of parentage based on her ex-partner's conduct and relationship with the child during their cohabitation rather than an operation of contract, the outcome may have been different (Walters Kluwer, 2007). Although courts may resolve the question of parentage based on the claimant's arguments and hold a different ruling because two people may never agree to co-parent absent the act of sex, sex still remains at the center of these claims. People who have to defend themselves from these types of parentage claims are typically those who had sex and opened themselves up to a parent-child situation.

To some, this may raise concern because it will cause an outcome where parenthood would "devolve upon an unwilling candidate" similar to the effect of a rebuttable presumption of paternity statute (*In re Nicholas*, 2002, p. 941).

Even with the same idea that those having sex can seek legal remedies and recourse and those who do not cannot, case outcomes have been different depending on the state and the doctrinal "hooks" they apply in rulings. Legislation and courts have dealt with cases concerning parental rights and parental duty differently, and the court's irregular response to the question of whether to impose duties of support on relational parents, especially using the *de facto parent* test, has long perplexed lawmakers.

With good intentions to protect children's sense of stability, the American Law Institute's proposal and the new UPA place relational parents in parity with legal parents regarding physical custody rights. However, the standard operates as a one-way street – it can be asserted by those seeking rights but not by those seeking continued support for a child. Section 3.03 of the ALI's proposal restricts responsibility to legal parents and those who have, in exceptional circumstances, willingly agreed to assume full parental responsibilities (American Law Institute, 2002) and leaves it to those deciding legal parentage

to determine who should shoulder the responsibilities of parenthood. (Baker, 2006). Baker (2006) critiques the deep incoherency in *de facto parentage*, calling it "asymmetrical parenthood." She analyzes the *Principles'* child support provisions teasing out "precisely the kind of scenario in which someone is likely to have custody or visitation rights as de facto parent under [the ALI's custody proposal], but not have financial responsibility for a child under [its child support proposals] …

> Fred, a widowed father of two, cohabited with Allen for five years before separating. During their cohabitation Fred and Allen shared their earnings and the children benefited from the increased household income. Assume also that Fred and Allen shared caretaking responsibilities with Allen doing as much as Fred. Allen would have custodial rights as a de facto parent but, absent affirmative conduct indicating … an agreement to assume a parental support obligation and even then only in exception circumstances, Allen would not be responsible for any child support. (p. 133)

In an attempt to avoid punishing people for having sex, the ALI proposal gives rights without obligations to live-in partners (Wilson, 2010). Regardless of the incoherency in court decisions concerning parental obligation suits, sexual behavior is still the factor that distinguishes people who can be made responsible versus people who cannot. Absent the act of sex, two adults and a child who forms a close relationship with both seem just as emotionally and financially interdependent as a relationship involving a cohabitating sexual partner. And yet, only the people who had sex with the child's parent will need to make their presence in court to defend themselves from parental obligation suits filed by the legal parent. No roommates, nannies, or even sisters would be lumped together in the same category as ex-partners with whom the parent had a sexual relationship. To clear inconsistencies, Fineman (2004) suggests care rather than sex as a nexus for legally recognizing relationships. She argues that the system should ensure a caretaking arrangement for children at the end of any interdependent relationship that may or may not involve having sex, and questions the significance of sex as an indicator of commitment or intimacy in modern family law. Whether or not the current system requires reorientation, court decisions concerning parent-child relationship reflect the role that sexual behavior plays in distinguishing adult relationships and determining legal questions of rights and responsibilities.

CONCLUSION

Sexual behavior in romantic relationships continues to have legal impact in family law. Sex is what separates relationships that carry duties and those that do not. Having sex with another adult can create the circumstances for paying support after the break up, whether married or not. Being sexually involved with another individual can create duties to share acquired wealth, whether married or not. An intimate relationship with a child's parent opens the

possibility of parent-like rights and even responsibilities toward that child – claims that would almost certainly never arise in the absence of sexual behavior with the parent. Whatever stance one takes on whether the act of sex *should matter* in the dissolution of relationships, it still does across much of America.

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