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Form and Substance in Parentage Law

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FORM AND SUBSTANCE IN PARENTAGE LAW

Lynn D. Wardle*

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INTRODUCTION: INVITATION TO REFORM PARENTAGE LAW

The Institute of Bill of Rights Law at the William & Mary School of Law, which convened a roundtable on reforming parentage laws ("Parentage Roundtable"), has graciously invited me to respond to a set of academic papers presented at the Parentage Roundtable and published by the *William & Mary Bill of Rights Journal* ("Parentage

* Bruce C. Hafen Professor of Law, J. Reuben Clark Law School, Brigham Young University (BYU). BYU law students Tracy Schofield, Zachary Starr, and Kevin Fiet provided valuable research assistance for this Article. Some members of the Case Western Reserve Law School faculty responded to an early draft of this Article I presented at a Faculty Works-in-Progress seminar on February 21, 2006; I express my appreciation to those faculty members who attended, asked questions, and provided feedback, especially to Professor George Dent. I also express my gratitude to Professor James G. Dwyer of William & Mary School of Law, who graciously invited me to prepare and submit this Article, and to Professor Brad Wilcox of the University of Virginia, a participant in the Institute of Bill of Rights Law's Task Force Roundtable: Reforming Parentage Laws, who initiated that invitation.

Symposium”), to add my own recommendation regarding “[w]hat would be an ideal set of rules for assigning newborn children to parents?”¹ The convener of the Parentage Roundtable, James G. Dwyer, Cabell Research Professor of Law at the William & Mary School of Law, asked the distinguished participants in the Parentage Roundtable to consider how law regulating the establishment of parentage for the newborn child would look if (1) only the best interests of the newborn child were considered, and (2) assuming that social conditions as they now exist (as unpleasant as they are in some situations) continue (thus precluding change-the-facts-by-assuming-miraculous-new-governmental-programs-or-socio-economic-improvements fantasy-solutions).² Professor Dwyer also explicitly asked that contributors engage in a free-thinking “thought experiment”³ to pursue a purely intellectual exercise in hopes of “trigger[ing] stimulating debate among family law scholars and among many other scholars and professionals.”⁴

This article addresses the subject of establishing legal parentage at the time of child-birth within the context of the broader debate over the relationship of form and substance in family law. The article also proposes some reforms to parentage principles and doctrines in the spirit of stimulating debate and encouraging family law scholars to explore approaches that break through the popular ideological barriers that often tend to dominate and constrain contemporary thinking and discourse about family law. Part I of this article reviews the six published papers by seven professors that resulted from the Parentage Roundtable, and provides three comments about the positions asserted (endorsing the child-centered approach, critiquing “mother-controls” proposals, and criticizing the weakening of the marital presumption of parentage). Part II of this Article examines whether the form or structure of parenting really matters for children, and, if so, how it should matter for the law governing the establishment of parentage at birth.⁵

¹ William & Mary School of Law, Institute of Bill of Rights Law, Program Archives, http://www.wm.edu/law/ibrl/program_archive.shtml (last visited Sept. 11, 2006). The Parentage Roundtable papers were published in a Symposium on Reforming Parentage Laws, 14 WM. & MARY BILL OF RTS. J. 843–986 (2006).

² James G. Dwyer, *A Child-Centered Approach to Parentage Law*, 14 WM. & MARY BILL RTS. J. 843, 843–46 (2006) [hereinafter Dwyer, *A Child-Centered Approach*].

³ *Id.* at 853 (symposium “designed as a thought experiment” to consider “somewhat radical” proposals).

⁴ *Id.* at 846; see also David D. Meyer, *The Constitutionality of “Best Interests” Parentage*, 14 WM. & MARY BILL RTS. J. 857, 857 (2006) (participants were invited “to think creatively and expansively”).

⁵ I assume herein that *if* form of parenting matters for children, it *should* matter for parentage law because parentage law should prefer, promote, and protect those forms of parenting that lead most consistently to positive child-rearing benefits for children. Parentage law should discourage and try to avoid those forms of parenting that consistently produce the most painful and harmful child-rearing consequences for children. This assumption about the role of law in regulating parent-child relations can be debated, but given the explicit direction of the convener that all authors base their proposals on the protection of child-interests only,

It emphasizes that because children generally do best when raised by their mother and father who are married, the law should strongly encourage and prefer marital dual-gender parenting. Part III of this article suggests some core principles that should underlie parentage law applicable to the newborn child and offers, for brainstorming discussion, some possible reform positions, with the caveat that pragmatic considerations must temper and shape how those principles and any reform proposals are applied in any given case. The Article concludes by endorsing the importance of fostering marital, biological, dual-gendered parenting in parentage law.

I. REVIEW AND CRITIQUE OF THE WILLIAM & MARY PARENTAGE ROUNDTABLE

A. *Review of the Papers Presented*

Articles published in the *William & Mary Bill of Rights Journal* Parentage Symposium provide a fairly representative selection of what knowledgeable and highly-respected American legal scholars think of the law regulating parentage today and of what it should be. Professor Karen Czapanskiy proposes to give birth mothers virtually unilateral control of legal parentage.⁶ Under her proposal, the birth mother would be the only presumed legal parent.⁷ She would be

empowered to decide whether she will be the child's sole legal parent or whether she will designate another as her parental partner. If she decides to designate a partner, she can designate whomever she wants; she is not constrained by presumptions in favor of her spouse or the child's biological father.⁸

A few other adults could petition a court to obtain parentage rights.⁹ Professor Czapanskiy's proposal would facilitate single-mother parenting, parenting by lesbian (but not gay) partners, and multi-generational parenting by the mother's choice, but it would weaken marital parenting.¹⁰ She argues that this is justified by her "interdependency theory."¹¹

Dwyer, *A Child-Centered Approach*, *supra* note 2, at 843–45, fuller analysis of that assumption must be reserved for another occasion.

⁶ Karen Czapanskiy, *To Protect and Defend: Assigning Parental Rights When Parents Are Living In Poverty*, 14 WM. & MARY BILL RTS. J. 943, 943 (2006) [hereinafter Czapanskiy, *Protect and Defend*].

⁷ *Id.* at 946.

⁸ *Id.* at 943.

⁹ *Id.* at 946.

¹⁰ *Id.* at 949–66.

¹¹ *Id.* at 947–48. While Professor Czapanskiy's analysis and proposal are probably the most feminist-centric in the Parentage Symposium, her briefly-described "interdependency

Professor Nancy Dowd also agrees that the mother-child relationship is the core and foundation of families and should be the basis of parentage law.¹² She would make marital status irrelevant for parentage determination.¹³ She would presume that biological fathers are entitled to parentage unless they were absent from the delivery without a good excuse (transforming a recent American cultural phenomenon into a near-absolute requirement for legal parentage), refused to acknowledge paternity, failed to care adequately, or acted abusively prior to birth.¹⁴ She would allow multiple men to have parental status and would separate social from economic paternity.¹⁵ She also endorses mother-control-of-parentage-“lite” by requiring the mother’s signature on an unwed father’s acknowledgment of paternity in order for him to get paternal status,¹⁶ and by requiring other putative fathers to reside with the child for two years and to “openly h[o]ld out the child as his own” (which, in most cases would require consent of the child’s mother who normally would have custody under the prevailing custody practice).¹⁷

Summarizing proposals and analysis that are developed in much greater detail in his recently published monograph entitled *The Relationship Rights of Children*,¹⁸ Professor Dwyer’s Parentage Symposium article also endorses a version of the “mother-control” rule; he would allow a not-unfit man married to the birth mother to automatically obtain legal parentage (regardless of biological parentage) “so long as the birth mother consents to his becoming the legal father.”¹⁹ Professor Dwyer advocates establishing rules that start with an assumption of parentage for some, but not all

theory” seems to have the potential to make a valuable contribution to the discussion of parentage law if the ideological gender-bias were eliminated. *Id.*

¹² Nancy E. Dowd, *Parentage at Birth: Birthfathers and Social Fatherhood*, 14 WM. & MARY BILL RTS. J. 909 (2006). Professor Dowd predicates parentage on nurturing, which she explicitly equates with mothering. *Id.* at 913, 918. Given that premise, it is ironic that her article focuses almost entirely on establishment of *paternity* and largely ignores (except for one page) the establishment of parentage for women. While giving lip service to equality, Dowd apparently would give birthmothers legal parentage without any evidence of nurturing other than carrying the child and giving birth, absent abusive behavior. *Id.* at 930.

¹³ *Id.* at 911, 917, 928–29. Yet, ironically, Professor Dowd would allow married men to establish paternity by executing an acknowledgment of paternity without the mother co-signing, but the mother’s signature would be required for an unmarried man to establish paternity by acknowledgment. *Id.* at 935.

¹⁴ *Id.* at 925.

¹⁵ *Id.* at 913, 917–21, 927–31.

¹⁶ *Id.* at 935.

¹⁷ *Id.* at 933.

¹⁸ JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* (2006) [hereinafter DWYER, *RELATIONSHIP RIGHTS*].

¹⁹ Dwyer, *A Child-Centered Approach*, *supra* note 2, at 848; *see also* DWYER, *RELATIONSHIP RIGHTS*, *supra* note 18, at 265 (“Men can become legal parents automatically, without petitioning, only if they are married to the birth mother and the mother consents to their parenthood.”); *id.* at 259–62, 266.

biological parents. Those that are deemed high-risk (including those who were younger than 18 years of age when the child was born, or who are parents to four other children and on welfare) are required to petition a court for an order of parentage.²⁰ Courts could “deny legal parenthood in the first instance to some biological parents on the grounds of unfitness,”²¹ such as by making “a ‘substituted judgment’ for the child, which would effectively amount to a best-interests determination.”²²

Professor David D. Meyer expresses cautious support for child-centered theories and parentage reform proposals.²³ After reviewing the movement away from strict parentage rules and toward greater “best interests” decision-making in parentage law,²⁴ Professor Meyer reviews the cases that protect what he calls the “parental identity” of traditional parents (biological and marital),²⁵ but suggests that “some Supreme Court authority . . . seems to . . . suggest[] that states do indeed have broad authority in defining the scope of parenthood.”²⁶ Nonetheless, any parentage rule must fairly treat all who have significant interests in the determination of parentage in order to pass constitutional muster,²⁷ and “to the extent parentage reform proposals would place significant barriers in the path of persons regarded as ‘parents’ by widely shared social consensus, it will trigger serious constitutional review.”²⁸

Professor Jane C. Murphy cautions against the optimistic, statist belief that greater state intervention in establishing parentage will benefit poor children.²⁹ Acknowledging the complexities of determining parentage today and the variety of contexts in which parentage questions arise, she distinguishes parentage cases involving competing claims to parentage from those involving efforts to “resolv[e] the legal status of the *one* adult

²⁰ Dwyer, *A Child-Centered Approach*, *supra* note 2, at 848. While many of the nine examples of unfitness Dwyer outlines seem to mirror existing child protection laws (e.g., abuse, neglect, and dependency), which would allow prompt termination of parental rights soon after a child’s birth. Two of the grounds for denial of parentage described in the text above are very troubling. For the widowed mother of a newborn child, whose husband recently died leaving her with four other children and in temporary need of welfare assistance, this proposal would add to the burdens of grief over loss of a spouse the additional legal, financial, and emotional difficulty of having to convince a court that she is deserving to be deemed a legal parent of her newborn child. Likewise, while the advantages of waiting until majority to marry and have children are profound, it is quite dubious to assume that the immaturity of youthful parentage alone causes such a great harm to minors as to justify creation of a presumption against parentage.

²¹ *Id.*

²² *Id.* at 849.

²³ Meyer, *supra* note 4, at 857–58.

²⁴ *Id.* at 859–64.

²⁵ *Id.* at 864–67.

²⁶ *Id.* at 869.

²⁷ *Id.* at 878–79.

²⁸ *Id.* at 874.

²⁹ Jane C. Murphy, *Protecting Children by Preserving Parenthood*, 14 WM. & MARY BILL RTS. J. 969, 969–73 (2006).

who may be available to serve as the legal mother or father” of a child.³⁰ She emphasizes the risks to children of their fathers or mothers losing parental status, the inadequacies of the state as a substitute parent, and the benefits to the child of having at least one biological parent acknowledged as a legal parent.³¹ She argues that federal law requiring prompt termination of parental rights has benefitted a few children who have become available for adoption,³² but that many more (than necessary to be protected) have been deprived of at least marginal parenting by their mothers due to hasty termination of parental rights.³³ Such children have suffered the state-inflicted deprivation resulting from parentless child-rearing in foster care, group homes, etc.³⁴ Based on her review of the experience of poor women and their treatment in child neglect and abuse proceedings, Murphy asserts that “there is considerable risk to children in requiring mothers to seek state intervention to *establish* parentage.”³⁵ She concludes by arguing against formal state intervention to establish parentage by showing fitness, by suggesting different standards for paternity and maternity reflecting the differences in prenatal investment, by endorsing presumed parentage of the birth mother, and by deferring to poor families to make their own decisions about parentage issues whenever possible.³⁶

Addressing the question, “Who should care for children when their biological parents cannot?”, sociologist W. Bradford Wilcox and law professor Robin Fretwell Wilson present the empirical and legal case that “children would be best served by placement with married parents and, barring this, that they should be placed with a single parent; as a final resort, a child should be placed with an unmarried, cohabiting couple for adoption by both of them.”³⁷ They assert with some impressive empirical evidence that “[t]he social science is clear: on average, children do best in a married home, compared to the alternatives.”³⁸ The authors review recent studies indicating that single parenting and non-marital couple parenting are less beneficial for children than marital parenting and explain those findings in terms of “social networks, the social and emotional support and monitoring of a co-parent, and parental quality.”³⁹ Likewise, they summarize some of the evidence that children raised by cohabiting parents are less advantaged than children raised by married couples and explain why in terms of lowered institutionalized social support, lowered commitment, less shared

³⁰ *Id.* at 969, 971.

³¹ *Id.* at 972–73.

³² Adoption and Safe Families Act of 1997, Pub. L. No. 105–89, 111 Stat. 2115; *see* 42 U.S.C. § 675 (2005).

³³ Murphy, *supra* note 29, at 978–79.

³⁴ *Id.*

³⁵ *Id.* at 982. Her paper focuses exclusively on motherhood. *Id.* at 973.

³⁶ *Id.* at 983–86.

³⁷ W. Bradford Wilcox & Robin Fretwell Wilson, *Bringing Up Baby: Adoption, Marriage, and the Best Interests of the Child*, 14 WM. & MARY BILL RTS. J. 883, 883 (2006).

³⁸ *Id.* at 883; *see also id.* at 891–99.

³⁹ *Id.* at 897; *see also id.* at 895–97.

understanding about parental roles and responsibilities, and higher levels of instability.⁴⁰ They recommend that states adopt any of several rules that support or prefer placement of children for adoption with married couples.⁴¹

Thus, the Parentage Symposium articles did not all address the same question about what rules should govern establishment of legal parentage at birth. Professor Murphy focused primarily on termination of parental rights of poor, single mothers,⁴² and Professors Wilcox and Wilson focused on establishing parentage for parentless children (abandoned, neglected, abused or dependent orphans).⁴³ Nonetheless, all of the papers addressed issues that relate to the general topic of reforming the laws regulating establishment of legal parentage at birth.

B. Commendation of Child-Centered Approach in Reforming Parentage Law

The Parentage Roundtable and resulting Parentage Symposium have made an important contribution to the discussion of parentage law reform by emphasizing the importance of taking a child-centered approach to legal regulation of the establishment of parentage at the time of birth.⁴⁴ Most of the symposium articles made at least a partially successful effort to follow the admonition to frame parentage law reform proposals or commentary from the perspective of protecting and promoting the interests of children.⁴⁵

The child-centered approach is an important perspective to establish in the law and to ingrain into the consciousness of academics and professionals who work with children in need of protection and with the legal policies and programs designed to help them. While this is not a new approach (it has been a part of the scholarly legal literature at least since Barbara Bennett Woodhouse's classic 1993 law review article *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*),⁴⁶ it still clearly merits repetitive emphasis in current scholarly discussions.

The remaining problem is how to determine what *really* is in the best interests of children. Almost any parentage policy position—from the most preposterous to the most prudential—can be (and probably has been) defended in child-centered terms and with the claim that it promotes the best interests of children.⁴⁷ “Child centered

⁴⁰ *Id.* at 899–903.

⁴¹ *Id.* at 904–07.

⁴² See *supra* notes 29–36 and accompanying text.

⁴³ See *supra* notes 37–41 and accompanying text.

⁴⁴ Dwyer, *A Child-Centered Approach*, *supra* note 2, at 843–44.

⁴⁵ *Id.*; Meyer, *supra* note 4, at 857–58; Murphy, *supra* note 29, at 971–73; Wilcox & Wilson, *supra* note 37, at 883, 891–97; see also Dowd, *supra* note 12, at 917–19.

⁴⁶ Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993).

⁴⁷ See, e.g., James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371, 1427–28 (1994) (responding to claims

analyses are popular, and for good reason. Children are typically understood to be innocent actors. Therefore, to propose legal reforms centered on their interests is to stand on unassailable ground."⁴⁸ Adopting a child-centered approach only identifies the issues; it does not determine any particular policy solution.⁴⁹

For example, pro-life and pro-choice advocates have been dueling for at least three decades over parental notification or consent requirements, with each side arguing that state-mandated parental involvement (by prior notification or consent) in the abortion decision of their pregnant daughter promotes or harms the welfare of the young woman.⁵⁰ Since parental notification results in fewer abortions, it is highly unlikely Planned Parenthood will ever agree that parental notification is in the best interests of children generally. Similarly, absence of parental participation results in more abortions, making it highly unlikely that the National Right to Life Committee will ever agree it is in the best interests of children to allow abortions on minors without parental notification or consent. We are likely to see peace in the Middle East before we see the contesting sides agree about whether parental notification prior to abortions performed on minors is a child-centered policy.

The problem is that "best" (as in "a child's best interests")⁵¹ is a normative term that depends on some external standard or reference. What is "best" largely depends upon what normative criteria are used to make that determination. As Professor Mnookin demonstrated many years ago, a child-centered legal standard (such as "best interests of the child") invariably generates indeterminacy.⁵² Mnookin's argument is based on

that parents' religiosity promotes child welfare). For some examples of proposals asserted to promote child-centered policies, see Christina Dugger Sommer, Note, *Empowering Children: Granting Foster Children the Right to Initiate Parental Rights Termination Proceedings*, 79 CORNELL L. REV. 1200 (1994); David K. Flaks, *Gay and Lesbian Families: Judicial Assumptions, Scientific Realities*, 3 WM. & MARY BILL RTS. J. 345, 350 n.34 (1994) (arguing that lesbian mothers are more child-centered than other parents).

⁴⁸ Julie Shapiro, *A Lesbian Centered Critique of "Genetic Parenthood"*, 9 J. GENDER RACE & JUST. 591, 598 (2006). This source is selected for the widely-recognized proposition quoted in the text because it is well-stated and asserts a dubious position with which I strongly disagree. Child-centeredness is a standard that can be raised in almost any camp. It is not the only standard with that distinction.

⁴⁹ Ira C. Lupa, *The Separation of Powers and the Protection of Children*, 61 U. CHI. L. REV. 1317, 1327 (1994) (adopting "a more child-centered view of the family and our social future . . . [still leaves] a set of uneasy choices").

⁵⁰ See, e.g., *Ayotte v. Planned Parenthood of N. New Eng.*, 126 S. Ct. 961 (2006); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Ohio v. Akron Ctr. for Reprod. Health, Inc.*, 497 U.S. 502 (1990); *Hodgson v. Minn.*, 497 U.S. 417 (1990); *Planned Parenthood Ass'n of Kan. City, Mo. v. Ashcroft*, 462 U.S. 476 (1983); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983); *H. L. v. Matheson*, 450 U.S. 398 (1981); *Bellotti v. Baird (II)*, 443 U.S. 622 (1979); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976).

⁵¹ Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 260 (1975).

⁵² *Id.*

the fact that: (1) there is not one universally-embraced theory of what is "best" for children (some say social development matters most; others prefer physical development, intellectual development, artistic development, moral or spiritual development, and/or well-roundedness or balance); (2) there is no fully reliable predictive criteria for what steps taken during child-rearing will result in any given child having any particular characteristics or qualities in the future; and (3) even if there was a consensus about what is "best" for child development and even if a reliable predictive theory for developing those qualities in children existed, our fact-finding capacities (especially in contested litigation before overburdened courts involving hostile contestants with differing resources and capacities to present evidence) are far from perfect and frustrate our attempt to promote the "best interests" of children.

Thus, a child-centered rule of decision, such as "best interests," merely moves the problem to another level. The determination of what is deemed the "best interests" of the child is quite subjective. It depends heavily on what set of normative standards, theories, and predictive assumptions are used, and that depends largely on *who* is making the decision. Thus, to adopt a child-centered rule boils down, in many cases, to a let-the-person-authorized-to-determine-what-is-best bring and apply his or her subjective normative values to decide what is "best" for the child. To move from an objective rule for determining legal parentage, such as biological parentage or marriage to the biological mother, to a child-centered standard, such as "best interests of the child," effectively makes the decision about establishing parentage much more subjective, indeterminate, and unpredictable. It also transfers the decision-making power from the hands of the most interested parties (who can choose to engage in procreative behavior or to marry) into the hands of third parties (judges or administrative officials appointed by and representing the state) who will be heavily influenced by (if not deciding the question according to) their own personal normative values or the normative values popular in the state. Adopting a "best interests of the child" rule for establishing parentage certainly raises serious constitutional questions, as well.⁵³

Thus, a child-centered rule for establishing parentage would be a strongly statist proposal, favoring state control over private relational ordering. Until now, state intervention to make such decisions has been used only when there is clear evidence of need for child protection—primarily because of the breakdown or dysfunction of the family (such as abuse, neglect, or dependency). One reason for the non-intervention presumption has been that the state has proven inconsistent, and sometimes incompetent, at providing better child-raising environments for children than many marginal parents, and even some abusive and neglectful parents.⁵⁴ State intervention always involves some form of harm to the child and often results in long-term abusive foster care or institutional care for the child.⁵⁵

⁵³ Some of the parents' rights cases and principles are reviewed and discussed by Professor Meyer, *supra* note 4, at 864–79.

⁵⁴ Murphy, *supra* note 29, at 976–83.

⁵⁵ See Lynn D. Wardle, *The Use and Abuse of Rights Rhetoric: The Constitutional Rights of*

However, the Parentage Symposium did not require participants to propose child-welfare-based parentage *rules*. Rather, Professor Dwyer tried “to constrain the participants to a purely child-centered *analysis* of parentage laws.”⁵⁶ The distinction may seem subtle, but it is quite important. Child-centered analysis requires making consideration of the welfare of the child the center of the analysis, the principal or main focus, and the core policy consideration, not the exclusive consideration or solitary perspective. (That is not only reasonable; it may be the *only* reasonable approach to setting public policy regarding establishment of parentage of children at birth.) Such child-centered analysis does not require adopting rules that allow judges or other state officials to decide critical issues in the name of doing what they think is best rather than the private parties who are connected to the child, nor does it mandate overriding the many other constitutional interests that are implicated when a child is born, and which indirectly may have a great impact on promoting the ultimate best interests of children.

C. Critique of the Revival of Gender Discrimination in Family Law

Three of the six Parentage Symposium articles assert variations on the law-should-prefer-mothers-over-fathers general theme that has been popular with some of the first generation of post-modern feminism,⁵⁷ including the mothers-should-control-who-

Children, 27 LOY. U. CHI. L.J. 321 (1996) (arguing that many imperfect and some seriously deficient parents provide something for their children that state substitutes usually cannot provide).

⁵⁶ Dwyer, *A Child-Centered Approach*, *supra* note 2, at 844 (emphasis added).

⁵⁷ See, e.g., JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW 132 (2000) (parent-child legal relations rather than marriage should occupy the “moral center of family law”); MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 101–233 (1995) (asserting that the mother-child dyad is the core of the family and that the law should abolish marriage and recognize the mother-child dyad as the basic family form instead); MONA HARRINGTON, CARE AND EQUALITY: INVENTING A NEW FAMILY POLITICS (1999) (advocating for a new culture of care dependant on the family, private employers, and the government—not on the “unpaid labor of women in the home”); BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY (1989) (adopting a system of parentage rights in which “children ‘belong to’ the mother and the mother’s spouse, if she has one, at the time of birth”); Katharine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809 (1998) (defending and redefining the institutions of marriage and family based on “concepts of fairness and family welfare,” not morality); Karen Czapanskiy, *Interdependencies, Families, and Children*, 39 SANTA CLARA L. REV. 957 (1999) [hereinafter Czapanskiy, *Interdependencies*] (advancing an “interdependency theory” in which every child needs a care giver and every care giver needs support from other persons and institutions); see also DWYER, RELATIONSHIP RIGHTS, *supra* note 18; Czapanskiy, *Protect and Defend*, *supra* note 6; Dowd, *supra* note 12; Dwyer, *A Child-Centered Approach*, *supra* note 2. See generally Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227 (2006) (taking a functionalist approach to the presumption of legitimacy and advocating for a modernized version for both traditional and

becomes-a-legal-parent position. Thus, one-half of the Parentage Symposium articles endorse the gender-discriminatory rule that the law should give preference and priority to one gender over the other regarding establishment of parentage at birth.⁵⁸ All three of those articles also endorse some form of mothers-control-who-else-is-legally-recognized-as-parent rule. That would effect a significant transformation of existing (and centuries of) parentage law that has recognized both the (presumed) biological mother and the (presumed) biological father as legal parents. It would embrace an overt gender preference in family law close on the heels of three decades of vigorous rejection of gender preferences in family law.

The mothers-control-who-gets-legal-parentage position seems to be fundamentally inconsistent with a long line of Supreme Court decisions rejecting legal discrimination based on gender and invalidating legal preferences for one gender based on social stereotypes or gender-preferring social policies.⁵⁹ Laws embodying generalizations about gender that perpetuate the same “outmoded notions of the relative capabilities

lesbian couples); Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL’Y 1, 3 n.2 (2004) (“This article endorses a family structure in which mothers hold initial rights and obligations but fathers almost always share those rights and obligations.”); Meredith Render, *The Man, The State and You: The Role of the State in Regulating Gender Hierarchies*, 14 AM. U. J. GENDER SOC. POL’Y & L. 73 (2006) (explaining the implications of the “regulation” vs. “governance” debate in the context of gender discrimination).

⁵⁸ Based on my review of the recent law review literature about parentage and my own subjective perception of the policy preferences of current family law teachers, I would estimate at least one-half (and probably closer to two-thirds) of current family law teachers would favor a gender-based (mothers-control) parentage policy of some sort.

⁵⁹ See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (state military college policy to admit only men violates Equal Protection Clause); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (use of peremptory challenges by state to exclude men from jury hearing paternity case violates Equal Protection Clause); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (state university admission policy that allows only women to enroll violates Equal Protection Clause); *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (community property law providing that men are the “head and master” of the community estate violates Equal Protection Clause); *Caban v. Mohammed*, 441 U.S. 380 (1979) (law allowing adoption without consent of unwed father, but not unwed mother, violates Equal Protection Clause); *Orr v. Orr*, 440 U.S. 268 (1979) (state law allowing women, but not men, to seek alimony upon divorce violates Equal Protection Clause); *Craig v. Boren*, 429 U.S. 190 (1976) (state law providing that women may obtain beer at age eighteen, but men at twenty-one, violates Equal Protection Clause); *Stanton v. Stanton*, 421 U.S. 7 (1975) (different ages for majority of men and women violates Equal Protection Clause); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (social security provision providing certain unemployment benefits to women, but not men, violates Equal Protection Clause); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (law requiring husbands, but not wives, of military service personnel to prove dependency violates Equal Protection Clause); *Stanley v. Illinois*, 405 U.S. 645 (1972) (law presuming fathers, but not mothers, of children born out of wedlock to be unfit is unconstitutional); *Reed v. Reed*, 404 U.S. 71 (1971) (statutory preference for males over females in administration of estates violates Equal Protection Clause).

of men and women . . . [have been] invalidated [by the Court] in [many] contexts.”⁶⁰ While actual, demonstrable differences between men and women or demonstrable historical disadvantages may justify some gender-differentiating laws that reflect those specific gender differences or compensate for those proven disadvantages,⁶¹ those laws must be carefully tailored to correlate the gender discrimination with the compelling and immutable actual gender difference or proven disadvantage.⁶² Giving control of legal parentage to one gender or the other reflects no inherent biological distinction and compensates for no established historical disadvantage, but it merely seems to reflect a popular new form of gender discrimination (favoring women).

One is hard-pressed to find any legal policy assigning *control* of a legal decision on the basis of gender that the Court has upheld. The only example that readily comes to mind is that of abortion, where the Court has in a couple of cases struck down laws designed to protect the rights and interests of fathers of unborn children to participate in the decision whether to destroy their living offspring.⁶³ But in those cases, the Court viewed the issue as a zero-sum question in which it had to uphold the unilateral decision of one parent or the other, and it opted to give the decision-making power to the one who would be most directly and physically impacted (thus, an impact-driven decision, not a gender-driven rule).⁶⁴ Of course, legal parentage is not zero-sum. Dual-parenting is and has long been the legal and social standard in this country, its legal progenitors, and throughout the world. Moreover, the Court would be strained to justify a policy

⁶⁰ *J.E.B.*, 511 U.S. at 139 n.11 (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441 (1985)).

⁶¹ See, e.g., *Nguyen v. I.N.S.*, 533 U.S. 53 (2001) (immigration law, which makes it more difficult for children born out of the United States to an American man and non-American woman to obtain citizenship than children born to an American woman and alien man, does not violate the Equal Protection Clause); *Miller v. Albright*, 523 U.S. 420 (1998) (immigration law imposing stricter proof-of-paternity requirements upon foreign children of American men than children of American women does not violate the Equal Protection Clause); *Lehr v. Robertson*, 463 U.S. 248 (1983) (adoption law, which denies notice of adoption to father, but not mother, of child born out of wedlock, yet provides multiple legal options to men to insure notice, is not unconstitutional); see also *Califano v. Webster*, 430 U.S. 313 (1977) (social security provision, which allows women to exclude more years of low-earnings in computing average income, is justified by fact of historically lower-paying work opportunities available to women).

⁶² See generally Virginia F. Milstead, *Forbidding Female Toplessness: Why “Real Difference” Jurisprudence Lacks “Support” and What Can Be Done About It*, 36 U. TOL. L. REV. 273 (2005). While this article contains a fine review of the case law, it reaches a naively erroneous conclusion, mistaking a non-gendered factual recognition of the impact of female nudity upon men for legal adoption of “a distinctly heterosexual male perspective” that is “socially imposed.” *Id.* at 279. That is like saying that a city ordinance requiring that lions and bears be kept in cages but not domestic dogs and cats improperly adopts the perspective of dogs and cats. See Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004).

⁶³ See, e.g., *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

⁶⁴ *Danforth*, 428 U.S. at 71; *Casey*, 505 U.S. at 887–98.

giving a biological mother veto power over the attempt of a biological father to claim parentage when it has rejected a state spousal-consent law precisely because it gave parents of one gender a legal veto power over a decision of the other.⁶⁵ Furthermore, abortion is *sui generis*, so cases upholding a woman's right to avoid enduring an unwanted pregnancy and having an unwanted child are hardly compelling authority for giving biological parents of one gender a right to bar parents of the other gender with exactly the same claim to biological-parental connectedness from claiming legal parentage.

More importantly, and in keeping with the focus of the convener's request to maintain a child-centered focus, both the general "mothers-matter-more-for-successful-child-rearing" premise and the specific "mothers-control-who-gets-legal-parentage" proposals would be disastrous for millions of children. The former continues the tragic post-modern feminist tradition of denying, if not denigrating, the importance of fathers to the welfare of their children. It stubbornly perpetuates an ideological position that simply defies the large and growing body of empirical research that has confirmed the unique and tremendously beneficial contributions of fathers to child-development and child well-being, and that has documented the multiple kinds of harms and deficits of father-absent child-rearing.⁶⁶ The latter proposal, which gives mothers at least veto power if not unilateral power of appointment over paternity, is an extreme example of putting the perspectives of adults (in this case, the theoretical fantasies of some feminists) over the needs and welfare of children. It would substitute an adult-centered, ideology-driven perspective for a child-centered, child-needs-driven approach to solving the dilemma of parentage.

While many children, especially (but not exclusively) children in poor minority communities, already are born and grow up in father-absent households, that tragedy cries for correction rather than legal expansion. In addition to its coercive, regulatory, protective, and remedial functions, family law serves very important facilitative, channeling, and expressive functions. Parentage law is intended to channel behavior and relationships into the most beneficial paths and forms, to facilitate and support non-legal institutions and relationships that benefit society and its families, and to articulate, teach, and foster community normative precepts, ideals, and understandings about successful, healthy, and happy family relationships and behaviors.⁶⁷ From those perspectives, the proposal to exclude fathers from legal parentage without the approval of birth mothers would likely increase the incidence of the tragedy of fatherless child-rearing, further alienate men from responsible fatherhood, and exacerbate the harms of single-parent child-rearing to both children and parents.

⁶⁵ *Danforth*, 428 U.S. at 69–71.

⁶⁶ See *infra* Part II.

⁶⁷ See generally CARLE SCHNEIDER & MARGARET F. BRINIG, AN INVITATION TO FAMILY LAW 194–204 (2d ed. 2000); Lynn D. Wardle, *Fragile Families and Family Law*, in FRAGILE FAMILIES AND THE MARRIAGE AGENDA 73 (Lori Kowaleski-Jones & Nicholas H. Wolfinger eds., 2006).

The mothers-control-who-gets-legal-parentage proposals reflect the bare, gendered assumption that all women who get pregnant and do not succumb to social incentives to abort are going to be good, responsible parents, and that no men who father children (even if married) are equally (or more) likely to be equally good (or better) parents. That is strikingly inaccurate, stunningly overbroad, and patently unconstitutional. It also disregards the needs of children.

Depriving a child of contact with one of his or her parents is a *very* disturbing practice that is taken *very* seriously in American law.⁶⁸ For example, if parents divorce when a child is an infant or if that child is born out of wedlock, the law still seeks to foster, protect, and promote the relationships between the child and his or her non-custodial parent through many policies and programs including joint-custody policies, presumptions and preferences (in effect in over forty states),⁶⁹ and “parenting plan”

⁶⁸ Monica K. Miller, *Through the Eyes of a Father: How PRWORA Affects Non-Resident Fathers and Their Children*, 20 INT’L J.L. POL’Y & FAM. 55, 60 (2006) (“Critics feel that neglecting fathers’ access to their children is a major weakness in the system. Since father involvement has [an] important impact on children’s educational and economic attainment, delinquent behaviour, and psychological well-being, development of programmes that increase parent-child visitations may benefit children.” (citation omitted)).

⁶⁹ Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 337–38 (2005) [hereinafter Murphy, *Legal Images*] (“In the area of custody, one of the first developments of this kind was the introduction of the concept of joint custody. The first joint custody statute was passed in 1979 in California, and most states eventually followed suit, either by joint custody statutes or through case law. While many scholars have critiqued the implementation of joint custody statutes, the enactment of such statutes reflects a legal recognition of fathers’ roles as caretakers of their children.” (citations omitted)); *id.* at 337 n.59 (listing forty-one states that permit joint custody, at least twelve of which allow courts to order joint custody over the objection of one or both of the parents); Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 455 n.2 (1984) (noting and critiquing the substantial body of literature favoring joint custody and the accelerating movement for joint custody presumption laws); Stephanie N. Barnes, Comment, *Strengthening the Father-Child Relationship Through a Joint Custody Presumption*, 35 WILLAMETTE L. REV. 601, 602–03 (1999) (“A presumption of joint custody, on the other hand, encourages both parents to initiate and continue parenting roles that help their children develop into healthy, stable, and happy adults. . . . [C]ourts should begin with the presumption that children and parents benefit most when both father and mother maintain physical, decisional, and authoritative presences while raising their children. Joint legal custody allows a father the opportunity to make important decisions regarding his children’s daily lives, thereby fulfilling the father’s need to remain involved in the children’s lives while also enhancing the father-child bond. In addition, joint physical custody, when practical, prevents fathers from evolving into distant voices on the telephone or stereotypical weekend-activity planners. Joint custody may also increase fathers’ compliance with child support orders. Joint legal and physical custody benefits mothers in several ways as well. By sharing child care responsibilities with fathers, mothers can foster their own independence by working outside the home, advancing their education, and developing personal relationships.”); Brian J. Melton, Note, *Solomon’s Wisdom or Solomon’s Wisdom Lost: Child Custody*

policies and laws (in effect in nearly half of the states).⁷⁰ Custody law says to the parents, "if you do not want to have contact with each other, that is fine; but it is very important that the child have the opportunity to develop a parental relationship with each parent, and neither of you has the right to deprive the child of that." That policy is reflected in a variety of laws, including laws about standing, paternity, visitation, child support, and interstate jurisdiction, as well as laws by agencies designed to support and facilitate visitation, even if the parents do not get along with each other.⁷¹ If the custodial parent interferes with visitation by the non-custodial parent, or vice-versa, it is taken very seriously. There are many cases in which courts have switched which parent has custody in order to ensure that the child is allowed to have a parental relationship with the other parent.⁷² A variety of tort claims have been recognized to provide relief against the parent interfering with the other parent's parent-child relationship.⁷³ Courts can and sometimes do impose contempt

in North Dakota—A Presumption that Joint Custody Is in the Best Interests of the Child in Custody Disputes, 73 N.D. L. REV. 263, 274 n.68 (1997) ("[J]oint custody provides the child with [the] love, attention, training, and influence of both parents.").

⁷⁰ See, e.g., Murphy, *Legal Images*, *supra* note 69, at 338–39 ("Another development over the last decade that has promoted involvement of fathers in children's lives when parents live apart is the growing use of court-ordered "parenting classes" in custody cases. "Parenting plans" emphasize the importance of both parents in caretaking of children by requiring the parties to delineate each parent's responsibilities for the care of the children and decisions about education, health care, and discipline. About thirteen states currently require parties to submit proposed parenting plans prior to a grant of custody. Another nine states and the District of Columbia have statutes that give judges discretion to require parenting plans in custody cases.").

⁷¹ See generally Murphy, *Legal Images*, *supra* note 69, at 335–41.

⁷² Many jurisdictions conclude that interference with visitation is grounds for a change of custody. See Edward B. Borris, *Interference with Parental Rights of Noncustodial Parent as Grounds for Modification of Child Custody*, 9 DIVORCE LITIG. 1 (1997) (reviewing cases and finding that most states consider consistent interference with visitation appropriate grounds for a change in primary custody); see, e.g., IOWA CODE ANN. § 598.41(1)(c) (West 2001) ("[T]he denial by one parent of the child's opportunity for maximum continuing contact with the other parent, without just cause, [shall be considered] a significant factor in determining the proper custody arrangement."); KAN. STAT. ANN. § 60–1616(e) (1996) ("Repeated unreasonable denial of or interference with visitation rights . . . granted [to a parent] . . . may be considered a material change of circumstances which justifies modification of a prior order of [child] custody."); MINN. STAT. ANN. § 518.18(c) (West 2001) (modification of custody order statute provides that the court "shall not prohibit a motion to modify a custody order or parenting plan if [it] finds that there is persistent and willful denial or interference with parenting time"); MONT. CODE ANN. § 40–4–219(1),(8) (2001) (allowing modification of custody if the custodial parent has interfered with noncustodial parent's exercise of visitation rights); WASH. REV. CODE ANN. § 26.09.260(2) (West 1997) (same, with addition that the non-moving party has been found in contempt of court at least twice in the past two years or has been convicted of custodial interference in the first or second degree).

⁷³ See generally CAL. FAM. CODE § 3028 (West 2005) (court may order compensation for custodial or visitation interference); RESTATEMENT (SECOND) OF TORTS § 700 (1976) (tort claim

sanctions for interference with visitation or custody.⁷⁴ Likewise, if the non-custodial parent interferes with custody or visitation by keeping the children longer than allowed or absconding with the child, the law takes those behaviors very seriously. Criminal prosecution may result because our laws recognize how important it is for the child to have the opportunity to develop a parental relationship with both parents.⁷⁵ "Currently, almost every state criminally forbids custodial interference by parents or relatives of the child."⁷⁶ If one parent attempts to alienate the child from the other

for interference with custody); Linda L. Berger, *Lies Between Mommy and Daddy: The Case for Recognizing Spousal Emotional Distress Claims Based on Domestic Deciet that Interferes with Parent-Child Relationships*, 33 LOY. L.A. L. REV. 449 (2000); Joy M. Feinberg & Lori S. Loeb, *Custody and Visitation Interference: Alternative Remedies*, 12 J. AM. ACAD. MATRIM. LAW. 271 (1994); Celia Guzaldo Gamrath, *Visitation Abuse v Unlawful Visitation Interference—Is There Comfort for Noncustodial Parents?*, 91 ILL. B.J. 450 (2003); Recent Case, *Family Law—Child Support Orders—Court May Terminate Child Support Order if Custodial Parent Intentionally Interferes with Visitation Rights—In re Marriage of Boudreaux*, 201 Cal. App. 3d 447, 247 Cal. Rptr 234 (6th Dist. 1988), 102 HARV. L. REV. 920 (1989); Eve Kahao Gonzalez, Note, *Intentional Interference With Visitation Rights—Is this a Tort?*: Owens v. Owens, 47 LA. L. REV. 217 (1986); William L. Hill, Note, *Tort Recovery for Intentional Interference with Visitation Rights: A Necessary Alternative*, 32 U. LOUISVILLE J. FAM. L. 657 (1993–94); Jesse E. Weisshaar, Note, *Does Loss of Custody of a Child Resulting from Attorney Negligence Cause Damage?*, 70 MO. L. REV. 1333 (2005).

⁷⁴ Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 981 n.300 (citing JEFFERY M. LEVING, FATHERS' RIGHTS: HARD-HITTING & FAIR ADVICE FOR EVERY FATHER INVOLVED IN A CUSTODY DISPUTE 7 (1997) ("Sanctions imposed to punish violation of a family court's visitation orders can include fines, forfeiture of child support, and sometimes incarceration.")); see, e.g., MO. ANN. STAT. § 452.400.7 (West 2003) (providing for application of court's powers of contempt when a parent interferes with custody); Morgan v. Foretich, 528 A.2d 425, 428–29 (D.C. 1987) (upholding a judgment of civil contempt when the mother refused to comply with a visitation order); Smith v. Smith, 434 N.E.2d 749, 753 (Ohio Ct. App. 1980) (affirming as not grossly excessive a five-day civil contempt sentence against a mother for interfering with visitation).

⁷⁵ See, e.g., FLA. STAT. ANN. § 787.03 (West 2000) (interference with custody); GA. CODE ANN. § 16–5–45 (1999) (custodial interference criminal offense); 720 ILL. COMP. STAT. ANN. 5/10–5.5 (West 2002) (making "unlawful visitation interference" a petty offense); IND. CODE ANN. § 35–42–3–4 (West 1998) (criminalizing violations of custody orders by hiding, kidnapping, or taking a child out of state); VA. CODE ANN. § 18.2–49.1(B) (West 2002) (wilful violation of custody and visitation orders is Class 4 misdemeanor; second conviction within twelve months is Class 3 misdemeanor); see also MODEL PENAL CODE § 212.4, 10A U.L.A. 430 (2001). See generally Nancy Levit, *Matrimonial Torts and Crimes: An Annotated Bibliography*, 19 J. AM. ACAD. MATRIM. LAW. 117, 181 (2004).

⁷⁶ Catherine F. Klein et al., *Border Crossings: Understanding the Civil, Criminal, and Immigration Implications for Battered Women Fleeing Across State Lines with Their Children*, 39 FAM. L.Q. 109, 117 (2005). See generally Susan Kreston, *Prosecuting International Parental Kidnapping*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 533, 533 ("Parental kidnapping is a crime, recognized as such in the United States by every state, the District of Columbia, and the federal government.").

parent, courts respond very strongly, sometimes removing or significantly modifying custody.⁷⁷ In all states, these kinds of unilateral efforts by one parent to deprive a child of a relationship with the other parent are clearly against public policy. If a parent crosses state lines, federal criminal and civil laws, as well as many state laws, may come into play, so serious is our concern about, *inter alia*, depriving the child of the chance to develop a filial relationship with the other parent.⁷⁸ For example, the Parental Kidnaping Prevention Act of 1980, which denies interstate recognition to custody decrees obtained by a parent who has abducted his or her child to another state,⁷⁹ amended the Fugitive Felon Act to make it applicable to parents who abduct or retain their children in violation of state law,⁸⁰ and extended the Federal Parent Locator Service to abducted children.⁸¹ Similarly, Congress enacted the Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today Act of 2003,⁸² which establishes criminal liability for attempting to remove a child from the United States with the intent to interfere with another person's legal custody of the child.⁸³ Internationally, many nations (including the United States and most western nations) have adopted the Hague Convention on the Civil Aspects of International Child Abduction,⁸⁴ designed to deter or remedy the wrongful removal by one parent of

⁷⁷ See Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases*, 35 FAM. L.Q. 527 (2001) (reviewing cases and critiquing diagnostic theory of parental alienation syndrome); Andrew I. Schepard, *Editorial Notes*, 42 FAM. CT. REV. 607, 608 (2004) (noting recent debate over validity of diagnosis of parental alienation syndrome); see also Daniel M. Fraidstern, Note, *Croll v. Croll and the Unfortunate Irony of the Hague Convention on the Civil Aspects of International Child Abduction: Parents with "Rights of Access" Get No Rights to Access Courts*, 30 BROOK. J. INT'L L. 641, 678 (2005) ("[I]t is enough [for contempt] to engage in behavior that undermines or alienates a child's relationship with his or her noncustodial parent.").

⁷⁸ See, e.g., Klein et al., *supra* note 76, at 112 (noting that the Uniform Child Custody Jurisdiction Act, Uniform Child Custody Jurisdiction and Enforcement Act, federal Parental Kidnapping Prevention Act, state criminal custody or visitation interference laws, and state civil custody or visitation interference statutes may be implicated); Kreston, *supra* note 76, at 533 ("Parental kidnapping is a crime, recognized as such in the United States by . . . the federal government."); *id.* at 537–39 (describing the role of the Federal Bureau of Investigation in responding to parental kidnapping); *id.* at 540 (describing the role of the Office of Children's Issues of the Department of State in dealing with international parental kidnapping).

⁷⁹ Pub. L. No. 96–611, 94 Stat. 3566 (1980) (codified at 28 U.S.C. § 1738A (2001)).

⁸⁰ 18 U.S.C. § 1073 (1983).

⁸¹ 42 U.S.C. § 663 (1983).

⁸² Pub. L. No. 108–21, 117 Stat. 650 (2003) (codified in scattered sections 18, 21, 28, and 42 U.S.C.).

⁸³ 18 U.S.C.A. § 1204 (2004).

⁸⁴ Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 97, *reprinted in* 51 Fed. Reg. 10,493 (Mar. 26, 1986). As of Aug. 31, 2006, seventy-six countries had acceded to the Convention. Hague Conference on Private International Law, Status Table, http://www.hcch.net/index_en.php?act=conventions.status&cid=24 (last visited Sept. 25, 2006); see also Kreston, *supra* note 76, at 543 (describing

children from the place where they have resided with the other parent.⁸⁵ Article 7 of the Convention on the Rights of the Child (CRC) specifically recognizes the right of every child, "as far as possible, . . . to know and be cared for by his or her parents."⁸⁶ Article 8 further protects "the right of the child to preserve his or her identity, including . . . family relations,"⁸⁷ while Article 16 also guarantees to children "the right to the protection of the law" against any "arbitrary or unlawful interference with his or her privacy, family, [or] home."⁸⁸ Likewise, Article 8 of the European Convention of Human Rights provides explicit protection of "private and family life,"⁸⁹ which has been interpreted to include the right of children to know their family origins and identity.⁹⁰ All these, as well as many other state, federal, and international laws, emphasize the importance of preserving the right of the child to grow up and develop a sound parental relationship with both his or her mother and father.

In light of such long-established and widely-recognized precedents, the Parentage Symposium proposals to allow one parent to deny his or her child a legal parental relationship with the other parent is surprising. These proposals would make laws regulating parent-child relations even more schizophrenic. Where the law goes to great lengths to protect the child's right to a filial relationship with both parents in most

Hague Convention procedures for responding to international parental kidnapping).

⁸⁵ See, e.g., Deborah M. Zawadzki, Note, *The Role of Courts in Preventing International Child Abduction*, 13 CARDOZO J. INT'L & COMP. L. 353 (2005).

⁸⁶ Convention on the Rights of the Child, G.A. Res. 44/25, art. 7(1), U.N. GAOR, 44th Sess., Supp. No. 49, at 168, U.N. Doc. A/44/736 (Nov. 20, 1989), reprinted in 28 I.L.M. 1448 (1989), available at <http://www.ohchr.org/english/law/pdf/crc.pdf>. Of course, the United States, one of the few nations to treat such treaties as "hard law" as distinct from merely aspiration and hortatory, has not signed the CRC.

⁸⁷ *Id.*, art. 8.

⁸⁸ *Id.*, art. 16.

⁸⁹ "Everyone has the right to respect for his private and family life, his home and his correspondence." Convention for the Protection of Human Rights and Fundamental Freedoms, § 1, art. 8, Nov. 4, 1950, CETS No. 005, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

⁹⁰ See Lynn D. Wardle, *Global Perspectives on Procreation and Parentage by Assisted Reproduction*, 35 CAP. U. L. REV. (forthcoming 2006); see also Jacqueline A. Laing & David S. Oderberg, *Artificial Reproduction, the 'Welfare Principle', and the Common Good*, 13 MED. L. REV. 328, 339 n.28 (2005). But see David D. Meyer, *The Modest Promise of Children's Relationship Rights*, 11 WM. & MARY BILL RTS. J. 1117, 1135 (2003); Ya'ir Ronen, *Redefining the Child's Right to Identity*, 18 INT'L J.L. POL'Y & FAM. 147, 159–60 (2004). A similar proscription of arbitrary or unlawful interference with privacy, family, or home (to the ICHR) is contained in Article 17 of the International Covenant on Civil and Political Rights (ICCPR) to which 148 nations, including the United States, have acceded. G.A. Res. 2200A, art. 17, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), 999 U.N.T.S. 171, 177 (entered into force Mar. 23, 1976), available at <http://www.ohchr.org/english/law/ccpr.htm>. See generally D. Marianne Blair, *The Influence of International Conventions on Municipal Adoption Law: The Disclosure Debate*, 96 AM. SOC. INT'L L. PROC. 193, 195 (2002).

other conceivable circumstances, they would have the law simply ignore that right and that need of children in the parentage context. It would be inconsistent with legal policy in most other parent-child contexts, where the law is used to protect, facilitate, and promote developing the child's relationship with his or her parents of both genders.

D. Criticism of Parentage Reform Proposals for Devaluing Dual-Gendered, Marital Parenting

At least three of the parentage proposals would eliminate or significantly diminish the value of marriage as a factor in parentage determinations at child birth.⁹¹ On the other hand, Professors Wilcox and Wilson make a compelling case that marital child-rearing is in the best interests of children generally, and merits a presumption or preference (at least in the adoption context, which was the only parentage context those authors examined).⁹² The marital presumption has long been recognized in Anglo-American law.⁹³ However, in the wake of recent significant social changes regarding sex, procreation, and marriage, including the increase in non-marital cohabitation, the rise in childbearing out of wedlock, historically heightened rates of divorce, and post-divorce waning of paternal parenting responsibility, the marital presumption has eroded.⁹⁴ Continued recognition and application of the marital presumption has become a contested policy issue, and the divergent positions are clearly represented in these Parentage Symposium papers and proposals.

Proposals to weaken or eliminate the marital presumption generally are myopic and are clearly inconsistent with the child-centered approach the convener emphasized, inasmuch as it would harm children. Marriage is a significant protective institution

⁹¹ Czapanskiy, *Interdependencies*, *supra* note 57, at 948 ("Under my proposal, the mother is the only person accorded the presumption of parenthood."); *id.* at 951–55 (married mother may, but is not required to, designate her husband as a parent); Dowd, *supra* note 12, at 917 ("I would not maintain the marital presumption, or alternatively, not give it much weight."); *id.* at 928–29 (marital presumption eliminated and replaced by social parentage notion); *see also* DWYER, *RELATIONSHIP RIGHTS*, *supra* note 18, at 265–66; Dwyer, *A Child-Centered Approach*, *supra* note 2, at 848 (legal fatherhood conferred upon husband of married birth mother only if she consents).

⁹² Wilcox & Wilson, *supra* note 37, at 891–904.

⁹³ Michael H. v. Gerald D., 491 U.S. 110, 124 (1989) (plurality opinion) (reviewing history of marital presumption of paternity); WILLIAM BLACKSTONE, 1 COMMENTARIES *434–47 (marital presumption of legitimacy at common law); *see also* HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 151–52 (2d ed. 1988) (reviewing history of marital presumption and illegitimacy); HARRY D. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 15–17 (1971) (good review of the history of the marital presumption and illegitimacy); Baker, *supra* note 57, at 12–13 (short history of marital presumption); Murphy, *Legal Images*, *supra* note 69, at 331–34 (review of history of marital presumption).

⁹⁴ *See* Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547 (2000).

that benefits children.⁹⁵ Recent social science scholarship corroborates the findings of numerous earlier studies (some of which may have been less sophisticated in design) that marital parenting involves substantial benefits and advantages for child-rearing and for the welfare of children.⁹⁶ Further explanation of reasons why a strong (but qualified) dual-gendered, marital presumption should be continued are provided in Part II, Subsections D and E.

II. FORM AND SUBSTANCE IN PARENTAGE LAW: IS LOVE ALL YOU NEED?

One of the core conceptual issues that divides the proposals and comments published in this Parentage Symposium is whether “substance” really is independent of and separate from “form” in parentage law and whether “love is all you need” in parenting and parentage law today. The suggestions in several of the Parentage Symposium papers that would reduce or eliminate the significance of marital and biological connections and of dual-gender parenting for parentage determinations all emphasize “substance” and devalue traditional forms of parentage (that emphasize or prefer marital, genetic, or biological relationships and male-female child-rearing). All also argue that courts (and/or mothers) are better-suited to select good parenting by persons who will further child well-being than reliance on these traditional relationship or parenting forms.

The thesis of this Article is that form and substance are intertwined in parenting, which should be reflected in parentage law. Specifically, marital parenting by a child’s mother and father (ideally the biological parents of the child) should be privileged, preferred, encouraged, and specially protected because it provides children with optimal opportunities for healthy development and a happy childhood, and lays the best foundation for personal freedom, individual success, and responsible adulthood. While quasi-parental status and rights should be recognized for carefully-screened categories of non-parents who satisfy high standards of commitment to and care of children, and of parental support and collaboration, as explained in Part III, the status and rights of parentage should not be expanded beyond biological and marital dual-gender parentage.

A. The Meaning of Form and Substance in Parentage Law

The tension between form and substance in family law underlies many contemporary family policy debates, as well as many of the family policy controversies that have

⁹⁵ See Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 247 (2006) (arguing for reinvigorating the marital presumption of paternity because “[m]arriage matters—and should continue to matter—in allocating parental rights and responsibilities”).

⁹⁶ See Robin Fretwell Wilson, *Evaluating Marriage: Does Marriage Matter to the Nurturing of Children?*, 42 SAN DIEGO L. REV. 847, 857–64 (2005) (recent well-designed, definitive studies confirm that children raised in marital homes do better on a host of child welfare factors than children raised in non-marital homes).

drawn attention during the past forty years. For purposes of this article, “form” refers to the structure, composition, or organization of family relationships; generally, it involves *conforming* to customary (legal) organizational patterns expected of certain relationships. Usually, it entails compliance with external social and legal formalities established for creating or ordering such relationships. “Substance,” on the other hand, refers to the essential nature or quality of which a thing consists; the core content or basic elements. Generally, it refers to internal conditions or qualities that are deemed to be the most important, intangible, motivating characteristics of a particular family relationship. The basic dispute concerns whether “form” and “substance” in family law are largely independent or whether substance is significantly related to form.⁹⁷

The form vs. substance debate takes on a particular poignancy when it involves parenting, parent-child relations, and the law. “Form” in this context primarily refers to formal legal recognition of dual-gendered marital and biological relationships conferring parental status, rights, and responsibilities. “Substance” generally refers to the internal qualities that generally characterize healthy biological parent-child relations because of the natural affection that exists between parents and offspring, such as a strong loving bond and mutual trust, adult willingness to sacrifice personal interests and welfare for the sake of the child, special sympathy for and understanding of each other, and adult commitment of time and resources to teach, train, and protect the child (and appropriate willingness of the child to be taught and to obey).⁹⁸ The form vs. substance debate in parentage law concerns such overlapping controversial issues as whether any adult child-nurturing relationships besides dual-gendered marital, biological parent-child relationships should be able to claim the legal protections and rights (and duties) of parentage against or in addition to those of the legal parents (and, if so, which ones); whether that legal protection should be equivalent to protections afforded legal parents (and, if not, what, if any, protections should be provided); and whether two (or more) persons of the same gender should both have full, equal parental rights (and, if so, which persons—and where to draw the line).

The form vs. substance debate influences contemporary discussion about how to define, determine, and describe the legal significance of legal parentage. While marital parenting by biological or adoptive parents has traditionally been preferred and privileged, whereby the form raises a strong (and traditionally near-exclusive) legal

⁹⁷ It is doubtful that anyone today would seriously argue that form is wholly unrelated to substance in family law; instead, the debate is whether the relationship is strong or weak, significant or minimal, undervalued or overvalued, and whether or when the legal emphasis on form is justified or unjustified.

⁹⁸ See generally *Hutchison v. Hutchison*, 649 P.2d 38, 40 (Utah 1982) (“It is rooted in the common experience of mankind, which teaches that parent and child normally share a strong attachment or bond for each other, that a natural parent will normally sacrifice personal interest and welfare for the child’s benefit, and that a natural parent is normally more sympathetic and understanding and better able to win the confidence and love of the child than anyone else.”).

presumption of substance, advocates of giving priority to substance over form argue that characteristics such as loving, nurturing, teaching, and socializing are the most important elements of parenting. If those elements are present, that is what matters most; the form of the relationship is and legally should be largely irrelevant.⁹⁹ Their theme song (taken from the Beatles) is "All you need is love."¹⁰⁰

The preference for substance over form in parenting and parentage law is certainly understandable today.¹⁰¹ Our newspapers, magazines, radio and television news programs, and Internet media regularly report terrible stories of failure and abuse, irresponsibility, dysfunction, and abandonment afflicting many formal parent-child relationships. Many people have experienced or know close friends or

⁹⁹ See, e.g., ARLENE SKOLNICK, *EMBATTLED PARADISE: THE AMERICAN FAMILY IN AN AGE OF UNCERTAINTY* 212 (1991) ("If we care about children, we need to focus less on the form of the families they live in and more on ways of supporting their well-being in all kinds of families."); Baker, *supra* note 57, at 2–6; Leslie Joan Harris, *Reconsidering the Criteria for Legal Fatherhood*, 1996 UTAH L. REV. 461, 485 ("What then, does morality require? I suggest that the most important moral requirement at stake here is that adults care and provide for children. Morality does not require that those children be the adults' biological offspring, and, as we have seen, law which bases parental rights and duties on biological relationship alone is not notably effective at inducing responsible behavior."); Melanie B. Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents*, 25 N. ILL. U. L. REV. 433 (2005); Niccole Kording, *Nature v. Nurture: Children Left Fatherless and Family-Less When Nature Prevails in Paternity Actions*, 65 U. PITT. L. REV. 811 (2004); Jenny Wald, *Legitimate Parents: Construing California's Uniform Parentage Act to Protect Children Born Into Nontraditional Families*, 6 J. CTR. FAM. CHILD. & CTS. 139 (2005); see also STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* 255–81 (1992) (advocating disregarding form of families and recognizing those that have subjective substance of family relations); JUDITH STACEY, *IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POST-MODERN AGE* 126–35 (1996) (arguing for recognition of lesbian and gay parents rights because they manifest the substance of parenting). To this list could be added virtually all of the extensive library of legal literature advocating the extension of parental rights to gay and lesbian partners of biological parents. See, e.g., Deborah L. Forman, *Married with Kids and Moving: Achieving Recognition for Same-Sex Parents Under the Uniform Parentage Act*, 4 WHITTIER J. CHILD. & FAM. ADVOC. 241 (2005); Jacobs, *supra*; Nancy D. Polikoff, *Lesbian and Gay Parenting: The Last Thirty Years*, 66 MONT. L. REV. 51 (2005); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 473 (1990); Julie Shapiro, *A Lesbian-Centered Critique of Genetic Parenthood*, 9 J. GENDER RACE & JUST. 591 (2006); Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305 (2006).

¹⁰⁰ THE BEATLES, *All You Need Is Love* (Capital Records 1967); see also 175 Songs of the Beatles, <http://membres.lycos.fr/Wilane/btts.html> (last visited Aug. 28, 2006). See generally Lynn D. Wardle, *All You Need Is Love?*, 14 S. CAL. REV. L. & WOMEN'S STUD. 51 (2004).

¹⁰¹ See generally Lynn D. Wardle, *Form and Substance in Committed Relationships in American Law*, in *COMMITTED RELATIONSHIPS, SOCIETY AND THE LAW* (Oran Doyle & William Binchy eds., forthcoming 2007).

family who have been hurt by the pain of failed or dysfunctional formal parents, so the rejection of exclusive protection or privileged treatment of formal parenting is a natural reaction to those reports, experiences, and fears. Form without substance is doubly destructive. A child denied affection, protection, and training because he or she is without any parents (an orphan) is deprived of something crucial indeed. Yet, a child who is denied affection, protection, or education or who is injured by neglectful or abusive parents suffers that as well as the additional loss of trust and is damaged by the failure of one of the basic expectations of humanity.

The idea that parenthood should be linked to marriage seems to be rejected by a growing number of alienated young people—children of the first generation of no-fault divorces, many of whom experienced during their childhood the painful disintegration of their “formal” marital families during and after the no-fault divorce revolution when the numbers and rates of divorce dramatically increased.¹⁰² More than 30 million of these childhood victims of no-fault divorce live in America now.¹⁰³ Many are now adults, hoping to start their own families. Their distrust of the institution of marriage—which failed them and hurt them deeply when they were children—is not insignificant.

Many of this generation of now-adult children of no-fault divorce are seeking alternatives to marriage and demanding the chance to become parents on their own terms—out of marriage. They are determined to be better parents out of marriage than their own parents were in marriages that failed and hurt them so badly. Sadly, however, the odds are against them, and many of these young people already have inflicted, are inflicting, and will inflict on their own children the same kind of pain and sorrow their own parents inflicted on them because they are building their own family relationships on the same tragically flawed foundation that was the chief defect of their own parents’ marriages—a pursuit of superficial “substance” at the cost of deep-substance linked to “form.” Many of their parents devalued the institution of marriage when problems arose by choosing to end the marriage and pursue the shallow “substance” of romantic satisfaction rather than undertaking the tough work of overcoming and resolving those problems and preserving the “deep substance” found within trial-strengthened

¹⁰² Between 1965 and 1980, the United States rate of divorce more than doubled, going from 2.5 to 5.2 per 1,000 population, and the number of divorces per year similarly rose two-and-a-half times, from 479,000 to 1,189,000. NAT’L CTR. FOR HEALTH STATISTICS, U.S. DEP’T OF HEALTH & HUMAN SERVS., 3 VITAL STATISTICS OF THE UNITED STATES 1988: MARRIAGE AND DIVORCE § 2, at 1 (1996). The percentage of the population that was divorced rose from 2.9% to 6.2% (today it is nearly ten percent). U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, MARITAL STATUS: 2000, at 3 (2003). Today, the number of divorced persons in America reaches nearly twenty million (18.3 million in 1996). Arlene F. Saluter & Terry A. Lugaila, *Marital Status and Living Arrangements: March 1996* (U.S. CENSUS BUREAU 1998).

¹⁰³ Dave Schultheis, Colorado State Representative, Q&A on 2002 Children of Divorce Protection Act, <http://www.daveschultheis.com/CURRENTISSUES/FamilyMarriageandSexuality/QAon2002ChildrenofDivorceProtectionAct/Index.html> (last visited Oct. 12, 2006).

marriages. It is no wonder that the children of those parents also devalue marriage—and are skeptical of marriage's claim to be a unique form of relationship that provides special protection and benefits for children.

Additionally, romanticized messages about the nobility and functional equivalence (if not superiority) of nonformal-but-loving-and-nurturing parental relationships are common themes in the stories we tell ourselves (in movies, television shows, theater, literature, song, etc.). Support for basing legal rights and decisions on the substance rather than the form of such relationships resonates with the yearning for privacy, independence, and autonomy that is deeply ingrained in the American character. In a time when formal government regulation of so many aspects of our individual and social lives is so pervasive, preference for private substance over public-regulated form in parenting is very appealing. Protection for parental rights and parental autonomy, including the rights of non-conforming parents, is deeply imbedded in our constitutional doctrine.¹⁰⁴

Thus, it is not surprising that in recent years, there has been an increasing number of cases challenging existing form-dependent regulations of parentage. There seems to be a trend toward asserting parentage or parental rights claims based on the alleged substance rather than the form of the relationship.¹⁰⁵

B. The Elusiveness of "Substance" in Parentage Proceedings

Form is used as a substitute for substance in many ways in parentage decisions. Parentage depends largely on the establishment of a legal or physiological form of relationship. Conjugal marriage for centuries (if not millenia) has been the key legal

¹⁰⁴ See *infra* notes 223–36 and accompanying text.

¹⁰⁵ Such claims include: claims to establish parentage out of wedlock; claims by a non-marital partner to establish parentage of a child born to a married woman; claims by men to disestablish parentage regarding a child after a paternity order or divorce decree with child support obligations has been entered; claims by a mother to disestablish her husband's parentage of a child born when the woman was married (often asserted to block a claim or exercise of custody or visitation); claims by biologically unrelated gay or lesbian partners to be recognized as the co-parent (usually by adoption) of a child born to their partner before the gay or lesbian relationship began but raised for some period of time by both partners; claims by biologically unrelated gay or lesbian partners to be recognized as the co-parent (usually by adoption) of a child born to their partner during the gay or lesbian relationship (usually deliberately conceived by artificial reproductive technology and planned to be raised as the child of both partners); claims by biologically related adults (as the lesbian partner egg-donor whose egg was implanted in the other lesbian partner who gave birth to the child, or a sperm donor gay man whose sperm inseminated a married woman who agreed to bear a child for him); claims by biologically unrelated heterosexual and homosexual cohabitants or former cohabitants of a child's parent to parental or quasi-parental rights and responsibilities (such as custody and visitation); and claims by other unrelated or distant relatives who have had some association with a child to full or partial parental rights, including custody or visitation.

form of relationship linked to parentage status, at least for men.¹⁰⁶ Biological linkage to a child is the key physiological form of relationship linked to parentage status for most women, and recently for many men, as well. Because the world is filled with examples of marital and biological parents who have lacked the substance of good parents, many critics and litigants have argued that parentage determination should be based directly upon substance of good parenting, rather than form.¹⁰⁷

Basing legal parentage decisions on substance would be more difficult than may have been imagined and potentially much more problematic than relying primarily on form. As a legal criterion for parentage decisions, substance (good parenting) is very elusive. For example, defining the substance of parentage that should be legally operative is no less complicated than defining the form of parentage. There is no consensus or authoritative standard regarding what specific elements are deemed of greatest or essential value, nor is the exact statement, formulation, or definition of those elements clear. Do we really want the government to develop a list of the approved substance of parentage? Yet if the elements of parentage-creating substance are to be applied uniformly by courts, they must not be arbitrary or vague.

When standards are ambiguous, judicial discretion is at its greatest. To make decisions as important as parentage decisions based on subjective judicial discretion, variable from one judge to another and potentially influenced by a plethora of personal preferences or prejudices, is deeply troubling. Likewise, proof of parental substance may be quite difficult to establish inasmuch as it entails intangibles. When proof is difficult, the advantage generally goes to the party with greater resources to dig out the evidence or pay experts to generate it. If substance of the relationship were dispositive of parentage disputes, the proof requirement would make such proceedings even more wealth-favoring than in most other kinds of legal cases (where the ability to hire better attorneys seems to favor the richer party). The idea that parentage determinations would become contests in which the richest contestants win is also very disturbing.

Timing presents a problem for advocates of substance-based parentage decisions. Many agree that it is in the best interests of children to establish parentage at the time of the birth of a child or as soon as possible thereafter.¹⁰⁸ For the parentage claimant or

¹⁰⁶ Should it not be for women as well? Given the importance of fathering, and the special advantages of biological fathers for the maturation and development of children, perhaps marriage should become a more significant factor in establishing parentage for women.

¹⁰⁷ See *infra* Part III.

¹⁰⁸ JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 53 (1979) ("The least detrimental alternative . . . is that specific placement and procedure . . . which maximizes, in accord with the child's sense of time and on the basis of short-term predictions given the limitations of knowledge, his or her opportunity for being wanted and for maintaining on a continuous basis a relationship with at least one adult who is or will become his psychological parent."); *id.* at 50–51 (a child's sense of time makes children highly sensitive to the length of separations). See generally Martin Guggenheim & Christine Gottlieb, *Justice Denied: Delays in Resolving Child Protection Cases in New York*, 12 VA. J. SOC. POL'Y & L.

claimants of a first-born child, providing evidence that they possess the substance of a good parent might be hard to prove.¹⁰⁹

Making substance the test for parentage might give an advantage to older claimants and claimants with one or more children over younger persons claiming parentage (including biological parents). It might advantage grandparents over parents. It could disadvantage older persons whose first child or children had not behaved well. It could disadvantage persons who had been marginal parents in the past but whose attitude and commitment had matured (it might be difficult for them to prove those intangible improvements in the face of evidence of their past inferior behavior).

Moreover, parentage is based on a prediction about the quality of future parenting. Even if we could arrive at a strong social consensus about the qualities that make up the substance of good parenting, how to describe them, and what proof would manifest those intangible elements, we would lack a completely reliable test for predicting the existence of those qualities in the future. Parentage status is not a reward for past behavior. Even adults who have been very good parents in the past (i.e., providing the substance of sacrificial love, commitment, protection, and training) may fail to provide the substance of good parenting in the future to other children who have different personalities or because of different environmental circumstances (e.g., loss of job, loss of property, loss of health, loss of spouse, loss of extended family support, change of spouse, change of geographic location, war, etc.).

Ultimately, the libertarian-privacy values that drive the preference for substance over form in parentage law would be among the first and most severely damaged victims if that law reform were adopted. Legal inquiry into the substance of parenting would entail massive intrusion into family and parental privacy. The substitution of subjective substantive standards for objective standards based on form would endanger unpopular minorities who would be at the mercy of the discretion of judges. The test of form shields individual privacy and protects the right to individualism, the right to be different, and the right to experiment with different, new, or unconventional parenting styles.

C. Form as Substance in Parenting and Parentage Law

Problems with using substance to make parentage decisions may explain why the law has generally looked to the substance of parenting only in exceptional situations.

546 (2005) (advocating respect for a child's sense of time in child protection cases); Alexandra Dylan Lowe, *Parents and Strangers: The Uniform Adoption Act Revisits the Parental Rights Doctrine*, 30 FAM. L.Q. 379, 411 n.139 (noting child's sense of time recommendation of Goldstein et al.).

¹⁰⁹ The mother might be able to show that she behaved responsibly in the child's interests during her pregnancy. Fathers might show evidence of commitment and willingness to provide for the child. Both could show emotional attachment or anticipation. Those, however, would cover only a small part of the substance of good parenting.

For example, courts have looked directly at parental substance for the purpose of policing and enforcing the minimum level of acceptable parenting substance. Out of necessity, the law has identified minimum standards of substance.¹¹⁰ There appears to be social consensus about some kinds of unacceptable parental behavior—abuse or neglect. However, even in termination of parental rights proceedings, the focus is often on the negative parenting (bad parenting and actual harm, such as physical or sexual abuse, medical or education deprivation, etc.), rather than on the presence of good parenting substance. Thus, there may be some social consensus about what constitutes really bad, intolerable parenting. There even may be some social consensus about what constitutes really extraordinary, heroic parenting.¹¹¹ But in the middle between the two extremes, courts tend to avoid making substance-based decisions for all of the reasons indicated above.¹¹²

Thus, parentage law and courts have utilized form (both legal form, especially marriage, and biological form of relationship) as a substitute for substance. Certain forms are presumed to raise a presumption of substance usually rebuttable only on proof that a party has fallen below the minimum-tolerable level of parenting.

Focusing primarily on form preserves and reinforces parentage as an institution. There are no formless institutions; forms of institutions are part of their presence and identity. To level all forms of parent-child relationship by making them equal in

¹¹⁰ Even in this context, there are frequent controversies when state agents and agencies charged with protecting children try to “push” the minimum standard a little and seek to terminate parental rights on grounds that provoke a public backlash. For example, two years ago in Utah, the state child protection agency and guardian-ad-litem tried to remove a teenage boy, Parker Jensen, from his middle-class parents’ custody because the parents (and the boy) refused to submit to chemotherapy for a condition that the boy’s doctor believed the child had, but was not absolutely certain. The parents fought back in the press, provoking a firestorm of public outcry. A few months later, when the legislature re-convened, more than forty bills were introduced to reduce the power of the state agencies involved. *See, e.g.,* David B. Dibble, *Parental Rights Movement on Utah’s Capitol Hill Should Not Make Gains at the Expense of the State’s Children*, 2005 BYU Educ. & L.J. 1 (reviewing case, public reaction, legislation, and commentary); *Recent Developments in Utah Law*, 2005 UTAH L. REV. 215, 359–65 (describing the Parker Jensen case and subsequent legislative proposals); *Recent Developments in Utah Law*, 2005 UTAH L. REV. 1430, 1431–37 (also describing the Parker Jensen case and subsequent legislative proposals).

¹¹¹ The standard for adoption historically has tried to identify parents with exceptional, gold-standard, near-heroic parental qualities.

¹¹² The best example is in custody disputes upon divorce. The common (near-ubiquitous) standard once was “best interests of the child,” and that or similar language still appears in many custody statutes and cases. Even this standard focuses on the child’s needs, not the parents’ parenting substance. Today, it is rare to find a custody case in which a court declares that one parent is a better parent (has better parental substance) than the other parent. Rather, courts turn to experts about child needs and development and relate that child’s particular needs to the situation of a particular parent. Usually the court finds that “both parents are fit” parents but that one is better situated to provide for the needs of the particular child or children.

the law, by piercing the form, and by focusing instead on substance destroys institutional influence. By making the form of parentage invisible, the institution of parentage also becomes invisible. As institutions such as marriage and parentage wither and deteriorate, the social influence they exert on members of society, especially on the young, also weakens and wanes. As the informal, non-legal influence of social institutions weakens, the need for government to exert its influence increases. Thus, ironically, as the law moves from making form primarily determinative of parentage to focusing on internal substance, it undermines the ability of the institution of parentage to perform valuable social channeling and regulating functions through informal means, and increases the need for the state to exert its power over individuals and families through more coercive and—may we say—*formal* means.¹¹³

Historically, parentage laws have relied primarily on relationship forms to establish parentage. The principal legal form used to establish paternity is marriage. There are many reasons why marriage has been the test for paternity. First, the overwhelming majority of children born to married women are the biological offspring of their mothers' husbands; that is even true in today's world of loosened sexual morality, weak social support for marital integrity, diminished social opprobrium for adultery, and increased rates of marital infidelity.¹¹⁴ Second, the substance of good parentage (commitment, care, protection, training, etc.) is generally associated with and often flows from biological parentage (which is marital parentage in most cases), marital parentage (even alone), and especially combined conjugal-marital-and-biological parentage. Third, for most of history, there was no more accurate or reliable basis for determining actual biological paternity in most cases than marriage. Fourth, even though DNA and other scientific tissue or blood or other physiological tests are now able to identify parentage with high rates of accuracy, the ease and simplicity of equating marital with biological parentage is not an insignificant advantage. Scientific parentage testing involves some bodily intrusion and even greater psychological intrusion into individual and family privacy, and results may take days or weeks; whereas marriage is a public status which parties voluntarily assume and is easily ascertainable as a matter of public record.

¹¹³ These thoughts were stimulated by the very insightful analysis of Jennifer Roback Morse, *Marriage and the Limits of Contract*, 130 POL'Y REV., Apr.–May 2005, available at <http://www.policyreview.org/apr05/morse.html>.

¹¹⁴ See *supra* note 94 and accompanying text. A landmark 1994 National Opinion Research Council (University of Chicago) survey revealed that slightly more than twenty-one percent of married men and 12.5% of married women reported that they had engaged in extramarital relations while married. TOM W. SMITH, AMERICAN SEXUAL BEHAVIOR: TRENDS, SOCIO-DEMOGRAPHIC DIFFERENCES, AND RISK BEHAVIOR tbl.7 (National Opinion Research Center, Univ. of Chicago, Updated Dec., 1998), <http://www.icpsr.umich.edu/gss/> (click Reports—Topical Reports—Report 25) (last visited Feb. 18, 2006). When less-reliable-but-more-sensational higher rates of adultery are cited, it is usually by writers seeking to justify or legitimate adultery. See, e.g., Martin J. Siegel, *For Better or for Worse: Adultery, Crime & the Constitution*, 30 J. FAM. L. 45, 55–56 (1991–92).

It is important to remember that biological parentage is itself a matter of form as it relates to the substance of good parenting. That is, if the goal and policy of the law is to provide for every child, parents who are sacrificially committed to the welfare of their children, care deeply and affectionately for them, and are fully devoted to protecting them and providing them with optimal educational, social, physical, economic, moral and spiritual development and independence (i.e., the substance of good parenting), and actually bond with the child, a biological tie is only a formal (physical) connection that is associated with and a predictor of that kind of parenting. Yet, biological parentage has been the underlying connecting link represented or assumed by the marital paternity rule because, again, biological parentage is associated with the substance of good parenting. Parents generally are biased toward, prefer, have “natural affection” for, love and spoil their offspring, the fruit of their loins, their blood progeny who carry their blood and genes and often look like them or their beloved relatives.

Biological connection itself may only be a “form” substituting for an assumed genetic connection of “flesh and blood kin.” Today, genetic and biological connection are not necessarily synonymous. For example, the birth mother of a child conceived with an egg donated by another woman may be presumed to be the mother of the child she bore, even though the child is genetically unrelated to her. The examples of using one form of relationship to substitute for other forms of relationship, which ultimately are themselves substitutes for desired substance qualities or characteristics, could be multiplied.

Each level of form associated with parentage presumptions in the law (e.g., genetic connection, biological connection, marital connection) independently has qualities that might justify linking it with the establishment of parentage apart from the other forms. The benefits of each level of form are cumulative. Thus, marital parentage is mostly the same as biological parentage, which is mostly the same as genetic parentage. Marital parents who are also biological parents and genetic parents have multiple layers of connection to the child that multiply the predictive likelihood that they will provide the substance of good parenting that the law seeks to imbue in parenting.

Thus, form does not merely represent, substitute for, and raise a presumption of the substance of good parenting. Certain forms of parenting actually engender, generate, reinforce, nurture, support, cultivate, and enhance the very substance of parenting. The substance of good parenting thrives in some forms (e.g., marital parenting) and struggles in many others (e.g., cohabitation and single-parenting). Form is substance not only because it is associated with substance, but because some forms (like marital parenting) create and increase the substance of good parenting.

D. Does Marital Form Really Matter in Parenting?

The argument that there is a significant connection between form of parenting (family structure) and substance of good parenting, as well as the historical legal presumptions and preferences regarding determination of parentage and the proposals made herein for establishing and regulating parentage, are predicated in significant

part on the validity of the assumption that the form of marital parentage is significantly and strongly associated with the substance of good parenting.¹¹⁵ Invariably, the challenge is made to “prove” the truth of that connection. The demand for empirical evidence may manifest the truth of Oliver Wendell Holmes’s famous observation that “we need education in the obvious more than investigation of the obscure.”¹¹⁶ Of course, what social scientists find will depend on what they are looking for, and there is little doubt that social scientists are influenced by their value preferences, peer pressure, and social taboos in their research.¹¹⁷ Nonetheless, with armies of social scientists and libraries of social science publications, it is not unreasonable to expect that such connections could be identified and documented.

Whether that evidence would be collected may be another matter, as social science research reflects the social and political preferences and prejudices of the members of those disciplines.¹¹⁸ In fact, the academic writing in this area clearly

¹¹⁵ I have reviewed many of the studies described here in prior publications. *See generally* Lynn D. Wardle, *Children and the Future of Marriage*, 17 REGENT U. L. REV. 279, 288–98 (2005) (reviewing studies showing benefits for children who grow up in traditional married families); Lynn D. Wardle, *Considering the Impacts on Children and Society of “Lesbigay” Parenting*, 23 QUINNIPIAC L. REV. 541, 550–63 (2004) [hereinafter Wardle, *Considering the Impacts of Children*] (reviewing flaws in research supportive of homosexual child rearing and the benefits of marital parenting for children); Lynn D. Wardle, “Multiply and Replenish”: *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL’Y 771, 788–92 (2001) [hereinafter Wardle, *Multiply and Replenish*] (reviewing disadvantages faced by children raised in non-marital families); Lynn D. Wardle, *Parenthood and the Limits of Adult Autonomy*, 24 ST. LOUIS U. PUB. L. REV. 169, 186–89 (2005) [hereinafter Wardle, *Parenthood and the Limits*] (reviewing the benefits of father-mother child rearing); Lynn D. Wardle, *Parentlessness: Adoption Problems, Paradigms, Policies, and Parameters*, 4 WHITTIER J. CHILD & FAM. ADVOC. 323, 324 (2005) [hereinafter Wardle, *Parentlessness*] (describing children who grow up with only one parent as “partially parentless”); Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 846–64 [hereinafter Wardle, *Potential Impact*] (reviewing methodological problems with studies on the effect of parental homosexual behavior and noting the data indicating the importance of father-mother parenting); Lynn D. Wardle, *Preference for Marital Couple Adoption—Constitutional and Policy Reflections*, 5 J.L. & FAM. STUD. 345, 377–80 (2003) [hereinafter Wardle, *Preference for Marital Couple Adoption*] (finding clear benefits for father-mother parenting and critiquing studies finding no difference between father-mother child rearing and homosexual child rearing); Lynn D. Wardle, *Threats and Challenges to the Family in the Twenty-first Century*, in THE FAMILY: AT THE CENTER OF HUMAN DEVELOPMENT 41 (2001). Some of the descriptions and commentary herein repeat those prior reviews.

¹¹⁶ OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 292–93 (1920).

¹¹⁷ *See generally* Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 18–23 (describing taboo against professional publications criticizing gay family relations and same-sex marriage in particular); Wardle, *Potential Impact*, *supra* note 115, at 836–40 (1997) (describing heavy bias of academic and professional literature about child-rearing by gay and lesbian couples).

¹¹⁸ *See* DESTRUCTIVE TRENDS IN MENTAL HEALTH: THE WELL-INTENTIONED PATH TO

reflects some significant taboos regarding parenting styles (as regarding lesbian parenting).¹¹⁹ There are significant problems in the collection of data about an alternative parenting style that may reflect poorly on the form of parenting. There are many different forms, structures, and styles of parenting. There are many other variables that must be identified, examined, and controlled when studying parenting styles (such as age of children, number of children, socio-economic status, education, timing of various events, transitions, disruptions, and stability). Methodological flaws can impair the reliability and validity of the data; analytical flaws may undermine the use of the data; interpretative bias can influence presentation of conclusions.

Despite these obstacles, the evidence is clear: "[t]he notion that all 'family forms' are equally as helpful or healthful for children has no basis in science."¹²⁰ Perhaps no further support need be offered than the very carefully selected and scrutinized studies described by Professors Wilcox and Wilson.¹²¹ Wilcox and Wilson conclude that, generally, "children do best in a married home, compared to the alternatives."¹²²

It bears emphasizing, however, that an impressive body of empirical research strongly supports the immense value of conjugal-marital child-rearing.¹²³ Taking a macro-perspective of the accumulating data (rather than a precise methodological examination of each quantitative study), it appears that the evidence is simply overwhelming and growing,¹²⁴ but still very unpopular in many

HARM (Rogers H. Wright & Nicholas A. Cummings eds., 2005) (criticizing psychological and psychiatric scholarship and professional developments as manifesting priority given to political agendas over objective and open scholarly inquiry); Richard E. Redding, *Sociopolitical Diversity in Psychology: The Case for Pluralism*, 56 AM. PSYCHOLOGIST 205, 207 (2001) (describing the lack of conservatives in the social sciences and the resulting unintended negative consequences).

¹¹⁹ See Wardle, *Potential Impact*, *supra* note 115, at 836–40 (describing huge imbalance in law review articles about lesbian parenting); Redding, *supra* note 118, at 207.

¹²⁰ A. Dean Byrd, *Gender Complementarity and Child-Rearing: Where Tradition and Science Agree*, 6 J.L. & FAM. STUD. 213, 213 (2004).

¹²¹ Wilcox & Wilson, *supra* note 37, at 891–904.

¹²² *Id.* at 883; see also Wilson, *supra* note 96, at 857–64 (reviewing in detail two definitive studies that show children raised in marital homes do better in many areas than children raised in non-marital homes).

¹²³ See *supra* note 115 for a list of the author's prior publications reviewing the social science evidence.

¹²⁴ For some accessible compilations of the existing research, see, for example, PAUL R. AMATO & ALAN BOOTH, A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPTURN *passim* (1997); DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM 1–5, 25–48 (1995); GENERATIVE FATHERING: BEYOND DEFICIT PERSPECTIVES *passim* (Alan J. Hawkins & David C. Dollahite eds., 1997); ELIZABETH MARQUARDT, BETWEEN TWO WORLDS: THE INNER LIVES OF CHILDREN OF DIVORCE 9–12, 16 (2005); SARA McLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS 19–63, 134 (1994); DAVID POPENOE, LIFE WITHOUT FATHER: COMPELLING NEW EVIDENCE THAT FATHERHOOD AND MARRIAGE ARE INDISPENSABLE FOR

circles.¹²⁵ As Rutgers Professor David Popenoe has noted, there are few bodies of social science research where the evidence is so abundant or so clear in showing that homes with a father and mother provide the best environment for raising emotionally stable children.¹²⁶ Psychologist and Professor A. Dean Byrd is even more specific in his review of the evidence: "There is no fact that has been established by social science literature more convincingly than the following: all variables considered, children are best served when reared in a home with a married mother and father."¹²⁷ He adds:

Children [raised by their married mother and father] navigate developmental stages more easily, are more solid in their gender identity, perform better in academic tasks at school, have fewer emotional disorders and become better functioning adults when they are reared by dual-gender parents. This conclusion, supported further by a plethora of research spanning decades, clearly demonstrates gender-linked differences in child-rearing that are protective for children.¹²⁸

Likewise, former Brigham Young University Law School Dean Bruce C. Hafen has noted that "[t]he most important causal factor of [recent declines in American] child

THE GOOD OF CHILDREN AND SOCIETY 52–73 (1996); THE POSTDIVORCE FAMILY: CHILDREN, PARENTING, AND SOCIETY *passim* (Ross A. Thompson & Paul R. Amato eds., 1999); GLENN T. STANTON, WHY MARRIAGE MATTERS: REASONS TO BELIEVE IN MARRIAGE IN POSTMODERN SOCIETY 97–122 (1997) (summarizing studies showing disadvantages of single parenting); LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY (2000); JUDITH WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE *passim* (1989) (describing the negative long-term impact of divorce); JUDITH WALLERSTEIN ET AL., THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY 107, 297, 299–300 (2000) (discussing the long-term effects of divorce and scholarly consensus regarding certain harms caused by divorce); BARBARA DAFOE WHITEHEAD, THE DIVORCE CULTURE 91–106 (1997); *see also* INST. FOR AM. VALUES, WHY MARRIAGE MATTERS: TWENTY-ONE CONCLUSIONS FROM THE SOCIAL SCIENCES (2002); INST. FOR AM. VALUES, WHY MARRIAGE MATTERS: TWENTY-SIX CONCLUSIONS FROM THE SOCIAL SCIENCES 8–9 (2005) [hereinafter TWENTY-SIX CONCLUSIONS]; INST. FOR AM. VALUES, THE CONSEQUENCES OF MARRIAGE FOR AFRICAN AMERICANS: A COMPREHENSIVE LITERATURE REVIEW (2005); CTR. FOR MARRIAGE & FAMILIES, FAMILY STRUCTURE AND CHILDREN'S EDUCATIONAL OUTCOMES 2–4 (2005), <http://www.americanvalues.org/briefs/edoutcomes.htm>.

¹²⁵ Larry D. Barnett, *Opinion and Knowledge of Child-Rearing Professionals and Non-Professionals Regarding Three Child-Rearing Systems*, 15 FAM. LIFE COORDINATOR 101 (1966).

¹²⁶ David Popenoe, Editorial, *The Controversial Trust: Two-Parent Families Are Better*, N.Y. TIMES, Dec. 26, 1992, at 21 ("[S]ocial science research is almost never conclusive . . . [y]et in three decades of work as a social scientist, I know of few other bodies of data in which the weight of evidence is so decisively on one side of the issue: on the whole, for children, two-parent families are preferable to single-parent families and stepfamilies.").

¹²⁷ Byrd, *supra* note 120, at 214.

¹²⁸ *Id.*

well-being is the remarkable collapse of marriage, leading to growing family instability and decreasing parental investment in children.”¹²⁹ University of Chicago demographer Linda Waite has written: “On average, children of married parents are physically and mentally healthier, better educated, and later in life, enjoy more career success than children in other family settings. Children with married parents are also more likely to escape some of the more common disasters of late-twentieth-century childhood and adolescence.”¹³⁰

By comparison, children of divorce or without fathers in their home are at the greatest risk of crime, child abuse, premarital sex, premarital pregnancy, poverty, and lower education, perform more poorly in school, and achieve less career success.¹³¹ “Compared with children with continuously married parents, children with divorced parents continued to score significantly lower on measures of academic achievement, conduct, psychological adjustment, self-concept, and social relations.”¹³² Children of broken marriages “must cope with new emotional and logistical difficulties” and they invariably miss living with the absent parent, whether father or mother; a growing body of research shows that for many children, “the suffering continues for years. For some, it never ends.”¹³³

What explains the tremendous advantages for children raised by their married mother and father? No one theory explains all of the research, and it is likely that a combination of these theories may explain why marital parenting works best. The theories include childhood socialization—children who grow up without a father are socialized in a way that results in disadvantages for living in a dual-gender society;¹³⁴ social control—supervision of children is more difficult in a single-parent household;¹³⁵ instability—dangerous behaviors are a response to the stress of instability and change in a child’s situation;¹³⁶ greater resources—more adult caregiver-mentors and more

¹²⁹ Bruce C. Hafen, *Bridle Your Passions: How Modern Law Can Protect the Family*, 63 VITAL SPEECHES OF THE DAY 635 (1997) (alteration in original).

¹³⁰ WAITE & GALLAGHER, *supra* note 124, at 124; *see also* Linda J. Waite, *Does Marriage Matter?*, 32 DEMOGRAPHY 483, 497–98 (1995).

¹³¹ WAITE & GALLAGHER, *supra* note 124, at 124–40; *see also* E. MAVIS HETHERINGTON & JOHN KELLY, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED 208 (2002); WALLERSTEIN ET AL., *supra* note 124, at 328–32.

¹³² Paul R. Amato, *Children of Divorce in the 1990s: An Update of the Amato and Keith (1991) Meta-Analysis*, 15 J. FAM. PSYCHOL. 355 (2001).

¹³³ INST. FOR AM. VALUES, THE MARRIAGE MOVEMENT: A STATEMENT OF PRINCIPLES 3, 10–12 (2000) [hereinafter MARRIAGE MOVEMENT].

¹³⁴ Lawrence L. Wu & Brian C. Martinson, *Family Structure and the Risk of a Premarital Birth*, 58 AM. SOC. REV. 210, 210 (1993) (supporting conflict theory and childhood socialization theory but not social control theory to explain why teens of married parents have fewer pregnancies out of wedlock).

¹³⁵ *Id.*

¹³⁶ *Id.*; *see also* Paul R. Amato et al., *Parental Divorce, Marital Conflict, and Offspring Well-being During Early Adulthood*, 73 SOCIAL FORCES 895 (1995).

assets provide greater opportunity for children;¹³⁷ greater attachment—more closeness between children and parents insulates children;¹³⁸ experience with a child or children generally;¹³⁹ pre-existing interest, or selection—biological attachment engenders natural affection that singles out children for favor and favorable responses.¹⁴⁰ Thus, the studies need to be carefully controlled to account for background factors that may be independent of the form of parenting. Also, comparing conjugal marital and nonmarital parenting may be of some help, but the kinds of nonmarital parenting need to be distinguished between children born out of wedlock and raised by a single parent (with little or no involvement of the father), children of divorced or separated parents, children raised by heterosexual cohabiting parents (or a biological parent and his or her opposite-sex nonmarital partner(s)), children raised by gay and lesbian parents (these parents can be further distinguished by whether the child was conceived/born after the lesbian union, from a prior union of one of the parties, etc.), children raised in reconstituted (step-) families, and children raised by relatives from their extended family (with or without parental involvement of a biological parent).

Marriage is a powerful social institution that is designed to link sexual activity and procreation to child-rearing.¹⁴¹ Human intimacy and procreation involves powerful

¹³⁷ Yongmin Sun, *The Well-Being of Adolescents in Households With No Biological Parents*, 65 J. MARRIAGE & FAM. 894 (2003) (finding that some differences between non-biological-parent and other family structures may be accounted for by differences in family resources).

¹³⁸ Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families*, 65 J. MARRIAGE & FAM. 876, 891 (2003) (finding that closeness of teen's relationship to his/her parents is a better predictor of well-being than parental monitoring; findings indicate attachment rather than social control theories of child development; religious teens are more likely to do better than non-religious teens); see also Paul R. Amato & Joan G. Gilbreth, *Nonresident Fathers and Children's Well-Being: A Meta-Analysis*, 61 J. MARRIAGE & FAM. 557 (1999) (finding that children do better when a nonresident father is close to a child and authoritatively participates in parenting).

¹³⁹ Sandra L. Hofferth & Kermyt G. Anderson, *Are All Dads Equal? Biology Versus Marriage as a Basis for Paternal Investment*, 65 J. MARRIAGE & FAM. 213, 229–30 (2003) (examining three theories why children growing up in a household in which a man other than their biological father married to their mother are worse off: (1) the non-biological father or biological cohabiting father will be less involved (more interested in his relationships with their mother); (2) they lack the experience with children or child to be effective fathers; and (3) selectivity—men who choose to enter such a relationship are selected because of a lack of alternatives). Married biological fathers are more likely to be more involved with a child than a cohabiting biological father.

¹⁴⁰ *Id.* at 214–15.

¹⁴¹ “Because human childhood dependency is long-lasting (legally presumed to last eighteen years) and labor intensive, the social consequences of procreation are substantial.” See Wardle, *Multiply and Replenish*, *supra* note 115, at 783. Society has a profound interest “to ensure that persons whose sexual behavior has resulted in the procreation of human children accept and fulfill the responsibility of parenting the children they have generated.” *Id.*

passions of sexual and biological relationships.¹⁴² Instability in those relationships involving a sexual partner or offspring have historically generated much interpersonal hostility and conflict. Children are the first victims of such confusion, instability, and domestic violence.¹⁴³

Children living outside of intact marital families are much more likely to be victims of child abuse than children in intact marital families. For example, children without fathers are more likely to be victims of physical and sexual abuse than children in intact marital families.¹⁴⁴ Nearly seventy percent of children live with two parents, but those children account for only twenty-eight percent of the child abuse; whereas twenty-five percent of children live with single mothers, and those children account for forty-four percent of the abused children population.¹⁴⁵ Single mothers' boyfriends perform less than two percent of child care, but they are "responsible for about half the child abuse committed by nonparents in caregiving roles."¹⁴⁶

The increased experience with child abuse may be one reason why many surveys show that children living apart from their fathers are far more likely than other children to experience social adjustment problems, to be expelled or suspended from school, to display emotional and behavioral problems, to have difficulty getting along with their peers, and to get in trouble with the police.¹⁴⁷ Children living apart from their fathers "have more social adjustment problems."¹⁴⁸ Dr. Urie Bronfenbrenner reported that even after controlling for such factors as low income, "children growing up in [single-parent] households are at a greater risk for experiencing a variety of behavioral and educational problems, including . . . smoking, drinking, [and] early and frequent sexual

¹⁴² See generally WILL DURANT & ARIEL DURANT, *THE LESSONS OF HISTORY* 35–36 (1968) ("[S]ex is a river of fire that must be banked and cooled by a hundred restraints if it is not to consume in chaos both the individual and the group.").

¹⁴³ See generally Amato et al., *supra* note 136. The value of marriage to enhance stability was articulated by the United States Supreme Court more than a century ago.

[C]ertainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth . . . than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement.

Murphy v. Ramsey, 114 U.S. 15, 45 (1885).

¹⁴⁴ BLANKENHORN, *supra* note 124, at 39–42.

¹⁴⁵ Catherine M. Malkin & Michael E. Lamb, *Child Maltreatment: A Test of Sociobiological Theory*, 25 J. COMP. FAM. STUD. 121, 129 (1994).

¹⁴⁶ Leslie Margolin, *Child Abuse by Mothers' Boyfriends: Why the Overrepresentation?*, 16 CHILD ABUSE & NEGLECT 541, 545 (1992) (The study focused on Iowa, and I feel those results can be true on a larger scale.).

¹⁴⁷ See Wardle, *Potential Impact*, *supra* note 115, at 848.

¹⁴⁸ *Id.*

experience.”¹⁴⁹ In many ways “[c]hildren in one-parent families are much worse off than those in two-parent families even when both families have the same earnings.”¹⁵⁰ While background factors including income are dominant factors, recent research confirms that “children raised in stable, cohabiting-parent families [which other data shows are uncommon] exhibit more behavior problems at age three than children raised in stable, married-parent families [which are more common].”¹⁵¹ Even taking into account socio-economic status, children raised in intact marital families enjoy better physical health than children raised in all other family forms.¹⁵² Children being raised by single parents are at heightened risk for “hyperactivity or withdrawal, . . . difficulty in deferring gratification, . . . school misbehavior, [and] absenteeism.”¹⁵³ Parental divorce doubles the risk that children will themselves divorce.¹⁵⁴ Parental divorce is associated with many emotional problems, problems with self-esteem, and difficulties with social relationships.¹⁵⁵ Children of marital families report significantly better relationships with their fathers (twenty-nine percent of non-divorced children rating that relationship as “poor” compared to sixty-five percent of children of divorce).¹⁵⁶

Children in single-parent families exhibit higher teen-childbirth rates¹⁵⁷—three times higher than children whose parents stayed married according to one recent study.¹⁵⁸ Only ten percent of teens aged twelve to fourteen living in intact families have engaged in sex, while the rates are twenty percent for those living in blended families, twenty-three percent in mother-headed families, and twenty-seven percent in father-only families.¹⁵⁹ Children growing up in single-parent households are at a significantly increased risk for drug abuse as teenagers.¹⁶⁰ “[T]he importance of family structure

¹⁴⁹ Urie Bronfenbrenner, *Discovering What Families Can Do, in* REBUILDING THE NEST: A NEW COMMITMENT TO THE AMERICAN FAMILY 27, 34 (David Blankenhorn et al. eds., 1990).

¹⁵⁰ James Q. Wilson, *Human Remedies for Social Disorders*, 131 PUB. INT. 25, 27–28 (1998).

¹⁵¹ FRAGILE FAMILIES & CHILD WELLBEING STUDY, YOUNG CHILDREN’S BEHAVIORAL PROBLEMS IN MARRIED AND COHABITATING FAMILIES 3 (2005), <http://www.fragilefamilies.princeton.edu/briefs/ResearchBrief33.pdf>.

¹⁵² TWENTY-SIX CONCLUSIONS, *supra* note 124, at 23.

¹⁵³ Bronfenbrenner, *supra* note 149, at 34.

¹⁵⁴ TWENTY-SIX CONCLUSIONS, *supra* note 124, at 14.

¹⁵⁵ FRANK F. FURSTENBURG, JR. & ANDREW J. CHERLIN, DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART 65–70 (1991); Paul R. Amato, *Children’s Adjustment to Divorce: Theories, Hypotheses, and Empirical Support*, 55 J. MARRIAGE & FAM. 23, 23 (1993).

¹⁵⁶ TWENTY-SIX CONCLUSIONS, *supra* note 124, at 12.

¹⁵⁷ *See id.* at 17–18.

¹⁵⁸ MARRIAGE MOVEMENT, *supra* note 133, at 11 (citing Andrew J. Cherlin et al., *Parental Divorce in Childhood and Demographic Outcomes in Young Adulthood*, 32 DEMOGRAPHY 299, 310–11 (1995)).

¹⁵⁹ *Id.* at 12 (citing Robert L. Flewelling & Karl E. Bauman, *Family Structure as a Predictor of Initial Substance Use and Sexual Intercourse in Early Adolescence*, 52 J. MARRIAGE & FAM. 171, 171 (1990)).

¹⁶⁰ Rhonda E. Denton & Charlene M. Kampfe, *The Relationship Between Family Variables and Adolescent Substance Abuse: A Literature Review*, 114 ADOLESCENCE 475 (1994).

variables" in predicting early sexual intercourse is "striking."¹⁶¹ The risks of early sexual activity are seventy-seven percent higher for boys and fifty-six percent higher for girls living in step-families, and sixty-two percent higher for boys and fifty-three percent higher for girls living in single-parent and non-parent family structures as compared to children raised by their biological parents.¹⁶²

A recent study suggests that being raised with a mother in the home protects teens from anxiety and depression (internal concerns), while having a father involved in child-rearing protects against such matters as impulsivity, hyperactivity, aggression, and delinquency (external coping factors), especially for daughters; for total "behavioral problems" only the presence of fathers (not mothers) in the home was a significant variable.¹⁶³

Studies in Europe corroborate the conclusion that "[f]amily structure [is] clearly associated with" multiple risk factors for adolescents.¹⁶⁴

[E]ven after controlling for their generally better material circumstances, young people living with both birth parents at fifteen were, three years later, less likely than those from 'step' and/or lone parent households to be heavy drinkers, have experience of drugs, of heterosexual intercourse, no school qualifications, to be unemployed or, among young women, to have experienced pregnancy.¹⁶⁵

Likewise, an Australian study reported highest socialization and adjustment skills (in class and on the playground) for children raised by married parents, over children raised by cohabiting parents and lesbian/gay parents.¹⁶⁶

A recent report noted that

[o]ne quarter of children in both mother-only and remarried families repeat a grade in school, compared to 14 percent of those in married families. About a quarter of children in mother-only fami-

¹⁶¹ Kathleen Mullan Harris et al., *Evaluating the Role of "Nothing to Lose" Attitudes on Risky Behavior in Adolescence*, 80 SOC. FORCES 1005, 1032 (2002), discussed at http://www.profam.org/pub/nr/nr_1606.htm?search=family%20structure.

¹⁶² *Id.* at 1023-28.

¹⁶³ Susan K. Williams & F. Donald Kelly, *Relationships Among Involvement, Attachment, and Behavioral Problems in Adolescence: Examining Father's Influence*, 25 J. EARLY ADOLESCENCE 168 (2005), discussed at http://www.profam.org/pub/nr/nr_1911.htm?search=comparison%20parenting&opt=ALL.

¹⁶⁴ Helen Sweeting et al., *Teenage Family Life, Lifestyles and Live Chances: Associations with Family Structure, Conflict with Parents and Joint Family Activity*, 12 INT'L J.L. POL'Y & FAM. 15, 38 (1998) (family time and conflict with parents account for some of the difference for some of the factors, but those are also associated with family structure).

¹⁶⁵ *Id.*

¹⁶⁶ Sotirios Sarantakos, *Children in Three Contexts: Family, Education and Social Development*, 21 CHILDREN AUSTRALIA 23 (1996).

lies (and 18 percent in stepfamilies) have been suspended or expelled, compared to less than 10 percent in mother-father families.¹⁶⁷

Children in a single-parent family generally “perform less successfully in educational activities, [and] have more social adjustment problems.”¹⁶⁸ Children raised with two parents have much higher rates of academic achievement, are up to one-third less likely to quit high school, and up to two-thirds less likely to drop out of college as children raised in other family structures.¹⁶⁹ Comparing high school students from different family structures, a 2003 survey that controlled for other significant variables (i.e., gender, ethnicity, family size, mother’s education, father’s education, and age at time of divorce) found that students from intact, married mother-father families outperformed students from non-intact family structures in terms of grades and attendance.¹⁷⁰ Likewise, “students from disrupted families [are] less likely to apply to, be admitted to, attend, or ever attend a four-year college. They were also less likely to choose a selective college.”¹⁷¹ Indeed, it appears that family structure is a critical element in shaping children’s IQ, and that “family environment plays a key and possibly irreversible role in shaping a child’s intelligence.”¹⁷² A study of school performance and behavior of hundreds of children being raised by married, cohabiting, and homosexual parents in Australia found that in almost all areas (including language and math exams, sports, learning, parental support, and aspirations for their children’s education), children raised by married parents did the best, followed by cohabiting heterosexual parents, followed by lesbian parents.¹⁷³ Thus, one wonders whether changing family structure (fewer married parents) might be related to the March 2006 ACT, Inc. report, which found that “[o]nly 51 percent of last year’s high-school graduates who took the ACT examination had the reading skills they

¹⁶⁷ MARRIAGE MOVEMENT, *supra* note 133, at 12 (citing Nicholas Zill, *Understanding Why Children in Stepfamilies Have More Learning and Behavior Problems Than Children in Nuclear Families*, in STEPFAMILIES: WHO BENEFITS? WHO DOES NOT? 97–106 (Alan Booth & Judy Dunn eds., 1994)).

¹⁶⁸ Wardle, *Potential Impact*, *supra* note 115, at 18. See generally Barbara Dafoe Whitehead, *Dan Quayle Was Right*, ATLANTIC MONTHLY, Apr. 1993, at 47, 66 (asserting that a growing body of social-scientific evidence demonstrates that children raised in single-parent families are worse off than children in two-parent families in many areas of well-being).

¹⁶⁹ Whitehead, *supra* note 168, at 66.

¹⁷⁰ Barry D. Ham, *The Effects of Divorce on the Academic Achievement of High School Seniors*, 38 J. DIVORCE & REMARRIAGE 167, 167 (2003); *id.* at 176–81 (statistics show that children from intact families perform better in all categories than children from divorced families).

¹⁷¹ Dean Lillard & Jennifer Gerner, *Getting to the Ivy League: How Family Composition Affects College Choice*, 70 J. HIGHER EDUC. 706, 721 (1999).

¹⁷² DAVID J. ARMOR, MAXIMIZING INTELLIGENCE, at ix (2003); see also *id.* at 92–98, 184–89.

¹⁷³ Sarantakos, *supra* note 166, at 23.

needed to succeed in college or job-training programs”¹⁷⁴—the lowest proportion in more than a decade.¹⁷⁵

Child poverty is more directly caused by nonmarital parenting than by any other factor. More than half of the increase in child poverty in the United States between 1980 and 1988 was “accounted for by changes in family structure.”¹⁷⁶ The U.S. Government reports that children who grow up without a father at home are five times more likely to live in poverty, compared to children living with both parents.¹⁷⁷ William Galston, who served as Domestic Policy Advisor to President Clinton, simply said that “the two-parent family is an American child’s best protection against poverty.”¹⁷⁸ Marital status is more closely associated with avoiding child poverty than any other factor. Many studies have shown that children in single-parent families are many times more likely to be living in poverty than children living with both a mother and father.¹⁷⁹ “Changing family structure also accounted for forty-eight percent of the increase during the 1980s in deep poverty, and fifty-nine percent of the rise in relative poverty

¹⁷⁴ Eric Hoover, *Barely Half of High-School Students Who Took the ACT Had College-Ready Reading Skills*, 52 CHRON. HIGHER EDUC., Mar. 10, 2006, at A33, available at <http://chronicle.com/daily/2006/03/2006030101n.htm>; accord ACT, INC., *READING BETWEEN THE LINES: WHAT THE ACT REVEALS ABOUT COLLEGE READINESS IN READING 1* (2006) [hereinafter *READING BETWEEN THE LINES*], http://www.act.org/path/policy/pdf/reading_summary.pdf (amazingly, the report controlled for gender, family income, and race, but stunningly makes no mention of family structure).

¹⁷⁵ *READING BETWEEN THE LINES*, *supra* note 174, at 2.

¹⁷⁶ David J. Eggebeen & Daniel T. Lichter, *Race, Family Structure, and Changing Poverty Among American Children*, 56 AM. SOC. REV. 801, 806 (1991). According to former Clinton White House aide William Galston, “child poverty rates today would be one-third lower if family structure had not changed so dramatically since 1960. Fifty-one percent of the increase in child poverty observed during the 1980s is attributable to changes in family structure during that period.” WADE F. HORN, NAT’L FATHERHOOD INST., *FATHER FACTS* 78 (1998).

¹⁷⁷ NAT’L CTR. FOR HEALTH STATISTICS, U.S. DEP’T OF HEALTH & HUMAN SERVS., *SURVEY ON CHILD HEALTH* (1993). “[Ten] percent of children in two-parent families were in poverty, compared to [fifty] percent in female householder families.” FED. INTERAGENCY FORUM ON CHILD & FAMILY STATISTICS, *AMERICA’S CHILDREN: KEY NATIONAL INDICATORS OF WELL-BEING* 14 (1997).

¹⁷⁸ ELAINE CIULLA KAMARCK & WILLIAM A. GALSTON, *PUTTING CHILDREN FIRST: A PROGRESSIVE FAMILY POLICY FOR THE 1990S*, at 12 (1990).

¹⁷⁹ See NAT’L COMM’N ON CHILDREN, *BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES* 253 (1991) (“Children who live with only one parent, usually their mothers, are six times as likely to be poor as children who live with both parents.”); see also William J. Doherty, *The Best of Times and the Worst of Times: Fathering as a Contested Arena of Academic Discourse*, in GENERATIVE FATHERING: BEYOND DEFICIT PERSPECTIVES 217, 221 (Alan J. Hawkins & David C. Dollahite eds., 1997) (66.3% of all children living with mothers who had never married were living below the poverty line, compared to only 10.6% of children living in two-parent families in 1993); Eggebeen & Lichter, *supra* note 176, at 806-07 (changes in family structure account for one-third of the increased child poverty between 1960 and 1988, and nearly sixty percent of the rise in child poverty during the 1980s).

among U.S. children.”¹⁸⁰ A recent update led by University of Virginia sociologist W. Bradford Wilcox of an earlier study about “why marriage matters” for, inter alia, children notes that disruption of the intact marital family significantly reduces the likelihood that children will graduate from college or achieve high-paying jobs.¹⁸¹ Thus, “[a]s a matter of public policy, if not of morality, it pays for society to approve of marriage as the best setting for children.”¹⁸²

“[C]hildren growing up in [single-parent] households are at greater risk for experiencing . . . vandalism, violence, and criminal acts.”¹⁸³ Separation of children from their fathers is “the engine driving our most urgent social problems, from crime to adolescent pregnancy to child sexual abuse to domestic violence against women.”¹⁸⁴ For instance, children in single-parent families exhibit higher rates of teenage sexual activity, teen pregnancy, and childbirth.¹⁸⁵ Children growing up in single-parent households are at a significantly increased risk for drug abuse as teenagers.¹⁸⁶

The relationship between adolescent (especially male) criminal behavior and family structure has long been known. One study reported that “the ‘relationship between crime and one-parent families’ is ‘so strong that controlling for family configuration erases the relationship between race and crime and between low income and crime.’”¹⁸⁷ Another recent study confirmed that the “presence of a residential and biological father reduces the likelihood of violent behavior by his sons grown to adulthood,” and “[d]ata analyzed across the U.S. indicate that father absence, rather than poverty, [is] the stronger predictor of young men’s violent behavior.”¹⁸⁸ The likelihood that a young male “will engage in criminal activity doubles if he is raised without a father, and triples if he lives in a neighborhood with a high concentration of single-parent families.”¹⁸⁹ A statement of family experts noted: “Boys raised outside of intact marriages are two to three times more likely to commit a crime leading to incarceration by the time they are in their early thirties, even after controlling for

¹⁸⁰ Eggebeen & Lichter, *supra* note 176, at 807. Moreover, researchers at Pennsylvania State University have concluded that if family breakdown had not deprived many families of a male breadwinner, “the child poverty rate would have declined to 13.8% in 1988.” Myron Magnet, *The American Family, 1992*, FORTUNE, Aug. 10, 1992, at 43.

¹⁸¹ TWENTY-SIX CONCLUSIONS, *supra* note 124, at 22.

¹⁸² Michael Novak, *Families: The Best Anti-Poverty Plan*, WASH. TIMES, Feb. 5, 1993, at F1.

¹⁸³ Bronfenbrenner, *supra* note 149, at 34; see also BLANKENHORN, *supra* note 124, at 26–32 (children without fathers are also more likely to be involved in youth violence than children with fathers in the home).

¹⁸⁴ BLANKENHORN, *supra* note 124, at 1.

¹⁸⁵ *Id.* at 46.

¹⁸⁶ Denton & Kampfe, *supra* note 160, at 480.

¹⁸⁷ BLANKENHORN, *supra* note 124, at 31.

¹⁸⁸ Wade C. Mackey & Ronald S. Immerman, *The Presence of the Social Father in Inhibiting Young Men’s Violence*, 44 MANKIND Q. 339, 339 (2004).

¹⁸⁹ M. ANNE HILL & JUNE O’NEILL, CITY UNIV. OF N.Y., UNDERCLASS BEHAVIORS IN THE UNITED STATES: MEASUREMENT AND ANALYSIS OF DETERMINANTS (1993).

race, family background, neighborhood quality, and cognitive ability.”¹⁹⁰ Being raised in an intact marital family statistically reduces the risk that children will be either the victims or perpetrators of crime.¹⁹¹ The rate of incarceration of children coming from marital intact homes is one-half the rate of incarceration of children from single homes (and one-third the rate of children from stepfamilies).¹⁹²

“[C]hildren are much more likely to die outside of an intact, married home than they are to die inside an intact, married home.”¹⁹³ For example, “[a] recent study in the journal *Pediatrics* found that preschool children in homes with an unrelated adult were nearly 50 times as likely to die because of physical abuse, compared to children in intact, married homes.”¹⁹⁴ Another study reviewing national crime data from the Federal Bureau of Investigation and U.S. Census Bureau found that nonmarital (“diverse”) family forms “significantly contributes to . . . acquaintance- and stranger-related homicide rates, as well as to the total . . . homicide rate, for white families.”¹⁹⁵

Health benefits of other kinds also are present. For example, “[c]hildren born to two married, biological parents are less likely to be diagnosed with asthma and less likely to experience an asthma-related emergency than children born into other family configurations.”¹⁹⁶ Likewise, a recent study notes that in Sweden, where single mothers do not suffer the poverty that accompanies single parenting in many other countries, children of single parents had “more than double the risk of psychiatric disease; suicide or attempted suicide, and alcohol-related disease, and more than three times the risk of drug-related disease compared with their counterparts in two-parent households.”¹⁹⁷

¹⁹⁰ MARRIAGE MOVEMENT, *supra* note 133, at 11.

¹⁹¹ TWENTY-SIX CONCLUSIONS, *supra* note 124, at 29.

¹⁹² *Id.*

¹⁹³ W. Bradford Wilcox, *Child Tragedies: Missing Marriage*, N.Y. POST ONLINE EDITION, Feb. 8, 2006, <http://www.nypost.com/postopinion/opedcolumnists/63138.htm>.

¹⁹⁴ *Id.*

¹⁹⁵ Karen F. Parker & Tracy Johns, *Urban Disadvantage and Types of Race-Specific Homicide: Assessing the Diversity in Family Structures in the Urban Context*, 39 J. RES. CRIME & DELINQ. 277, 292 (2002).

¹⁹⁶ FRAGILE FAMILIES & CHILD WELLBEING STUDY, CHILDREN’S ELEVATED RISK OF ASTHMA IN UNMARRIED FAMILIES (2005), <http://www.fragilefamilies.princeton.edu/briefs/ResearchBrief32.pdf>.

¹⁹⁷ Margaret Whitehead & Paula Holland, *What Puts Children of Lone Parents at a Health Disadvantage?*, 361 LANCET 271 (2003), available at <http://www.thelancet.com/journals/lancet/section?volume=361&issue=9354§ion=Commentary>; see also Anna L. Christopoulos, *Relationships Between Parents’ Marital Status and University Students’ Mental Health, Views of Mothers and Views of Fathers: A Study in Bulgaria*, 34 J. DIVORCE & REMARRIAGE 179, 179–80 (2001) (“Students from divorced homes reported significantly more psychological difficulties in general than their peers from intact homes. [They also] reported significantly more somatic complaints and problems of depression than students whose parents were married. . . . [S]tudents from divorced homes reported significantly more negative attitudes toward their fathers than students from intact homes. A similar trend was obtained with respect to views of mothers.”).

Alternative relationships are sometimes described as equivalent to marital families. Yet, perhaps surprisingly, disappointing outcomes for children result from even the most promising alternative family forms. For example, childhood in step-families, which may come the closest to intact families in terms of structure, pales by comparison to intact marital families of the child's mother and father. While many reconstituted families succeed and raise wonderful children, studies consistently report that step-families provide a demonstrably less favorable environment for child-rearing than the intact marital family (of biological father and mother).¹⁹⁸ For example, a recent report noted that "children living with stepparents (usually a stepfather) are more than forty times as likely to be killed or sexually abused, compared to children living in an intact, married family."¹⁹⁹

One of the most complete compilations of data on outcomes of nonmarital cohabitation in the United States is contained in an extensive report by sociologists David Popenoe and Barbara Dafoe Whitehead.²⁰⁰ They conclude that nonmarital cohabitation in the United States "has weakened marriage and the intact, two-parent family and thereby damaged our social wellbeing, especially that of women and children."²⁰¹ They noted: "[V]irtually all research on the topic has determined that the chances of divorce ending a marriage preceded by cohabitation are significantly greater than for a marriage not preceded by cohabitation."²⁰² Likewise, "[a]ccording to recent studies cohabitants tend not to be as committed as married couples in their dedication to the continuation of the relationship . . . and they are more oriented toward their own personal autonomy."²⁰³ That instability in the home is a cause of

¹⁹⁸ See, e.g., Paul R. Amato, *Children of Divorce in the 1990s: An Update of the Amato and Keith (1991) Meta-Analysis*, 15 J. FAM. PSYCHOL. 355 (2001); Paul R. Amato & Bruce Keith, *Parental Divorce and the Well-Being of Children: A Meta-Analysis*, 110 PSYCHOL. BULL. 26 (1991); Debra L. Foley et al., *Risks for Conduct Disorder Symptoms Associated with Parental Alcoholism in Stepfather Families Versus Intact Families from a Community Sample*, 45 J. CHILD PSYCHOL. & PSYCHIATRY 687 (2004); see also Marilyn Coleman & Lawrence H. Ganong, *Remarriage and Stepfamily Research in the 1980s: Increased Interest in an Old Family Form*, 52 J. MARRIAGE & FAM. 925, 928 (1990); Frank F. Furstenberg, Jr., *The New Extended Family: The Experience of Parents and Children after Remarriage*, in REMARRIAGE AND STEPPARENTING: CURRENT RESEARCH AND THEORY 42, 59 (Kay Pasley & Marilyn Ihinger-Tallman eds., 1987); Nicholas Zill, *Behavior, Achievement, and Health Problems Among Children in Stepfamilies: Findings From a National Survey of Child Health*, in IMPACT OF DIVORCE, SINGLE PARENTING, AND STEPPARENTING ON CHILDREN 352, 362 (E. Mavis Hetherington & Josephine D. Arasteh eds., 1988).

¹⁹⁹ Wilcox, *supra* note 193, at 1.

²⁰⁰ DAVID POPENOE & BARBARA DAFOE WHITEHEAD, NAT'L MARRIAGE PROJECT, SHOULD WE LIVE TOGETHER? WHAT YOUNG ADULTS NEED TO KNOW ABOUT COHABITATION BEFORE MARRIAGE, A COMPREHENSIVE REVIEW OF RECENT RESEARCH (1999), <http://www.smartmarriages.com/cohabit.html> [hereinafter POPENOE & WHITEHEAD, SHOULD WE LIVE TOGETHER?].

²⁰¹ *Id.* at 16.

²⁰² *Id.* at 4.

²⁰³ *Id.* at 5.

detriment for children. "In general, cohabiting relationships tend to be less satisfactory than marriage relationships."²⁰⁴ Additionally,

[a]nnual rates of depression among cohabiting couples are more than three times what they are among married couples. And women in cohabiting relationships are more likely than married women to suffer physical and sexual abuse. Some research has shown that aggression is at least twice as common among cohabitators as it is among married partners.²⁰⁵

That translates into impaired parenting for children. Another study notes that cohabiting men are four times more likely than husbands to cheat on their partners, and cohabiting women are eight times more likely than wives to be unfaithful to their partners.²⁰⁶ Thus, it is not surprising that "three quarters of children born to cohabiting parents will see their parents split up before they reach age sixteen, whereas only about a third of children born to married parents face a similar fate."²⁰⁷ Studies also indicate that in cohabiting couples there are "far higher levels of child abuse than is found in intact families."²⁰⁸ Other studies have documented that rates of domestic violence are higher and the type of violence more severe in nonmarital cohabitation than in marriage.²⁰⁹ Likewise, "[w]hile the 1996 poverty rate for children living in married couple households was about 6%, it was 31% for children living in cohabiting households."²¹⁰ Another study noted that children of cohabiting unmarried couples are economically disadvantaged compared to children of married parents, with a mean household income per adult of \$7,200 compared to \$10,800 for married couples.²¹¹ Further, white children living with cohabiting couples are four times more likely to live below poverty level than children living with married couples.²¹² These risks of cohabitation are not unique to the United States. For example, "the widespread substitution of cohabitation for marriage in

²⁰⁴ *Id.* at 6.

²⁰⁵ *Id.* at 7.

²⁰⁶ MARRIAGE MOVEMENT, *supra* note 133, at 9.

²⁰⁷ POPENOE & WHITEHEAD, SHOULD WE LIVE TOGETHER?, *supra* note 200, at 7.

²⁰⁸ *Id.* at 8.

²⁰⁹ See, e.g., Jan E. Stets & Murray A. Straus, *The Marriage License as a Hitting License: A Comparison of Assaults in Dating, Cohabiting, and Married Couples*, 4 J. FAM. VIOLENCE 161 (1989).

²¹⁰ POPENOE & WHITEHEAD, SHOULD WE LIVE TOGETHER?, *supra* note 200, at 8.

²¹¹ Wendy D. Manning & Daniel T. Lichter, *Parental Cohabitation and Children's Economic Well-Being*, 58 J. MARRIAGE & FAM. 998 (1996), as described in S. Edwards, *Economic Resources Lag Among Children Whose Parents are Cohabiting*, 29 FAM. PLAN. PERSPS. 143 (1997).

²¹² *Id.*

Sweden has given that country the highest rate of family dissolution and single parenting in the developed world.”²¹³

One of the most exhaustive and impressive collections of data on single mothers and cohabiting couples raising children is *The Fragile Families and Child Wellbeing Study*, completed under the direction of Professor Sara McLanahan of Princeton University.²¹⁴ The study finds that cohabiting couples are not like married couples in critical respects, nor are single mothers like “Murphy Brown.”²¹⁵ Those family environments are exceptionally unstable and tenuous (factors that do not bode well for child development). There is often greater stress in those families, often translating into impaired or dysfunctional parenting. While stable cohabiting couples share many characteristics with stable marital families, stability in cohabitation (unlike in marital families) is the small exception rather than the general rule.²¹⁶

It is indisputable that children born out of wedlock are born into lives of disadvantage. So serious were the harms to children and society that at common law an entire branch of the law of domestic relations was established to promote childbearing within marriage.²¹⁷ English common law (and until less than forty years ago American law) adopted the radical strategy of declaring the very existence of children born out of wedlock as *illegitimate*—contrary to the policy of the law and society.²¹⁸ Thankfully, that legal status is now abolished, but the real harm remains.

E. Dual-Gender Parenting and the Challenge of Lesbigan Parenting

Advocates and supporters of lesbigan parenting also frequently assert the “no difference” claim—that there is “no difference” between children who are raised by lesbian or gay parents and children raised in intact marital families.²¹⁹ Increasingly,

²¹³ *Irizarry v. Bd. of Educ.*, 251 F.3d 604, 608 (7th Cir. 2001) (citing DAVID POPENOE, *DIS-
TURBING THE NEST: FAMILY CHANGE AND DECLINE IN MODERN SOCIETIES* 173–74 (1988)).

²¹⁴ See generally FRAGILE FAMILIES AND CHILD WELLBEING STUDY, <http://www.fragilefamilies.princeton.edu> (last visited Sept. 28, 2006).

²¹⁵ FRAGILE FAMILIES AND CHILD WELLBEING STUDY, *LOOKING FOR “MURPHY BROWN”:
ARE COLLEGE-EDUCATED, SINGLE MOTHERS UNIQUE?* (2003), <http://www.fragilefamilies.princeton.edu/briefs/ResearchBrief18.pdf>.

²¹⁶ FRAGILE FAMILIES AND CHILD WELLBEING STUDY, *MATERNAL STRESS AND MOTHERING
BEHAVIORS IN STABLE AND UNSTABLE FAMILIES* (2004), <http://www.fragilefamilies.princeton.edu/briefs/ResearchBrief27.pdf>.

²¹⁷ 1 WILLIAM BLACKSTONE, *COMMENTARIES* *443 (“The main end and design of marriage . . . [is] to ascertain and fix upon some certain person, to whom the care, the protection, the maintenance, and the education of the children should belong.”); see also HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 149–203 (2d ed. 1988) (describing the history of illegitimacy in Anglo-American law).

²¹⁸ CLARK, *supra* note 217, at 155–56.

²¹⁹ See, e.g., Wardle, *Considering the Impacts on Children*, *supra* note 115, at 550–56; Wardle, *Parenthood and the Limits*, *supra* note 115, at 192; Wardle, *Parentlessness*, *supra*

the issue is being addressed by lawmakers. As of November 2005, at least twenty states and the District of Columbia had either legislation or an appellate court ruling taking a specific legal position regarding whether gays and lesbians could adopt children.²²⁰ Twelve states and the District of Columbia allow lesbian adoption (four by legislation and nine by court ruling), while eight states ban lesbian adoption (four by legislation and four by court ruling).²²¹ By February 21, 2006, it was reported that proposals to ban lesbian adoption were pending in at least sixteen states.²²²

The most common argument for allowing lesbian legal parentage is that there is “no difference” for children between being raised by heterosexual parents and being raised by a same-sex couple. Some courts have explicitly embraced the “no difference” claim. In *Baehr v. Miike*,²²³ the first American decision to order same-sex marriage,²²⁴ the Hawaii court based its decision significantly on the finding that same-sex couples and heterosexual couples were equivalent as parents because love is what matters most in parenting:

125. The evidence presented by Plaintiffs and Defendant establishes that the single most important factor in the development of a happy, healthy and well-adjusted child is the nurturing relationship between parent and child.

More specifically, it is the quality of parenting or the “sensitive care-giving” described by David Brodzinsky, which is the most significant factor that affects the development of a child.

....

132. Gay and lesbian parents and same-sex couples can be as fit and loving parents, as non-gay men and women and different-sex couples.²²⁵

Likewise, in *Baker v. State*,²²⁶ the first state supreme court decision holding that same-sex couples must be given the right to marry or to enter into an equivalent legal

note 115, at 323; Wardle, *Potential Impact*, *supra* note 115, at 842–44; Wardle, *Preference for Marital Couple Adoption*, *supra* note 115, at 377–78.

²²⁰ See generally Lynn D. Wardle, *The “Inner Lives” of Children in Lesbian Adoption: Narratives and Other Concerns*, 18 ST. THOMAS L. REV. 511, 512–15 (2006).

²²¹ *Id.* at 513.

²²² Andrea Stone, *Drives to Ban Gay Adoption Heat Up*, USA TODAY, Feb. 21, 2006, at 1A (noting that bills or ballot proposals to ban lesbian adoption have been introduced in at least sixteen states early in 2006).

²²³ CIV No. 91–1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *aff’d*, 950 P.2d 1234 (Haw. 1997).

²²⁴ The Hawaii trial court enjoined the Department of Health, which issued marriage licenses, “from denying an application for a marriage license solely because the applicants are of the same sex.” *Id.* at *22, ¶ 2.

²²⁵ *Id.* at *17, ¶¶ 125, 132.

²²⁶ 744 A.2d 864 (Vt. 1999).

status with comparable benefits, the Vermont Supreme Court rejected the State's argument about the importance of dual-gender marriage for children and child-rearing.²²⁷ The gender differences were dismissed because "such differences are not necessarily found in comparing any given man and any given woman."²²⁸ As to parenting, the court rejected the State's argument that same-sex and male-female couples were different from each other in any significant way, noting that "to the extent that the state's purpose in licensing civil marriage was, and is, to legitimize children and provide for their security, the statutes plainly exclude *many same-sex couples who are no different from opposite-sex couples with respect to these objectives*."²²⁹ The majority opinion of Chief Justice Amestoy further stated that same-sex and heterosexual parents "are *similarly situated*" in terms of the state's interest in protecting children by linking parentage with marriage.²³⁰ The court specifically held that there was "*extreme logical disjunction* between the classification and the stated purposes of the law—protecting children and 'furthering the link between procreation and child rearing.'"²³¹

The Massachusetts Supreme Judicial Court, in *Goodridge v. Department of Public Health*,²³² ruled that the Massachusetts Constitution required that same-sex marriage be legal in the Commonwealth. It reasoned, *inter alia*, that to deny gay and lesbian couples marriage curiously "confers an official stamp of approval on [a] *destructive stereotype* that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect."²³³ It emphasized that same-sex couples, as a group, are indistinguishable from conjugal couples in terms of the state's interests in marriage, and that "extending civil marriage to same-sex couples *reinforc[ed]* the importance of marriage to individuals and communities."²³⁴ The Court emphasized: "There is . . . no rational relationship between the marriage statute and the Commonwealth's proffered goal of protecting the 'optimal' child rearing unit."²³⁵ Moreover, "[i]t cannot be rational under our laws, and indeed it is not permitted, to penalize children by depriving them of State benefits because the State disapproves of their parents' sexual orientation."²³⁶

²²⁷ *Id.* at 909, 911–12 (Johnson, J., concurring in part and dissenting in part).

²²⁸ *Id.* at 910.

²²⁹ *Id.* at 882 (majority opinion) (emphasis added).

²³⁰ *Id.* (emphasis added in part).

²³¹ *Id.* at 884 (emphasis added).

²³² 798 N.E.2d 941 (Mass. 2003).

²³³ *Id.* at 962 (emphasis added). Chief Justice Marshall wisely chose not to try to explain the questionable assumption that a policy that some relationships are "unstable and inferior" to conjugal unions in terms of accomplishing state interests relating to marriage means that such relationships "are not worthy of respect." *Id.* For example, the fact that mothers and sons or brothers and sisters cannot marry does not mean that those very important relationships are not worthy of respect.

²³⁴ *Id.* at 965.

²³⁵ *Id.* at 963.

²³⁶ *Id.* at 964.

Many other judges, however, have concluded that there are rational, if not compelling, grounds for lawmakers to conclude that conjugal marital parenting (dual-gender parenting) is in the best interests of children.²³⁷ Justice Cordy, dissenting in *Goodridge*, concluded that the Massachusetts legislature, in reserving marriage to opposite-sex couples, reasonably may have believed that the ideal of dual-gender parenting should be preserved whenever possible,²³⁸ and that “being raised by a same-sex couple has not yet been shown to be the absolute equivalent of being raised by one’s married biological parents.”²³⁹ Likewise, Justice Sossman acknowledged the importance of dual-gender parenting in her dissent in *Goodridge*.²⁴⁰ In *Lofton v. Kearney*,²⁴¹ a federal district court upheld Florida’s no-homosexual-adoptions rule, noting that “a child’s best interest is to be raised in a home stabilized by marriage, in a family consisting of both a mother and a father.”²⁴² Affirming, the Eleventh Circuit Court of Appeals agreed that the legislature could reasonably conclude that “children benefit from the presence of both a father and mother in the home.”²⁴³ Even Justice Brennan acknowledged that “[t]he optimal situation for the child is to have both an involved mother and an involved father.”²⁴⁴

The social science evidence fails to support the claims of equivalence between marital conjugal parenting and lesbian parenting. We certainly do not yet know the full effects of homosexual parenting on children. The evidence is just beginning to be assembled, and it is far from reliable or complete. Most of the completed studies to date suffer from significant methodological flaws such as defects in design, sample bias, sample size, very poor (or no) control groups, inappropriate measures, misuse of measures, and misinterpretation of data. It may take another generation before substantial, reliable data about the effects of homosexual parenting on children is available and before social scientists begin to accumulate significant data showing the effects on children of lesbian child-rearing (just as it took a generation for the children of no-fault divorce to reach maturity and to begin to speak out—allowing social scientists to discover that children suffer significant harm

²³⁷ See generally *Hernandez v. Robles*, 855 N.E.2d 1, 7 (2006); *Lewis v. Harris*, 875 A.2d 259, 266–71 (N.J. Super. Ct. App. Div. 2005); *Samuels v. N.Y. State Dep’t of Health*, 29 A.D.3d 9 (N.Y. App. Div. 2006); *Morrison v. Sadler*, 821 N.E.2d 15, 25 (Ind. Ct. App. 2005); *Standhardt v. Superior Court*, 77 P.3d 451, 461–64 (Az. Ct. App. 2004), *rev. denied*, May 26, 2004.

²³⁸ *Goodridge*, 798 N.E.2d at 999–1000 (Cordy, J., dissenting).

²³⁹ *Id.* at 1000.

²⁴⁰ *Id.* at 979–82 (Sossman, J., dissenting).

²⁴¹ 157 F.Supp.2d 1372 (S.D. Fla. 2001), *aff’d sub nom Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804, 827 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005).

²⁴² *Kearney*, 157 F.Supp.2d at 1383.

²⁴³ *Lofton*, 358 F.3d at 819.

²⁴⁴ *Bowen v. Gilliard*, 483 U.S. 587, 614 (1987) (Brennan, J., dissenting) (alteration in original) (quoting HENRY BILLER, *PATERNAL DEPRIVATION* 10 (1974)). This language is quoted and endorsed in *In re Kandu*, 315 B.R. 123, 146 (Bankr. W.D. Wash. 2004).

and some are permanently disadvantaged by their parents' divorce, contrary to the general expectations of psychologists in the 1970s that divorce usually caused only minor and temporary setback for children).²⁴⁵

Two benchmark surveys were published in 2001 that acknowledged the methodological flaws in the social science studies of "lesbigay" parenting. In the *American Sociological Review*, researchers Judith Stacey and Timothy Biblarz, sympathetic to lesbigay parenting, examined the social science literature that found "no difference" between heterosexual and lesbigay parents.²⁴⁶ They conducted a thorough examination of one meta-analysis concluding "no difference" and twenty-one particular studies reaching the same conclusion and found significant flaws in study design, sample groups, controls, methodologies, and in matching the data reported with the conclusions reached ("no difference"). Particularly, they found significant differences between children raised by lesbigay parents and heterosexual parents relating to sexual orientation, gender-appropriate activities, and homoerotic behaviors.²⁴⁷

Likewise, social scientists Robert Lerner, Ph.D., and Althea K. Nagai, Ph.D., who conducted research for an organization critical of lesbigay parenting, carefully examined forty-nine published articles concerning the impact that homosexual parents have on the rearing of their children. Most of the studies claim that there is no difference in child outcomes based on parental sexual orientation²⁴⁸ and found that the scientific methods in all of them were seriously flawed. Lerner and Nagai conclude: "[T]hese studies display an unreflective, rote-like application of statistical methods. The researchers seem to have spent no time reflecting upon what these statistical tests and methods mean. . . . [T]hese small studies claiming non-significant results must be treated as entirely inconclusive."²⁴⁹

Several other studies reach the same conclusion about the flawed social science. Richard E. Redding of the University of Virginia has cited the research used by advocates of the policy "that parental sexual orientation should be irrelevant in child custody

²⁴⁵ BARBARA DAFOE WHITEHEAD, *THE DIVORCE CULTURE* 45–107 (1996); WAITE & GALLAGHER, *supra* note 124, at 1–12, 124–40.

²⁴⁶ Judith Stacey & Timothy J. Biblarz, (*How*) *Does the Sexual Orientation of Parents Matter?*, 66 AM SOC. REV. 159, 159–60, 178–79 (2001).

²⁴⁷ *Id.* at 164–69.

²⁴⁸ ROBERT LERNER & ALTHEA K. NAGAI, *MARRIAGE LAW PROJECT, NO BASIS: WHAT THE STUDIES DON'T TELL US ABOUT SAME-SEX PARENTING* 3–9 (2001) [hereinafter LERNER & NAGAI, *NO BASIS*].

²⁴⁹ *Id.* at 108; see also Robert Lerner & Althea K. Nagai, *Marriage Policy and the Methodology of Research on Homosexual Parenting*, in *REVITALIZING THE INSTITUTION OF MARRIAGE FOR THE TWENTY-FIRST CENTURY: AN AGENDA FOR STRENGTHENING MARRIAGE* 155, 157 (Alan J. Hawkins et al. eds., 2003); see also Philip A. Belcastro et al., *A Review of Data Based Studies Addressing the Affects of Homosexual Parenting on Children's Sexual and Social Functioning*, 20 J. DIVORCE & REMARRIAGE 105, 106 (1993) ("The conclusion that there are no significant differences in children reared by lesbian mothers versus heterosexual mothers is not supported by the published research data base.").

decisions . . . [a]s an example of liberal bias affecting research interpretation and its use in advocacy.”²⁵⁰ Professor Redding’s colleague, Professor Stephen Nock, “a leading scholar of marriage at the University of Virginia, wrote in March 2001 . . . that every study on [the effect of same-sex marriage on the couple’s children] ‘contained at least one fatal flaw’ and ‘not a single one was conducted according to generally accepted standards of scientific research.’”²⁵¹ In a court affidavit, Nock declared that all of the research “including the study considered the most rigorous, cannot be taken as establishing the claim that scientific research shows no differences between the children of gay parents and the children of heterosexual parents in terms of gender identity or sexual orientation.”²⁵² George A. Rekers, Distinguished Professor of Neuropsychiatry and Behavioral Science Emeritus at the University of South Carolina School of Medicine and a Fellow of the Academy of Clinical Psychology, has reached the same conclusion.²⁵³ He described the “no difference” studies as “with very few exceptions . . . methodologically flawed.”²⁵⁴ “[T]hey should be considered no more than exploratory pilot work which suggest directions for future rigorous research studies” because they are “not, in fact, substantiated by adequate scientific research.”²⁵⁵

One of the biggest problems with research dealing with the effects of lesbian parenting on children is that it does not address the hard questions about the effect of homosexual activity by residential parents on children. What are the long-term effects on children with regard to inter-gender relations? Courtship? Personal intimacy? Sexual practices? Their physical and mental health? Use and abuse of alcohol and drugs? Their entering marriage? Sustaining marriage? Spousal interactions in marriage? Other relationships? Childbearing? Their parenting? Relations with grandchildren? Researchers need to examine the kinds of behavior that are most likely to be influenced by parental sexual behaviors—including the sexual behaviors, interests, and identification of children, premature or delayed sexual behavior, risky sexual behaviors, sexual self-identification, fidelity in sexual relations, and promiscuity in sexual relations. Will those relationships be stable? Emotionally healthy? Fulfilling? How will extended family relationships of children raised by gay and lesbian parents be affected? Researchers have not even begun to ask these critical questions.

The effects of lesbian parenting on children over time is a major hole in existing research. Even Charlotte Patterson, one of the most avid supporters of lesbian

²⁵⁰ Richard E. Redding, *Sociopolitical Diversity in Psychology; The Case for Pluralism*, 56 AM. PSYCHOL. 205, 207 (2001).

²⁵¹ Don Browning & Elizabeth Marquardt, Editorial, *A Marriage Made in History?*, N.Y. TIMES, Mar. 9, 2004, at A25.

²⁵² Affidavit of Stephen Lowell Nock, in *Halpern v. Att’y Gen. of Can.*, No. 684/00, ¶ 140 (Ont. Super. Ct. of Justice, Div. Ct.) (March 2001).

²⁵³ George Rekers & Mark Kilgus, *Studies of Homosexual Parenting: A Critical Review*, 14 REGENT U. L. REV. 343 (2004).

²⁵⁴ *Id.* at 345.

²⁵⁵ *Id.* at 345–46.

parenting, has agreed that “longitudinal studies that follow lesbian and gay families over time are still badly needed.”²⁵⁶

Surprisingly, even many of the methodologically biased, pro-lesbigay-parenting studies cited in support of the “no difference” claim suggest that there are some significant risks for children raised by lesbian or gay couples. In some studies, it appears that children raised by same-sex couples are more likely than children raised by heterosexual parents to be drawn to a homosexual self-identity, homo-erotic attraction, and early, risky sexual behavior. The leading pro-lesbigay parenting study of Golombok and Tasker reveals, in the words of one reviewer, that “there is a statistically significant difference between [children with heterosexual parents and children with homosexual parents] when one compares ratings of same sex [sic] attraction.”²⁵⁷ Many other “no difference” studies also have produced data indicating “some significant differences between children raised by lesbian mothers versus heterosexual mothers in their family relationships, gender identity and gender behavior.”²⁵⁸ A notable but small critical study found substantial differences between children raised by lesbian mothers and children raised by single heterosexual mothers in terms of how many wanted to marry, how many wanted to have children, and in the sexual self-identities of the children.²⁵⁹ Even Stacey and Biblarz acknowledged that there seem to be differences between children raised by lesbigay parents and heterosexual parents relating to sexual orientation, gender-appropriate activities, and homoerotic behaviors.²⁶⁰ One psychological research specialist concluded: “The clearest effect on children of the sexual orientation of their parents seems to be on the children’s attitude toward sexuality and their acceptance of an experimentation with homosexual activity.”²⁶¹ Homosexual attraction for adolescents is fraught with serious individual and social risks including concerns about suicide, depression, and heightened rates of risky sexual behavior. Thus, the “no difference” claim is demonstrably false concerning adolescent sexual orientation and behavior.

Furthermore, the social science that purports to show “no difference” defies all theories of child development. As Stacey and Biblarz admitted:

²⁵⁶ CHARLOTTE PATTERSON, AM. PSYCHOLOGICAL ASS’N, LESBIAN & GAY PARENTING 15 (1995) (cited in Timothy J. Dailey, *Homosexual Parenting: Placing Children at Risk*, FAMILY RESEARCH COUNCIL (2002), <http://www.frc.org/get.cfm?i=IS01J3>).

²⁵⁷ Warren Throckmorton, *Do Parents Influence the Sexual Preference of Children?* (Feb. 19, 2004), <http://www.drthrockmorton.com/article.asp?id=39>; see also Belcastro et al., *supra*, note 249, at 112, 119 (discussing small study that reports significant sexual orientation difference); Paul Cameron & Kirk Cameron, *Children Of Homosexual Parents Report Childhood Difficulties*, 90 PSYCHOL. REPS. 71–82, http://www.familyresearchinst.org/FRI_homokids.html (last visited Aug. 28, 2006) (examining narratives of children raised by lesbigay parents, twenty-seven percent of older daughters and twenty percent of older sons described themselves as homosexual or bisexual).

²⁵⁸ Belcastro et al., *supra* note 249, at 119.

²⁵⁹ *Id.* at 108.

²⁶⁰ Stacey & Biblarz, *supra* note 246, at 167–69.

²⁶¹ Williams & Kelly, *supra* note 163, at 28.

Virtually all the published research claims to find no differences in the sexuality of children reared by lesbian parents and those raised by nongay parents—but none of the studies that report this finding attempts to theorize about such an implausible outcome. Yet it is difficult to conceive of a credible theory of sexual development that would not expect the adult children of lesbian parents to display a somewhat higher incidence of homoerotic desire, behavior, and identity than children of heterosexual parents.²⁶²

Parents' behaviors are known to have a powerful influence on children because children grow up imitating their parents.

Nonetheless, it seems quite likely that on some measures children raised by gay and lesbian parents will perform quite well. For instance, there is little reason to assume that many prospective parents who also want to engage in homosexual relations will not be just as able or willing as heterosexual married adults to teach their children to read, to provide nutritious food, to provide adequate shelter and clothing, or to provide financially for their needs. Given the demographics of the gay and lesbian sub-groups of American population, on some measures (perhaps educational and financial-related measures, for instance) one might rationally expect children raised by gays and lesbians to perform as well or even possibly better than children raised in the broad, general heterosexual parent population. However, those data do not address the real point of concern about lesbian parentage. Very few, if any, children will not be provided adequate shelter, clothing, food, and basic education in our society today. Those factors are "givens" in virtually all child placement and parentage decisions. We do not need to auction off children to the prospective parents who can offer the best educational, nutritional, or socio-economic status for the children. Proof that gay and lesbian couples may provide more resources and resource-based opportunities or that children who are raised by adults who provide such resources will perform better in some areas (educational achievement, grades, college entrance, etc.), therefore, is not dispositive of the parentage question.

The quantitative research into lesbian parenting is very immature and unstable. Even Charlotte Patterson has admitted that the "research on lesbian and gay parents and their children . . . is still limited in extent. . . . Longitudinal studies that follow lesbian and gay parent families over time are still needed."²⁶³

It appears, however, that dual-gender marital parenting has some significant health advantages for children. For instance, some research shows that "positive male figures

²⁶² Stacey & Biblarz, *supra* note 246, at 163.

²⁶³ PATTERSON, *supra* note 256, at 15.

in the lives of children are significantly related to a decrease of children requiring medication for behavior problems.”²⁶⁴

F. The Importance of the Biological Tie of Parentage

Another “formal” connection that some of the parentage law reform proposals seem to disregard is the importance of biological ties. While those do not always ripen into meaningful parenting, history suggests that the biological bond between parent and child can be a powerful force for good, as Professors Robert and Elizabeth Scott have noted:

Scholars representing very diverse perspectives and ideologies have emphasized the importance of the biological bond between parents and children as an influence on parental behavior. Evolutionary psychologists argue that biological parenthood inclines parents to protect and care for their children. By this account, parents nurture their young (and have little inclination to nurture the children of others) in order to protect their genetic heritage and maximize its survival. Researchers point to the much lower rates of violence directed toward biological children than toward stepchildren and non-biological family members as evidence of this biological inclination.

Less debatable is the powerful affective bond between parent and child. At the birth of their child, parents undertake a long-term relationship which usually builds incrementally and involves a deep emotional attachment. This relationship is distinctive among others characterized by emotional attachment, constituting what social psychologists describe as a “crescive bond,” which links irreplaceable individuals into a continuing relationship. For these bonds to form, the relationship must be an important component of the parents’ personal and social identity and must provide rewards, particularly self-esteem. Research suggests that the role of parent is among the most important in defining personal identity for both men and women.

The affective bond provides powerful grounding for a parental precommitment to care for the welfare of one’s children.²⁶⁵

²⁶⁴ Warren Throckmorton, *Is Psychology in Denial?*, WASH. TIMES, Jan. 3, 2006, at A12 (reviewing ROGERS WRIGHT & NICHOLAS CUMMINGS, *DESTRUCTIVE TRENDS IN MENTAL HEALTH: THE WELL-INTENTIONED PATH TO HARM* (2005)).

²⁶⁵ Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2433–34 (1995).

Recent research has emphasized the potentially protective shield that the biological bond to a parent provides for children.²⁶⁶ Professor Robin Fretwell Wilson has identified more than seventy studies that show increased risk of sexual abuse of girls in broken families.²⁶⁷ One probable explanation for the greater molestation is the absence of biological bonds with the men in the step- or cohabitation families into which the daughters' custodial mothers take them by remarriage or nonmarital cohabitation.²⁶⁸

Moreover, the biological bond may matter even more from a child-centered perspective than from an adult perspective. Biological parentage often matters to children, for reasons suggested in an editorial in a major national newspaper some years ago that illustrates the importance to children of parental bonds which from an adult perspective would be considered tragically dysfunctional:

In a story making the rounds among child welfare workers, Billy, who is 12, has run away at least twice from the foster home where he was placed by the [Massachusetts] Department of Youth

²⁶⁶ See, e.g., Martin Daly & Margo Wilson, *Child Abuse and Other Risks of Not Living with Both Parents*, 6 ETHOLOGY & SOCIOBIOLOGY 197 (1985) (explaining that children living with both natural parents are significantly less likely to be abused than children living with one natural parent and one stepparent); Joy L. Lightcap et al., *Child Abuse: A Test of Some Predictions from Evolutionary Theory*, 3 ETHOLOGY & SOCIOBIOLOGY 61 (1982) (claiming that adults lacking a genetic relationship with a child are more likely to neglect or abuse the child); Scott & Scott, *supra* note 265, at 2433–34, 2434 n.104 (citing Margo Wilson, *Impacts of the Uncertainty of Paternity on Family Law*, 45 U. TORONTO FAC. L. REV. 216, 222–24 (1987)) (arguing that evolutionary biology supports the claim biological parentage).

²⁶⁷ Robin Fretwell Wilson, *Children at Risk: The Sexual Exploitation of Female Children After Divorce*, 86 CORNELL L. REV. 251, 254–55 (2001) (“[A] review of forty-two publications observed that ‘[t]he majority of children who were sexually abused . . . appeared to have come from single[-parent] or reconstituted families.’” (alteration in original)).

²⁶⁸ See Owen D. Jones, *Evolutionary Analysis in Law: An Introduction and Application to Child Abuse*, 75 N.C. L. REV. 1117, 1207–36 (1997) (arguing that the greater risk of abuse at the hands of adults without a biological link to the child can be explained by absence of a biological connection); Wilson, *supra* note 267, at 268 (“[T]he evidence is legion that step-fathers represent a greater portion of abusers than their incidence in the general population, suggesting that they are more likely to abuse their daughters than biological fathers.”); see also BLANKENHORN, *supra* note 124, at 39–40 (“What magnifies the risk of sexual abuse for children is not the presence of a married father but his absence. More specifically, the escalating risk of childhood sexual abuse in our society stems primarily from the growing absence of married fathers and the growing presence of stepfathers, boyfriends, and other unrelated or transient males.”). See generally Wilson, *supra* note 267, *passim* (discussing summaries of numerous studies showing greater likelihood of abuse by biologically unrelated men than by biological fathers). But see Dana E. Prescott, *Biological Altruism, Splitting Siblings and the Judicial Process: A Child's Right to Constitutional Protection in Family Dislocation*, 71 UMKC L. REV. 623, 633 (2003) (arguing that “an analysis of biological versus non-biological relationships and the correlation between family (biological parent) dislocation and sexual victimization of children does yield telling results”).

Services. Each time he went back to his home—to his alcoholic mother and to his father who routinely beats him. After he was picked up the second time and asked why he keeps returning to those dreadful conditions, he replied: “Why, they love me. You should have seen what they gave me for Christmas.”

It turns out that the boy’s Christmas present was a \$3 pair of sneakers, and the story is being told to explain the growing feeling among child welfare professionals that their efforts should be redirected toward families and away from the traditional near-exclusive concentration on children. The argument is that even in families usually written off as hopeless, there may be shreds of love upon which to build; the result of that care and attention could be a stronger and healthier society.

....

[The former Massachusetts Commissioner of Youth Services said:] “We have loaded our kids down with helpers but we have done little to help their parents.”

There is some small amount of evidence that work with families is more cost-effective, and certainly cheaper, than working with a child alone. But even if it were not, it is a challenge that a caring society should accept.²⁶⁹

III. REFORMING PARENTAGE LAW: PRINCIPLES AND POLICIES

In the interest of respecting Professor Dwyer’s request for some brainstorming suggestions about how parentage law might be reformed and in hopes of “trigger[ing] stimulating debate among family law scholars and among many other scholars and professionals,”²⁷⁰ the following general principles and specific reforms are offered solely for discussion. They are meant for academic debate primarily, and before they could be implemented they would need to be modified in light of practical considerations and circumstances.

Seven foundational principles should underlie parentage law and parentage law reforms:

- (1) Every child has a biological father and a biological mother.
- (2) Biological connectedness matters in parenting for both adults and minors; it is generally a positive connection that supports

²⁶⁹ Editorial, “*They Love Me*”, CHRISTIAN SCI. MONITOR, Nov. 8, 1979, at 28.

²⁷⁰ Dwyer, *A Child-Centered Approach*, *supra* note 2, at 846; *see also* Meyer, *supra* note 4, at 857 (stating that participants were invited “to think creatively and expansively”).

good child-rearing by parents and good developmental outcomes for children.

- (3) Dual-gender parenting is generally a positive factor in parenting; children who are raised by both a mother and a father generally experience a degree of protection against some risk factors associated with child development that may be lacking in single-gender child-rearing.
- (4) Marriage generally provides a positive bond for parenting, and generally is associated with positive child-rearing outcomes for children.
- (5) The child-rearing environment that generally provides the best opportunity for optimal development for children is a home in which the child is raised by his or her biological father and mother who are married to each other.
- (6) Less-than-ideal (marital-biological-dual-gender) child-rearing relationships may provide successful environments for children to develop, but inherent in those alternative child-rearing systems are increased risks and greater potential obstacles to healthy child development.
- (7) Other quasi-parental relationships (including many actual and some imitative “extended family relationships”) can be very important to both parents and children and can be very supportive of and contribute to effective, happy, enriching child development experiences; the law should recognize such relations but distinguish them from and keep them subordinate to parental relations.

The following ten reform policy proposals might be considered for discussion to improve American parentage law:

- (1) Within thirty days of birth, one father and one mother shall be recognized or assigned for each child.
- (2) The birth mother, her husband, every potential father (i.e., any man who timely claims or is alleged by the birth mother, or her husband, or another potential father to have had sexual relations with the birth mother within ten months prior to the birth of the child), and every putative egg donor (i.e., women who claim to have donated their egg(s) to the birth mother) may request within two years after birth that the child’s biological parentage be determined by DNA testing; unless ordered otherwise for good cause by the tribunal, the birth mother, her husband, and every potential father or putative egg donor shall (upon pain of incarceration for contempt)

provide their DNA samples for testing within one week of the request; the results shall be promptly provided to all parties who provided samples, and to the parentage tribunal.

- (3) If the birth mother of the child is married to a man at the time of birth, and if both she and her husband sign the birth certificate within twenty-one days of the birth, they both shall be recognized as the parents of the child by the recording of the birth certificate.
- (4) If the birth mother is not married to a man, or if her husband does not sign the birth certificate, and she signs the birth certificate within twenty-one days of birth, she will be deemed the mother of the child; thereafter, child protective services shall be notified that the child has no legal father and may file a petition to establish paternity, and/or to terminate or reduce parental rights in the case of abuse, neglect, or dependency.
- (5) Beginning twenty-eight days after birth, any marital or putative biological parent may petition the tribunal (for up to three months after learning of the birth until the child is two years old) for a determination that he or she is a legal parent, unless the birth mother and her husband both have been recognized previously as the parents of the child.
- (6) Priority in the establishment of legal parentage of a child in contested cases should be given first to the biological mother and father of each child who are married to each other; second, in the absence of married biological parents, to the responsible unmarried biological parents who show a high level of parental responsibility, commitment, bonding, and love; and third, when such are not available, to a responsible, married biological parent and his or her lawful opposite-gender spouse who accepts the full responsibilities of parentage, and who shows a high level of parental responsibility, commitment, bonding, and love.
- (7) If a child does not have a legal father and legal mother established within thirty days of birth, the parentage tribunal immediately shall assign the child a substitute "temporary father" for any missing father and/or a "temporary mother" for any missing mother from either the opposite-sex kin of a legal parent, or from a list of men and women employed and trained to function as "temporary fathers" and women employed and trained to function as "temporary mothers" by the department of child protection. When appointed as "temporary father" or "temporary mother" for a child, those persons shall exercise full parental rights as a co-parent with joint legal custody of the child as long as they are assigned

as the temporary parent. (They shall relate to the other parent and child as if they are divorced parents with joint legal custody, with no physical custody, but with the visitation that such divorced parents without custody normally receive.)

- (8) The parental rights of a temporary parent cease and terminate upon the marriage of the legal (not “temporary”) parent of the child, or upon the adoption of the child by a spouse of the legal parent, or upon adoption by a man and a woman who are married, or upon replacement by another temporary parent,
- (9) The Governor shall be the ultimate head of the department of “temporary parents” and shall be responsible for the supervision of that department. If responsible, trained “temporary parents” are not available, the governor shall personally be named as “temporary parent” of the child missing a parent of his or her gender until adequate trained “temporary parents” are available.
- (10) Persons who are not legal parents may petition the tribunal to be legally recognized as members of the legal extended family as “quasi-aunts” or “quasi-uncles” or “quasi-grandparents” with the same legal rights, status, and responsibilities that such biological extended family members enjoy and with such visitation rights as the court deems to be in the best interests of the child, with due respect for and deference to the priority of parental rights of the child’s legal parent(s). The tribunal should recognize, support, and encourage the formation and exercise of such legally-created extended family relationships, but those relationships must be subordinate to the rights, relationship, and responsibilities of the legal parent(s) and temporary parent(s) regarding their children.

Comment: Because many (and increasing numbers of) children are being born outside of the optimal child-rearing parental forms, parentage law should be modified to facilitate the establishment of quasi-parental relationships equivalent to extended family member relationships (but subordinate and not equal to legal parenthood) for non-parents who can meet high parental standards and some significant quasi-parental substance (including proven, long-term care for, trusting and affectionate parent-like relationship with, and sacrificial commitment to a child), but who are not and cannot become a parent (because the child already has two parents, or a parent of the same gender, or the parental presumption bars custody, etc.). Thus, states should allow the establishment of non-parental quasi-relative relationships—such as equivalent to grandparent or uncle or aunt relations—for persons who meet high standards and show some significant quasi-parental bond of substance and commitment. Since all humans and all human relationships are imperfect, some

allowance must be made for adults' failures and short-comings and mistakes. Nonetheless, parentage law should clearly recognize, prioritize, encourage, reinforce, and communicate the value of conjugal marital and biological parenting.²⁷¹

CONCLUSION: UNITING FORM AND SUBSTANCE IN PARENTAGE LAW

Considering how parentage law can be improved is a valuable exercise, and the convener of the Parentage Roundtable and publishers of the Parentage Symposium are to be commended for their valuable contribution to the parentage law reform debate. Just as consideration of how changes in parentage law might improve it, so also the benefits and value of existing forms and structures ought to be carefully reconsidered. More than a decade ago, respected social scientists Sara McLanahan and Gary Sandefur concluded their review of the social science evidence regarding parenting by single adults with a surprising declaration. This declaration has relevance for students of possible parentage law reforms:

If we were asked to design a system for making sure that children's basic needs were met, we would probably come up with something quite similar to the two-parent family idea. . . . The fact that both adults have a biological connection to the child would increase the likelihood that the parents would identify with the child and be willing to sacrifice for that child, and it would reduce the likelihood that either parent would abuse the child.²⁷²

Marriage strengthens the bond between parents and children, thus increasing the likelihood "that children ha[ve] access to the time and money of two adults [and] . . . provid[ing] a system of checks and balances that promote[s] quality parenting."²⁷³

The conclusion of Professors McLanahan and Sandefur reflects George Santayana's famous observation that "[p]rogress, far from consisting in change, depends on retentiveness. . . . Those who cannot remember the past are condemned to repeat it."²⁷⁴

²⁷¹ The term "marital parenting" means conjugal marital parenting by a father and mother who are married to each other, and, ideally and preferably, who are the biological father and mother of the child[ren]. See generally George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 595 (1999) ("Not only do children need two parents; it also seems that ideally a child should have both a mother and a father."); Wardle, *Multiply and Replenish*, *supra* note 115, at *passim* (advocating marriage links to safe sex, responsible procreation, and optimal child-rearing).

²⁷² SARA McLANAHAN & GARY SANDEFUR, *GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS* 38 (1994).

²⁷³ *Id.*

²⁷⁴ GEORGE SANTAYANA, *THE LIFE OF REASON* 82 (Dover 1980). This quote was brought to my attention by Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 235 (2005).

While considering possible parentage law reforms, one must also recognize the lessons that human history and experience teach. As Santayana suggested, in our quest for progress in parentage law, we can ignore what past generations experienced and learned about parenting only at the painful cost (and often the terrible cost for children) of having to relearn difficult lessons and rediscover forgotten realities. Human experience teaches that biological connection, marriage, and dual-gender parenting provide substantial benefits in child-rearing. The law historically has recognized those benefits and preferred those forms in order to promote the substance of good child-rearing. Parentage reform proposals and discussions clearly should not ignore or undervalue the contributions of those forms, systems, relations, and environments in parenting.

To ignore form in pursuit of substance in parenting has been disastrous and would invite chaos for children, families, and society. Substance alone, in the abstract, is not a very sound criteria for deciding cases or a basis for public policy unless it is manifest in forms and structures that give it objective reality, promoting and benefitting children, families, and society. As Susan Bandes has acknowledged, the "law cannot accommodate the endless subtleties and variations that might exist among emotional states [At some point,] these variables render the translation into legal context impossible[.]"²⁷⁵ By leveling form and treating all structures as equal, the most socially valuable relationships are diminished and the most trivial are enhanced.

Marital-biological parentage by a mother and a father unites both form and substance. Marriage reinforces and enhances the ties of biological parentage and provides an additional bond that both generates and strengthens natural affection.

Parents act in a dual capacity—for themselves and for society. They act for themselves in raising up their own posterity and nurturing, protecting, and providing the best opportunities for the bearers of their hopes, their dreams, their genetic code, and their own unfulfilled aspirations. Parents also act as trustees for society, which has great interests, both immediate and long-term, in the care and rearing of children. Parentage law is important because society must identify the adults responsible for supporting and rearing children. The law of parentage sends an important message to both adults and children about social expectations of intergenerational responsibility. It encourages the welfare of children by giving legal incentive to their parents to provide for their support and socialization and by identifying the adults who have these responsibilities.

Marital parentage by biological parents provides the optimal setting for child-rearing. Every child deserves the legacy of being born within the bonds of matrimony with a mother and father who love each other and their children. Every child deserves to be born to parents who are totally committed to the welfare of the child and their family. Every child deserves to be reared by a father and a mother who honor each other with complete fidelity. Parentage law should confirm that principle and emphasize that parents have a critical responsibility to raise their children in love, to provide

²⁷⁵ Susan A. Bandes, *Introduction*, in *THE PASSIONS OF LAW* 1, 13 (Susan A. Bandes ed. 1999).

for their physical, emotional, and educational needs, and to encourage them to develop their talents. The protective value to children of having both a legal father and a legal mother who are married to each other is undeniable. Our legal policy should protect and promote that form of parentage.

While looking for ways to value and recognize other child-rearing relations and forms as social structures shift and alter, the law must not forget the advantages and lose the legacy of marital, biological parenting. The recent past indicates that the near future will offer many challenges. Childbearing out of wedlock continues to rise, cohabitation is increasing, and marriage continues to be unstable. The law must strive to provide the best child-rearing opportunities for many children who are born in sub-optimal family circumstances, without undermining the integrity or denigrating value of the optimal child-rearing environment. Extremes in theory must be rejected, for they put ideology above children. Balancing the “is” and the “ought” in parentage law, for the sake of all children, requires that parentage law recognize and protect effective forms of parenting in order to protect the substance of optimal parenting, as well as recognize subordinate alternative quasi-parental relationships that manifest stable and promising child-rearing substance.