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Preglimony

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PREGLIMONY

Shari Motro*

Unmarried lovers who conceive are strangers in the eyes of the law. If the woman terminates the pregnancy, the man owes her nothing. If she takes the pregnancy to term, the man's obligation to support her is limited. The law reflects this lovers-as-strangers presumption by making a man's obligation towards a woman with whom he conceives derivative of his paternity-related obligations; his duty is towards his child, not towards the woman in her own right. Thus, a pregnant woman's lost wages and other personal costs are her private problem, and if there is no child at the end of the pregnancy, there is no one—from a legal perspective—that the man must support.

The law also endorses this lovers-as-strangers default in the way in which it treats men who do support their pregnant lovers. It does this through the tax code. Current tax law likely regards payments between unmarried lovers as gifts or as child support. This characterization not only misses the mark descriptively, it also misses an opportunity to reward and encourage a behavior that is critically important in an age when sex and procreation outside of marriage are common.

This Article argues that the law should develop a new framework for addressing the unique relationship between unmarried lovers who conceive and that tax reform offers a practical and relatively modest first step for doing so. To this end, it proposes that Congress create a pregnancy-support deduction to benefit taxpayers who already support pregnant women, thereby extending to them the same deduction we now give taxpayers who pay alimony.

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INTRODUCTION

We have alimony. We have palimony. Why don't we have *preglimony*?

Under current law, a man has no legal obligation towards a woman with whom he conceives until paternity is established. This almost always happens after and only *if* a pregnancy is taken to full term. If the pregnancy ends in abortion, the woman is entirely on her own. If she gives birth, the man may be required to reimburse her for a portion of prenatal and birthing medical expenses, but other pregnancy-related costs—like her lost wages—are seen as her personal problem. In many cases, women never invoke even these limited retroactive entitlements for fear of alienating men already reluctant to meet their child support obligations.

Why is this a problem? First, unless both parties understood their encounter as a no-strings-attached proposition, the current rule is unfair. It puts a disproportionate share of the costs of both parties' actions on the woman alone. Second, it gives men who assume their partner will terminate an unwanted pregnancy no economic incentive to be vigilant about birth control. Of course, conscientious men have plenty of other reasons to prevent an unwanted pregnancy, but the fact that abortion is free for men leaves some unconcerned about pregnancy prevention, contributing to the perception that birth control is a woman's responsibility.¹ Finally, the current paradigm disregards the relational implications of conception. Some pregnancies result from what is clearly a no-strings-attached encounter, but often the sex² that produces a pregnancy takes

1. See Jennifer A. Reich & Claire D. Brindis, *Conceiving Risk and Responsibility: A Qualitative Examination of Men's Experiences of Unintended Pregnancy and Abortion*, 5 INT'L J. MEN'S HEALTH 133, 140 (2006) (noting that in a study of men whose sexual partners had undergone an abortion, the majority stated that "pregnancy prevention is the primary responsibility of women").

2. Since the focus of this Article is on pregnancy, "sex" or "sexual relations" generally refers to penile-vaginal penetration. There are, of course, many other types of sex. Susan Appleton has argued that the legal and cultural focus on heterosexual intercourse to the exclusion of other types of physical intimacy reflects a deep-seated disregard for women's

place in the context of a relationship in which certain baseline responsibilities are assumed. Data on men's involvement in pregnancy and abortion is scant,³ but it does suggest that many abortions and most births take place in the context of relationships that involve some expectation of care and support.⁴

Current scholarship on the legal relationship between unmarried lovers who conceive is virtually nonexistent,⁵ judicial commentary on the scope of unwed fathers' pregnancy-related obligations is sparse, and many state courts have been silent on the issue. Uncertainty abounds, leaving unmarried lovers who conceive to muddle through on their own. In the past, when marriage was the primary site for procreation, the problem was relatively modest. Today, with over one-third of births⁶ and two-thirds of abortions⁷ occurring outside of marriage, the status quo is untenable.

In a prior work—*The Price of Pleasure*⁸—I argued that the lovers-as-strangers paradigm that now governs out-of-wedlock pregnancy should be replaced with a relational default. This default would require unmarried lovers who conceive to share both the direct and indirect financial burdens of the

pleasure. See Susan Frelich Appleton, *Toward a "Culturally Cliterate" Family Law?*, 23 BERKELEY J. GENDER L. & JUST. 267, 285-86 (2008).

3. See *infra* note 34.

4. See *infra* note 35.

5. A number of scholars have begun to critique the law's hands-off approach to sexual fraud. But these scholars do not focus on pregnancy in particular and they are unconcerned with consensual sex that involves no fraud or deceit. See Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 830-35 (1988) (arguing that criminal law is not "at a point where deception is generally regarded as an impermissible inducement to sex"); Jane E. Larson, "Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction, 93 COLUM. L. REV. 374, 381 (1993) (arguing that the existing adjudicatory system is capable of "identify[ing] the absence of authentic consent required under [a] theory of sexual fraud"); Michelle Oberman, *Sex, Lies, and the Duty to Disclose*, 47 ARIZ. L. REV. 871, 889 (2005) ("The post-seduction norm of nondisclosure [that enables sexual fraud] represents a degree of complacency with regard to bald-faced lying that is almost unparalleled in the common law governing tort and contract."); Lea VanderVelde, *The Legal Ways of Seduction*, 48 STAN. L. REV. 817, 892-93 (1996) (exploring the history of seduction under the law and treatment of sexual fraud under the Field Codes).

The work of Linda Hirshman and Jane Larson does address the imbalance at the heart of the default code governing consensual heterosexual sex, but Hirshman and Larson do not focus on conception. See LINDA R. HIRSHMAN & JANE E. LARSON, *HARD BARGAINS: THE POLITICS OF SEX* 281 (1998).

6. FED. INTERAGENCY FORUM ON CHILD & FAMILY STATISTICS, *AMERICA'S CHILDREN IN BRIEF* 4 (2008); see also Jeffrey A. Parness & Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth*, 40 U. BALT. L. REV. 51, 86 (2010) ("In 2007, the number of children in the United States born out of wedlock exceeded 1.7 million, more than nineteen times the estimated number of children born out of wedlock in 1940.").

7. *An Overview of Abortion in the United States*, GUTTMACHER INST., <http://www.guttmacher.org/media/presskits/2005/06/28/abortionoverview.html> (last visited Oct. 26, 2010).

8. Shari Motro, *The Price of Pleasure*, 104 NW. U. L. REV. 917 (2010).

pregnancy regardless of its outcome. It would not apply to pregnancies resulting from nonconsensual sex (including sex involving fraud or deceit) for which we have (albeit imperfect) criminal and tort frameworks, and couples who don't want to be governed by the relational paradigm would be free to opt out of it. No-strings-attached sex isn't inherently wrong; it's just the wrong legal default.

I continue to maintain that comprehensive reform along these lines represents an important long-term ideal, but I also recognize that imposing a mandatory pregnancy-support obligation on unmarried men presents both administrative and philosophical challenges that require further study. In this Article, therefore, I develop a simpler, more immediately practical framework through which we may begin to recognize the unique relationship between unmarried lovers who conceive: tax reform.

The law is silent on the proper tax treatment of pregnancy-related payments, but current principles suggest that they may be either gifts or child support for tax purposes. Neither of these characterizations matches the realities of the relationship between lovers who conceive, and neither triggers tax consequences because gifts and child support are nondeductible to the payor and excludible by the recipient. As a result, the current rule misses an opportunity to reward and encourage men who are already inclined to support their pregnant lovers. In addition, it implicitly endorses a view of lovers as legal strangers.

This Article proposes that Congress create a pregnancy-support deduction—a provision that would extend to taxpayers who support pregnant women the same benefits we now give taxpayers who pay alimony. Part I lays out the problem—when unmarried sexual partners conceive they often view the pregnancy as a shared responsibility, but the law treats them as strangers. As a result, the current legal approach to reproduction is unjust, it is expressly harmful, and it sets up the wrong incentives. Part II explores possibilities for reform—bolstering marriage as the gateway to sex, increasing public support for pregnant women, and giving women a legally enforceable entitlement to support from the men with whom they conceive. Ultimately, I conclude that these possibilities are unworkable, utopian, or unlikely to materialize in the near term. Part III therefore turns to the pregnancy-support deduction—a relatively simple amendment to the Internal Revenue Code with immediate effects. The deduction would incentivize greater pregnancy-related support and treat unmarried lovers more equitably by implicitly recognizing that they are neither spouses nor complete strangers, but rather something in between.

I. THE LOVERS-AS-STRANGERS PARADIGM

A. *The Current Law of Conception*

Our legal tradition has not been kind to unmarried love. Under the common law, men had no legal obligations towards the women with whom they conceived out of wedlock.⁹ Today, the same rule holds in cases in which the woman terminates an unintended pregnancy—the man owes her nothing. When the woman takes the pregnancy to term, most states require unwed fathers to participate in the “reasonable expenses” of pregnancy,¹⁰ which are generally limited to expenses that directly benefit the subsequently born child. This is because most states frame pregnancy-related obligations as an element of a man’s child support obligations¹¹ or as part of a parentage order,¹² not as a duty towards the woman in her own right. The rationale behind this approach stems from the now widely accepted imperative that children of unmarried parents should not be relegated to the legal no-man’s-land of “illegitimacy.”¹³ All fifty states now require both parents to support their offspring regardless of marital status.¹⁴ Since a child’s prebirth health cannot be disentangled from the health

9. See *People ex rel. Lawton v. Snell*, 111 N.E. 50, 51 (N.Y. 1916); *In re Cirillo’s Estate*, 114 N.Y.S.2d 799, 801 (Sur. Ct. 1952); *Jelen v. Price*, 458 N.E.2d 1267, 1270 (Ohio Ct. App. 1983).

10. See, e.g., CAL. FAM. CODE § 7637 (West 2010) (an unwed father may be directed “to pay the reasonable expenses of the mother’s pregnancy and confinement”); R.I. GEN. LAWS § 15-8-1 (2010) (“The father of a child which is or may be born out of lawful wedlock is liable to the same extent as the father of a child born in lawful wedlock . . . for the reasonable expense of the mother’s pregnancy and confinement . . .”); VA. CODE ANN. § 20-49.8(A) (2010) (“A judgment or order establishing parentage . . . may direct either party to pay the reasonable and necessary unpaid expenses of the mother’s pregnancy and delivery or equitably apportion the unpaid expenses between the parties.”); *State ex rel. Reitenour*, 807 A.2d 1259, 1262 (N.H. 2002) (relying on N.H. REV. STAT. ANN. § 168-A:1 (2002) in holding that “[o]nce paternity has been established, the father of a child born out of wedlock is liable for the ‘reasonable expense of the mother’s pregnancy and confinement’”).

11. See, e.g., 750 ILL. COMP. STAT. ANN. 45/14 (West 2010); MASS. GEN. LAWS ANN. ch. 209C, § 9 (West 2010); MISS. CODE ANN. § 93-9-7 (2010).

12. See, e.g., CAL. FAM. CODE § 7637; COLO. REV. STAT. § 19-4-116(3)(a) (2010); VA. CODE ANN. § 20-49.8(A).

13. See AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 3.01, at 464 (2002) (“[I]t is now generally accepted that children of informal and formal relationships must be treated equally with respect to the amount and duration of child support.”).

14. See Jeffery W. Santema, Annotation, *Liability of Father for Retroactive Child Support on Judicial Determination of Paternity*, 87 A.L.R. 5th 361, 379-80 (2001) (“The parents of a child born out of wedlock have an obligation to support the child. . . . It is the fact of paternity or maternity, not that of marriage, that obligates the parents to nourish and rear the child. Hence, the support rights of children born out of wedlock are the same as those of children born in wedlock.”).

of the expectant mother, child support begins in utero.¹⁵ Accordingly, most cases dealing with the scope of these pregnancy-related obligations focus on prenatal and birthing medical expenses,¹⁶ as does the Uniform Parentage Act, which provides that:

Copies of bills for genetic testing and for prenatal and postnatal health care for the mother and child which are furnished to the adverse party [to a paternity proceeding] not less than 10 days before the date of a hearing are admissible to establish:

....

... that the charges were reasonable, necessary, and customary.¹⁷

Case law generally disregards other costs like lost wages,¹⁸ childbirth classes,¹⁹ and maternity clothes.²⁰

15. See *Coxwell v. Matthews*, 435 S.E.2d 33, 34 (Ga. 1993) (“[T]he duty to protect and maintain a child includes the duty to ensure that the child receives adequate medical care prior to and during birth.”).

16. See, e.g., *id.* at 34 (holding that a claim for \$15,459 in pregnancy- and birth-related medical expenses may be made in an action to determine the paternity of a child and affirming the trial court’s order that the father reimburse the mother for the entire amount); *Sisneroz v. Polanco*, 975 P.2d 392, 398-99 (N.M. Ct. App. 1999) (holding that the mother of a child born out of wedlock had standing to seek reimbursement for pregnancy and birthing expenses while recognizing the trial court’s discretion to grant or deny pregnancy and birthing costs); *State ex rel. Dep’t of Health & Human Res. v. Carpenter*, 564 S.E.2d 173, 176 (W. Va. 2002) (requiring a biological father to reimburse the Department of Health and Human Resources for \$4,879 in birth and medical expenses paid on behalf of the mother); *Kathy L.B. v. Patrick J.B.*, 371 S.E.2d 583, 587 (W. Va. 1988) (requiring a child’s biological father to reimburse the mother for birth expenses); see also, e.g., MASS. GEN. LAWS ANN. ch. 209C, § 9(a) (“An order may be entered requiring a parent chargeable with support to reimburse the mother . . . for medical expenses attributable to the child or associated with childbirth or resulting from the pregnancy.”); N.D. CENT. CODE § 14-20-48 (2010) (adopting language from section 621(d) of Uniform Parentage Act); OKLA. STAT. tit. 10, § 7700-621 (2010) (adopting same section 621(d) language); TEX. FAM. CODE ANN. § 160.621 (West 2010) (also adopting section 621(d) language); *id.* § 160.636(g) (“On a finding of parentage, the court may . . . on a proper showing, order a party to pay an equitable portion of all of the prenatal and postnatal health care expenses of the mother and the child.”); UTAH CODE ANN. § 78B-15-613 (LexisNexis 2010) (adopting language from section 621(d) of Uniform Parentage Act); WASH. REV. CODE ANN. § 26.26.570 (West 2010) (adopting same section 621(d) language); WYO. STAT. ANN. § 14-2-813 (2010) (adopting same section 621(d) language).

17. UNIF. PARENTAGE ACT § 621(d) (amended 2002), 9B U.L.A. 346 (2001 & Supp. 2008).

18. Many jurisdictions have been silent on the issue, but Minnesota, Montana, and Ohio have construed the Uniform Parentage Act not to include lost wages as part of the reasonable expenses associated with the birth. See *Bunge v. Zachman*, 578 N.W.2d 387, 389 (Minn. Ct. App. 1998); *In re Paternity of W.L.*, 855 P.2d 521, 523-24 (Mont. 1993); *Jelen v. Price*, 458 N.E.2d 1267, 1270 (Ohio Ct. App. 1983). *But see* *Horner v. Dible*, No. S-93-44, 1994 WL 319071, at *3 (Ohio Ct. App. June 30, 1994) (affirming the trial court’s award of lost wages under new statutory language). Lost wages are also not included in reasonable expenses of pregnancy in Arkansas. See *Taylor v. Finck*, 211 S.W.3d 532, 537 (Ark. 2005).

19. See, e.g., *In re Baby Girl D.*, 517 A.2d 925, 929 (Pa. 1986) (construing the “reasonable lying-in expenses” language to mean that Lamaze classes, prenatal care, and sonograms are not chargeable to the adopting parents to reimburse for expenses on behalf of the

B. *The Problem with the Status Quo*

This legal status quo is troubling for three main reasons. First, it is unfair. When a woman who isn't prepared to be a mother discovers she's pregnant, the weeks and months that follow can be extremely difficult. If she chooses to terminate the pregnancy, the physical and emotional risks of the procedure alone are significant.²¹ When an abortion causes an infection, the long-term effects may be serious, even fatal.²² For many women, an abortion is also logistically and financially hard to obtain.²³

natural mother). The court in *Taylor* relied on this holding to deny reimbursement to a birth mother for such expenses from the birth father. 211 S.W.3d at 537.

20. See, e.g., *Taylor*, 211 S.W.3d at 537 (“Lying-in expenses normally would not include items such as maternity clothes, lost wages, or counseling.”). A minority of states extend a man’s pregnancy-related obligations beyond the narrow scope guided by the best interests of the child to encompass duties to the woman in her own right. Most notably, Delaware’s domestic relations statute dedicates an independent code section to the “[d]uty to support woman with child conceived out of wedlock.” DEL. CODE ANN. tit. 13, § 504 (2010). This provision empowers judges to allocate the costs of pregnancy and birth as they see fit. Despite this broad statutory language, however, there is little indication that Delaware courts have awarded pregnant women anything in excess of the amount typically available in other states under the child support rubric: reimbursement for medical expenses directly related to pregnancy and childbirth. See *DCSE/J. O’C. v. D.U.*, No. CN07-03863, 2009 WL 1205835, at *2 (Del. Fam. Ct. Mar. 18, 2009) (discussing only out-of-pocket delivery expenses in connection with a man’s pregnancy-related obligation).

21. These include abdominal cramping, irregular bleeding, nausea, vomiting, and diarrhea. See ELIZABETH RING-CASSIDY & IAN GENTLES, *WOMEN’S HEALTH AFTER ABORTION* 2-3 (2002); *Abortion—Before, During, and After an Abortion: When to Call a Doctor*, WEBMD, <http://women.webmd.com/tc/abortion-before-during-and-after-an-abortion-when-to-call-a-doctor> (last updated Sept. 29, 2008); *Possible Physical Side Affects* [sic], AM. PREGNANCY ASS’N, <http://www.americanpregnancy.org/unplannedpregnancy/possiblesideeffects.html> (last updated Sept. 2007). On the psychological effects of abortion and debates surrounding the extent and relevance of these effects, see Reva B. Siegel, Lecture, *The Right’s Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008); Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193 (2010); and *Emotional Reactions After an Abortion*, WEBMD, <http://www.webmd.com/hw-popup/emotional-reactions-after-an-abortion> (last updated Sept. 29, 2008).

22. See F. GARY CUNNINGHAM ET AL., *WILLIAMS OBSTETRICS* 247 (22d ed. 2005) (“Although serious complications of abortion most often occur with criminal abortion, even spontaneous abortion and legal elective abortion continue to be associated with severe and even fatal infections. Severe hemorrhage, sepsis, bacterial shock, and acute renal failure have all developed in association with abortion but at a much lower frequency. Uterine infection is the usual outcome, but parametritis, peritonitis, endocarditis, and septicemia may all occur.” (citations omitted)); RING-CASSIDY & GENTLES, *supra* note 21, at 2; Joel Brind et al., *Induced Abortion as an Independent Risk Factor for Breast Cancer*, 50 J. EPIDEMIOLOGY & COMMUNITY HEALTH 481 (1996); David A. Grimes, *Sequelae of Abortion*, in *MODERN METHODS OF INDUCING ABORTION* 95, 101-02 (David T. Baird et al. eds., 1995).

23. Most U.S. counties do not have abortion providers. This means that women must travel, sometimes for hours, to the nearest clinic. Once they arrive, an abortion typically costs several hundred dollars, and public funding for abortions is limited. As a result of their difficulties reaching a clinic and raising the money for the procedure, pregnant women who

As for a pregnancy taken to term, the consequences go far beyond the monetary charges of visits to the obstetrician/gynecologist and the delivery room. Pregnancy may of course be an inspiring and joyful experience, but even smooth pregnancies come with routine difficulties that are more extensive than is generally recognized—including prolonged bouts of nausea and vomiting, back pain, and fatigue.²⁴ Pregnancy also limits a woman's freedom of movement and it transforms her public identity. Reva Siegel captures some of the effects of pregnancy on a woman's personhood:

A woman may find that pregnancy comes to embody her social identity to others, who may treat her with love and respect or, alternatively, abuse her as a burden, scorn her as unwed, or judge her as unfit for employment. . . . Pregnancy, and the period of lactation that follows it, are not merely burdensome, disruptive, or even consuming forms of work. They amplify the gendered judgments and constraints to which women are already subject, exposing them to material and dignitary injuries having nothing to do with the physiology of reproduction, and entangling them in relationships that profoundly define their identity and life prospects.²⁵

After childbirth, a woman may require weeks, sometimes months to recover, especially if she is among the one-third of mothers who now give birth through a cesarean—which is major abdominal surgery.²⁶ Possible complications and long-term risks of pregnancy and childbirth include chronic vaginal and bowel infections, incontinence, and diabetes. All of these effects compounded togeth-

are both poor and young are more likely to undergo later-term—and therefore riskier—abortions. See *The New Health Care Reform Legislation: Pros and Cons for Reproductive Health*, GUTTMACHER INST. (Mar. 29, 2010), <http://www.guttmacher.org/media/inthenews/2010/03/29/index.html>.

24. I discuss these effects in further detail in *The Price of Pleasure*. See Motro, *supra* note 8, at 923-24.

25. Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 374-75 (1992) (footnotes omitted); see also ANNIE MURPHY PAUL, ORIGINS: HOW THE NINE MONTHS BEFORE BIRTH SHAPE THE REST OF OUR LIVES 167 (2010) (“We’re used to thinking of adolescence as a time when our bodies are changing, when our emotions are unruly—well, pregnancy is very similar It’s a very disorderly time, when a lot of things are in flux. But that fluidity also opens up new opportunities for positive change. . . . You have to let yourself fall apart, and then put the pieces back together in a different way.” (quoting therapist Catherine Monk)).

26. See *Cesarean Section—Topic Overview*, WEBMD, <http://www.webmd.com/baby/tc/cesarean-section-topic-overview> (last updated Feb. 24, 2010) (“[I]t may take 4 weeks or longer to fully recover [after a C-section].”). On recovery of the perineal area in particular, see Frederick R. Jelovsek, *Vaginal Conditions After Delivery*, WOMEN’S HEALTH RESOURCE, <http://www.wdxcyber.com/npreg14.htm> (last visited June 6, 2010) (“One study that looked at how long, on the average, it took women to recover various functions after normal vaginal delivery found that the median time (time for 50% of subjects) ‘for perineal comfort in general (including walking and sitting) was 1 month (range, 0-6 months); 20% of women took more than 2 months to achieve general perineal comfort. For comfort during sexual intercourse, the median time was 3 months (range, 1 to more than 12 months); 20% of women took longer than 6 months to achieve comfort during sexual intercourse.’” (emphasis omitted)).

er tend to interfere with a woman's ability to provide for herself, if only temporarily, and the scope of workplace protections for pregnant women is limited. As Joanna Grossman explains,

[t]he plight of pregnant workers today rests . . . primarily . . . in the failure of current law to account for the physical, medical, and social realities of pregnancy. Pregnancy discrimination law provides absolute protection for women only if they retain full work capacity during the period of pregnancy and childbirth. A pregnant woman who seeks to continue working through pregnancy, but experiences a temporary diminishment or alteration of capacity due to the physical effects of pregnancy, will encounter limited protection in the law.²⁷

Annie Murphy Paul illustrates the disconnect between pregnant women's reality and their roles in society through what she calls the myth of the Pregnant Superwoman:

This imaginary superhero never needs to sit down and take the weight off her feet, or catch her breath at the top of the stairs. She runs a marathon in her third trimester and works twelve-hour days until her water breaks. She's just like a nonpregnant mortal, in fact, only better, and she has become the unattainable standard against which women measure themselves during pregnancy.

. . . .
 . . . [The myth of the Pregnant Superwoman] is perpetuated in part by pregnant women themselves: she reassures us with her cheerful invulnerability, her bulletproof resistance to all the changes—physical and emotional and logistical—that come along with having a child. Her fearless independence allows us to evade the fact that pregnancy and childrearing *do* make us more dependent on others, in the heat of a disaster and in the heart of everyday life. In short, the Pregnant Superwoman embodies the insistence that pregnancy doesn't change anything, a fable that may hold as much appeal for pregnant women as it does for spouses and employers. She tells us that, for nine months more, we can hold off the tidal wave of change we know is coming—but at the cost of slighting the needs that have already arisen, and ignoring the changes that are already here.²⁸

27. Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 570 (2010); see also *id.* at 578 (“An important, yet under-examined, aspect of pregnant women in the modern workplace is the potential for conflict between the physical effects of pregnancy and paid work. . . . Historically, women ‘with child’ were presumed incapable of work, particularly in the later stages of pregnancy. . . . Today, the opposite presumption is often applied—uncomplicated pregnancy has no meaningful physical effects that bear on a woman’s ability to work. The presumption of incapacity and the presumption of uninterrupted capacity are, however, both flawed.”).

28. PAUL, *supra* note 25, at 59, 73-74; see also Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 955-56 (1984) (“The power to create people is awesome. Men are profoundly disadvantaged by the reality that only women can produce a human being and experience the growth of a child in pregnancy. Pregnancy and childbirth are also burdensome to health, mobility, independence, and sometimes to life itself, and women are profoundly disadvantaged in that they alone bear these burdens.”).

These realities combined with our heavy reliance on the nuclear family as a form of “social insurance”²⁹ mean that when the man is not forthcoming and the pregnancy is complicated (both physically and in its impact on a woman’s work life), the law leaves a single pregnant woman to shoulder most of the burdens alone. When a man goes beyond his legal call of duty and regards the pregnancy as a shared responsibility, the law casts his contributions as optional gifts, gratuitous acts of kindness, which leads some women to refuse the help they deserve out of pride.³⁰ As we shall see, tax law reinforces this message. For sexual partners who do not already share their income but who nevertheless view pregnancy as a shared responsibility, the law also gives virtually no guidance as to a reasonable or equitable baseline for pregnancy-related support. Partners must essentially make up their own rules as they go, which can put tremendous pressure on men and women alike.

The second problem with the status quo is that it sets up the wrong incentives. Studies show that adolescent men who expect to pay child support should their partner become pregnant have fewer partners, less frequent intercourse, and are more likely to use contraceptives.³¹ But in some relationships, men assume—sometimes reasonably—that a woman will terminate an unwanted pregnancy. How does the fact that abortion frees men not only of child support but also of any responsibility towards the woman figure into what happens in the bedroom?

Decisions about sex, contraception, and abortion take place in the shadow of the law’s allocation of their attendant risks. It is only logical that one way to reduce unintended pregnancies might be to raise the stakes for men, to make sure *all* pregnancies have concrete consequences for both parties involved.

29. See Anne Alstott, *Private Tragedies? Family Law as Social Insurance*, HARV. L. & POL’Y REV. 3 (2010).

30. I have not found in-depth studies of support patterns among unmarried lovers, but the 1960 novel *The L-Shaped Room* provides one beautifully subtle rendering of the complex and layered emotions involved. See LYNNE REID BANKS, *THE L-SHAPED ROOM* 240 (1960) (“‘What’s your trouble, my lad?’” the heroine asks the stirring in her womb after meeting Terry, the man with whom she conceived, for the first time since their affair. “‘Should I have taken the money he wanted to give us? Why not? you ask. A good question.’ Well, why not? He hadn’t offered it out of a sense of duty. Or had he? I didn’t much care. What mattered was that I hadn’t wanted it . . . ‘It would have given him some claim on you,’ I said to the bump under my hand, ‘and such claims can’t be bought with money.’ But I knew that wasn’t the only reason. I looked at the stove, snarling like the part of me that had wanted Terry to see all this—the five long flights, the darkness, the smell, the landing taps; I had wanted to punish him. But that feeling had gone—so quickly. I drew back my lips and snapped my teeth happily at the stove. I felt pleased with myself. It would have been so easy to hate Terry, to take advantage of his vulnerable position; it would have been so easy to take the money, and to justify taking it. I wasn’t pleased because I’d resisted the temptation to take it. I was pleased because I hadn’t wanted it.”).

31. See Chien-Chung Huang & Wen-Jui Han, *Child Support Enforcement and Sexual Activity of Male Adolescents*, 69 J. MARRIAGE & FAM. 763 (2007); Chien-Chung Huang & Wen-Jui Han, *Perceptions of Child Support and Sexual Activity of Adolescent Males*, 27 J. ADOLESCENCE 731 (2004).

Thus, increasing support for pregnant women regardless of the pregnancy's outcome is likely, over time, to change abortion from being used as a form of birth control that lets men off the hook into a last resort that both parties are invested in preventing. It may also reduce abortions obtained under the pressure of short-term economic considerations.³²

To be sure, responsible men don't need external incentives to do the right thing; they do their best to prevent pregnancy, and when their efforts fail they don't leave their partner in the lurch, even when their legal duties are minimal or nil. But for some men, the bottom line matters.

Third and finally, by viewing nonmarital pregnancies through the prism of paternity rather than as giving rise to an obligation toward the woman herself, the current rule not only underestimates the real costs of pregnancy, it also ignores the relational implications of conception. True, not all conceptions happen in the context of an ongoing relationship, and casual lovers who mutually intend and expect a no-strings-attached encounter (i.e., those who expect to have no responsibilities vis-à-vis each other should pregnancy occur) should be permitted to set their own rules. But using the lovers-as-strangers paradigm as the baseline governing all nonmarital conceptions flies in the face of most people's reality. For one, most conceptions result not from birth control failures during a single encounter but from repeated acts of unprotected intercourse.³³ Also, though further research is needed,³⁴ studies suggest that most unmarried fathers are involved to some extent during the birth of their child, and boy-

32. A recent study suggests that child support enforcement decreases the incidence of abortion. See Jocelyn Elise Crowley, Radha Jagannathan & Galo Falchettiore, *The Effect of Child Support Enforcement on Abortion in the United States 22-23* (unpublished manuscript) (on file with author). For data on the higher incidence of abortion among poor women, see HEATHER D. BOONSTRA ET AL., GUTTMACHER INST., *ABORTION IN WOMEN'S LIVES 20* (2006), available at <http://www.guttmacher.org/pubs/2006/05/04/AiWL.pdf> ("The abortion rate among women living below the federal poverty level . . . is more than four times that of women living above 300% of the poverty level . . ."); and Annie Murphy Paul, *Is the Recession Causing More Abortions?*, SLATE (May 15, 2009), <http://www.doublex.com/section/health-science/recession-causing-more-abortions>.

33. See JENNIFER J. FROST, JACQUELINE E. DARROCH & LISA REMEZ, GUTTMACHER INST., *IMPROVING CONTRACEPTIVE USE IN THE UNITED STATES 1* (2008), available at <http://www.guttmacher.org/pubs/2008/05/09/ImprovingContraceptiveUse.pdf> ("Slightly more than half of unintended pregnancies occur among women who were not using any method of contraception in the month they conceived, and more than four in 10 occur among women who used their method inconsistently or incorrectly. Only one in 20 are attributable to method failure."); EILEEN L. McDONAGH, *BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT 51-53* (1996).

34. See ARTHUR B. SHOSTAK & GARY McLOUTH, *MEN AND ABORTION: LESSONS, LOSSES, AND LOVE 5* (1984) (finding that eight-five percent of sociological research on abortion "dealt with women, or the fetus, or the state, etc.—anything except the men involved"); Reich & Brindis, *supra* note 1, at 134 ("Some research has been conducted regarding the perceptions of men's roles in contraception, reproduction, or pregnancy in general, but far less research has been conducted in the area of men's experiences with abortion." (citations omitted)).

friends commonly pay for or contribute to the cost of an abortion.³⁵ Unless the sex was mutually understood as implying no ongoing responsibilities should conception occur, when the man abandons his pregnant lover we generally think he has done something wrong, that he has violated a basic moral code.

Why then is a lovers-as-strangers paradigm our legal default?

One way to make sense of the current rule is as an example of what Robin West sees as the hyperindividualistic starting point—the “separation thesis”—that underlies modern American jurisprudence.³⁶ We imagine ourselves as disconnected self-sufficient beings; we believe that we are essentially and fundamentally free-floating independent selves. Accordingly, we think that the greatest danger we face is that other individuals will interfere with or violate our otherwise blissfully isolated independence. This “separation thesis” drives us to fortify ourselves with laws that preserve values like autonomy and privacy, while ignoring other values that are equally essential to human flourishing like intimacy and mutual responsibility.³⁷ Human beings are social animals, we are

35. One study of unmarried parents in Oakland, California, revealed that most unmarried parents were romantically involved when their child was born and that about half were living together. SARAH McLANAHAN ET AL., PUB. POLICY INST. OF CAL., FRAGILE FAMILIES ONE YEAR LATER: OAKLAND, CALIFORNIA 7 (2002), available at http://www.ppic.org/content/pubs/op/op_1002smop.pdf. Approximately eighty percent of the mothers in the survey “reported that the father had contributed financial support or helped in other ways (such as providing transportation) during the pregnancy.” *Id.* at 10; see also MAUREEN R. WALLER, MY BABY’S FATHER: UNMARRIED PARENTS AND PATERNAL RESPONSIBILITY 2-3 (2002) (“Approximately 33 percent of all births in the United States now occur to unmarried parents . . . [and] about half of these parents are living together at the time of their child’s birth.”). Another survey of men in abortion clinic waiting rooms revealed that most paid for all or some of the procedure. See SHOSTAK & McLOUTH, *supra* note 34, at 36. Note, however, that data on how many men accompany their partner to the clinic are contradictory. Compare Reich & Brindis, *supra* note 1, at 135 (“One recent study found that only 22-25% of women came or left the abortion procedure with the man by whom they became pregnant.” (citing Britta Beenhakker et al., *Are Partners Available for Post-Abortion Contraceptive Counseling? A Pilot Study in a Baltimore City Clinic*, 69 CONTRACEPTION 419 (2004))), with SHOSTAK & McLOUTH, *supra* note 34, at 17 n.1 (finding that men accompanied their partners to abortion clinics approximately half of the time).

36. See Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 2 (1988).

37. West casts this opposition in gendered terms. In her view, the separation bias is inherently male, while connection is inherently female. Women, unlike men, “are not essentially, necessarily, inevitably . . . separate from other human beings . . . [W]oman [sic] are ‘essentially connected’ . . .” *Id.* at 2-3. West locates women’s essential connectedness in their “critical material experiences,” including pregnancy and breastfeeding. *Id.* at 3; see also Robin L. West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN’S L.J. 149, 210 (2000).

I do not know whether separation is essentially masculine or connection is essentially feminine, but I do believe that the ultimate conclusion West draws from these categories is crucial to the knot we are trying to unravel. Her most compelling insight is that connectedness expresses an important, undervalued truth that is critical to the happiness of both men and women. Though she emphasizes the differences between the sexes, West also thinks that both men and women are animated by both connection and separation. It is the tension between the two, she says, that is essential to our nature. See West, *supra* note 36, at 15-19.

all inescapably interdependent, we are mutually bound, and we need one another. Thus, West argues that building and cultivating a “connection thesis” to counterbalance the prevailing separation bias is critical to creating a more humane jurisprudence.

Applying this framework to our problem, pregnancy and the sexual act that precedes it are the ultimate embodiment of human beings’ capacity for connectedness. A system that treats a woman and the man with whom she conceives as legal strangers is profoundly out of touch with the emotional, spiritual, and moral dimensions of human experience. In some cases, this legal lacuna legitimates the view that an unintended pregnancy is a woman’s problem. In others, the law’s failure to provide a script, a framework for couples to deal with a difficult situation that clearly implicates both parties, may contribute to the pressure to marry when alternative forms would yield better long-term consequences.³⁸ Finally, by remaining silent on this issue, the law misses an opportunity to sanction and encourage, indeed to *normalize*, pregnancy support within unmarried couples.³⁹

In sum, the lovers-as-strangers paradigm belongs in the past. It is out of step with broadly accepted mores regarding men’s responsibility toward a lover undergoing an abortion, and its minimalist approach to pregnancies taken to term is unfair, unwise, and untrue to human experience.

II. POSSIBLE SOLUTIONS

In this Part, I turn from the problem to possible solutions. Ultimately, I conclude that the main existing framework for addressing the special relationship between a man and a woman who conceive—marriage—is not a panacea. Nor are utopian proposals to do away with civil marriage and shift the burden of supporting reproduction from the private realm of the family to the state. A third possibility is to create a new legal status specifically designed to address the unique situation of unmarried lovers who conceive. This option is promising, but requires further development before it may be implemented.

38. See *infra* notes 50-54 and accompanying text.

39. Supporting and encouraging pregnancy support should be especially popular among those dedicated to responsible fatherhood initiatives. See Senator Barack Obama, Remarks at the Apostolic Church of God (June 15, 2008) (transcript available at <http://my.barackobama.com/page/community/post/stateupdates/gG5nFK>) (“We need fathers to realize that responsibility does not end at conception.”); *White House Launches Fatherhood Initiative*, NPR (Aug. 11, 2009), <http://www.npr.org/templates/story/story.php?storyId=111770004> (“Obama’s faith-based office will go around the country holding town hall meetings to discuss the importance of fatherhood and speak with community organizations about what policies best work to build strong families.”).

A. Marriage

The legal vacuum in which unmarried lovers who conceive find themselves might be seen as a symptom of another, broader crisis: the crisis afflicting the institution of marriage. The very purpose of marriage, some believe, is to regulate the unique relational consequences of heterosexual reproduction.⁴⁰ The most visible recent manifestation of this view has arisen in the context of the debates surrounding gay marriage. “[A]n orderly society requires some mechanism for coping with the fact that sexual intercourse commonly results in pregnancy and childbirth,” wrote dissenting Massachusetts Supreme Judicial Court Justice Robert Cordy in *Goodridge v. Department of Public Health*,⁴¹ and “[t]he institution of marriage is that mechanism.”⁴² According to this frequently quoted argument,⁴³ marriage should be limited to heterosexuals because the *raison d’être* of marriage—regulating accidental procreation—is a nonissue for gay and lesbian lovers.

Applying this theory of marriage to the problem, the most appropriate response might be to bolster the tried-and-true institution we already have for addressing the issue rather than reinventing the wheel. From this perspective, marriage is women’s insurance policy against being left in the lurch. Marriage guarantees a minimal level of mutual support, at least *de jure*.⁴⁴ A pregnant woman married to the man with whom she conceives is thus marginally safer than a pregnant woman who is unwed. Women who want their relationship to be governed by a set of rules that depart from the no-strings-attached default are free to make their commitment official and legally binding. Indeed, some people believe that society deliberately provides additional incentives for them

40. For a discussion and critique of the channeling function of marriage, see Appleton, *supra* note 2, at 276-85.

41. 798 N.E.2d 941, 995 (Mass. 2003) (Cordy, J., dissenting); *see also id.* at 969 (majority opinion) (holding that a bar against same-sex marriage violated the state’s constitution).

42. *Id.* at 995 (Cordy, J., dissenting).

43. *See* Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 YALE J.L. & HUMAN. 1, 3-4 (2009) (surveying and critiquing the widespread influence of Justice Cordy’s decision).

44. Note however that economically dependent spouses generally have few mechanisms for enforcing their entitlements during marriage. Spouses’ economic rights generally vest at divorce. For a discussion of spouses’ limited economic rights during an ongoing marriage, see Alicia Brokars Kelly, *Money Matters in Marriage: Unmasking Interdependence in Ongoing Spousal Economic Relations*, 47 U. LOUISVILLE L. REV. 113 (2008-2009). *See also* Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 34 (1996) (explaining that spouses’ duty of mutual support is “not directly enforceable between the parties when married” but “may be enforceable during a marriage only by third party creditors who may sue one spouse for certain very narrow categories of debts undertaken by the other”). Even at divorce, while property distribution determinations may take childcare contributions into account, they do not look at pregnancy and the “labor” of childbirth for purposes of determining spouses’ contributions to the marriage.

to do so—including sizable tax benefits⁴⁵—and that partners who choose not to commit deserve to face the consequences of their actions alone. From this perspective, changing the default governing unmarried lovers to include minimal relational duties might further erode the fragile institution by removing one of the remaining imperatives to get married.

The historical accuracy of the theory of marriage as primarily aimed at regulating accidental reproduction is subject to debate.⁴⁶ Its current relevance, however, is clearly dubious. The overwhelming majority of Americans today have sex outside of marriage.⁴⁷ Even the abstinence movement within conserv-

45. Contrary to popular belief, Congress did not create the “marriage bonus” in order to promote marriage. Nevertheless, politicians and activists have grown to defend it as though Congress did. See Shari Motro, *A New “I Do”: Towards a Marriage-Neutral Income Tax*, 91 IOWA L. REV. 1509, 1529 (2006) [hereinafter Motro, *A New “I Do”*]. For discussion of tax and other marriage-based benefits, see Appleton, *supra* note 2, at 273 (“By licensing marriage and attaching to it material and status-based benefits, the state singles out the favored, ‘legitimate’ site for sexual activity, and clearly communicates its preference for monogamy . . .” (footnote omitted)); Tara Siegel Bernard & Ron Lieber, *The Costs of Being a Gay Couple Run Higher*, N.Y. TIMES, Oct. 3, 2009, at A1; and Shari Motro, Op-Ed., *The State of the Unions; Single and Paying for It*, N.Y. TIMES, Jan. 25, 2004, § 4, at 15.

46. In fact, as Kerry Abrams and Peter Brooks argue, rather than guaranteeing all pregnant women a minimal level of support, marriage *limited* men’s responsibility to just one of their companions. “In the English legal tradition,” they write, “[m]arriage . . . functioned not as a check on the wildness of male heterosexuality but as a way for men to maintain sexual freedom without adverse financial consequences . . .” Abrams & Brooks, *supra* note 43, at 9. Marriage obviously provided no protections to mistresses, prostitutes, or slaves. See Larson, *supra* note 5, at 389-90 (“[Victorian] conventions of female sexual modesty protected ‘respectable’ women only at the expense of prostitutes, enslaved women, and domestic servants, against whom male sexual interest was redirected.”); see also STEPHANIE COONTZ, MARRIAGE, A HISTORY 35 (2005) (“The story that marriage was invented for the protection of women is still the most widespread myth about the origins of marriage.”); *id.* at 31 (“Probably the single most important function of marriage through most of history . . . was its role in establishing cooperative relationships between families and communities.”); *id.* at 34-49 (discussing the invention of marriage); NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 16 (2000) (“As an intentional and harmonious juncture of individuals for mutual protection, economic advantage, and common interest, the marriage bond resembled the social contract that produced government.”). For a summary of judicial critiques of the theory, see Courtney Megan Cahill, *The Genuine Article: A Subversive Economic Perspective on the Law’s Procreationist Vision of Marriage*, 64 WASH. & LEE L. REV. 393, 410-12 (2007); and Law, *supra* note 28, at 957-58.

47. See Naomi Cahn & June Carbone, *Red Families v. Blue Families* 60 (George Washington Univ. Law Sch. Pub. Law & Legal Theory, Working Paper No. 343, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008544 (“Social science research . . . suggests that well over 90% of all adults engage in sex before they marry . . .”). As Cahn and Carbone show, the main cultural divide in America today seems to be not between unmarried youth who abstain and those who are sexually active. Rather, the main division is in how people tend to handle an unplanned pregnancy. Conservatives tend toward the “shotgun wedding” while liberals are more likely to terminate the pregnancy.

The unintended pregnancy rate is highest among young unmarried women. See Stanley K. Henshaw, *Unintended Pregnancy in the United States*, 30 FAM. PLAN. PERSP. 24, 27 (1998); Melinda Beck, *The Birth-Control Riddle*, WALL ST. J., Apr. 20, 2010, at D1 (“One

ative Christian communities has delayed the age of first intercourse only marginally.⁴⁸ Some studies show that teens who take chastity pledges are also less likely to use birth control, presumably because “the use of birth control implies that one thought about sex beforehand; one *planned* for it.”⁴⁹ As the age of first intercourse falls and the age of first marriage rises, the real world relevance of marriage as gatekeeper becomes increasingly tenuous.

Not only does marriage fail to deter nonmarital sex, the solution it offers young people who marry *because* of an accidental pregnancy—the preferred fallback in conservative communities—may also be less than ideal. A “shotgun marriage” will guarantee the woman a baseline level of support,⁵⁰ but early marriages (particularly those “compelled by an improvident pregnancy”) are more likely than other marriages to end in divorce.⁵¹ Furthermore, the financial and emotional costs of dissolving a failed marriage may outweigh the temporary security it provides during pregnancy. Marriage provides a useful way to formalize intimate relations between lovers who would choose to marry regardless of the risk of procreative accidents. By standardizing a basket of rights and responsibilities between adults who intend to unite for life, it absolves couples of the need to deliberate and negotiate over every aspect of their union. Its maximalist one-size-fits-all defaults designate spouses as each others’ primary beneficiaries, caretakers, guardians, agents, and representatives in all aspects of

out of every two American women aged 15 to 44 has at least one unplanned pregnancy in her lifetime. Among unmarried women in their 20s, seven out of 10 pregnancies are unplanned.”); see also Rob Stein, *Rise in Teenage Pregnancy Rate Spurs New Debate on Arresting It*, WASH. POST, Jan. 26, 2010, at A4.

48. See LAUREN F. WINNER, *REAL SEX: THE NAKED TRUTH ABOUT CHASTITY* 17 (2005) (“In 2001, a study of 6,800 students showed that virgins who took the [True Love Waits abstinence] pledge were likely to abstain from sex for eighteen months longer than those who did not take the pledge. This . . . means simply that a lot of abstinence pledgers are having sex at nineteen instead of eighteen.”); Heather D. Boonstra, *Advocates Call for a New Approach After the Era of “Abstinence-Only” Sex Education*, GUTTMACHER POL’Y REV., Winter 2009, at 6, 8.

49. WINNER, *supra* note 48, at 17. More broadly, rather than functioning as an insurance policy against unintended procreation, marriage is more commonly the form of choice for couples who *intend* to conceive. “Many people today marry,” write Kerry Abrams and Peter Brooks,

once they think they have found the person they want to procreate with, not because they have decided to have sex for the first time and want to insure themselves against “accidents,” but because they have been (irresponsibly?) engaging in sex for quite some time and only now are ready to settle down and have a child.

Abrams & Brooks, *supra* note 43, at 32.

50. The scope of this Article is limited to unmarried conception, but the treatment of pregnancy in marriage and divorce law, while better, is also lacking.

51. Cahn & Carbone, *supra* note 47, at 60; see also *id.* at 26 (“[D]ivorce risk . . . increases with younger age of marriage, lower economic status, and having a baby either prior to marriage or within the first seven months after marriage. Accordingly, family strategies that either emphasize marrying young, or marriage as the solution to an improvident pregnancy are likely to increase rates of divorce, all other things being equal.” (footnote omitted)).

life—financial, medical, spiritual. In this capacity, spouses replace parents and siblings as a person's most significant legal relation. Though pregnancy and co-parenting are life-altering undertakings, marriage binds people to a broader, more extensive commitment than is needed to protect lovers who conceive and their unplanned children. Thus when pregnancy is accidental, couples whose actual emotional relationship is not one of lifelong commitment may be better served by an intermediate status that is calibrated to their situation.⁵² The “shotgun” practice is at best an incomplete answer to the problem. Finally, even when parties are already married when they conceive, being married does not necessarily improve the woman's position because it may lock her into a harmful relationship,⁵³ with the only alternative—divorce—having potentially devastating economic consequences.⁵⁴

In sum, Justice Cordy and those who follow his lead are correct that accidental procreation demands attention. We do need legal institutions that recognize and support its consequences. But marriage is not the ultimate answer. A more coherent and honest approach would acknowledge the crossroads at which we stand. Marriage as we know it does not and cannot set the code for all unplanned pregnancies. An alternative form is needed.⁵⁵

B. *Collective Responsibility Towards Pregnant Women*

Another possibility is to follow Martha Fineman's lead and go to the opposite extreme: abolish marriage altogether and instead privilege only caretaker-

52. See *id.* at 59 (“[M]arriage at younger ages is a risky enterprise. It has historically required a high degree of community-reinforced socialization into marital roles—including stereotypical gender roles, male financial contributions and female dependence—to succeed. New research emphasizes that full emotional maturity does not occur until the mid-twenties, and the less than fully mature early twenties brain (especially if male) is primed for risk-taking and sexual experimentation. At the same time, the modern economy provides fewer opportunities for the men who are ready to start families in their early twenties to move into productive employment.” (footnotes omitted)); see also HIRSHMAN & LARSON, *supra* note 5, at 276 (“Rather than try to force sexual actors into marriage, we choose to modify the anarchic state of nature that characterizes nonmarital sexual bargaining.”). But see Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 235 (noting that “even broken marriages provide financial and relationship benefits for dependent family members”).

53. See JEANNIE SUK, *AT HOME IN THE LAW* 13-16 (2009) (discussing the marital home as a site of violence, the limitations of available legal remedies, and the difficulties women face in leaving abusive marriages).

54. See ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD* 149-61 (2001); MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995); Appleton, *supra* note 2, at 296-97 (describing family law's failure to deliver on the presumed promises of marriage).

55. For a broader argument that family law should recognize and support friendships that do not resemble marriage or marriage-like relationships, see Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189 (2007).

dependent relationships.⁵⁶ Fineman starts from the premise that dependency is an inevitable aspect of our nature. “Far from being a ‘pathological’ condition . . . it is an inevitable part of the human condition. It is universal—a developmental and shared experience. All of us were dependent as children, and many of us will become dependent as we age, fall ill, or are disabled.”⁵⁷ To be human is to be dependent; to be human is to be vulnerable.⁵⁸ It follows that all humans need to be cared for at some point in their lives. The people who do this caretaking—usually women⁵⁹—in turn need to be supported themselves because “caretaking requires the sacrifice of autonomy and entails compromises that negatively affect economic and market possibilities.”⁶⁰ As Robin West puts it:

Emotionally and morally women may benefit from the dependency of the fetus and the infant upon us. But *materially* we are more often burdened than enriched by that dependency. And because we are burdened, we differentially depend more heavily upon others, both for our own survival, and for the survival of the children who are part of us. Women, more than men, depend upon relationships with others, because the weakest of human beings—infants—depend upon us.

Thus, motherhood leaves us vulnerable: a woman giving birth is unable to defend herself against aggression; a woman nursing an infant is physically exposed; a woman nurturing and feeding the young is less able to feed herself. Motherhood leaves us unequal . . .⁶¹

56. See generally FINEMAN, *supra* note 54. For related arguments, see Alstott, *supra* note 29, at 6 (showing “how family law operates—despite its traditional private-law label—as social insurance for affective life” and asking “whether public programs ought to address, more explicitly, the consequences of risks traditionally covered by family law—risks of divorce, nonmarriage, parenthood, and childhood”); and Appleton, *supra* note 2, at 274-76 (critiquing family law’s sex-centricity).

57. Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL’Y & L. 239, 269 (2001).

58. See Martha Albertson Fineman, Essay, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 8 (2008) (“I want to claim the term ‘vulnerable’ for its potential in describing a universal, inevitable, enduring aspect of the human condition that must be at the heart of our concept of social and state responsibility.”); *id.* at 12 (“The vulnerable subject approach does what the one-dimensional liberal subject approach cannot: it embodies the fact that human reality encompasses a wide range of differing and interdependent abilities over the span of a lifetime. The vulnerability approach recognizes that individuals are anchored at each end of their lives by dependency and the absence of capacity.”).

59. See FINEMAN, *supra* note 54, at 162-63 (“Women, wives, mothers, daughters, daughters-in-law, sisters are typically the socially and culturally assigned caretakers. As caretakers they are tied into intimate relationships with their dependents. The very process of assuming caretaking responsibilities creates dependency in the caretaker—she needs some social structure to provide the means to care for others.”).

60. Fineman, *supra* note 57, at 270.

61. West, *supra* note 37, at 210.

The question then becomes, who bears the responsibility for these “inevitable dependents”⁶² (the children, the ill, the elderly) and the “derivative depend[ies]”⁶³ of their caretakers? Currently, Fineman argues, we are myopically focused on sexual affiliations between men and women (i.e., marriage and its approximations) as the primary legally significant intimate connection and the framework through which we address dependency.⁶⁴ “Marriage has historically served as the ‘natural’ repository for dependencies,” she writes. “The family is the institution to which children, the elderly, and the ill are referred; it is the way that the state has effectively ‘privatized’ dependencies that otherwise might become the responsibility of the collective unit or state.”⁶⁵

Fineman argues that this is the wrong approach because romantic relationships do not, in fact, protect dependent caretakers. Though she notes that marriage on an individual level is so specific in practice that any attempt at a generalized definition of the institution is meaningless,⁶⁶ she emphasizes that historically, marriage has worked to disadvantage women.⁶⁷ A family law that privileges sexual affiliates also casts other intimate forms as deviant, eclipsing discussion about the pressing problems of dependency throughout society, not just amongst pairs.⁶⁸ Thus, it exacerbates dependencies by masking them.⁶⁹ Most importantly, relegating dependency to the nuclear family is wrong because “dependency is of concern well beyond the family. Dependency work is of benefit to the entire society.”⁷⁰ This is true not only because primary caretakers’ circumstances influence the children who will become the future citizens of our world but also because the conditions of pregnant women influence

62. Fineman, *supra* note 57, at 269.

63. *Id.* at 270.

64. *See id.* at 243.

65. *Id.* at 268; *see also* FINEMAN, *supra* note 54, at 226 (“In our individualistic society, the state relies on the family—allocating to it the care and protection of society’s weaker members and the production and education of its future citizens.”).

66. *See* Fineman, *supra* note 57, at 241 (“Except in extreme situations, there are no legal enforcement mechanisms to ensure compliance with standards of conduct imposed generally across marriages. The result might be characterized as creating a vacuum of legally mandated meaning for marriage—a vacuum that is to be filled with various non-legal, sometimes conflicting, individual aspirations, expectations, fears, and longings.” (footnote omitted)).

67. *See id.* at 247 (“[M]arriage has not been a neutral social, cultural, or legal institution. It has shaped the aspirations and experiences of women and men in ways that have historically disadvantaged women.” (footnote omitted)).

68. *See id.* at 246 (“Marriage, as the preferred societal solution, has become the problem. The very existence of this institution eclipses discussion and debate about the problems of dependency and allows us to avoid confronting the difficulty of making the transformations necessary to address these problems.”).

69. *See id.*

70. *Id.* at 268.

their fetuses⁷¹—potentially replicating and perpetuating economic inequalities.⁷² Thus Fineman would abolish marriage as a legal category,⁷³ recognize “the parent-child relationship as the quintessential or core family connection [to be subsidized and supported], and focus on how policy can strengthen this tie.”⁷⁴ In sum, Fineman’s vision

leaves behind the obsession with the marital tie and is built around the caretaker and dependent relationship. It is this relationship that should be subsidized and protected. Recognizing both the inevitability of dependency and the society preserving work that caretakers do in meeting the demands of that dependency, [she] argue[s] for the restructuring of our workplaces to accommodate a “dually responsible” worker, and the reinvigoration of our state so that caretaking and market work . . . are compatible, accomplishable tasks. Only when this is accomplished will we have a society in which dependency is fairly and justly managed.⁷⁵

As Fineman herself acknowledges, however, her project is utopian.⁷⁶ Public support for single pregnant women remains limited,⁷⁷ and support for unmarried women seeking an abortion, already scant, is on the decline.⁷⁸ This is

71. See PAUL, *supra* note 25, at 155 (“Increased rates of premature delivery and low birth weight among babies born to depressed pregnant women have been firmly established by research. Now scientists are exploring a startling but still speculative notion: that a pregnant woman’s emotional state can influence the fetus’s developing brain and nervous system, potentially shaping the way the offspring will experience and manage its own emotions—a kind of maternal impressions redux.”).

72. See *id.* at 210 (“In recent years, [Douglas] Almond notes, early-life health measures of blacks have stagnated; black infants are two and a half times more likely to have low birth weight as white infants, and are more than twice as likely to die before age one. Given the potentially lasting effects of prenatal experience, Almond warns, it may be the case that ‘a future of racial inequality is being programmed.’”).

73. FINEMAN, *supra* note 54, at 228.

74. Fineman, *supra* note 57, at 245.

75. *Id.* at 271 (footnotes omitted).

76. FINEMAN, *supra* note 54, at 232.

77. See Rachel Benson Gold, *Recession Taking Its Toll: Family Planning Safety Net Stretched Thin as Service Demand Increases*, GUTTMACHER POL’Y REV., Winter 2010, at 8, 11-12 (examining the recession’s harsh impact on women of reproductive age and acknowledging that many women, even before the recession, were uninsured without sufficient public support for family planning). Indeed, even California, a state once touted for its “landmark healthcare programs,” has proposed limiting the state’s Medicaid program for pregnant women by reducing eligibility requirements from 200% to 133% of the poverty level. See Tom Eley, *U.S. States Slash Medicaid*, GLOBAL RES. (Feb. 22, 2010), <http://www.globalresearch.ca/index.php?context=va&aid=17743>; see also Shane Goldmacher & Evan Halper, *Schwarzenegger’s Revised Budget Plan Is Expected to Eliminate Health Programs*, L.A. TIMES, May 13, 2010, at AA1.

78. Since 1976, Congress has passed various versions of legislation known as the Hyde Amendment, which prohibits the use of federal funding to pay for abortions except when a mother’s life is in danger, or in the case of rape or incest. Act of Sept. 30, 1976, Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434. Although abortion remains legally permissible, the Hyde Amendment makes it difficult for women without independent resources to obtain one. See Heather Boonstra & Adam Sonfield, *Rights Without Access: Revisiting Public*

not to say that efforts to increase collective responsibility for dependency are futile, and advances in this direction are being made. For example, provisions in the recently passed health reform law benefiting pregnant women and teens (read in isolation from the law's abortion-related provisions) are a positive development.⁷⁹ But in the current climate, even the most generous public program is unlikely to adequately support the pregnant unwed. Thus, in addition to working towards increasing public pregnancy-related benefits, something more is needed. Furthermore, as I explain in the next Subpart, *regardless* of such public support, women and the men with whom they conceive form a special relationship that demands its own legal category.

Marriage is changing, but it is not going away. In fact, its variations are multiplying, and the theme unifying its progeny—civil unions, domestic partnerships, and the infinite variety of marriages defined by individually crafted premarital agreements—continues to be the sexually affiliated dyad. Rather than focus on futile attempts to stem the tide, we should recognize it as reality. As long as marriage and marriage-like privileges exist for some citizens, extending them to a greater diversity of relationships is preferable to the status quo.⁸⁰

Funding of Abortion for Poor Women, GUTTMACHER REP. ON PUB. POL'Y, Apr. 2000, at 8, 10 (“[R]estrictions on funding have considerable impact on women’s reproductive decisions. . . . [P]regnancies that would have otherwise been aborted are instead carried to term. . . . [W]omen who are able to raise the money needed for an abortion do so at a great sacrifice to themselves and their families.”); Lawrence B. Finer & Stanley K. Henshaw, *Disparities in Rates of Unintended Pregnancy in the United States, 1994 and 2001*, 38 PERSP. ON SEXUAL & REPROD. HEALTH 90, 95 (2006) (noting that even though indigent women are two times as likely not to have health insurance, “the only federal stream of dollars dedicated to family planning services for low-income women[] declined between 1994 and 2001”); GUTTMACHER INST., FACTS ON INDUCED ABORTION IN THE UNITED STATES 2 (2011), http://www.guttmacher.org/pubs/fb_induced_abortion.pdf (“About 20% of abortion patients report using Medicaid to pay for abortions (virtually all in states where abortion services are paid for with state dollars.”); NAT’L ABORTION FED’N, PUBLIC FUNDING FOR ABORTION: MEDICAID AND THE HYDE AMENDMENT 2 (2006), http://prochoice.org/pubs_research/publications/downloads/about_abortion/public_funding.pdf (“Barriers to abortion access such as the lack of providers, state laws delaying women from receiving timely care, and funding restrictions like the Hyde Amendment fall disproportionately on low-income women who have limited resources with which to overcome these obstacles.”).

79. See *The New Health Care Reform Legislation: Pros and Cons for Reproductive Health*, *supra* note 23 (stating that the “16 million more Americans to join Medicaid by 2019 [under the health care reform will] . . . receive the program’s guarantee of family planning services without cost sharing, along with coverage for its comprehensive package of reproductive health services beyond family planning”).

80. I also support retracting these privileges from economically independent spouses. See *infra* note 188.

C. *Mandatory Preglimony and the Relational Default*

Nonmarital intimate relationships used to inhabit a legal no-man's-land. Over the past few decades, however, courts and legislatures have begun to recognize unmarried partners who live together as forming a unique type of relationship under theories that parallel contractual and equity-based theories of marriage. Where a couple formalizes their domestic partnership and then one partner abandons the other, "palimony"⁸¹ relief to the abandoned partner may be granted under contract principles.⁸² Where a couple has made no explicit agreement formalizing their commitment, many jurisdictions nevertheless recognize that a partnership was formed and provide protections when the relationship breaks down under either an implied contract theory⁸³ or an equity-based status approach.⁸⁴

A similar logic applies to sexual partners who conceive, whether or not they live together. From a contractual perspective, partners who conceive should be recognized under the rubric of a distinct legal relationship because, in many sexual relationships, an agreement to assume mutual obligations of support and communication can be inferred. In these types of relationships, each sexual connection implies a promise, an engagement of sorts to maintain some semblance of a relationship, some minimal modicum of collective responsibility and care should the woman become pregnant.

But even where such an agreement cannot be inferred, sexual partners who conceive should be legally responsible to each other for normative reasons. When a man and a woman have nonreproductive sex, they knowingly engage in an act that has a reasonable possibility of radically interfering with the woman's life, and disproportionately so. If neither party expects an ongoing commitment, a lovers-as-strangers rule is appropriate. But where their expectations

81. The *Oxford English Dictionary* traces the term back to the late 1970s, linking it with the California Supreme Court landmark case *Marvin v. Marvin*, which recognized support rights arising from a cohabitation relationship. See 557 P.2d 106 (Cal. 1976); *Palimony Definition*, OED.COM, <http://oed.com/view/Entry/136318> (last visited Jan. 6, 2010).

82. Most jurisdictions that recognize domestic partners as forming a legally significant relationship follow the contractual approach introduced in *Marvin v. Marvin*. Under this approach, divorce-type property distribution rules apply to separating domestic partners who have explicitly agreed to formalize their union in a marriage-like relationship.

83. See Scott, *supra* note 52, at 258; Shahar Lifshitz, *Married Against Their Will* 11-13 (Bar-Ilan Univ. Pub. Law & Legal Theory Working Paper Series, Paper No. 06-09, 2009), available at <http://ssrn.com/abstract=1352043>.

84. A minority of jurisdictions and the American Law Institute's *Principles of Family Dissolution* reject the contractual approach in favor of a status-based solution. Contract is seen as a poor vehicle for regulating intimate relations for two main reasons. First, as ALI chief reporter Ira Ellman put it, "people do not think of their intimate relationships in contract terms." Ira Mark Ellman, "*Contract Thinking*" Was *Marvin's Fatal Flaw*, 76 NOTRE DAME L. REV. 1365, 1373 (2001). Second, the contract rubric fails to address the equitable claims of abandoned partners where no implied agreement can be reasonably inferred. *Id.* at 1372 & n.39.

diverge, the current default exacerbates imbalances in power and risk. In these types of relationships, when an unwanted pregnancy occurs, fairness requires that the material cost should be distributed between the two parties.

Fineman is right that dependency is inevitable and that its burdens extend to caretakers. She may also be right that the world would be a better place if women could have sexual relationships with whomever they wished, and for however long, relying on kinship ties and community support when they became pregnant. But the “sexual family”⁸⁵ persists as the dominant form in our society because sex and procreation *are* related and because—whether we are biologically or culturally programmed to do so—fathers and mothers tend to have a special relationship with each other. I agree with Fineman that the “core family connection”—the primary connection that deserves legal recognition and support—should not be marriage or sexual affiliation.⁸⁶ But I do not think the mother/child or caretaker/dependent relationship is the only relationship that should matter. Rather, in addition to the vertical relationship between caretaker and dependent, the horizontal relationship between individuals who share responsibility for a dependent is also critical.⁸⁷ A pregnant woman and the man with whom she conceives inhabit a murky middle ground between complete strangers and co-parents. Regardless of whether life begins at conception or whether a fetus can be said to be a “dependent,” a pregnant woman *is* providing for a potential dependent. This reality diminishes her ability to survive on her own and creates a special relationship between her and the man with whom she conceived.

A man’s obligation towards his pregnant lover might be analogized to the support obligations of a breadwinner towards a dependent spouse. Naturally, a sexual relationship implies a much lower level of commitment than betrothal, but, I would like to suggest, it falls along the same spectrum. Sex implies a baseline level of responsibility—a promise. In some communities, conception is tantamount to an engagement to marry. In others, the man is expected to do much less, but few people think he has no responsibilities. Accordingly, the justifications behind continued postdissolution support in the marital context—alimony—parallel the justifications behind my proposed pregnancy-support obligation—preglimony.

One common justification for alimony is contract based. Marriage implies a promise to share economic resources for life. When that promise is broken, the dependent spouse is entitled to an ongoing share of the higher-earning spouse’s income because he or she has relied on the marital unity promise and

85. Fineman uses this term “to emphasize that our societal and legal images and expectations of family are tenaciously organized around a sexual affiliation between a man and a woman.” FINEMAN, *supra* note 54, at 143.

86. Fineman, *supra* note 57, at 245.

87. As I have argued elsewhere, I also believe that horizontal relationships between adults who do not share a dependent, but who share their resources, should be recognized under a separate rubric. See Motro, *A New “I Do,” supra* note 45.

reasonably expected to be supported over time. An alternative justification awards alimony based on a rehabilitative theory—alimony’s function is to tide dependent spouses over until they can “get back on their feet” and support themselves. A related theory links alimony to needs that result “from the unfair allocation of the financial losses arising from the marital failure.”⁸⁸ A final rationale frames alimony in restitutionary terms: its function is to make whole a spouse who sacrificed career opportunities in order contribute to the marriage in nonmonetary ways.⁸⁹

Each of these theories is relevant for the unmarried couple facing a pregnancy. Again, sex can be viewed as a promise of sorts; when the promise is broken and pregnancy support is not forthcoming, preglimony ensures that the breaching party pays his fair share. Preglimony will also ensure that a pregnant woman who is temporarily unable to provide for herself will be taken care of during a transitional period. Third, it ensures that the financial losses arising from the sexual relationship will be allocated fairly. And finally, if the assumption of risk is a type of “contribution” to a relationship, preglimony ensures that the man contributes too if the woman becomes pregnant. (In this sense, preglimony might be understood as a way to prevent unjust enrichment.)⁹⁰

How might a mandatory preglimony regime work in practice? I explore this question in further detail in *The Price of Pleasure*.⁹¹ My main goal in that piece was to introduce the principle of a relational default to replace the current lovers-as-strangers paradigm governing nonmarital conception. Specifically, I argued that the material costs of pregnancy, childbirth, miscarriage, and abortion should be shared by both the woman and the man with whom she conceives. That article also laid out a range of possibilities for how the amount of a man’s preglimony obligation might be set. One possibility is that it be based on the costs associated with each particular pregnancy broadly defined, including not only medical costs but also indirect costs like lost wages, maternity clothes, and childbirth classes. Alternatively, the preglimony obligation might be based on a more objective standard, like the length of the pregnancy and/or the parties’ financial situation. The relational default would not apply to pregnancies conceived through rape or fraud and partners who do not want to be governed by the relational standard would be free to opt out of it. These exceptions notwithstanding, preglimony would apply to most nonmarital pregnancies. Again, no-strings-attached sex isn’t inherently wrong; it’s just the wrong legal default.

The most frequent objection I hear to the full-blown preglimony proposal is the fear that it will shift the decisionmaking power over abortion to men.

88. AM. LAW INST., *supra* note 13, § 5.02 cmt. a, at 789.

89. For further discussion of justifications for alimony, see DOUGLAS E. ABRAMS ET AL., *CONTEMPORARY FAMILY LAW* 548-52 (2006); and KATHARINE K. BAKER & KATHARINE B. SILBAUGH, *FAMILY LAW* 135-46 (2009).

90. I credit Susan Appleton for this insight.

91. *See* Motro, *supra* note 8.

Specifically, since pregnancy support (and child support) will likely be lower if the woman terminates the pregnancy, the concern is that preglimony will increase abortions. In my opinion, this objection collapses a critical distinction. Yes, once men have to pay they will be brought into the conversation and have an opportunity to share their feelings and preferences. In this sense, they will have *a* say, but that does not mean they will have *the final* say over abortion. Opening the door to greater male participation in women's reproductive decisions is dangerous only if we assume that the imbalance of power so heavily tilts towards the man that he will always, by definition, steamroll over the woman's preferences. But preliminary data on the influence of child support enforcement on the incidence of abortion suggests that the opposite may be true—abortions drop as child support enforcement rises.⁹² To be sure, the concern that once men participate in bearing the costs of pregnancy they may pressure women to have (or not to have) an abortion is relevant in some cases. It is *possible* that these cases justify a lovers-as-strangers default, but over the long haul, the current rule may do more harm than good. "Protecting" women by assigning to them most of the material burdens of pregnancy and abortion perpetuates the perception that pregnancy is a woman's problem and shuts men out of a process that implicates them in profound ways. Pregnancy that results from consensual sex where the partners have not agreed on a no-strings-attached arrangement concerns both parties to the act. Ideally, the law should treat it accordingly.

Nevertheless, the mandatory preglimony proposal requires further study before it can be implemented. Among the most pressing challenges is devising valuation, administration, and enforcement mechanisms that are not prohibitively expensive. Another challenge parallels a challenge common in the child support context: The goal of the child support system is to ensure that all parents support their children. But child support obligations that exceed a parent's realistic ability to pay sometimes work to alienate parents from children and to snowball the already indigent into more dire financial turmoil.⁹³ Preglimony that is not carefully calibrated to each situation might have similar effects. Finally, there is a danger that calls for mandatory preglimony will result in a backlash. Specifically, some fringe men's rights groups already challenge mandatory child support rules by arguing that men should have a right to a so-called

92. The number of abortions *falls* as the expectation that men will have to pay child support rises because women are "encouraged by the potential economic security that the father may provide." Crowley, Jagannathan & Falchettore, *supra* note 32, at 22. A similar dynamic may lead pregnant women who are considering an abortion because they are worried about loss of income due to their pregnancy to take the pregnancy to term once they know additional preglimony support will be coming.

93. For a discussion of the negative effects of the current child support paradigm on never-married poor fathers, see Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991 (2006).

“financial abortion.”⁹⁴ These activists believe that a man should be able to “buy” his way out of child support obligations by paying his pregnant partner a sum equal to the cost of an abortion. Although no legal authority takes their claims seriously,⁹⁵ mandatory preglimony may increase support for these attitudes.

While we are studying these issues, however, there is something simpler and less controversial we can do more quickly. As a first step towards recognizing and integrating the relational paradigm, we can support and reward men who already participate in the costs of pregnancy through the tax code. Unlike a mandatory pregnancy-support regime paralleling the cumbersome alimony and child support systems, tax reform offers a much leaner alternative. By creating an incentive for support rather than imposing sanctions for failure to support, it sidesteps thorny enforcement issues and encourages cooperation rather than conflict. Incentivizing rather than requiring support also responds to some men’s fear that they will be duped into impregnating a woman. Though mandatory preglimony as I envision it would not apply where the woman engaged in foul play (e.g., lying about birth control) evidentiary challenges make this exception difficult to enforce. Tax reform based on voluntary preglimony avoids this problem.

To be clear, the remainder of this Article proposes to use tax law for the narrow purpose of bolstering public support for the *relational* aspects of pregnancy. Again, in an ideal world, greater public support for pregnant women regardless of their relational status would be forthcoming. Thus, I would support a tax credit available to all pregnant women in need—including those estranged from the man with whom they conceived as well as those whose partner is also

94. See Kim Shayo Buchanan, Lawrence v. Geduldig: *Regulating Women’s Sexuality*, 56 EMORY L.J. 1235, 1245 (2007); John Tierney, Op-Ed., *Men’s Abortion Rights*, N.Y. TIMES, Jan. 10, 2006, at A25; Sherry F. Colb, *Should Men Have the Right to a “Financial Abortion”? A Biological Father Cries Sex Discrimination When Forced to Pay Child Support for an Unwanted Baby*, FINDLAW (Mar. 21, 2006), <http://writ.news.findlaw.com/colb/20060321.html>; Stephanie Fairington, *The Parent Trap: Paternal Rights and Abortion*, ELLE.COM (May 17, 2010), <http://www.elle.com/Life-Love/Society-Career-Power/The-Parent-Trap-Paternal-Rights-and-Abortion>. For *New York Times* readers’ comments on the issue, see Readers’ Comments to *A Father’s Reproductive Rights: What Happens When a Man Makes His Intentions Clear Before a Child Is Conceived or Born?*, N.Y. TIMES MOTHERLODE BLOG, <http://community.nytimes.com/comments/parenting.blogs.nytimes.com/2010/05/17/a-fathers-reproductive-rights/> (last visited Aug. 15, 2010). Many commenters assert that a man should have no right to prevent a woman from having an abortion and should be required to pay child support for a child he does not want, while some argue a man’s opposition to a woman’s decision to take a pregnancy to term should exempt him from having to pay child support.

95. Anne M. Payne, Annotation, *Parent’s Child Support Liability as Affected by Other Parent’s Fraudulent Misrepresentation Regarding Sterility or Use of Birth Control, or Refusal to Abort Pregnancy*, 2 A.L.R. 5th 337, 348 (1992) (“To date, the courts have refused to deem a woman’s decision to bear a child despite the objections of the child’s father, even where he has offered to pay for an abortion, to create an unconstitutional infringement on the father’s federal or state equal protection or due process rights.” (citation omitted)).

poor.⁹⁶ But at this time, public support for indigent pregnant women remains limited.⁹⁷ So long as community assistance to these women remains at its current level, tax law can help incentivize and normalize greater financial support by men who do have the means to participate meaningfully in the fallout of pregnancy. The solution I offer gets at only a subset of the relevant cases: situations in which the pregnant woman earns significantly less than the man with whom she conceived. Thus it provides no help to poor couples, equal-earner couples, women whose income exceeds that of their partners, and most young couples. Instead, it begins with relatively low-hanging fruit—high-income men already predisposed to contribute to their pregnant lovers' welfare—pursuing a viable, symbolically potent first step towards breaking the silence on this issue.

III. THE PREGNANCY-SUPPORT DEDUCTION

When unmarried lovers conceive and the man helps support the woman through pregnancy, miscarriage, or abortion, how is this support treated for tax purposes? How should it be?⁹⁸ Current tax law is silent on preglimony payments, but it most likely treats them as neither deductible to the payor nor includible by the recipient. By contrast, married and divorced taxpayers who support each other and whose incomes diverge can shift high-bracket income to a lower bracket, producing a tax benefit. As I argue below, preglimony is more like an intraspousal transfer or alimony than a transfer between strangers, friends, or siblings. It should be treated accordingly.

A. *The Current Income Tax Treatment of Pregnancy-Related Transfers*

1. *A primer on the taxation of personal transfers*

Before we turn to the ideal treatment of preglimony, let's take a brief tour of the basic principles undergirding our income tax system so we may consider the full range of possibilities. The current income tax system measures income by "accessions to wealth."⁹⁹ In general, this means that receipts are taxable and expenditures are not deductible unless they represent the costs of producing in-

96. Some "65 percent of unmarried fathers have incomes below \$20,000, with about 19 percent reporting incomes below \$5,000." WALLER, *supra* note 35, at 49.

97. See *supra* Part II.B.

98. I limit the scope of this Article to the income tax consequences of pregnancy-related transfers and disregard any gift tax implication because in most cases the transfers either fall below the yearly gift tax exclusion amount (\$13,000 for 2010) or include payments for medical care which, if paid directly to the provider, are exempted from gift taxes.

99. *Comm'r v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955). The normative base for the *Glenshaw* formulation and for the current tax system is the Haig-Simons definition of income as the sum of consumption and savings. See HENRY C. SIMONS, *PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY* 50 (1938).

come.¹⁰⁰ Tax law does, however, deviate from this principle. Some receipts may be excluded from income despite the fact that they raise the taxpayer's wealth, and some expenditures may be deducted despite the fact that they are clearly personal in nature. Thus, when one taxpayer transfers property to another, four consequences may result. Assuming the taxpayers are not married and that one is not a dependent of the other,¹⁰¹ the transfer may:

(a) be neither includible by the recipient nor deductible to the payor (as when an individual gives a gift to another individual¹⁰²);

(b) result in taxable income to the recipient and a deduction to the payor (this is what happens when an employer compensates an employee working in her business¹⁰³);

(c) result in taxable income to the recipient without a corresponding deduction allowance to the payor (as when an individual compensates a housekeeper, gardener, or other purveyor of personal services¹⁰⁴); or

(d) produce no taxable income to the recipient and be deductible to the payor (as when an individual makes a charitable contribution¹⁰⁵).

The significance of each possibility may be demonstrated as follows. Assume a payor whose taxable income is \$100,000 transfers \$20,000 to a recipient whose taxable income is \$60,000. Assume also, for simplicity, a rate schedule with only two brackets. Taxable income that does not exceed \$80,000 is taxed at a ten percent rate, taxable income above \$80,000 is taxed at a thirty-five percent rate.

100. See 26 U.S.C. § 262(a) (2006).

101. If the woman qualifies as the man's dependent, the tax system provides several benefits. Section 213(a) gives the payor a deduction for certain medical expenses paid on behalf of a dependent, § 151 provides a personal exemption for dependents, and § 21 provides a credit for the costs of household and dependent care services if the dependent is incapable of caring for herself. (The credit is available if the services procured are necessary for the supporting taxpayer's gainful employment. Thus, an employed man whose pregnant domestic partner is confined to bed rest can receive a credit for hiring a nurse on her behalf.) For a more detailed list of tax benefits available to taxpayers providing for a dependent, see Theodore P. Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529, 1543 n.35 (2008). See also 26 U.S.C. § 223 (allowing a deduction for amounts paid into a health savings account on behalf of a dependent).

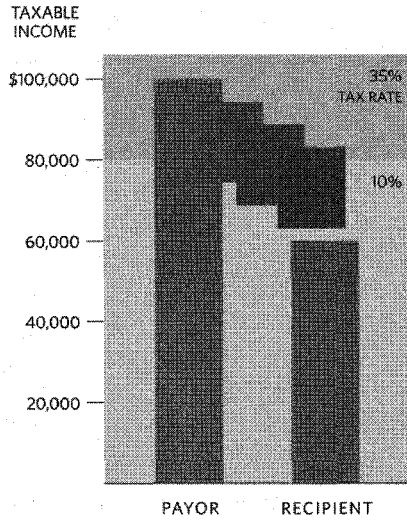
102. See 26 U.S.C. § 102.

103. See *id.* §§ 61(a)(1), 162.

104. See *id.* §§ 61(a)(1), 262.

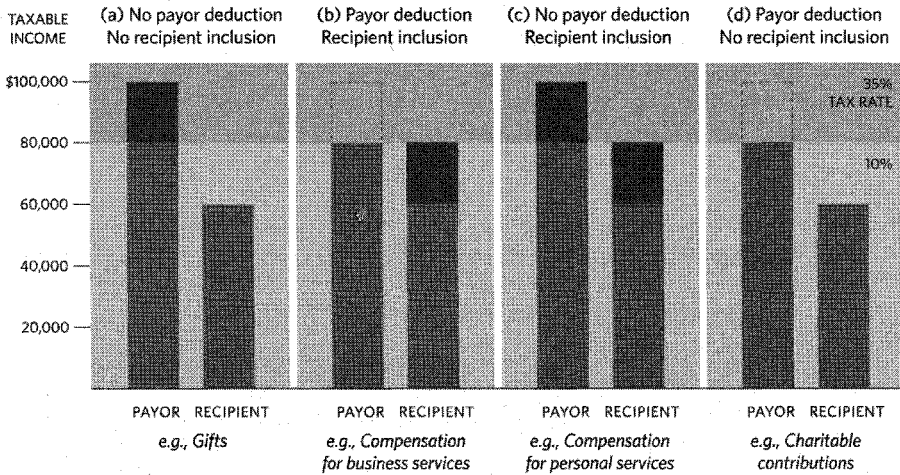
105. See *id.* § 170.

FIGURE 1¹⁰⁶



The four possible treatments are:

FIGURE 2



Thus, a transfer may be taxed once (alternatives (a) and (b)), twice (alternative (c)), or not at all (alternative (d)). From the taxpayers' collective perspec-

106. Graphic design by Jonathan Corum.

tive, (c) is the worst outcome and (d) is the best. If, as in alternatives (a) and (b), the transfer is taxable income to only one of the two taxpayers, the overall tax liability associated with it will be lower if the liability falls on the taxpayer whose marginal rate is the lower of the two. It follows that if, as in the illustration, the recipient is in a lower bracket than the payor, the transfer will be subject to a lower tax rate if it is includible by the recipient and deductible by the payor than if it is excludible by the recipient and nondeductible to the payor. That is, all else being equal, (b) is better for the taxpayers as a "team" than (a).

It is in order to prevent this "income-shifting" advantage that Congress does not extend the deduction/inclusion rule in scenario (b) to most personal transfers. Rather, income is generally taxable to the individual who earns it¹⁰⁷ or who owns the property that generates it¹⁰⁸ *even if* she assigns that income to another individual.¹⁰⁹ As Justice Holmes famously put it, fruits may not be "attributed to a different tree from that on which they grew."¹¹⁰

Congress has carved out one major exception to this assignment of income prohibition: marriage. Regardless of whether spouses in fact share their incomes, they are effectively treated as if each spouse earned half of their combined income, at least at lower income levels. It accomplishes this result through a rate structure for married taxpayers filing jointly that uses brackets approximately twice as wide as those applied to individuals.¹¹¹ Another way of describing the effective result is that tax law assumes that the high earner transferred to the low earner enough income so as to make the spouses equal, and blesses the assumed transfer with the deduction/inclusion alternative of scenario (b). For couples whose incomes diverge significantly, this produces a marriage bonus (i.e., it makes them better off than an unmarried couple whose transfers are treated as nondeductible/excludible gifts as in (a)).¹¹² Extending the benefit beyond marriage, tax law also permits a divorced spouse paying alimony (usually the higher earner) to deduct the payment provided the reci-

107. See *Comm'r v. Culbertson*, 337 U.S. 733, 739-40 (1949); *Helvering v. Eubank*, 311 U.S. 122, 124-25 (1940); *Lucas v. Earl*, 281 U.S. 111, 114-15 (1930).

108. See *Helvering v. Horst*, 311 U.S. 112, 117-20 (1940); *Blair v. Comm'r*, 300 U.S. 5, 12-14 (1937).

109. See generally 3 BORIS I. BITTKER & LAWRENCE LOKKEN, *FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS* ¶ 75.2 (2d ed. 1991).

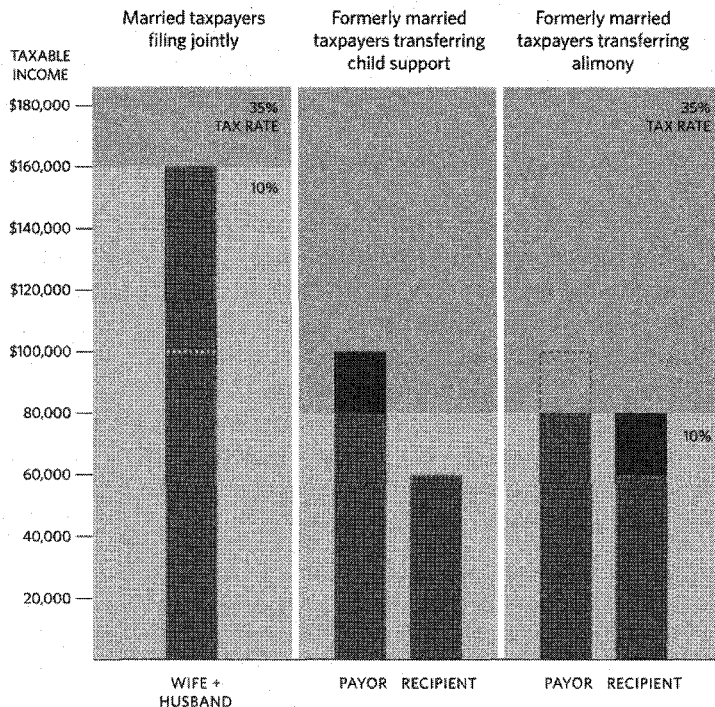
110. *Earl*, 281 U.S. at 115. For a critique of the fruit-and-the-tree metaphor, see Patricia A. Cain, *The Story of Earl: How Echoes (and Metaphors) from the Past Continue to Shape the Assignment of Income Doctrine*, in *TAX STORIES: AN IN-DEPTH LOOK AT TEN LEADING FEDERAL INCOME TAX CASES* 275, 276-79 (Paul L. Caron ed., 2003).

111. For a more detailed discussion of the way in which the rate structure produces a marriage bonus for unequal earners and a marriage penalty for equal earners, see EDWARD J. McCAFFERY, *TAXING WOMEN* 12-19 (1997); and Motro, *A New "I Do," supra* note 45, at 1560-68.

112. The joint return reduces their overall tax liability because with a progressive rate structure, the tax on two people earning \$50,000 is less than the tax on one person earning \$100,000.

ipient (the low earner) includes it;¹¹³ thus, the taxes on the payment are based on the recipient's lower marginal rate. Child support payments, by contrast, are seen as inherently personal, and as such they are nondeductible to the payor and excludible to the receiving custodial parent.¹¹⁴

FIGURE 3



113. See 26 U.S.C. §§ 71, 215 (2006). The deduction/inclusion of alimony is the default treatment, but taxpayers may elect to designate payments as nondeductible to the payor and excludible by the recipient. *Id.* § 71(a), (b)(1)(B).

114. Bittker and Lokken explain that the underlying theory for this rule is that “child support payments do not reflect a diversion [of] income from one spouse to the other because they are not for the payee’s benefit.” 3 BITTKER & LOKKEN, *supra* note 109, ¶ 77.1.7; see also *Knight v. Comm’r*, 64 T.C.M. (CCH) 1519, 1523 (1992) (explaining that the child support a man pays to the mother of his child “goes toward the support of their children, not for her benefit or enjoyment as is the case of alimony” and that “personal, living, and family expenses (including the cost of supporting one’s child) are not deductible by any taxpayer” (citing 26 U.S.C. § 262 (1988))). *But see infra* note 156 and accompanying text.

2. *The current taxation of preglimony*

No authority has addressed the proper income tax treatment of pregnancy-related transfers.¹¹⁵ Current law regarding these types of payments is therefore a matter of conjecture. If asked to rule on the issue, the Internal Revenue Service might characterize them as either child support or as gifts, depending on the jurisdiction and on the particular circumstances of the pregnancy. In either case, the payments would be nondeductible to the payor and excludible by the recipient. In short, both alternatives are essentially disregarded for tax purposes.

a. *Child support characterization*

In jurisdictions that frame a man's pregnancy-related obligations as an element of child support, payments made pursuant to this obligation might be treated accordingly for tax purposes (i.e., he would not be permitted to deduct the payments and the woman would not be required to include them).¹¹⁶ This is because federal income tax consequences generally track state law's characterization of a given event.¹¹⁷ Child support characterization is also consistent with the Tax Court's holding that pregnancy-related medical payments made by adoptive parents on the birth mother's behalf may be treated as payments on behalf of their unborn "dependent" if the payments can be disentangled from payments necessary for the care of the mother.¹¹⁸

115. The IRS has also been silent regarding the broader issue of other support payments between unmarried couples either during the partnership or after dissolution. See Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 829 (2008).

This Article addresses only income tax issues. Gift tax issues arise only with respect to payments that exceed \$13,000, the annual gift tax exclusion amount for 2010. 26 U.S.C. § 2503(b)(1) (2006); Rev. Proc. 2009-50, 2009-45 I.R.B. 617. For many unmarried lovers who conceive, this means the only relevant question concerns income tax treatment.

116. See 26 U.S.C. § 71(c); *Knight*, 64 T.C.M. (CCH) at 1523 ("[C]hild support payments are neither deductible by the payor nor taxable to the recipient. . . . [N]o parent may deduct the cost of supporting his or her child; no distinction is made between parents who are married or unmarried, parents who are married to each other or to others, or parents having or not having custody of the child."). In the surrogate motherhood context, some attorneys advise surrogates not to include payments they receive from the intended fathers under the theory that these payments are child support. On the other hand, some scholars argue these payments are compensation. See Bridget J. Crawford, *Taxation, Pregnancy, and Privacy*, 16 WM. & MARY J. WOMEN & L. 327, 343-45 (2010); Bridget J. Crawford, *Taxing Surrogacy, in CHALLENGING GENDER INEQUALITY IN FISCAL POLICY MAKING: COMPARATIVE RESEARCH ON TAXATION* (Åsa Gunnarsson et al. eds., forthcoming May 2011) (manuscript at 2), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1422180.

117. See *United States v. Mitchell*, 403 U.S. 190, 194-96 (1971); *Poe v. Seaborn*, 282 U.S. 101, 110 (1930); see also Cain, *supra* note 115, at 838-39.

118. See *Kilpatrick v. Comm'r*, 68 T.C. 469, 472-73 (1977). *Kilpatrick* deals with whether adoptive parents were allowed to deduct the expenses incurred for medical services rendered to their son's natural mother under 26 U.S.C. § 213, which provides a deduction for certain medical care expenses incurred on behalf of a taxpayer's dependent. The court ac-

However, the characterization of pregnancy-related payments as child support might be challenged as inconsistent with another aspect of the tax system: the treatment of the gestational period for purposes of determining personal exemptions. If pregnancy-related transfers are indeed child support, the pregnant woman should be eligible to take a dependency deduction in her capacity as the custodial parent.¹¹⁹ The Court of Federal Claims, however, has clearly held that a taxpayer is not entitled to a dependency exemption for a tax year in which an “unborn child” is still in utero.¹²⁰

b. *Gift characterization*

Even if pregnancy-related payments classified as child support for state law purposes are not deemed to be child support for federal tax purposes,¹²¹ they might still be neither includible by the recipient nor deductible to the payor under the theory that they constitute gifts. The same holds for pregnancy-related payments made pursuant to state laws that do not frame the obligation as an element of child support but rather as an obligation towards the woman her-

knowledge that “medical care rendered to an expectant mother *may*, under certain circumstances, constitute medical care rendered to her child.” 68 T.C. at 472 (emphasis added). “Prior to the child’s birth,” the court explains, “the health of the mother is so intimately connected with the health of the child that to say a service rendered to one could never be a service rendered to the other belies believability.” *Id.* at 472-73. However, the court placed the burden on the adoptive parents seeking to take the deduction to prove that “the expenses in question were directly or proximately related to the ‘diagnosis, cure, mitigation, treatment, or prevention of disease’ in the unborn child.” *Id.* at 473 (quoting *Havey v. Comm’r*, 12 T.C. 409, 412 (1949)). In the absence of such proof, it held the entire amount to be a nondeductible personal expense. *Id.*; see also *Hornish v. Comm’r*, 37 T.C.M. (CCH) 919 (1978) (denying deduction to adoptive parents for failure to prove what portion, if any, of delivery fees constituted medical care for the child).

119. See 26 U.S.C. § 152(c).

120. *Cassman v. United States*, 31 Fed. Cl. 121, 123-24 (1994). In a brief filed in *Magdalin v. Commissioner*, 96 T.C.M. (CCH) 491 (2008), *aff’d*, No. 09-1153, 2009 WL 5557509 (1st Cir. Dec. 17, 2009), *Cassman* was cited for the proposition that “an unborn child is not a dependent.” See Katherine Pratt, *Deducting the Costs of Fertility Treatment: Implications of Magdalin v. Commissioner for Opposite-Sex Couples, Gay and Lesbian Same-Sex Couples, and Single Women and Men*, 2009 Wis. L. REV. 1283, 1315.

121. For examples of situations in which federal income tax treatment does not track state law, see *Boyer v. Commissioner*, 668 F.2d 1382, 1388 (4th Cir. 1981) (holding that a divorce that is valid under state law may nevertheless be deemed invalid for federal income tax purposes under the sham transaction doctrine); Deborah A. Geier, *Simplifying and Rationalizing the Federal Income Tax Law Applicable to Transfers in Divorce*, 55 TAX LAW. 363, 363 n.3 (2002) (“[P]ayments subject to the inclusion/deduction scheme [of alimony for federal tax purposes] may not actually constitute ‘alimony’ under state law, so long as the payment satisfies the federal tax definition of ‘alimony’ in section 71(b).”); and Deborah H. Schenk, *Simplification for Individual Taxpayers: Problems and Proposals*, 45 TAX L. REV. 121, 135 (1989) (“[T]he Code provides a special federal definition of an abandoned spouse so that a taxpayer who is married for state law purposes may be single for federal purposes.”).

self.¹²² Gift treatment might also apply to payments that exceed those required by any jurisdiction's law (including support for a woman undergoing and recovering from an abortion). This is true despite the fact that the circumstances in which these payments are made may, but often do not, match the law's official test for tax-free gifts, which hinges on the payor's intent.

Under the test coined in *Commissioner v. Duberstein*, to qualify as a gift for income tax purposes the payment must arise out of "detached and disinterested generosity."¹²³ It must be made "out of affection, respect, admiration, charity or like impulses."¹²⁴ Pregnancy-related payments rarely fit this bill. When they come from the man who is "responsible" because he feels it is his duty they are inherently *not* detached and disinterested. The case clearly states that a payment that arises from either a legal *or* a moral obligation cannot qualify for gift treatment.¹²⁵ The *Duberstein* test also precludes from gift treatment payments proceeding from the "'incentive of anticipated benefit' of an economic nature."¹²⁶ In some instances, payments towards an abortion are very much self-interested. Surely there are some men who support their pregnant lovers purely out of love and generosity, but in many instances an element of duty is present as well. Thus, the gift treatment of many of these payments does not fit well with the doctrine.

Pregnancy-related transfers between lovers might nevertheless be treated as gifts because other payments between sexual partners have been classified as gifts by several courts in the past.¹²⁷ Another reason why these payments might be nondeductible to the payor and excludible by the recipient is that the alternative leads to a counterintuitive result. In theory, every accession is income unless it is explicitly exempted¹²⁸ and all personal expenditures are nondeductible unless specifically covered by a deduction allowance. Thus, if pregnancy-related payments are not gifts, there is a possibility that the payments would be included in the recipient's income and nondeductible to the payor as in illustration (c) above. They would be taxed the same way we tax a person paying for a housekeeper or any other provider of services that are personal in nature—both

122. See *supra* note 20.

123. 363 U.S. 278, 285 (1960) (quoting *Comm'r v. LoBue*, 351 U.S. 243, 246 (1956)).

124. *Id.* (quoting *Robertson v. United States*, 343 U.S. 711, 714 (1952)).

125. *Id.* ("[I]f the payment proceeds primarily from 'the constraining force of any moral or legal duty' . . . it is not a gift." (quoting *Bogardus v. Comm'r*, 302 U.S. 34, 41 (1937))).

126. *Id.* (quoting *Bogardus*, 302 U.S. at 41).

127. See 1 BITTKER & LOKKEN, *supra* note 109, ¶ 10.2.7 (surveying case law classifying "[t]ransfers of cash and property by a taxpayer to a companion or sexual partner . . . as tax-free gifts or taxable compensation, depending on whether the recipient appears to be a beneficiary of generosity or a purveyor of services").

128. Section 61 of the Internal Revenue Code clearly provides that "[e]xcept as otherwise provided . . . gross income means all income from whatever source derived." 26 U.S.C. § 61(a) (2006); see also *supra* note 99.

the payor and the recipient would bear a liability.¹²⁹ In practice however, many transfers that do not fall neatly into the official definition of gifts and which are made in nonbusiness contexts are routinely disregarded by taxpayers and by the Internal Revenue Service alike.¹³⁰ As Boris Bittker and Lawrence Lokken put it in the context of their discussion of intrafamily transfers that would not qualify as gifts under the law's technical definition, such transfers "can be properly viewed as excludable by a higher authority than the language of § 102(a)—a supposition, so obvious that it does not require explicit mention in the [Internal Revenue] Code, that Congress never intended to tax them."¹³¹

In sum, current principles suggest that pregnancy-related payments are either child support or gifts for tax purposes. As such, they have no tax consequences to either the payor or the recipient.

While neutral on its face, this result has harmful consequences. First, as an expressive matter, treating pregnancy-related payments as child support disregards the effects of pregnancy on the woman. Both child support and gift characterizations also disregard the reality that these payments tend to stem, at least in part, from the man's sense of his moral obligation to the woman herself. Second, from a utilitarian perspective, the current treatment misses a relatively simple opportunity to reward and encourage men who are inclined to help support their pregnant partners.

Finally, while the gift/child support theory is reasonable, it is not certain. For reasons discussed above, if the IRS eventually reviews the tax status of pregnancy-related payments, it could take the position that they are neither gifts nor child support. In that case, they might be properly taxed twice (i.e., they may not be deductible to the payor and they may be taxable income to the recipient).¹³² The result would put couples who conceive in a worse position than

129. Indeed, some theorists believe this is the correct treatment of all gifts, but their approach has not held sway. See, e.g., SIMONS, *supra* note 99, at 56-58, 125-28.

130. But see Wendy Gerzog Shaller, *On Public Policy Grounds, a Limited Tax Credit for Child Support and Alimony*, 11 AM. J. TAX POL'Y 321, 329 (1994) ("Taxing the payment to both the payor and the payee is exactly what happens when . . . personal liabilities [other than alimony] are paid. When money changes hands between taxpayers and there is no gift involved, ordinarily the money is taxed to each successive taxpayer who has been enriched.").

131. 1 BITTKER & LOKKEN, *supra* note 109, ¶ 10.2.

132. For arguments in favor of treating alimony as nondeductible to the payor and includible by the recipient, see Geier, *supra* note 121, at 368 ("[I]f we view the matter from the recipient's side alone, and if alimony is considered within the *Glenshaw Glass* notion of 'income' as an undeniable accession to wealth, etc., then it would be includable by the recipient. At the same time, the payor earning wages from which the alimony was paid would have to include the wages in gross income, since compensation for services rendered is specifically listed as 'income' in section 61(a)(1). Moreover, the payor would arguably be denied a deduction for the payment under a strict definition of 'income' in the familiar Schanz-Haig-Simons sense, under which only outlays incurred to produce includable income are properly deductible (with personal consumption outlays being nondeductible, and thus taxed."); and *id.* at 430.

all other taxpayers exchanging gifts. It would effectively treat the woman as the man's employee—like a housekeeper, she would be receiving gross income in exchange for performing a personal nondeductible service for him—an improbable but nevertheless disturbing outcome.¹³³

B. *The Pregnancy-Support Deduction*

How then *should* preglimony be taxed? First, it should be clear that not taxing the transfers at all (i.e., providing a deduction/exclusion option similar to that applicable to charitable contributions (scenario (d))) is not a relevant option. It may seem appealing at first glance, but this approach would create a new type of marriage penalty because a high-earning man and a low-earning pregnant woman who share income would pay more if they marry than they would if, as unmarried, he can deduct and she can exclude the transfers.¹³⁴ Again, taxing the transfer twice as in scenario (c) is an unlikely result considering current practices.¹³⁵ It would also be punitive and administratively cumbersome as it would require detached and disinterested gifts to pregnant women to be disentangled from duty-inspired preglimony. The remaining choice, therefore, is to move from the status quo (no deduction/no inclusion) to an income-shifting option (deduction/inclusion), which would produce a benefit in cases in which the payor's income is higher than the recipient's.

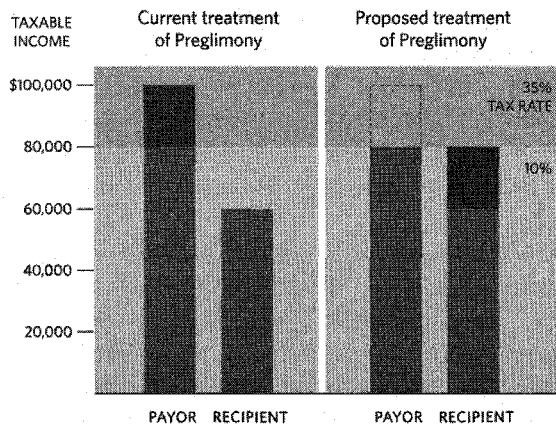
133. For a discussion of why alimony is not taxed twice (i.e., to both payor and recipient), see *id.* at 368-71.

134. To remedy this result a new credit or deduction for pregnant spouses might be introduced, but for simplicity I will bracket this alternative and assume the current tax treatment of spouses as a given.

A deduction/exclusion would also be inconsistent with the current charitable contributions framework, which permits a deduction only for gifts to eligible charitable entities, not to individuals. 26 U.S.C. § 170(a), (c) (2006).

135. See *supra* notes 128-31 and accompanying text.

FIGURE 4



As we have seen, current tax law does not apply the general prohibition against income shifting to married taxpayers and to former spouses paying alimony. It allows married taxpayers to shift income by means of a special rate schedule applicable only to spouses filing jointly.¹³⁶ It allows former spouses agreeing on an alimony arrangement to elect to treat the payments as deductible to the payor and includible by the recipient.¹³⁷

Though the justifications for both of these special rules are problematic, as long as they remain in force, similar treatment should extend to unmarried lovers who conceive. The next Subpart surveys the main critiques of marriage- and divorce-based income-shifting benefits, and introduces a novel theory for why they remain deeply entrenched despite voluminous criticism they have received. This theory suggests preglimony should be treated comparably. Then, I turn to utilitarian justifications for a deduction/inclusion approach to preglimony.

1. Theoretical justification

Marriage-based joint filing has been the subject of much criticism,¹³⁸

136. See *supra* notes 111-12 and accompanying text.

137. 26 U.S.C. §§ 62(a)(10), 71(a)-(b), 215(a). To qualify for this treatment the payments must be in cash and they must be made pursuant to a divorce or separation instrument. *Id.* § 71(a)-(b).

138. See McCaffery, *supra* note 111, at 11-85; Pamela Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1 (1980); Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63 (1993); Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983 (1993); Law-

which I will not review here, except to reiterate¹³⁹ that the most compelling rationale for retaining it—an assumption that marriage serves as a proxy for economic unity—is faulty. In most states, spouses have no obligation to share income during marriage, and many marriages are clearly (sometimes *contractually*) not fifty-fifty propositions. There is no defensible reason to assume that spouses whose union is governed by a premarital agreement separating their economic identities actually share to the point of equalizing their incomes, and there is no reason to then exempt these imaginary transfers from the assignment of income doctrine.

The deduction/inclusion option available to former spouses paying alimony also rests on a shaky foundation. The original rationale for the rule was to mitigate the effects of marginal rates as high as ninety-one percent in the early 1940s.¹⁴⁰ The force of this rationale diminished as the rate structure became less steeply progressive, but scholars point to other theories for the system's endurance¹⁴¹ including mitigating the financial hardship of divorce,¹⁴² promoting equity between “wealthy” and “less wealthy” divorcing couples,¹⁴³ and incentivizing higher alimony payments.¹⁴⁴ The leading theory is that the rule essentially extends to former spouses the income-splitting benefits to which they were entitled during marriage because divorce does not end their economic¹⁴⁵

rence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1, 3 (2000); Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339 (1994) [hereinafter Zelenak, *Marriage and Tax*].

139. See Motro, *A New “I Do,”* *supra* note 45.

140. See Geier, *supra* note 121, at 371-72; Gerzog Shaller, *supra* note 130, at 322.

141. See Gerzog Shaller, *supra* note 130, at 322-23 (noting that since the original enactment of the alimony provision “its repeal, which could be seen as a natural concomitant with the enactment of lower rates, has not been seriously contemplated” (footnote omitted)).

142. See Geier, *supra* note 121, at 396 (“Since divorce frequently strains liquidity to the breaking point anyway, in the view of the Task Force, such a harsh result, *i.e.*, divorce *per se* pushing incomes into higher brackets, should be avoided, if possible.” (quoting AM. BAR ASS’N’S DOMESTIC RELATIONS TAX SIMPLIFICATION TASK FORCE, THE “INCOME-SHIFTING” PRINCIPLE IN PROPOSALS FOR SIMPLIFICATION OF DOMESTIC RELATIONS TAX LAW 5 (1983))); *id.* at 435 (“Divorce is usually accompanied by financial hardship (and it triples the chances of bankruptcy). Therefore, Congress should avoid adopting what would amount to a mandatory divorce tax ‘penalty’ in many cases.”). Geier makes the related argument that taxing the payments twice would also affirmatively discourage divorce. See *id.* at 370.

143. See *id.* at 435 (“[A] mandatory exclusion/nondeduction rule would also introduce a disparity between less wealthy couples, where support payments must come from future wages of the payor, and wealthy couples, who could still engage in significant income-shifting by transferring income-producing assets to the payee to fund support.”).

144. See *id.*; Michael Waggoner, *IRC § 71 May Impoverish Children, Endanger Ex-Wives, and Disrupt Federalism*, 46 FAM. CT. REV. 574 (2008).

145. See Cain, *supra* note 115, at 828 (“The underlying principle [for the alimony rule] is that the now-divided family will only be taxed once on the income that is used to support its prior members. This principle is consistent with the notion that the spousal unit is a single economic unit for federal tax purposes.”); Geier, *supra* note 121, at 369-70 (“[T]he . . . appropriate way to think about the payment [of alimony is to] . . . view both taxpayers *together*. In an intact marriage, by analogy, amounts earned by one spouse and

or legal¹⁴⁶ relationship. Since marriage-based joint filing approximates income splitting, former spouses should be entitled to continue to shift the tax burden associated with income they share postdivorce to the party who actually benefits from the income (i.e., the recipient).

None of these theories is compelling. If the goal is to mitigate the financial hardship of divorce, the deduction/inclusion of alimony is a particularly inefficient mechanism for providing relief. The benefit it produces rises as income differentials between spouses rise, which also correlates with higher overall income; lower-income couples are more likely to be equal earners and thus unable to benefit from the deduction/inclusion at all. A better way to mitigate hardships would be to provide a phased out credit for taxpayers whose household income drops as a result of divorce.

The rule does promote equity between taxpayers who own income-producing assets and those whose main income-generating asset is their career. This is because without the deduction/inclusion of alimony, property owners could transfer assets to their former spouses, effectively shifting these assets' income streams to the recipient's lower tax bracket, whereas professionals would have to pay taxes on their wage income first (at their own presumably higher rates) before transferring them to the lower-bracket alimony recipient.¹⁴⁷ But this disparity exists between every transfer of cash as compared with income-generating property. It's not clear why having been married should justify equalizing the earned/unearned income differential when it is largely ignored throughout the rest of the tax system.

Incentivizing higher alimony payments is a laudable goal, but the extent to which the deduction/inclusion accomplishes this goal is unclear. Also, as I will discuss in further detail shortly, the same argument—indeed a more compelling argument—can be made with respect to child support payments and preglimony.

paid to another are ignored for tax purposes (i.e., they are neither includable by the recipient nor deductible by the payor) Therefore, the amounts are taxed only once between the two. We could reason that the amounts should continue to be taxed only once, even though the family is no longer intact, because of the clear and direct relationship of the payments to the former legal relationship of the parties (or the continuing legal relationship, in the case of a paternity payment to support a child after a divorce or otherwise outside of marriage).” (footnote omitted)); Gerzog Shaller, *supra* note 130, at 324 n.15; Laurie L. Malman, *Unfinished Reform: The Tax Consequences of Divorce*, 61 N.Y.U. L. REV. 363, 392 (1986) (“To the extent that family law continues the former spouses’ economic unit through alimony payments, the tax laws should also treat the former spouses as a continuing, single tax unit after divorce.”); Schenk, *supra* note 121, at 164 (“Although the marital relationship ends, the economic relationship does not and thus, the taxation of the earnings should not change.”).

146. See Geier, *supra* note 121, at 370.

147. See *id.* at 396 (“[E]liminating income-shifting would discriminate between well-to-do couples with income-producing property, who would effectively be able to continue to engage in income-shifting by transferring such property in satisfaction of support obligations, and less wealthy couples.”).

Finally, the main theoretical rationale for the deduction/inclusion of alimony—that the tax treatment of alimony should extend the effective income shifting accomplished through the joint return during marriage—is incoherent. The first problem is that it assumes marriage-based joint filing is justified. But even if we assume that a large enough number of spouses share income to a significant extent¹⁴⁸ and if we take this assumption as sufficient justification for joint filing,¹⁴⁹ the argument does not track when applied to alimony because alimony (though actually paid) rarely results in a fifty-fifty income split. We support and reward marriage not on the theory that spouses share *some* of their income (as unmarried taxpayers do quite frequently), but rather because we assume they share *everything*.¹⁵⁰ Marriage deserves special treatment, the argument goes, because when two people join their fates, society is better off. Marriage is worth supporting because it binds individuals into an economic partnership of equals.¹⁵¹ Divorce does not end spouses' economic relationship, but it does change it quite explicitly *away* from the fifty-fifty presumption and toward an unequal model. If alimony replicated a community-property-style marriage,¹⁵²

148. *But see* Kornhauser, *supra* note 138, at 80 ("The theoretical justification for the joint return—the belief that married couples share resources—is largely unsupported by empirical evidence."); *id.* at 91 ("[N]either assertions of pooling nor nominal arrangement of assets in a pooling manner accurately reflect the reality of financial arrangements. Behind the facade of sharing is a deep-seated, though often subtle, control of the income by the earner spouse.").

149. *See* Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1420-22 (1975); Zelenak, *Marriage and Tax*, *supra* note 138, at 353 ("If one accepts the premise that the crucial question in determining the appropriate taxable unit is 'Does this person pool his income with another person for the purpose of shared consumption (and savings)?' then requiring joint returns for married couples and separate returns for unmarried persons is an easy-to-administer rule that gets it right most of the time.").

150. *See* Motro, *A New "I Do," supra* note 45, at 1541-42 & nn.108-09 (critiquing Henry Smith's proposal for partial income splitting in marriage based on individually determined ratios, Henry E. Smith, *Intermediate Filing in Household Taxation*, 72 S. CAL. L. REV. 145, 183 (1998)).

151. On the equality principle in marriage, see Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 91 (2004) ("People may engage in many joint enterprises where equality is not necessary. Joint owners in a business, for instance, may divide the ownership interest 70-30 without raising any alarm. But it would be perverse to conceive of a marriage of this sort, where one spouse has a recognized controlling interest in the property that partially constitutes the marriage, and, correspondingly, in marital decisions. . . . Disparity in the control of marital property moves beyond simple inequality—which an individual may rightly choose as a means to other ends—to subordination, which systematically denies the importance of whatever ends that individual chooses. As subordination in marriage is a threat to a spouse's basic personhood, the marital community must be bounded by a commitment to equality.").

152. For persuasive arguments that it should, see Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1117 (1989) (proposing that divorcing couples be required to share income for a set period of time after the divorce); and Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2260-61 (1994) (arguing for postdivorce income equalization for the duration of children's dependence plus one additional year for every two years of marriage beginning at the date of divorce).

the deduction/inclusion rule might make sense. Since it rarely does, extending the income shifting of marriage to alimony is indefensible.¹⁵³ Lots of taxpayers share some of their income on a regular basis. It is unclear why having been married should change the tax treatment of similarly personal transfers.

Several scholars who have written about the current iteration of the rule also believe that the taxation of postdivorce transfers is flawed in its disparate treatment of alimony and child support.¹⁵⁴ For one, the two types of payments are practically impossible to distinguish.¹⁵⁵ More importantly, the same extension-of-marriage argument for the deduction/inclusion of alimony holds with respect to child support.¹⁵⁶

In sum, the justifications for both marriage- and alimony-based benefits are weak, and yet these benefits are so firmly entrenched they are taken for granted as permanent aspects of the income tax system.

Perhaps, however, there is another—subterranean, rarely articulated—reason behind the current tax treatment of both alimony and marriage that helps explain these benefits' longevity. Perhaps the real reason we think married and divorced taxpayers deserve a special benefit is that we use marriage as a proxy not for economic unity, but for procreation. Perhaps marriage is a proxy for the

153. Thus, the alimony rule is difficult to defend for reasons that are slightly different from the problem at the heart of marriage-based income splitting. Whereas marriage-based income splitting relies on the questionable presumption that most spouses share income equally, the alimony rule extends a benefit specifically limited to taxpayers who (presumably) share equally to taxpayers who explicitly share *unequally*.

154. See Geier, *supra* note 121, at 432 (“[T]he parties should be given full power to decide who, between them, should be taxed on all cash transfers incident to divorce.”); *id.* at 411-30; Gerzog Shaller, *supra* note 130, at 321 (“[T]here are public policy reasons to eliminate the distinctions between them and to allow a limited credit for both types of payments.”); Malman, *supra* note 145, at 379-80; Schenk, *supra* note 121, at 162 (proposing that child support and alimony should not be differentiated for federal tax purposes to eliminate complexities resulting from the difficulty distinguishing the two); Waggoner, *supra* note 144; Laura Bigler, Note, *A Change Is Needed: The Taxation of Alimony and Child Support*, 48 CLEV. ST. L. REV. 361, 361-62 (2000).

155. This argument appears in almost every critique of the current system.

156. The theoretical justification for the nondeductibility/exclusion of child support is that supporting one's child is inherently personal; the costs of raising a child are not deductible during marriage, nor should they be after divorce. The problem with this line of reasoning is that it ignores the fundamental difference between the nondeductibility of child raising costs *by a married couple* and the nondeductibility of child support *by an ex-spouse*. The former ensures that the underlying income is taxed to the couple rather than escaping taxation altogether; the latter determines that it is taxed to the payor rather than to the recipient. The alternative to nondeductibility of child support is deductibility *coupled with* inclusion to the recipient, which would be entirely consistent with the treatment of the costs of raising a child during marriage because joint filing during marriage accomplishes (approximately) the same thing as a deduction/inclusion postdivorce. Viewing the couple together, the deduction of child support wouldn't really be a deduction at all, but rather an income-shifting mechanism. For a similar argument, see Geier, *supra* note 121, at 369-70, 431.

special type of dependency and identity transformation that tends to accompany the co-parenting relationship.¹⁵⁷

Thus, we give married one-earner couples a benefit as compared with unmarried couples with the same income distribution because we imagine the married couple to be composed of a husband supporting the mother of his children. Even if he doesn't literally split his income with her, they are a unit in a sense that goes deeper than mere economics. He need not "assign" his income to her to legitimate the income-splitting tax result. To turn Holmes's metaphor on its head, taxing father and mother as one (i.e., as if each earned half of their combined income) does not effectively attribute the fruits "to a different tree from that on which they grew" because procreation turns two trees into one. In a sense what I'm suggesting is that we subconsciously retain some vestige of coverture, or some religious sensibility that husband and wife are "one flesh." This unity is most apparent during the gestational period—when the combination of both parents' genetic material is physically inside the expectant wife-mother—but it extends to childbirth, and to the nursing period, and is also true as children grow.

If the marriage dissolves and the man continues to support his former wife, again, we may treat these transfers in a special way because we imagine the former wife as a mother—the woman who carried, gave birth to, and who is caring for the man's children. This is not to say that alimony is really child support in disguise. Rather, quite apart from supporting one's child—paying for education, health care, housing—supporting a woman who is also the mother of one's child is in some sense supporting one's self. Transfers to her simply do not fit into any of the categories applicable to taxpayers who are not parents of the same child. They are not compensation paid to an employee, they are not

157. I do not mean to suggest that policymakers have deliberately or consciously used marriage as a proxy for procreation. The existence of children is, of course, quite easy to determine directly. But marriage may serve as a convenient and comfortable way for us to privilege "responsible procreation" without confronting the prevalence of nonmarital children. On the stigma associated with "irresponsible reproduction," see Linda C. McClain, "Irresponsible" *Reproduction*, 47 *HASTINGS L.J.* 339 (1996). Marriage also expresses a view that all spouses, even elderly couples who have never had children, are potentially procreative, which those who see procreation as essential to the human experience may find comforting.

As we saw in Part II.A, courts denying same-sex couples' right to marry have often relied on the argument that the main purpose of marriage is to regulate accidental procreation. Another, related argument used in this context focuses not on *accidental* procreation specifically, but on the essential feature of marriage being procreation more generally. See *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980) ("[T]he main justification in this age for societal recognition and protection of the institution of marriage is procreation, perpetuation of the race."); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) ("The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis."); *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) ("[M]arriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race.").

gifts arising out of detached generosity in the absence of any legal or moral obligation, and they are not charity. In a sense, they are not “transfers” at all.

To be clear, I am not taking a position here on whether procreation does in fact justify the income-shifting benefits of marriage and alimony. I am simply suggesting that if this procreation hypothesis has merit (i.e., if the true reason we support marriage is because we use it as a proxy for the co-parenting relationship) the same treatment should extend to all transfers between unmarried co-parents generally and, most relevantly for our purposes, to lovers who conceive regardless of whether a child is ultimately born.¹⁵⁸

Conception is a marriage of sorts. It is the union of two individuals’ bodies to create a third potential life. While this potential life is in gestation, and whether or not it is in fact born, a man who supports the woman carrying it is different from a man supporting a stranger, a friend, or a sister. He is supporting a person—the woman—who is bearing his own flesh, including if the woman ultimately terminates the pregnancy. During the weeks or months of the pregnancy, man and woman are existentially bound.

2. *Utilitarian justifications*

Even if my procreation hypothesis is wrong (i.e., if marriage-based tax benefits are not our collective subconscious’s way of supporting “responsible procreation”) extending alimony treatment to preglimony makes sense for utilitarian reasons. First, the policy will encourage support for pregnant women.¹⁵⁹ By setting a minimal baseline for acceptable support, the rule will also have positive expressive effects, shaming those who leave their pregnant lovers to fend for themselves.¹⁶⁰ Imagine Internal Revenue Service Form 1040 (and

158. It also suggests that income-shifting benefits should not be automatically available to childless spouses and former spouses, but this issue is outside the scope of this Article. As I have argued elsewhere, I believe that joint filing should be limited to taxpayers who are legally committed to sharing income equally regardless of marital status. *See* Motro, *A New “I Do,” supra* note 45. Taken together, this project and my former work recommend that childless couples be permitted to file jointly only if they are legally committed to sharing income and that co-parents be permitted to shift income through a deduction/inclusion mechanism so long as they are transferring more than a minimal threshold amount.

159. *Cf.* Bigler, *supra* note 154, at 379 (arguing for extending the deduction/inclusion treatment of alimony to child support payments in order to “encourage ‘deadbeat dads’ to pay their support obligations”).

160. Some commentators may object that the tax code is the wrong vehicle for achieving this symbolic goal because it is the wrong vehicle for social engineering more broadly. This is not the place to revisit debates on the proper role of tax law in setting social norms. It is worth noting, however, that Congress routinely and deliberately uses the tax system to shape economic and social behavior. *See* Maureen B. Cavanaugh, *On the Road to Incoherence: Congress, Economics, and Taxes*, 49 UCLA L. REV. 685, 687 (2002) (“[G]overnments generally (and Congress in particular), have frequently used both tax incentives and disincentives in an effort to address important social problems.”); Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 705 (1970). Given that tax expend-

TurboTax's corresponding prompts) modified to include preglimony as well as alimony. The appearance of the term alone (to be defined in the form's instructions as per the model statute below¹⁶¹) will link pregnancy with financial obligation in the minds of taxpayers from the time they begin filing their taxes.

Champions of marriage may, at first glance, worry that the pregnancy-support deduction might undermine marriage by offering a "marriage-lite" alternative, subsidizing out-of-wedlock childbearing. But the limited timeframe for deductibility means that in reality the revenue costs of the subsidy will be quite small. Furthermore, by "hooking" steady couples to the benefits of income splitting, the deduction might create an additional incentive to marry. It may, in other words, function as a step towards marriage—instead of marriage lite, marriage with training wheels.¹⁶²

On the flip side, this supposed benefit may, at first glance, figure as a negative aspect of the proposal in light of the ways in which marriage-based tax benefits exacerbate power imbalances along gendered lines. (For example, the current income tax system penalizes two-earner married couples whereas it privileges couples composed of one exclusive breadwinner. This creates an incentive for the low, so-called "secondary" earner—usually the wife—to forgo paid work, eventually becoming entirely dependent on her husband.)¹⁶³ Rather than chipping away at this problem, preglimony arguably extends it. Admittedly, this will be true in some cases. In others, however, preglimony benefits may help ill-suited partners forestall and ultimately avoid an unhappy marriage. More broadly, preglimony's promise is that it can expose the inherent contradictions at the heart of a marriage-centered view of friendship, family, and community. Whereas marriage is an arbitrary eligibility criterion for special tax treatment, pregnancy presents a crystal clear *limited* moment during which a gendered view of men and women's different economic capabilities, needs, and deserts is appropriate.¹⁶⁴ Marriage is not special; pregnancy and nursing an in-

itures have grown from \$45 billion in 1968 to \$1 trillion for fiscal years 2001 to 2005, Stanley Surrey's comments are as true today as they were when he first advocated a strong presumption against their use. For a discussion of the influence of tax law on gender relations in particular, see MCCAFFERY, *supra* note 111.

161. *See infra* pp. 696-97.

162. *Cf.* WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE?* (2006) (using Scandinavian countries' experience with gay marriage to suggest that alternatives to traditional heterosexual marriage may bolster rather than undermine the institution).

163. *See* MCCAFFERY, *supra* note 111, at 19-23 (discussing the tax system's secondary-earner bias); Nancy C. Staudt, *Taxing Housework*, 84 *GEO. L.J.* 1571, 1574 (1996) (examining "the possibility of valuing and taxing nonmarket labor in the same manner as market labor"); *see also* Silbaugh, *supra* note 44, at 44-55 (1996) (surveying a variety of ways in which the tax system contributes to the law's failure to value unpaid work).

164. Discussions with Laura Rosenbury and Adam Rosenzweig helped me in identifying and thinking about this issue.

fant are.¹⁶⁵ By isolating the obvious, undeniable temporary dependency that comes along with procreation, preglimony can begin to strip away the *imagined* dependency that often follows women throughout their lives.¹⁶⁶

Finally, over time the combination of these effects may create a more robust pregnancy-support norm that will influence sexual behavior. That is, if the government's preferential treatment of significant pregnancy support helps make it socially mandatory, the fear of such responsibility may incentivize men who do not want to become fathers to be more vigilant about birth control.¹⁶⁷

C. *How It Would Work*

The administrative mechanism for the pregnancy-support deduction would mirror that used in the alimony context, except that whereas alimony payments must be made pursuant to divorce or separation, preglimony payments would have to be made to a pregnant woman.¹⁶⁸ Like in the alimony context, the deduction/inclusion treatment would be elective.¹⁶⁹ Proof of the pregnancy or abortion from a health care provider would be required. This administrative burden on the taxpayers would create an incentive for pregnant women to seek medical care, a net positive.¹⁷⁰ (Thus, the pregnancy discovered through a

165. For a related argument, see CRITTENDEN, *supra* note 54, at 268 (proposing that the birth or adoption of a child should turn spouses into full economic partners).

166. See *supra* Part II.B.

167. After conception occurs, it is unclear whether and how the deduction/inclusion of preglimony may influence the incidence of abortion. It would apply whether or not the pregnancy is taken to term, but if the existence of the tax benefit and its expressive effects causes men to support a pregnancy taken to term more robustly than they currently do such that the woman receives more in after-tax dollars, this may decrease abortions undertaken because of financial pressures. Cf. Crowley, Jagannathan & Falchettore, *supra* note 32, at 22-23 (finding that increased child support correlates with fewer abortions).

168. See notes 181-84 and accompanying text for a discussion of whether the payor must be the man with whom the woman conceived.

169. Unlike in the alimony context, however, the default would be that preglimony payments are nondeductible to the payor and excludible by the recipient, because the deduction/inclusion alternative requires formal and deliberate cooperation, which will not always be possible. Additionally, women should be able to keep their pregnancy private if they wish to do so. For an argument that the default rule for alimony should also be nondeductible/excludible, see Waggoner, *supra* note 144, at 579.

170. For a discussion of the risks to both woman and newborn child when a pregnant woman receives no prenatal care, see MATERNAL & CHILD HEALTH BUREAU, U.S. DEP'T. OF HEALTH & HUMAN SERVS., A HEALTHY START: BEGIN BEFORE BABY'S BORN, available at <http://ftp.hrsa.gov/mchb/prenatal.pdf> ("Babies born to mothers who received no prenatal care are *three* times more likely to be born at low birth weight, and *five* times more likely to die, than those whose mothers received prenatal care."); and John L. Kiely & Michael D. Kogan, *Prenatal Care*, in FROM DATA TO ACTION: CDC'S PUBLIC HEALTH SURVEILLANCE FOR WOMEN, INFANTS, AND CHILDREN 105, 105 (1994), available at <http://www.cdc.gov/reproductivehealth/ProductsPubs/DatatoAction/pdf/rhow8.pdf> ("Inadequate use of prenatal care has been associated with increased risks of low-birth-weight births, premature births, neonatal mortality, infant mortality, and maternal mortality." (citation omitted)). *But see*

home pregnancy-test kit that ends in spontaneous miscarriage would only be eligible for preglimony tax treatment if medical proof of the pregnancy were available.)

Whereas alimony tax treatment requires that parties not live together,¹⁷¹ parties would be permitted to deduct/include preglimony regardless of whether they live together. In this respect, preglimony is qualitatively different from both alimony and palimony, which are triggered by the dissolution of a relationship. Preglimony is triggered by pregnancy. It *may* coincide with the end of a relationship, but it may take place in the context of an intact relationship and it may solidify a relationship.¹⁷² In a sense, preglimony might be seen as a term marriage of sorts—a time-bound commitment of mutual respect and of material support from the man to the woman.¹⁷³

To take advantage of the deduction/inclusion rule, the payor and the pregnant recipient will need to cooperate. Both will need to retain documentary proof of the pregnancy and of the amount of the transfers, though an itemized record linking each transfer to particular costs would not be required.¹⁷⁴ The taxpayers will also need to coordinate so their respective deductions and inclusions are consistent. To be recognized as alimony for tax purposes, payments must be made under a divorce or separation instrument (i.e., under a decree or written agreement).¹⁷⁵ Similarly, preglimony tax treatment would require parties to agree in writing that payments represent pregnancy-related support and that they wish to designate them as deductible to the payor and includible to the

Cassman v. United States, 31 Fed. Cl. 121, 129 (1994) (Taxpayers are not entitled to a deduction based on conception because, among other reasons, allowing a deduction would “create confusion because of the uncertainty regarding the date when a particular conception occurs. . . . A live birth [by contrast] . . . results in the issuance of a birth certificate, which is a universally accepted and administratively efficient document of identification. . . . If the court held . . . that the dependent exemption was available as of the date of conception, then the exemption would be available for pregnancies that never resulted in live births and the issuance of a birth certificate, including those pregnancies ending in miscarriages, induced abortions, and stillbirths. In the absence of any clear evidence of congressional intent to do otherwise, the court must spare taxpayers and the I.R.S. the administrative burden of establishing that such pregnancies occurred or did not occur.”).

171. See 26 U.S.C. § 71(b)(1)(C) (2006).

172. Susan Appleton and Cheryl Block alerted me to the significance of these distinctions.

173. I am not suggesting a similarity to the term “marriage” in Islamic law, which contemplates more robust obligations. See *generally* SHAHLA HAERI, LAW OF DESIRE: TEMPORARY MARRIAGE IN SHI’I IRAN (1989).

174. For one, requiring itemization would be administratively burdensome. More importantly, the physical, professional, and emotional effects of pregnancy are so diverse that parsing apart pregnancy-related expenses from other expenses would be nearly impossible. Finally, even if it were possible to draw such a distinction, since many of the burdens of pregnancy cannot be ameliorated, payments used toward non-pregnancy-related ends—whether indulgences or investments for the future—should be given the same support and encouragement as payments used for strictly pregnancy-related ends.

175. 26 U.S.C. § 71(b)(2).

recipient.¹⁷⁶ While this imposes another administrative burden, again, it also creates a beneficial incentive; it encourages partners to communicate and reach agreement about their circumstances.

One concern is that taxing women on the preglimony they receive could leave them with less support than they would have gotten under the current no deduction/no inclusion rule. This would happen in cases in which the deductibility of preglimony does not incentivize a significantly higher payment. A simple deduction/inclusion rule would also reward even the most ungenerous contributions, sending the wrong message. To avoid this result, the deduction should be limited to payors whose pregnancy support exceeds a certain threshold set so as to produce a reasonable after-tax award for the woman. One possibility is to extend deduction/inclusion treatment to any transfer to a pregnant woman that exceeds a standard dollar amount fixed for all pregnancies. Alternatively, the minimal threshold might vary depending on the length of the pregnancy. It might also depend on the payor and the recipient's economic circumstances. Finally, at the maximalist end of the spectrum, the rule could require that the man transfer enough of his yearly income to the woman so as to equalize their earnings. That is, only if lovers are prepared to share fifty-fifty, as if they were married in a community property state, should they be entitled to the income-shifting benefit.¹⁷⁷

The modest revenue effects of the existing alimony rule¹⁷⁸ suggest that the costs of even the most expensive version of the new rule would likely be small. Nevertheless, should the potential revenue impact of an unlimited deduction

176. In order to reduce fraud or collusion, in addition to proof of the pregnancy, the payor and recipient might also be required to include with their return a cosigned statement recording their agreement and understanding of the tax consequences to each. I credit Wendy Gerzog for this suggestion.

177. The advantage of this requirement is that it would encourage significant support. The disadvantage is that it would provide no incentive for those who are prepared to share significantly but not to the point of fifty-fifty division. It would also subject unmarried partners to a higher sharing standard than we apply to spouses, an incongruous result. Finally, it would create a marriage penalty because the rate schedule for married taxpayers filing jointly approximates but does not replicate "pure" income splitting.

178. See Malman, *supra* note 145, at 398-99 ("Statistics indicate . . . that the revenues at stake in the alimony deduction are not large. For example, only 0.6% of all returns filed claimed a deduction for alimony payments. In contrast, 48.3% of all returns filed took advantage of the joint return tables. Moreover, the potential for a significant revenue impact is more hypothetical than real. Although divorced women are generally in lower tax brackets than their male counterparts, studies indicate that cash awards to former spouses are relatively few in number and small in size, and often remain uncollected. Even where substantial annual payments are made, the resulting increase in the recipient's income narrows the difference between the former spouses' marginal tax rates and thus lessens the revenue impact." (footnotes omitted)); see also Waggoner, *supra* note 144, at 579-80 (concluding that the revenue loss following a reform extending the deduction/inclusion treatment of alimony to child support and lump sum payments is difficult to calculate but, regardless of the cost, in light of the dangers of the current rule to the custodial spouse and the children, "it may be an appropriate area for some federal revenue loss").

rule prove to be a concern, a maximum cap on amounts eligible for deduction/inclusion treatment might be set.¹⁷⁹ Another reason for considering a cap is the possibility that if an unequal-earner unmarried couple splits income entirely (i.e., if the payor shares enough to put both parties on equal footing) it would be in a better after-tax position than a married couple.¹⁸⁰

Finally, lawmakers will need to determine whether proof linking the preglimony payor with the recipient's pregnancy would be required. Requiring such proof would ensure that the benefit is narrowly tailored to apply only to unmarried heterosexual lovers who conceive (as opposed to same-sex couples and other types of relationships that involve economic support). This would make the proposal more politically promising than its alternative. In an ideal world, however, a more expansive alternative is preferable. One reason is administrative. Though in utero genetic testing is available, it is risky and expensive.¹⁸¹ Thus, if proof linking the payor with the pregnancy were required, a couple wishing to avoid the risky test might have to forgo its preglimony benefits initially and amend their returns once testing becomes safe (i.e., once the pregnancy ends in birth, abortion, or miscarriage).¹⁸² The test also creates additional costs. This level of administrative hassle and added cost would make the program prohibitively complex and burdensome to many taxpayers.

Another reason for not requiring that the payor prove a genetic connection to the pregnancy is equitable. Recent (albeit controversial) family law trends diminish the focus on blood ties for purposes of determining paternity in favor of more functional approaches.¹⁸³ We recognize that to be a parent, one need

179. I credit Wendy Gerzog for this insight, though she would rather the cap apply only to the deduction, not the inclusion amount.

180. This is because joint filing *approximates* but does not quite replicate pure income splitting. See Gerzog Shaller, *supra* note 130, at 328 (discussing the "divorce bonus"). To prevent the resulting "marriage penalty," the income-shifting benefit derived from the pregnancy-support deduction might be capped at the benefit that would have accrued to the couple were they married.

181. See *Paternity Testing*, AM. PREGNANCY ASS'N, <http://www.americanpregnancy.org/prenataltesting/paternitytesting.html> (last updated Nov. 2007) ("Prenatal DNA testing done in conjunction with other prenatal testing involves some risk associated with how the testing is conducted, whether amniocentesis or CVS. These tests are often discouraged for the sole reason of seeking paternity because of the increased miscarriage risks."). The cost of paternity testing generally "range[s] from \$400.00 to \$2,000.00. Prenatal testing is often more costly than testing done after a baby is born because of the additional doctor and hospital-related fees." *Id.*

182. If, for example, the couple conceives in November of year 1 and miscarries in May of year 2, the support payments made in November and December of year 1 would not be taken into account in each partner's year 1 tax returns filed in April. Then, after the miscarriage, a test linking the man to the ill-fated pregnancy would enable them to amend their year 1 returns to take advantage of the benefit—an administrative hassle that would effectively make the program impractical for most couples.

183. See *Lehr v. Robertson*, 463 U.S. 248, 266-67 (1983) (holding that a biological father's legal rights with respect to his child are contingent on whether he established a relationship with the child); see also *Michael H. v. Gerald D.*, 491 U.S. 110, 113 (1989) (plurali-

not have a biological relationship with a child; likewise, to be a supportive partner to a pregnant woman, one need not be the person with whom she conceived. Thus, ideally, a pregnant woman and her lesbian partner should be eligible for the deduction, as should a woman and a man other than the one with whom she conceived.¹⁸⁴ But again, the more expansive the eligibility criteria the less likely the proposal is to be politically viable. Not requiring that the payor be the man with whom the woman conceived also broadens the targets of the reform beyond the main issue addressed in this Article—the relational consequences of pregnancy. In any case, if no genetic link is required, to be consistent with broader tax policy considerations aimed at preventing intrafamily income shifting,¹⁸⁵ an exception would need to be made limiting the deduction/inclusion treatment to unrelated parties.¹⁸⁶

The proposal would only benefit couples in which the payor's income is higher than the pregnant woman's and the value it bestows will increase as the rate differential between the two increases. Thus, the pregnancy-support deduction will not significantly help low-income taxpayers whose incomes are more likely to be comparable and whose rate differentials, if any, tend to be smaller. But as we have seen, calls for more robust public assistance for the unmarried poor have gone largely unheeded in favor of a model privatizing care for dependents.¹⁸⁷ The fact is that the world in which we live leaves many pregnant women to fend for themselves. Unless and until society steps in more robustly, incentivizing men to shoulder more of the burden is preferable to the status quo, and though it will only affect the well-off, its symbolic effects are likely to spread more broadly.

ty opinion) (denying a biological father's paternity rights when the mother was married to another man when she gave birth because "a child born to a married woman living with her husband is presumed to be a child of the marriage").

184. Indeed, one possibility is to allow multiple people to shift income to a single pregnant woman, which would represent a step in the direction of recognizing broader collective responsibilities rather than focusing on the nuclear family as the main form of social insurance. See *supra* Part II.B. The multiple-party version of the proposal would also accommodate polyamorous forms. See Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 284-85 (2004) (suggesting that the law should give greater attention and consideration to polyamorous alternatives to marriage and monogamy). It is not, however, likely to attract broad support.

185. See generally 3 BITTKER & LOKKEN, *supra* note 109, ¶ 75.2.

186. Thus payments from parents to their daughter would not be eligible for deduction/inclusion treatment. Payments formally characterized as transfers from parents to their son's girlfriend would also be ineligible as they would be viewed as gifts from parents to son followed by preglimony payments from the son to his girlfriend. The gifts to the son would be nondeductible and excludible (as all gifts are). The payments from the son would be eligible for preglimony tax treatment but the benefit would most likely be lost (because if the son needs his parents to pay, his marginal rate is likely to be low, in which case no income-shifting benefit would be available).

187. See *supra* Part II.B.

In light of the fact that pregnancy's effects often extend over more than one year, the benefit might apply during the year of conception plus the subsequent year or two—either as a standard matter or depending on whether the pregnancy was taken to term and whether the birth mother retained custody of the child. This may seem fair, but it would require distinguishing extended preglimony from nondeductible child support, which, as we saw in the divorce context, is practically impossible. In this sense, the preglimony debate may revive arguments for making child support deductible as well, which would be a positive development. More broadly, the long-term effects of pregnancy and child-bearing raise an even thornier question: If the reason we support marriage through the tax code is as a proxy for procreation, why not create a *motherhood* or primary-caregiver support deduction as well as a pregnancy-support deduction?¹⁸⁸ Again, like the issues discussed in Part II.B above, the answer to this question turns on how we as a society wish to treat unmarried parents more broadly, a subject that has been studied by other scholars. Regardless of these broader issues, however, recognizing and rewarding preglimony in isolation would be valuable in itself. The relational aspects of nonmarital pregnancies, which marriage enthusiasts and critics alike agree present opportunities for reform, have been largely ignored. I hope this project helps bring them out of the shadows and into the public debate.

The provision I envision might be worded as follows:

Pregnancy-Related Payments

(a) *General Rule.*—Pregnancy-related payments, designated as such by both the payor and the transferee, shall be includible in the gross income of the recipient and deductible by the payor.

(b) *Pregnancy-Related Payments Defined.*—For purposes of this section, the term “pregnancy-related payments” means any payment in cash if—

- (1) such payment is received by a pregnant person¹⁸⁹ (as defined in subsection (c)) within the later of [one year] of the start of the pregnancy or [one year] of the birth a child, and

188. Elsewhere I have argued that joint filing should be limited to taxpayers who are legally obligated to share their income, regardless of marital status. See Motro, *A New “I Do,”* *supra* note 45. I continue to support this reform. In addition, I agree with critics who have argued that child support paid subsequent to a divorce should receive the same tax treatment as alimony. See *supra* note 154. I would also support extending this treatment to unmarried co-parents.

189. The provision should be gender neutral to avoid uncertainties that might arise with respect to intersexual, transgendered, and other individuals whose sexual identity is ambiguous or subject to dispute. For a discussion of intersexuality and sex discrimination, see Julie A. Greenberg, *Intersex and Intrasex Debates: Building Alliances to Challenge Sex Discrimination*, 12 CARDOZO J.L. & GENDER 99 (2005).

(2) the payment exceeds [dollar amount, percentage of payor's adjusted gross income, or other minimal threshold].

(c) *Pregnant Person Defined.*—For purposes of this section the term “pregnant person” means a person deemed to be pregnant by a physician in a licensed hospital (or in a medical care facility which is related to, or the equivalent of, a licensed hospital).

CONCLUSION

Unmarried partners who conceive respond to pregnancy in a range of different ways. Some get married. Others face pregnancy and its repercussions—whether it ends in abortion, miscarriage, or childbirth—together without marrying. A third group views conception as the woman's private affair.

The law effectively treats all sexual partners who are not married as falling into the third category; it treats all lovers as strangers. When pregnancy ends in abortion, it requires nothing of the man. When pregnancy progresses to term, the law requires male participation only in the bare essentials of bringing a child into the world. Its requirements fall short of the type of support that would be provided by a man who views the pregnancy itself—in addition to the potential child it creates—as a joint responsibility.

This Article begins to bring the law up to date with this now commonplace sensibility. Pregnancy results from a connection between two people; its burdens should be borne by both parties to the act. Translating this moral intuition into a comprehensive legal regime is complicated and controversial; it will take some time. But there is something we can begin to do now: the law can and should respect lovers who already regard conception as a joint responsibility by treating the economics of the pregnancy accordingly. The pregnancy-support deduction offers a first step in this direction.

Preglimony is a new word; it is not a new practice. It's time the law noticed.