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## Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty

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# WHICH TIES BIND? REDEFINING THE PARENT-CHILD RELATIONSHIP IN AN AGE OF GENETIC CERTAINTY

June Carbone\* and Naomi Cahn\*\*

To prosper, children need, at a minimum, the ability to draw on adult material resources — food, clothing, shelter, love, care, education, and guidance. Children must develop, in addition, a social identity, a sense of self that connects them to the society around them. With the changing conceptions of the family, we must face the issue of how society ensures children's well-being, and whether we should continue to police family structure or become more willing to focus attention on children's individual needs. In addressing these topics in this paper, we therefore start with two overriding questions: (1) Are children's rights best protected by the assertion of individual claims or by the design of a regime that can be expected to advance their interests?; and (2) to what degree should children's claims on adults responsible for their care depend on genetic ties?

We plan to begin by staking out a position on the nature of children's rights. We believe that the legal system recognizes these rights not by treating children as autonomous actors but by identifying the individuals and institutions most likely to promote children's interests and encouraging their success. Historically, this principally meant emphasizing the unity of sex, reproduction, and childrearing; in the modern era, it means redefining parenthood in light of the separation of these activities. In either event, however, it means delineating clear lines of authority for those responsible for children rather than case-by-case decision-making.

Second, we will examine what is known about the relationship between genetics and childcare. This examination will focus on the existing empirical and socio-biological literature that considers the importance of biological relationships. While this literature does not produce a definitive set of answers, and while it should not be used to dictate public policy, it suggests that genetic ties play an important role, albeit a role mediated by intimate relationships.

We use the empirical literature to critique selected areas of family law as they have interpreted the importance of the genetic link. This examination will focus primarily on paternity, starting with the constitutional status of the marital

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presumption, proceeding to the state court treatment of the presumption following the Supreme Court's fractured decision in *Michael H.*,<sup>1</sup> and ending with reconsideration of the role of marriage in determining parenthood. We will conclude that trade-offs exist between recognizing the mother's partner, who may be the most likely source of parental care during the child's early years, and identifying a committed parent, capable of playing a role throughout the child's minority. We believe that in early societies the critical period for the child's well-being was the period immediately following birth when two-parent support could decisively tip the balance in favor of survival. In the modern era, newborn health may be less of an issue while long term parental ties may have become more important. These considerations produce a dilemma: Identifying the biological father at birth may undermine the mother's existing partnership, but failing to inquire about paternity at birth may prevent the child from establishing a relationship with an adult who is committed to her and not just her mother. In an era of readily available divorce and DNA testing, we need to reexamine the policies likely to promote permanent ties between children and the adults in their lives.

Finally, we propose modifying existing law concerning paternity and second parent determinations at birth. In an era when children are likely to discover the truth of their biological origins whether all of the concerned adults wish it or not, testing for biological certainty ought to be made a routine part of the birth process. Given the religious and cultural sensitivities involved, however, some ability to waive testing is also necessary. Nonetheless, because of the strong policy reasons in support of testing, waivers should be tied to strong estoppel measures and provisions designed to deter fraud. Under such a system, a married man<sup>2</sup> must either undergo paternity testing or he will be estopped from subsequent challenges to paternity. Although the issues are more complex and extend beyond the scope of this paper, a similar system could apply to unmarried parents, encouraging paternity testing and, in appropriate cases, voluntary declarations that establish parental status based on intent.<sup>3</sup> In either case, those who sign parenting acknowledgments will be estopped from any subsequent challenge to their parenting status. This system ensures stability for the child. A man cannot, upon divorce,

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<sup>1</sup> *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), *reh'g denied*, 499 U.S. 984 (1991).

<sup>2</sup> As discussed *infra*, we use the term "married man" because no state yet recognizes same-sex marriage. Moreover, a marital presumption of biological parenthood would have no direct application in a same-sex relationship. Instead, recognition of children born into the marriage is likely to involve either the stream-lined provisions now applicable in most states to step-parent adoptions, or separate recognition of the parental status of same-sex couples who arrange for the birth of a child as part of their partnership on the basis of intent.

<sup>3</sup> The only issues we discuss in this Article, however, are the marital presumption and the similar position of an unmarried man who believes he is the biological father, but is not. Voluntary declarations for unmarried parents present complex issues that will be discussed further in our forthcoming book.

claim that he has no obligations to children for whom he has functioned as a father. Similarly, an unmarried man who has signed a voluntary paternity acknowledgment, or a second parent who has signed a parenting acknowledgment, assume obligations as a responsible legal parent. We believe that, in an era in which biological connections are increasingly easy to determine, parental relationships should be based on truth and certainty rather than convenience or presumptions — or even biology.

#### I. ARE CHILDREN'S RIGHTS AN OXYMORON?: PROTECTING THE INTERESTS OF THOSE WHO CANNOT BE INDEPENDENT LEGAL ACTORS

Charting children's interests in terms of their moral and legal claims on adults is a difficult task. Given children's vulnerability and limited autonomy, their well-being most systematically lies with establishing adult relationships that will nurture and protect them. The law has tended to promote the creation of these relationships and then to defer to the autonomy of adults.<sup>4</sup> As a result, children often lack recognition as independent legal actors,<sup>5</sup> and the law rarely acknowledges the complexity of children's claims in a multi-party context. Instead, when disputes arise, the legal system packages actions into one of two two-party formats. In the first, children's interests are equated with those of their guardians. Child support disputes, for example, are structured as claims by the child against the non-custodial parent (NCP). Both the NCP's grievances against the custodial parent (CP) and the child's interest in the quality of the relationship between two disappear from view in the first format.<sup>6</sup> In the second format (child abuse cases come most readily to

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<sup>4</sup> Katharine T. Bartlett, *Rethinking Parenthood As An Exclusive Status: The Need For Legal Alternatives When The Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 890–93 (1984) (arguing that this is an instrumental view of family regulation).

<sup>5</sup> Indeed, there are questions as to whether children have standing to pursue actions against their parents. *See, e.g.*, the controversy surrounding Greg Kingsley's efforts to "divorce" his parents discussed in *Kingsley v. Kingsley*, 623 So. 2d 780 (Fla. Ct. App. 1993) (overturning the trial court's conclusion that the child had standing to bring parental termination action, but finding the error harmless). *See generally* Catherine Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 223 (1999) [hereinafter Ross, *An Emerging Right*]; Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 FORDHAM L. REV. 1571 (1996) [hereinafter Ross, *From Vulnerability to Voice*] (arguing that children should have legal rights independent of their parents).

<sup>6</sup> *See, e.g.*, *County of San Luis Obispo v. Nathaniel J.*, 57 Cal. Rptr. 2d 843 (Ct. App. 1996) (holding a fifteen year-old boy liable for child support for a child born to a thirty-four year-old who seduced him); *State ex rel. Hermesmann v. Seyer*, 847 P.2d 1273 (Kan. 1993) (finding a boy who impregnated his babysitter in a relationship that began when he was twelve was still liable for child support even though she had been convicted of statutory rape); *L. Pamela P. v. Frank S.*, 449 N.E.2d 713 (N.Y. 1983) (finding an allegation that a

mind), the state acts on behalf of a child for protection against her custodians. What is most clearly at stake in such actions, explicitly or implicitly, is whether the state will intervene, albeit in the name of the child but regardless of the child's actual wishes, to deny the caretaker continued custody.<sup>7</sup>

These formats underscore the fact that the most important legal determination affecting children is the legal definition of parenthood and the lines of responsibility that connect parents and children. The law draws bright line distinctions between parents and non-parents and attributes decision-making power exclusively to the former (or those acting in their stead).<sup>8</sup> Once the parenthood determination has been made, the courts intervene with great hesitation, and then most effectively only to determine custody or a change in caretakers.<sup>9</sup> The Supreme Court's recent

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mother lied to a father about use of birth control irrelevant to his child support obligation); see also Ross, *From Vulnerability to Voice*, *supra* note 5 (arguing that children need representation separate from their parents in all custody proceedings).

<sup>7</sup> See James G. Dwyer, *Children's Interests in a Family Context — A Cautionary Note*, 39 SANTA CLARA L. REV. 1053, 1060–61 (1999) (observing that children are often literally out-of-sight at such hearings and that the court focuses overwhelmingly on whether the parent's behavior is sufficiently egregious to warrant termination). The state, of course, does regulate the parent-child relationship in other ways, mandatory education and child labor laws constituting prime examples. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding child labor laws over parent's religious objections); cf. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (invalidating compulsory education over parents' religious objections); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (invalidating a law compelling public school attendance); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (invalidating a law prohibiting instruction in German). Nonetheless, state intervention to enforce such mandates is rare, and the ultimate practical threat in the face of parental opposition is the removal of custody, whether directly or through the imprisonment of the parents. Juveniles receive the greatest recognition of their rights when the state proceeds directly against them. See, e.g., Naomi Cahn, *Juvenile Justice*, \_\_\_ WIS. L. REV. \_\_\_ (forthcoming 2003).

<sup>8</sup> The law often denies standing altogether to legal non-parents. The result of the decision in *Michael H.*, 491 U.S. 110, for example, was to deny standing to a biological father to challenge the paternity of the mother's husband.

<sup>9</sup> Scott and Scott's notion of parents as fiduciaries captures much of the force of this arrangement. See Elizabeth Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995). The law identifies those individuals most likely to advance children's interests and then defers to their judgment. The grounds for deference weaken, however, once parents part. First, separated parents are less likely than parents in intact families to act as a unit and reach joint decisions. Second, separated parents are more likely to experience conflicts of interest in which they will be tempted to use the relationship with the children to advance their struggle with the other parent. Finally, the privacy interests that compel hesitation in intervening in intact families are weaker, particularly if the parents are already in court seeking judicial resolution of their disputes. Carbone has argued that the adoption of a strong norm linking children's well-being to continued contact with both parents has increased the importance of identifying those circumstances in which the parents' relationship with each other undermines children's well-being. Such conduct, which Carbone identified with high conflict cases involving either domestic violence or parental alienation, could be described

decision in *Troxel*,<sup>10</sup> though indicative of a deeply divided court, still concludes that parental autonomy is entitled to significant constitutional protection.<sup>11</sup>

The parentage determination is thus a centerpiece in the protection of children's interests. To what extent do courts consider children's rights in determining the legal status of children? The short answer is not at all. Discussions of parentage often assume an answer, and when they do, they most often assume that the word "parent" refers a child's biological progenitors. The law is more varied and complex. The definition of legal parent varies not only over time and culture but also by jurisdiction. Some states, for example, terminate the parental status of a sperm donor contributing to artificial insemination in all cases in which a physician is involved<sup>12</sup> and in other states only if the recipient is married, irrespective of a doctor's involvement.<sup>13</sup> Still other states have never resolved the matter or do so on a case-by-case basis in accordance with estoppel principles.<sup>14</sup> Only in the latter cases may a particular child's interests come into play at all. In the other

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as breaches of the parent's fiduciary duty to their children. See June Carbone, *The Missing Piece of the Custody Puzzle: Creating a New Model of Parental Partnership*, 39 SANTA CLARA L. REV. 1091, 1148 (1999).

<sup>10</sup> *Troxel v. Granville*, 530 U.S. 57 (2000).

<sup>11</sup> Scott and Scott's fiduciary notion, however, assumes (for good reason) that parents are more likely than others to act in their children's interests, but without a particularly effectively means of enforcing that obligation. See *supra* note 9. The fiduciary label in commercial contexts subjects the fiduciary to more stringent legal requirements that may be enforced through actions by those parties adversely affected by the decisions. In the family context, however, while parents can and should be expected to assume greater duties toward their children than toward strangers, the law most commonly responds to the parental designation with a higher, rather than lower, standard of deference. See *Troxel v. Granville*, 530 U.S. 57 (2000) (allowing a mother to dictate visitation time to paternal grandparents); cf. Barbara Bennett Woodhouse, *The Dark Side of Family Privacy*, 67 GEO. WASH. L. REV. 1247, 1253 (1999) ("The caretaking unit, composed . . . by persons who are inherently and essentially in positions of inequality, is uniquely dangerous and more open, rather than less open, to abuse if completely privatized. This is especially true because children have few, if any, exit options.").

<sup>12</sup> See Audra Elizabeth Laabs, *Lesbian ART*, 19 LAW & INEQ. 65, 70-73 & n.61 (2001) (discussing California provisions terminating a sperm donor's parental status if a physician is used).

<sup>13</sup> See Kyle C. Velte, *Egging on Lesbian Maternity: The Legal Implications of Tri-Gametic In Vitro Fertilization*, 7 AM. U. J. GENDER SOC. POL'Y & L. 431, 442-43 (1999) ("Of the thirty-four states that currently have legislation dealing with AID, sixteen have statutes that address AID only in the context of marriage.").

<sup>14</sup> See Bridget R. Penick, Note, *Give the Child a Legal Father: A Plea for Iowa to Adopt a Statute Regulating Artificial Insemination by Anonymous Donor*, 83 IOWA L. REV. 633 (1998). See generally Marsha Garrison, *Law Making for Baby Making: An Interpretative Approach to the Determination of Legal Parenthood*, 113 HARV. L. REV. 835, 918 (2000) (reviewing the different state approaches, and arguing that the form of conception should not lead to substantive differences in the definition of parenthood).

jurisdictions, parenthood is a matter of law. Either the law terminates the sperm donor's parenthood on the basis of intent or it does not. The individual child's concerns are not before the court.

To the extent that children's rights come into the determination of parenthood, therefore, it is in the design of the regime rather than its implementation in specific cases.<sup>15</sup> State legislatures, for example, are sympathetic to the use of artificial insemination to treat infertility; they are divided about the use of the procedure to supply sperm to single women who have not secured a husband's participation in the child's upbringing. The dispute is one about children's interests. Some legislatures equate children's well-being with the existence of a two-parent family. These legislatures are not willing to put the state's imprimatur on other arrangements, and they are unwilling to lower the barriers to single parenthood. While these rules may work to the disadvantage of some children, the hope is that they will help other children, if only by discouraging their birth in inopportune circumstances.

The connection between the legal definition of parenthood and children's interests thus depends on the soundness of the regime (whether children are really better off not being born than being born in to single parent families) and the effect the legal rules have on parental behavior. If a given state terminates a sperm donor's parental status only where the recipient is married, a prospective unmarried mother may (a) not become pregnant, (b) use sperm from a friend in whom she has confidence rather than an anonymous donor, or (c) have the baby in California, which terminates the sperm provider's parental status regardless of the mother's marital status. Only (a) furthers the legislative intent of discouraging the enterprise. The effect of widespread circumvention of the rules then depends on the trade-offs: Does use of a known sperm donor whose identity may be available to the child further children's interests to a greater degree than use of an anonymous donor? Is birth in California better than birth elsewhere?

The historic effort to provide for children's well-being and to link children to an appropriate set of parents involves exactly these trade-offs. Legislators have ordinarily sought to advance children's well-being not by providing for them directly but by encouraging their birth within marriage.<sup>16</sup> In its purest, most

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<sup>15</sup> See, e.g., MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 201-02 (1985). Grossberg comments that:

reformers exposed the problem at the heart of bastardy law: whether the individual or the family was the unit to be protected by the law. Reformers, like most of those who tackled the issue, divided over the question. They struggled to find a way to aid these children without undermining the home as a social institution.

*Id.* at 228.

<sup>16</sup> See June Carbone, *Morality, Public Policy and the Family: The Role of Marriage and the Public/Private Divide*, 36 SANTA CLARA L. REV. 267, 269-71 (1996).

coherent form (and, indeed, in the aspirational images most religions continue to promote), marriage celebrates the unity of sex, reproduction, and childrearing. As an *institution*, marriage draws a bright-line distinction between legitimate and illegitimate sexual relationships, assumes (particularly but not exclusively within the Catholic tradition) that couples marry with at least an openness to childbearing,<sup>17</sup> and emphasizes the lifelong nature of the marital commitment as part of the creation of a family as a permanent entity.<sup>18</sup> So long as couples bear children solely through sexual relations undertaken within marriage, parenthood is a simple matter: The biological mother and father are the child's legal parents, and marriage unites them in an enterprise of lifelong duration.

Despite the almost universal association of marriage with this union of sex, reproduction, and childrearing,<sup>19</sup> each era, each culture, and, indeed, each legal regime involves a different set of trade-offs with respect to the relationships that fail to conform to the established rules. In these trade-offs, the logic of the underlying legal rules and the needs of society often carry more weight than genetic connections. Consider, for example, the doctrine of *filius nullius*, which English law adopted at the height of the emphasis on primogeniture to legally separate parents from their genetic offspring. Blackstone explained that, under the law of that era, the child born outside of marriage was literally “the son of nobody[:]”

The incapacity of a bastard consists principally of this, that he cannot be heir to any one, neither can he have heirs, but of his own body; for, being *nullius filius*, he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived.<sup>20</sup>

The harshness of the rule, which even extended to children whose parents married after their birth,<sup>21</sup> served partly to insure a clear line of succession in an era in which primogeniture was the norm, and the living property holder had limited

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<sup>17</sup> See JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW 136 (2000) (describing the partnership and procreative purposes of marriage as dual parts of a single objective within the Catholic tradition). Although contraception has always been available in some form, and the major push toward planned parenthood began in the eighteenth-century, well before the pill and other modern contraceptive techniques, our era is unique in the Anglo-American tradition in the extent to which marriage and readiness for procreation have been separated. *Id.* at 102–07.

<sup>18</sup> *Id.* at 139–40.

<sup>19</sup> That is, in an aspirational sense, marriage is almost universally identified with sex, reproduction, and childrearing. This does not mean that in every culture, marriage is the exclusive legitimate ambit for these activities or that every marriage is necessarily associated with all three.

<sup>20</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*447.

<sup>21</sup> 1 FREDERICK POLLOCK & FREDERICK MAITLAND, THE HISTORY OF ENGLAND BEFORE THE TIME OF EDWARD I 127 (2d ed. 1923).



ability to change the order of descent through a will.<sup>22</sup> Parents had the period of the pregnancy to safeguard the mother's reputation and the child's inheritance by marrying. Permitting them to do so after the child's birth might have invited long-delayed marriages designed to circumvent inconvenient heirs. English property law countenanced no such result.<sup>23</sup>

The law also served to reinforce the stigma associated with non-marital sexual relationships. Ayer comments that: "It was in the interest of morals that the children born of a valid marriage should have privileges denied children born of illicit unions. Parents were to be punished in their children's disabilities more effectively than in themselves."<sup>24</sup> Draconian punishments, however, win widespread acceptance only when they produce a high degree of compliance. English parishes kept comprehensive records of births, deaths, and marriages. These records demonstrate that English bastardy rates, as they were then called, varied from less than one percent in the 1650's to six percent in 1790.<sup>25</sup> The rise was sufficient both to prompt cries of alarm from the keepers of public morality and to intensify calls to lighten the restrictions on the fornicators and their offspring.<sup>26</sup>

If traditional English marriage law kept parents and their non-marital children legally apart, it could also secure legitimate status for children of dubious paternity. Once a couple married, the marital presumption discouraged too close an inquiry into the children that followed. Nonetheless, the presumption was not absolute; it was simply administered in a way that avoided colliding "irrefutably with alternative facts."<sup>27</sup> The presumption, for example, did not apply to cases in which

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<sup>22</sup> Helmholz emphasizes that the doctrine applied in its strictest sense to the law courts, which oversaw title to property. The ecclesiastical courts recognized the moral obligation of a father to provide for his non-marital offspring and had the power to order support upon pain of excommunication. Richard H. Helmholz, *Support Orders, Church Courts, and the Rule of Filius Nullius: A Reassessment of the Common Law*, 63 VA. L. REV. 431, 445 (1977).

<sup>23</sup> Joseph Ayer explains further that: "[S]ince it is necessary that the heir should be one whose right could be ascertained, therefore marriage, an act capable of proof, could be relied upon as determining the heir." Joseph C. Ayer, Jr., *Legitimacy and Marriage*, 16 HARV. L. REV. 22, 23 (1902). Of course, this doesn't explain why the date of the marriage matters. See Laurence C. Nolan, "Unwed Children" and Their Parents Before the United States Supreme Court from *Levy* to *Michael H.*: Unlikely Participants in Constitutional Jurisprudence, 28 CAP. U. L. REV. 1, 7 (1999) ("Marriage provided certainty in the law as it pertained to paternity, avoided fraudulent claims to paternity, and facilitated the administration of decedents' estates.").

<sup>24</sup> Ayer, *supra* note 23, at 37.

<sup>25</sup> See LAWRENCE STONE, *THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500-1800*, at 390 (abridged ed. 1979) (charting illegitimacy rates in England between 1580 and 1800 as varying from less than one-percent in the mid-1600s to about six-percent in the late 1700s).

<sup>26</sup> *Id.* at 399-400.

<sup>27</sup> Janet L. Dolgin, *Choice, Tradition, and the New Genetics: The Fragmentation of the Ideology of Family*, 32 CONN. L. REV. 523, 528 (2000).

the mother's husband clearly could not have fathered the child — “cases in which a man was sterile, impotent, or, in Blackstone's words, ‘extra quatuor maria,’ [beyond the four seas] for above nine months.”<sup>28</sup> Yet the courts did not permit either spouse to testify to the husband's nonaccess.<sup>29</sup> Lynne Kohm concludes that “the result, in a time before blood testing and DNA analysis, was that the marital presumption of legitimacy was almost impossible to rebut.”<sup>30</sup>

These examples demonstrate the continuing tensions between the genetic tie and socially constructed ties. Marriage is an institution historically designed to promote the biological family. Proof of the lack of paternity could destroy the marriage and the paternal relationship between father and child. Uncertainty, however, (at least if suspicion and jealousy could be kept within check) need not have such consequences. The very importance of the distinctions between legitimate and illegitimate children made the courts reluctant to disturb established relationships. Whatever the truth of their birth, individual children's interests clearly depended on the strength of their relationship to their mother's husband. Happily for the children, the institution of marriage and the orderly administration of the courts also benefitted from the efforts to discourage charges of infidelity.

In this era biology mattered, but the concept of sexual virtue at the core of marriage mediated its importance. While commentators in almost every era, for

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<sup>28</sup> *Id.* at 527 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*445).

<sup>29</sup> See Lord Mansfield's Rule, first enunciated in *Goodright v. Moss*, 98 Eng. Rep. 1257 (1777). Lynne Kohm identifies the rule with the traditional marital evidentiary privilege that prohibited spouses from testifying against each other, but others see it as a family law rule designed to further the legitimacy of children. See Lynne Marie Kohm, *Marriage and the Intact Family: The Significance of Michael H. v. Gerald D.*, 22 WHITTIER L. REV. 327, 335 (2000); James Duane, *The Bizarre Drafting Errors in the Virginia Statute on Privileged Marital Communications*, 12 REGENT U. L. REV. 91 (1999) (discussing the Virginia marital communication privilege); cf. Dolgin, *supra* note 27, at 528 (concluding that the essential goal of this presumption, however, was to manifestly “protect children from the hardship of being defined as illegitimate and more generally, to promote the ‘peace and tranquility of State and families.’”) (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 125 (1989) (quoting JAMES SCHOUER, LAW OF THE DOMESTIC RELATIONS § 225, at 304 (3d ed. 1882))). I suspect that the rule was intended to protect the courts as well. Permitting testimony as to the mother's fidelity could have destroyed her reputation even if the child were in fact the husband's, and the truth of any testimony about such intrinsically private matters would be impossible to establish. The courts could not have been eager to preside over such determinations. See Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 564 (2000) (arguing that the ban on testimony of non-access was originally part of a wholesale bar of spousal testimony about the intricacies of the marriage but that the bar on marital communications eroded around the turn of the last century in the United States, and the ban survived only on testimony that would bastardize a child).

<sup>30</sup> Kohm, *supra* note 29, at 335.

example, decried the unfairness of visiting the sins of the parents on the illegitimate offspring, a strand of English literature suggests that non-marital children were seen as unworthy, not merely because of their legal status, but also because they were likely to inherit the character flaw that had made their parents (and particularly, of course, their mothers) succumb to temptation. Conversely, popular stories delight in the discovery that the impoverished child of noble character is really the rightful heir to a great estate.<sup>31</sup> The social characteristics associated with marital virtue and the genetically determined character traits that permit its realization thus fuse. Children's interests in such an era were associated with making sure that their parents had internalized the proper set of family virtues and successfully transmitted — through genes, for example, and instruction — the same moral character to their young.

Modern family law proceeds from the dismantling of the system designed to insure that children would be raised by their genetic parents. If the centerpiece of the older system was insistence on the unity of sex, reproduction, and childrearing, enforced through the stigmatization of extramarital sex,<sup>32</sup> then the most fundamental change proceeds from separation of sex and reproduction. Americans marry later in an era more accepting of non-marital sexuality.<sup>33</sup> The result is a larger number of sexually active singles with no immediate plans to reproduce. Engaging in sexual activity therefore need not involve either openness to procreation or a commitment to limit sexuality to circumstances consistent with responsibility for

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<sup>31</sup> See, e.g., FRANCES HODGSON BURNETT, *LITTLE LORD FAUNTLEROY* (1886) (finding that the impoverished child was the son of the lord's third son, whereas the presumed heir, who was the child of the lord's eldest son, turned out to be illegitimate due to the timing of his birth).

<sup>32</sup> As my colleague David Friedman points out, greater wealth makes the creation of ideal arrangements less critical to survival across the board. DAVID D. FRIEDMAN, *LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS* 177 (2000). In a hunter-gatherer society, the failure of a genetic mother to care for her offspring, or of the genetic father to provide for the mother, might lead directly to their children's death. In Victorian society, it would almost certainly lead to their impoverishment and might well imperil their survival. Indeed, in Boston in 1914, more than three-fifths of illegitimate children would become wards of the state by their first birthdays. CARBONE, *supra* note 17, at 201. In modern American society, single mothers are relatively better able to care for their children, and social service and charitable agencies provide enough support so that survival is rarely at issue.

<sup>33</sup> The average age of first marriage for men is twenty-seven today, twenty-five for women — compared to the 1960s, when it was twenty-three and twenty, respectively. Overall marriage rates have dropped forty-one percent during the same period. University of Wisconsin researchers have also discovered that the number of people living together before marriage has grown tenfold — from just 430,000 in the 1960s to 4.26 million today. Nat'l Ctr. for Pol'y Analysis, Social Issues — Put Off Marriage? (2001), at <http://www.ncpa.org/pd/social/pd061500c.html>; see also Jay D. Teachman et al., *The Changing Demography of America's Families*, 62 J. MARRIAGE & FAM. 1234, 1235–36 (2000).

children.

Closely following the decoupling of sex and procreation is the separation of marriage and childrearing. In the nineties, one in every three births took place outside of marriage, one of every two marriages ended in divorce,<sup>34</sup> and over half of American children would spend some part of their childhood in a single parent family. The decisions to conceive and bear children do not necessarily trigger a commitment to remain involved with either the other parent or the child, and a decision to marry need not result in relationships that endure through the child's minority. The indirect forces that linked children to their genetic parents can no longer be expected to do so on anything close to a universal basis.

With the destruction of the system that tied children to two married parents, the courts have become more likely to be involved in resolving family disputes. In such a context, Dwyer and Vallentyne's suggestion that the courts employ a best interests test to make children's interests central to all decisions affecting them, including designation of their caretakers, has more traction. Nonetheless, determination of children's interests on a case-by-case basis, if it is to be fair, predictable, and effective, requires a framework for determining where those interests lie. Modern custody decisions, for example, most frequently proceed from a starting assumption that children have an interest in continuing relationships with each of their legal parents. When this assumption is treated as a matter of right, it serves as a trump, often asserted by the non-custodial parent (albeit in the child's name) to veto a move, secure a more favorable visitation schedule, excuse inappropriate behavior, or threaten loss of custody.<sup>35</sup> The ability of children's rights to serve children's

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<sup>34</sup> Although divorce rates have leveled off, the ranks of the never married have increased, suggesting fewer, more stable marriages. Margaret F. Brinig, *The Role of Socioeconomics in Teaching Family Law*, 53 J. LEGAL EDUC. (forthcoming 2003) (showing divorce rates peaking in 1980 and leveling off at the end of the nineties at levels similar to those of the early seventies); see also CARBONE, *supra* note 17, at 79 (showing rates of married men and women).

<sup>35</sup> See, e.g., *Renaud v. Renaud*, 721 A.2d 463 (Vt. 1998), which involved a father who had run off with another woman while the child was under two. The mother, angry at the father's behavior, had undermined his relationship with the child through, among other things, baseless allegations of sexual abuse. *Id.* at 465. The court conditioned the continued award of custody to the mother on her cooperation with the father's efforts to reestablish his relationship with the child. *Id.* at 468. In an earlier era, the father's misconduct would have disqualified him from visitation over the mother's objections, in part, because he would be treated as an inappropriate role model. For those courts influenced by Freud, Solnit and Goldstein's model of the psychological parent, the award of shared custody, with the father receiving visitation equal to about fifty percent of the child's time, would be seen as undermining the custodial parent's autonomy to the detriment of the child. JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTEREST OF THE CHILD* 38 (1979). In contemporary Vermont, the child's interests in a relationship with both parents were viewed as paramount. The principal tensions in the case were not even so much between the parents' respective rights as between competing definitions of the child's interests. See *Renaud*, 721 A.2d at 466.

interests depends on the wisdom of the regime that defines them.

We prefer a regime that continues to try to identify those adults who are most likely to put children's interests ahead of their own. Studies overwhelmingly show that children raised in intact families do better on a variety of measures than children raised in single-parent families and that a substantial portion of the difference can be attributed to differences in income, supervision, and parental attention. Two are better than one for reasons that have nothing to do with biology.<sup>36</sup> To counter these effects, the law already mandates that children have a right of support from both biological<sup>37</sup> parents irrespective of the understandings the parents had with each other, and it recognizes children's interests in the continuing involvement of both parents in the child's life.<sup>38</sup>

With the separation of sex, reproduction, and childrearing, however, some of the policies that promote two-parent families—continued application of the marital presumption, practices that facilitate two-parent or second parent adoption, recognition of functional families—may interfere with the child's ability to identify and develop relationships with two genetic parents. We therefore face the historically unprecedented issue, partly because of our greater ability to identify genetic parents and partly because of the disaggregation of functional and biological relationships, of determining just how important the genetic tie is, standing on its own.

## II. WHAT DO WE KNOW ABOUT THE IMPORTANCE OF THE GENETIC TIE?: EVOLUTIONARY PSYCHOLOGY AND THE MODERN FAMILY

### A. *Initial Observations*

In examining this issue we start with four observations. First, the mechanisms societies use to advance children's claims on adult resources are social constructs that vary widely. Some societies (England at the height of primogeniture comes to mind) place enormous emphasis on the genetic tie; others with more communal childrearing and inheritance practices give more weight to functional relationships. Social mores and family values vary sufficiently across time and culture to defy any

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Was it better to penalize the mother in order to promote the child's continuing relationship with both parents or to recognize the child's almost exclusive attachment to the mother who had undermined his relationship to his father?

<sup>36</sup> For an overview of the literature, see CARBONE, *supra* note 17, at 111–22.

<sup>37</sup> We are using the term “biological” here to mean mothers who are both genetic and gestational parents and genetic fathers who conceive either through sexual intercourse or through artificial means intended to produce a child without the severance of the father's parental rights.

<sup>38</sup> See Carbone, *supra* note 9, at 1144 (arguing that the child's interest is identified with a continuing relationship with non-custodial parent).

claim of universal family form and any universal children's claim to a particular type of support.<sup>39</sup>

Second, all societies condition children's interests to some degree on the presence of a genetic tie, if only as a matter of practicality. Two genetic parents are necessary to conceive a child, and they bear the initial responsibility for the child's well-being. Psychologists are unanimous in endorsing the importance of attachment, moreover, and attachment begins in the womb.<sup>40</sup> Until the birth of the first test tube baby more than two decades ago, the genetic tie between mothers and the children to whom they gave birth was a given. Paternity, in contrast, is a matter often accompanied by uncertainty. Most — but not all — social customs serve to increase the likelihood that a child will be raised by its genetic parents, and children's interests often lie directly in strengthening their social and psychological ties with their genetic parents.<sup>41</sup> Virtually all systems that recognize children's claims to male support link the degree of male investment to the level of certainty about paternity.<sup>42</sup>

Nonetheless, the nature of a child's interest in his genetic parents does not easily or necessarily translate into a claim of right. Perhaps children's strongest claim is the demand that the parents responsible for their existence provide for their care. The more controversial issues are whether that claim extends to both parents, even if the one assuming responsibility for the child objects to the involvement of the other, and whether it extends to both genetic parents, even if other adults have assumed parental roles. At the core of this dispute is an empirical question that is hard to resolve: Do genetic parents provide care that is qualitatively or quantitatively better than that provided by other adults? Our hunch is yes,<sup>43</sup> and it

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<sup>39</sup> CARBONE, *supra* note 17, at 55–58.

<sup>40</sup> See generally Eleanor Willemsen & Kristen Marcel, *Attachment 101 for Attorneys*, 36 SANTA CLARA L. REV. 439 (1996).

<sup>41</sup> The emphasis on fidelity, particularly female fidelity, is the most obvious. See FRIEDMAN, *supra* note 32, at 177.

<sup>42</sup> See, e.g., David Buss et al., *Sex Differences in Jealousy: Evolution, Physiology and Psychology*, 3 PSYCHOL. SCI. 251 (1992).

<sup>43</sup> Carbone and Cahn disagree on this point. Carbone argues that, even if non-biological parents are just as capable as biological parents, the samples are likely to be skewed. Consider two groups. One consists of families with two biological parents, and the other group is a mix of single parent families, step-parent families, divorced families with shared parenting, etc. Carbone predicts that children are better off with two biological parents for two reasons. First, the groups are not the same. Dysfunctional parents will be overrepresented in the second group, and the second group will receive less societal support, which is not necessarily true with adoptive parents. Second, the genetic tie may make more of a difference in the general population than in a highly educated or highly motivated group. Carbone predicts that (the stereotype is deliberate) a beer guzzling, blue collar twenty-two year-old male, at the margin, will treat his own child better than his girlfriend's child with another man, even if most twenty-two year-old beer guzzling blue collar males treat both children

is possible to demonstrate the advantages enjoyed by children raised in two parent families, and, indeed, in married families with two biological parents.<sup>44</sup> Conclusively demonstrating that it is the genetic tie, as opposed to the presence of two adults committed to the child's well-being and supported by society, is another matter.<sup>45</sup>

Third, all societies, however much weight they place on the genetic tie, have exceptions. Life is too fragile to depend exclusively on the survival of one's genetic forbears. Stepparents, apprenticeships, formal and informal systems of adoption, and kinship care in a variety of forms exist in almost every society, and children's well-being often rests on the strength of their claims to support from others.

Finally, we observe that not only is the importance of the genetic tie to children an issue capable of renegotiation in each generation, but moreover it is an issue that is even more critically important today. Marriage has long served as the institution that polices parent-child ties. In some places, in some eras, marriage served as a bright-line demarcation between acceptable and unacceptable sexuality and served to reinforce the links between sex, reproduction, and child-rearing. In more liberal sexual eras, marriage still served to lock in two (not necessarily biological) parents committed to the child's care. In this era, childrearing is increasingly taking place outside of marriage, and the issue of which adults a child has the right to claim as his own is an increasingly muddled, yet critical, issue.

As biological certainty increases, and family forms multiply, the genetic link has assumed greater importance. As a practical matter the lack of consensus on the

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reasonably well (or poorly). Cahn points out that adopted children who have no genetic tie to either parent are cared for quite well, even in comparison to two biological parents. *See infra* note 66.

<sup>44</sup> For a summary of the empirical literature on the advantages of two-parent families, see CARBONE, *supra* note 17, at 111–19. *But cf.* NANCY E. DOWD, IN DEFENSE OF SINGLE-PARENT FAMILIES (1997) (arguing that the critical factor in children's well-being is the primary custodian's ability to secure a help-mate and that single parents overall are able to provide more than adequate care).

<sup>45</sup> Moreover, even if it is true that a two parent biological family provides the best outcomes for children, it does not automatically follow that society should subordinate adult rights to children's rights. Better SAT scores or fewer teen pregnancies do not necessarily compel restrictions on divorce. First, as an empirical matter, those parents who seek divorce disproportionately include parents whose continued relationship is not necessarily good for their children. *See* Paul Amato & Alan Booth, *Parental Divorce, Marital Conflict, and Off-Spring Well-Being During Early Adulthood*, 73 SOC. FORCES 895, 910 (1995) (reporting that children of high conflict marriages are better off if their parents divorce while children in low conflict marriages are better off if their parents remain together.). Second, even if the children would be better off if their parents remained together, it does not necessarily follow that the infringement on their parents' autonomy interests outweighs the benefit to the children. Finally, to the extent that it is difficult to distinguish those children who benefit from those who do not, and the imposition on parental autonomy is considerable, the justification weakens further.

legal status and obligations of functional parents leaves biological parents as the readiest source of support. Shotgun marriage may be dead; shotgun parenthood is not. A child has an unequivocal moral claim on those responsible for conception who have not made alternative provisions for the child's well-being. Moreover, as scientific understanding of the role of genes in producing personality, behavior, illness, and success increases, a child's genetic heritage is becoming an increasingly important constituent of identity. A child's sense of himself may depend on knowledge about his forbearers. As parents struggle to produce biological offspring children acquire a greater interest in preserving links to the past from which they came.

None of these issues means that genetic ties need to fully determine the nature of a child's claim on his genetic parents. Instead it requires a full examination of the implications of the genetic tie to determine when biology itself is what is really at stake and when the genetic tie is simply a shorthand for other interests that may not depend on biology at all. In this section we intend to provide such an exploration.

### *B. Insights from Sociobiology*

The importance of a child's relationship with a genetic (as opposed to functional) parent is the product of two factors: a socio-cultural construct that links emotional and material provisions to their relationship with genetic forbears, and the impact, direct or indirect, of the genetic tie on parental behavior. When the issue is how much weight a given society *should* place on the genetic tie the first factor becomes circular. If the society privileges genetic connections in inheritance, support, emotional well-being, or identity, then it will necessarily be in children's interest to maintain and nurture their relationship with genetic parents.<sup>46</sup> The fact that this may be true, however, is not much of an argument for why the practices should continue, especially for a society at a crossroads with a real ability to choose among a variety of possible paths.<sup>47</sup>

Attention thus turns to the second factor: How much we can say with certainty about the influence of genes on parental behavior; that is, to what degree can we say that it is in children's interests to be with their biological parents, because such

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<sup>46</sup> Indeed, Dorothy Roberts provides a compelling account of how African-Americans have created different understandings about the role of the genetic tie in the context of a society that undervalues it for African-Americans. See Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209 (1995).

<sup>47</sup> While, as a matter of formal logic, the "is" is never supposed to justify the "ought," we nonetheless recognize that societies exist where the possibility of change may be sufficiently remote such that it is not worth considering. See FRANCIS FUKUYAMA, OUR POSTHUMAN FUTURE 112-21 (2002).



parents are likely to be more devoted to them?<sup>48</sup> The short answer is that we are unlikely ever to know for sure. While we can observe parents treating their biological offspring differently from other children, and parents as committed to their adopted children as those with the closest genetic ties, it is difficult to devise a controlled experiment that isolates the effect of biology from societal attitudes, the relationship with the other parent, and the consequences of suspicion and jealousy. The longer answer is that the discipline of sociobiology attempts to provide a structured (if not always certain) examination of the role of evolution in explaining human tendencies.<sup>49</sup>

Sociobiology<sup>50</sup> starts with the assumption that Richard Dawkins described as the “selfish gene,” that is, the assumption that the genes that increase the prospects for reproductive success are more likely to be replicated in the next generation.<sup>51</sup> Consider, for example, two hominids at the edge of the savanna three million years ago. One becomes nervous whenever her<sup>52</sup> offspring stray from sight; the other does not. If both mothers have the same number of newborns, but the more vigilant

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<sup>48</sup> A separate issue concerns the importance of genes in predicting the child’s future, particularly with respect to inherited traits and susceptibility to disease. The most critical information along these lines, however, is coded into the child’s own genes. Accordingly, identification of biological parents is most important when a particular trait is known to be inheritable but is not yet associated with a particular gene that can be identified through the child’s DNA.

<sup>49</sup> See generally THE ADAPTED MIND: EVOLUTIONARY PSYCHOLOGY AND THE GENERATION OF CULTURE (J.H. Barkow et al. eds., 1992); ROBERT M. AXELROD, THE EVOLUTION OF COOPERATION (1984); D.M. BUSS, THE EVOLUTION OF DESIRE (1994); RICHARD DAWKINS, RIVER OUT OF EDEN: A DARWINIAN VIEW OF LIFE (1995); RICHARD DAWKINS, THE SELFISH GENE (1976) [hereinafter DAWKINS, SELFISH GENE]; STEPHEN PINKER, HOW THE MIND WORKS (1997); EDMUND O. WILSON, SOCIOBIOLOGY (1980). Sociobiology is the theory that, to a great degree, people act as they do because certain behavioral characteristics had survival value hundreds of thousands of years ago. For example, sociobiology asserts that men are more aggressive than women because this enhanced the likelihood of survival of prehistoric prehuman tribes. Walter Block, *The Legalization of Blackmail: A Reply to Professor Gordon*, 30 SETON HALL L. REV. 1182, 1212 n.127 (2000).

Amy Wax, in her review of Robert Wright’s book, *The Moral Animal*, notes that: “He makes the crucial distinction between sociobiology’s view of evolved *psychology* (the closely programmed cognitive and emotional responses triggered by experience) and behavior (the outward manifestation of a range of sometimes conflicting impulses and thoughts, which is highly influenced by custom and culture).” Amy L. Wax, *Review: Against Nature — On Robert Wright’s The Moral Animal*, 63 U. CHI. L. REV. 307, 309 (1996) (emphasis in original).

<sup>50</sup> We use the terms sociobiology and evolutionary psychology interchangeably in this Article.

<sup>51</sup> DAWKINS, SELFISH GENE, *supra* note 49; see also ROBERT WRIGHT, THE MORAL ANIMAL: EVOLUTIONARY PSYCHOLOGY AND EVERYDAY LIFE 23 (1994).

<sup>52</sup> The pronoun is intentionally gendered.

(or more neurotic) mother's children survive at a higher rate than the other's, that mother's genes will enjoy greater representation in the next generation. With time, the gene that produces maternal watchfulness may predominate and survive into successive generations even if the trait is not universal, its expression can be influenced by society, and the behavior no longer serves the same needs as it did on the edge of the savanna three million years ago.

Sociobiology thus offers the promise of explaining present behavior in terms of the evolutionary experiences that shaped human survival during the days of our emergence as hunter-gatherers. Its premises are plausible; its explanations are seductive; its limits lie in its methods. We are unlikely to identify a gene sequence that produces, or by its absence eliminates, parental vigilance; and, indeed, sociobiology purports to explain only the persistence of certain behaviors, not their biochemical cause.<sup>53</sup> Without an understanding of causation, however, it is difficult to separate cultural influences from natural inclination, and we cannot ethically conduct a controlled experiment to determine whether a different method of socialization can eliminate or even significantly alter traits like watchfulness.<sup>54</sup> Moreover, even when we observe what appears to be common human behavior with obvious reproductive advantages, we risk creating "just so" stories. If we already

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<sup>53</sup> Indeed, sociobiologists themselves do not adhere to such a deterministic account of human behavior. See DAWKINS, *SELFISH GENE*, *supra* note 49, at 3 ("[I]t is a fallacy . . . to suppose that genetically inherited traits are by definition fixed and unmodifiable."); STEVEN PINKER, *THE BLANK SLATE, THE MODERN DENIAL OF HUMAN NATURE* 195 (2002) ("Ideas about human nature cannot, on their own, resolve perplexing controversies or determine public policy. But without such ideas we are not playing with a full deck."); Wax, *supra* note 49, at 311–12 ("The psychological program does not make human personality impervious to experience or environment — indeed much of the program is devoted to channeling and shaping complex responses to a vast range of circumstances."). Daly and Wilson explain that:

Behavior genetics is the scientific discipline concerned with analyzing the degree to which behavioral differences between individuals within populations can be traced to genetic differences. This field has been largely isolated from evolutionary psychology (and behavioral ecology and sociobiology), whose main concerns are mental mechanisms and processes that are shared by all normal individuals, generating behavioral variation as contingent response, both immediate and enduring (developmental), to social and other environmental variation.

Martin Daly & Margo Wilson, *Crime and Conflict: Homicide in Evolutionary Psychological Perspective*, 22 *CRIME & JUST.* 51 (1997). Sociobiologists emphasize the importance of understanding behavior development, not accepting it.

<sup>54</sup> And, even if we could, it might not resolve the issue of evolutionary influence to the extent that the causal agent is the tendency of human societies to instill watchfulness in the parents of newborns. See, e.g., Louise B. Silverstein & Carl F. Auerbach, *Deconstructing the Essential Father*, 54 *AM. PSYCHOLOGIST* 397, 400 (1999) (stating that neither mothers nor fathers are "natural parents," but both become more competent parents as time spent with children increases).

identify good parenting with careful attention to toddlers, it is only too easy to invent an account that attributes the trait to imagined life among the predators at the edge of the savanna.

Despite these limitations, the careful use of sociobiology's methods, particularly if grounded in empirical observations and comparisons with animal behavior, can provide us with a set of default rules. That is, if we understand the behavior a hunter-gatherer society is likely to produce, and if we can test our hypotheses with empirical observations of modern behavior, we may be able to chart the behavior to which human societies are likely to return in the absence of strong measures to the contrary.

Consider, for example, body weight. Hunter-gatherer societies were characterized by a scarcity of food and an abundance of exercise. In such an environment obesity was not a concern. If we eat in accordance with our unthinking inclinations, conditioned by hunter-gatherer existence, we are likely to eat more fat, carbohydrates, and refined sugar than our bodies need in a sedentary culture. Education and will power, however, can change the result. Evolutionary psychology does not serve as a "Cassandra" crying out about an inevitable future we are powerless to prevent. Instead it offers the possibility of charting an agenda of self-conscious social action and law reform.

In considering the importance of the genetic tie, a discipline focused on the importance of evolution is likely to start with the assumption that genes matter — that behavior and institutions that secure the survival of a given individual's progeny (as opposed to someone else's) are the most likely to endure. Careful application of the insights of the discipline, however, will also demonstrate the strategy that ensures survival. Humans act not just through direct provisions for their children and indifference (or even hostility) toward others but through the creation of complex customs and institutions that instill values and habits including altruism and selfishness.<sup>55</sup> The trick in using sociobiology to make sense of parental behavior therefore lies in identifying the competing tendencies and the possible

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<sup>55</sup> See, e.g., PINKER, *supra* note 53, at 166 (noting that humans have faculties not just for greed, but also for sympathy). Wax emphasizes that sociobiologists attempt to explain how humans are primed to behave as social animals, who design practices that restrain, as well as facilitate, selfish impulses. She observes that:

Morality is one part of a larger phenomenon — man's ability to order his social life through the generation of complex cultures. Wright's book is devoted to providing a biological account of how and why man habitually adopts cultural conventions that frustrate — indeed are designed to frustrate — important "natural" preferences and wishes. His explanation hinges on showing that evolution favors the development of these conventions because individuals are better off in the long run when forced collectively to rein in selfish desires for immediate gratification.

Wax, *supra* note 49, at 309–10.

trade-offs among them.

Let's start, for example, with sociobiology's most basic assumption, *viz.* that evolution is likely to shape human behavior in ways that increase the likelihood that a given individual's genes are more likely to be present in the next generation. It would seem to follow that parents are likely to invest more in biological than non-biological offspring, and sociobiologists indeed posit that care for others' children is "contrary to [an organism's] own interests, . . . adaptations should evolve to guard individuals from such tasks."<sup>56</sup> Proving this point starts with animal studies. The most dramatic accounts — and the most thoroughly documented — concern lions. Lion society consists of matriarchal prides in which a group of related females remain together for life. The males disperse at maturity, and small groups of often-related males take over a pride by driving out the existing males, frequently at a point when the original males are weakened by age or disease. The new males then systematically kill the nursing cubs, accelerating the point at which the females will again become fertile.<sup>57</sup> Langurs, a group of primates more closely related to humans than lions, engage in similar behavior. Like lions, the langurs form groups of closely related females, this time with a single dominant male. When a new male takes over, the nursing langurs "disappear."<sup>58</sup> In his 1976 book, *Sociobiology*, Edmund Wilson argued such phenomena are routine and adaptive.<sup>59</sup> Daly and Wilson took the even more controversial step of attempting to demonstrate that such behavior, at least in the preference for biological over non-biological children, applies to humans.<sup>60</sup>

Daly and Wilson's most recent book is entitled *The Truth About Cinderella*, and it starts with the ubiquitous tales of evil step-mothers. It goes on to test the evidence supporting the thesis that parents would invest more in biological children

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<sup>56</sup> Robert L. Trivers, *Paternal Investment and Sexual Selection*, in *SEXUAL SELECTION AND THE DESCENT OF MAN* 136, 147 (Bernard Campbell ed., 1972). Trivers suggests, however, that individuals can be fooled through the development of "more sophisticated cuckolds." *Id.* at 149; see also Kermyt G. Anderson et al., *Paternal Care by Genetic Fathers and Stepfathers II: Reports by Xhosa High School Students*, 20 *EVOLUTION & HUM. BEHAVIOR* 433, 434–35 (1999) (providing support that men invest significantly more in their genetic offspring and the children of their current mates).

<sup>57</sup> See MARTIN DALY & MARGO WILSON, *THE TRUTH ABOUT CINDERELLA* 37 (1999). For a summary of the literature documenting infanticide in other species, see Owen D. Jones, *Evolutionary Analysis in Law: An Introduction and Application to Child Abuse*, 75 *N.C. L. REV.* 1117, 1185–89 (1997) (noting that in some species over seventy percent of all young die at the hands of adults of their own species, and, in some rodent species, forty percent of all newborns die at the hands of homicidal males).

<sup>58</sup> DALY & WILSON, *supra* note 57, at 15.

<sup>59</sup> *Id.* at 20. Daly and Wilson, observe, however, that while Wilson's assertion went beyond the evidence then available, "subsequent fieldwork has abundantly confirmed his interpretations." *Id.*

<sup>60</sup> *Id.*

than unrelated children, and it concludes that the disparity is particularly compelling when the worst forms of abuse are analyzed.<sup>61</sup> Daly and Wilson report that children are a hundred times more likely to be abused or killed by a stepparent than by a genetic parent, with the greatest differences appearing in child homicides under the age of two (i.e., children who would still be nursing in hunter-gatherer societies).<sup>62</sup> They then examined studies from other countries demonstrating similar patterns of stepparent abuse or neglect, and reported, for example, that step-fathers are significantly more likely than biological fathers to sexually abuse their daughters.<sup>63</sup> They end their summary with the dramatic example of the Ache of Paraguay, a contemporary group of hunter-gatherers in which forty-three percent of children raised by a mother and stepfather die before their fifteenth birthday, in contrast with only nineteen percent of those brought up by two genetic parents.<sup>64</sup> Wilson and Daly conclude with the “hypothesi[s] that it has been a general feature of [hunter-gatherer] societies that step-children are variously disadvantaged — as they are among the Ache — and we know of no contrary evidence.”<sup>65</sup>

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<sup>61</sup> See *id.* at 1–66.

<sup>62</sup> DALY & WILSON, *supra* note 57, at 28. Daly and Wilson’s initial calculations, undertaken in the seventies, indicated that a child under three years of age, who lived with one genetic parent and one stepparent, was about seven times more likely to be abused than one who resided with two biological parents. *Id.* at 27. As they made their criteria more stringent and narrowed the sample down to the most unmistakable cases (from 87,789 maltreatment reports to 279 fatal child-abuse cases), the estimated rates in stepparent plus genetic-parent households had grown to approximately one hundred times greater than in two genetic-parent households. *Id.* at 27–28; see also Rolando Mazariegos, *Comment: The Frequency of Abuse and Neglect on Stepchildren: Evolutionary Perspective and Biosocial Dimensions*, 21 J. JUV. L. 56, 65–66 n.77 (2000) (observing the risk of overreporting stepparent abuse and Daly and Martin’s efforts to limit the risk by focusing on homicide cases). In their carefully controlled Canadian study, Daly and Wilson found that the risk of abuse was forty times greater but that a co-residing step-parent was seventy times more likely to kill a child under two than his genetic father. DALY & WILSON, *supra* note 57, at 32.

<sup>63</sup> *Id.* at 30; see also Mary Becker, *Women, Morality, and Sexual Orientation*, 8 UCLA WOMEN’S L.J. 165, 178 n.46 (1998) (citing Diana E.H. Russell, *The Prevalence and Seriousness of Incestuous Abuse: Stepfathers vs. Biological Fathers*, 8 CHILD ABUSE & NEGLECT 15 (1984), which found “that in a random sample of 930 adult women, 17% of those who had lived with a stepfather in childhood were sexually abused while 2% of those who lived with a biological father were abused by him,” and concluding that “these statistics illustrate that the abuse by stepfathers was more severe”); Lynne Olman Lourim, Note, *Parents and the State: Joining Forces to Report Incest and Support Its Victims*, 28 U. MICH. J.L. REFORM 715, 717–18 n.13 (citing Mark D. Everson et al., *Maternal Support Following Disclosure of Incest*, 59 AM. J. ORTHOPSYCHIATRY 197, 199 (1989), who studied eighty-eight victims of child sexual abuse and found that thirty percent of the perpetrators were biological fathers, forty-one percent were stepfathers, seventeen percent were boyfriends of the child’s mother, while in the remaining twelve percent were brothers, uncles, and cousins).

<sup>64</sup> DALY & WILSON, *supra* note 57, at 36.

<sup>65</sup> *Id.* They further note that the problem is not limited to men. Stepmothers are also more

The problem with these accounts is that, precisely because they cannot identify a causal factor with certainty, it is difficult to chart their implications for a modern industrial society. The simplistic interpretations of these findings are that genes matter, that parents will treat their biological offspring differently from others, and that children therefore have a fundamental interest in being raised not only by one but by two biological parents. While Daly and Wilson claim to know of no contrary evidence in *hunter-gatherer* societies, *our* society produces compelling evidence to the contrary.

The first counterpoint involves adoption. As Daly and Wilson acknowledge, the pattern of abuse they document in stepparent families has not been replicated in adoptive families, suggesting that the genetic tie cannot provide a full answer.<sup>66</sup> Second, studies of paternal behavior indicate that, whether or not fathers distinguish between biological and non-biological children in other ways, they are more likely to support the ones they are with. Child support studies routinely find that men contribute more to the children of the women with whom they are living than to their own biological children after the relationship with the mother had ended. Third, it bears repeating that the effects Daly and Wilson report are quite small. The vast majority of stepparents are loving and supportive of their stepchildren. The fact that stepparents are overrepresented in the tiny minority who seriously injure children does not in itself compel draconian measures or rigid insistence on a particular family form.

These patterns thus require explanation if any sociobiological account is to survive scrutiny. Daly and Wilson provide a start. They observe that “[c]hild abuse must . . . be considered a non-adaptive . . . byproduct of the evolved psyche’s functional organization, rather than an adaption in its own right.”<sup>67</sup> To state the obvious, people are not lions. We do not live in matriarchal prides dominated by a small number of temporarily resident males. While a female lion is unlikely to reject the advances of the usurper who murders her young since he may be, after all, the only male around, human females are likely to react quite differently.

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likely to abuse their children than biological mothers, but the number of children living with stepmothers is so small in the modern era that it is difficult to find a sufficient data base for meaningful comparison. *Id.* at 60–61. Daly and Wilson acknowledge that biological parents also kill their children but report that the patterns and motivations are distinctly different and more likely to be linked to serious mental illness. *Id.* at 34–35.

<sup>66</sup> See Margo Wilson & Martin Daly, *Risk of Maltreatment of Children Living with Stepparents*, in *CHILD ABUSE AND NEGLECT: BIOSOCIAL DIMENSIONS* 215, 218–19 (Richard J. Gelles & Jane B. Lancaster eds., 1987); Mazariegos, *supra* note 62, at 64–65; Owens, *supra*, at 1207 n.298. Greater differences appear, however, in families that combine biological and adoptive children.

<sup>67</sup> DALY & WILSON, *supra* note 57, at 37–38; see also PINKER, *supra* note 53, at 165 (understanding stepparent tendencies could help manage a marriage if the biological parent acknowledges and appreciates caring behavior).

Moreover, the mother's fury will be reinforced by her male relatives who share a genetic link to the child and, unlike the female lion's male relatives, live in the same community. Risking the gallows, as Daly and Wilson acknowledge, is a poor path to reproductive success. Hrdy emphasizes that stepparent abuse is more likely to happen because of the stepparent's "lack of solicitude for an unrelated, very vulnerable but demanding dependent" or because of a "general predisposition to respond violently to repeated annoyance" than because of any evolutionary predisposition to murder another male's children.<sup>68</sup> Biological parents, who are more likely to have bonded with the child and more likely to be providing on-going care, are less likely to forget about the child in the bath or on the edge of the stairs and more likely to restrain their anger at an irritable child's whining. Adoptive parents are similarly likely to demonstrate a higher degree of attachment and commitment to children than a stepparent who may only be a temporary resident of a family not of his making.<sup>69</sup> Genes are not everything.

Moreover, as the child support data indicates, the importance of relationships introduces an additional degree of complexity even from the perspective of evolutionary psychology. Among sociobiology's most fundamental — and controversial — insights is its explication of gender differences, and the trade-offs between men's and women's reproductive strategies. Men and women differ in their approach to reproduction in that women produce eggs — in numbers limited from birth — and men produce sperm — millions and millions of sperm. Amy Wax explains:

From this simple disparity of function flows a momentous consequence: a woman in a lifetime can produce at most twenty children. Moreover, the investment a woman was required to make in the ancestral environment to insure each baby's survival — including nine months of pregnancy, intensive and prolonged breast feeding, and the day-to-day care of the very young child — virtually ruled out significant engagement in any other demanding activity for most of her adult life. In contrast, an ancestral man could produce hundreds or even thousands of offspring in a lifetime. A brief sexual encounter might be all that was required to get his genes into the next generation.<sup>70</sup>

The result, however, is not a straightforward story of male promiscuity and female fidelity or even female devotion to caretaking and male indifference. Women in

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<sup>68</sup> SARAH BLAFFER HRDY, *MOTHER NATURE: A HISTORY OF MOTHERS, INFANTS, AND NATURAL SELECTION* 237 (1999).

<sup>69</sup> And, indeed, stepparent families are more likely to dissolve than biological families for a complex set of reasons. See DALY & WILSON, *supra* note 57, at 24–25.

<sup>70</sup> Wax, *supra* note 49, at 315.

this scenario, after all, have an incentive to prefer men who will not just impregnate them but also help care for them and their offspring.<sup>71</sup> Men may have incentives to father as many children as possible, but they should also be willing to trade more certain sexual access for fewer partners.<sup>72</sup> In securing support for their children, women should care more about the quality of the assistance a particular man provides than whether he is the biological father of the children. And while men can be expected to invest more in their own children than in others, they may also care more about ensuring the continuation of the relationship than in guaranteeing paternity, particularly if the care they provide increases their odds of fathering additional children.

Sociobiologists have dubbed these patterns “the mating effort.”<sup>73</sup> Stepparenting can be an adaptive strategy if the care the stepparent provides increases “access to mates and, potentially, to future reproductive opportunities.”<sup>74</sup> Kermyt Anderson attempted to test this hypothesis by comparing stepparents with other men, and he produced results consistent with a mating effect. He observed that “[m]en who are ranked lower in the mating market (less education, lower income, previously married, or already have children) are less likely to marry highly ranked mates or perhaps to marry at all.”<sup>75</sup> These men increased their prospects for marriage by their willingness to marry women who already had children and their propensity to assist with child care. Anderson found that the men who entered into marriages with one or two stepchildren were just as likely as men without stepchildren to have their own children within the marriage. He concluded that, for these men, caring for other men’s children increased the odds that their genes would be present in the next generation.<sup>76</sup>

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<sup>71</sup> See, e.g., JOHN ALCOCK, *ANIMAL BEHAVIOR: AN EVOLUTIONARY APPROACH* 499–500 (6th ed. 1998); MATT RIDLEY, *THE RED QUEEN: SEX AND THE EVOLUTION OF HUMAN NATURE* 180–81 (1993); ROBERT TRIVERS, *SOCIAL EVOLUTION* 215–19 (1985) (all arguing that male tendency to abandon their young produces female incentives to choose mates carefully).

<sup>72</sup> See Trivers, *supra* note 56, at 139. Trivers defines parental investment as: “any investment by the parent in an individual offspring that increases the offspring’s chances of surviving (and hence reproductive success) at the cost of the parent’s ability to invest in other offspring.” *Id.* He excludes courtship behavior from this definition. *Id.*; see also Stephen T. Emlen, *An Evolutionary Theory of the Family*, 92 *PROC. NAT’L ACAD. SCI.* 8092, 8095 (1995).

<sup>73</sup> Kermyt G. Anderson, *The Life Histories of American Stepfathers in Evolutionary Perspective*, in 11 *HUM. NATURE* 307, 309 (2000).

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

<sup>75</sup> *Id.* at 326.

<sup>76</sup> *Id.* at 326–27. Many of these factors, including poverty and family size, also increase the likelihood of child abuse. Daly and Wilson attempted to control for income, family size, and maternal age, but it is not clear whether they were able to control for all of the factors that make stepfathers systematically different from other men or all of the factors that



In other studies, however, Anderson has maintained that the desire to father children is only a fraction of the motivation behind a male's decision to invest in the child of his current mate.<sup>77</sup> Daly and Wilson agree, explaining that:

Step-parents are primarily replacement mates, and only secondarily replacement parents. They assume their pseudo-parental obligations in the context of a web of reciprocities with the genetic parent, who is likely to recognize more or less explicitly that the new mate's tolerance and investment constitute benefits bestowed on the genetic parent and the child, entitling the step-parent to reciprocal considerations. And once having opted in to this situation, why shouldn't a reasonably well-appreciated step-parent be kindly, and even affectionate?<sup>78</sup>

This "reciprocity" or "relationship effect" suggests that, even if the primary evolutionary advantage of a relationship is the survival of one's genes,<sup>79</sup> those genes may produce human beings who seek relationships for more than their instrumental value in reproduction.<sup>80</sup> Anderson observes that "[I]ndividuals often remain married past the wife's menopause; they may remain together after their children have grown up and become self-sufficient, or even if they have not had children together or do not have grandchildren to invest in."<sup>81</sup> Men value sex,

Anderson identified with lowered value on the mating market. See DALY & WILSON, *supra* note 57, at 31.

<sup>77</sup> Kermyt G. Anderson et al., *Paternal Care by Genetic Fathers and Stepfathers I: Reports from Albuquerque Men*, in 20 EVOLUTION & HUM. BEHAVIOR 405, 409 (1999). "[M]en . . . invest in children because of the effects of the care on their relationship with the children's mothers — i.e., for relationship benefits." *Id.* at 426. This suggests, of course, that the stepparent needs to care for the children at least well enough to retain the mother's gratitude, further indicating that abuse, neglect and infanticide will be maladaptive.

<sup>78</sup> DALY & WILSON, *supra* note 57, at 64.

<sup>79</sup> And indeed, it is important to emphasize that for women in hunter-gatherer societies the ability to form a relationship with a man who might not be the father of her children could be critical to her children's survival, and often her own. See HELEN E. FISHER, *THE SEX CONTRACT: THE EVOLUTION OF HUMAN BEHAVIOR* 150, 188, 221–24 (1982) (describing pair bonding as critical to survival, but deceit and infidelity as universal).

<sup>80</sup> At this point, Silverstein's "reciprocity theory" and Anderson's "relationship effort" overlap. "An individual may perform an altruistic act for his partner (such as investing in her child), with the understanding that she will later reciprocate by performing an altruistic act that benefits him." Anderson et al., *supra* note 77, at 409. Accordingly, a male invests in the non-genetic children of his current mate because the mother of the children can provide a reciprocal benefit to the male, thereby increasing the cooperation and quality of the marital relationship. Both appear to agree that this reciprocal benefit can be something as simple as companionship, making such relationship effort or reciprocal motivation to be more than just a mating effort. See *id.*; Silverstein & Auerbach, *supra* note 54, at 401–02.

<sup>81</sup> Anderson et al., *supra* note 77, at 409.

companionship, and home cooking whether or not they lead to children and grandchildren; women value sex, companionship, and contributions to the household (not necessarily in that order).<sup>82</sup> Anderson coined the term “relationship effort” to advance the theory that a male invests in the non-genetic children of his current mate to increase the quality and duration of the marital relationship as an end in itself.

This relationship effect has a number of implications for paternal investment in children. The most obvious is that it suggests that if step-parent care is adaptive, and if it is tied to the value of the relationship, then the end of the relationship should decrease paternal investment.<sup>83</sup> Anderson conducted studies, one in Xhosa High School in South Africa and a second in Albuquerque, New Mexico, that produced results consistent with the “reciprocity” and “relationship effort” theories.<sup>84</sup> Men invest more in the offspring of their current mates thereby supporting the underlying hypothesis that relationship effort is an important influence on male parental investment.<sup>85</sup> Resident genetic fathers and step-fathers spend significantly more time with children for each measure of time involvement studied.<sup>86</sup> Modern divorce studies confirm the result. “Love the one you’re with” proves to be a better predictor of male contributions to children than genetic ties.<sup>87</sup>

This, in turn, raises the issue of whether stepparents in fact behave all that differently from biological fathers. During the hunter-gatherer stage of human evolution, men are unlikely to have had any certain measure of paternity, and they may indeed have been likely to have fathered any number of children with different mothers.<sup>88</sup> In which children did they invest? Evolutionary psychology suggests that women have a direct relationship with their children; men are more likely to see their relationship to children mediated by their attachment to their mate.<sup>89</sup> Are men, therefore, more likely to support the children they are with (and the mothers who provide them with the greatest immediate return) irrespective of paternity?

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<sup>82</sup> Anderson, *supra* note 73, at 434.

<sup>83</sup> Anderson et al., *supra* note 77, at 428.

<sup>84</sup> See Anderson et al., *supra* note 77, at 405; Anderson et al., *supra* note 56, at 434.

<sup>85</sup> Anderson et al., *supra* note 77, at 428; Anderson et al., *supra* note 56, at 448.

<sup>86</sup> Anderson et al., *supra* note 56, at 442.

<sup>87</sup> See Nancy E. Dowd, *Rethinking Fatherhood*, 48 FLA. L. REV. 523 (1996).

The strongest predictor of ongoing contact is the father’s relationship with their ex-wife rather than the strength of paternal involvement prior to divorce. Lack of visitation occurs in about 50% of all cases, and upwards of one-third of children in divorced families will not see their fathers at all after the first year of separation.

*Id.* at 525.

<sup>88</sup> For an attempt to use anthropological research to develop an account of early human evolution, see FISHER, *supra* note 79 (arguing that the disappearance of estrus and the possibility of constant sex was critical to the emergence of pair bonding).

<sup>89</sup> See *supra* notes 72–87 and accompanying text.

Evolutionary psychologists have tended to address the issue by focusing on jealousy.<sup>90</sup> They argue that males are more likely to support their young if paternity is certain.<sup>91</sup> The evidence from the animal world is mixed. Males in species characterized by monogamous relationships do invest more in their young. Males in multi-male groupings, however, often invest more in offspring than males contribute in species with a single dominant male whose paternity is certain. Where the males must compete for sexual access, female preferences carry more weight. The biological tie is important but so is the relationship with the mate.

Humans, of course, fall into the monogamous species camp,<sup>92</sup> and the only way, until recently, for a man to ensure paternity was to police his mate's sexual activity. Sociobiologists emphasize what they see as an obsession with female fidelity that runs the gamut from female genital mutilation to the double standard to incapacitatingly high heels.<sup>93</sup> Moreover, jealousy may accompany even more relaxed sexual attitudes. Recent studies show that, while public acceptance of non-marital sexuality and childbearing has greatly increased, public attitudes against adultery have hardened for both men and women.<sup>94</sup> Infidelity still breaks up relationships, and studies suggest that step-parents who knowingly invest in another man's children may behave differently from men who mistakenly believe that the children in whom they are investing are their own.<sup>95</sup>

<sup>90</sup> FISHER, *supra* note 79, at 113–14.

<sup>91</sup> When a man “has been cuckolded, however, [his] relatedness to the offspring is zero, and the fitness benefit accrued by caring for such offspring largely disappears.” Emlen, *supra* note 72, at 8095.

<sup>92</sup> That is, humans are relatively monogamous. See FISHER, *supra* note 79, at 221 (concluding that in hunter-gatherer societies, pairing for most couples may have lasted only long enough to enable a female to feed and protect her young through infancy).

<sup>93</sup> See, e.g., Jane B. Lancaster, *The Evolutionary History of Human Parental Investment in Relation to Population Growth and Social Stratification*, in FEMINISM AND EVOLUTIONARY BIOLOGY: BOUNDARIES, INTERSECTIONS, AND FRONTIERS 476 (Patricia Adair Gowaty ed., 1997) (describing competition among families to guarantee bridal virginity and wifely chastity as a way to raise male confidence in paternity and increase the “price” their daughters can command on the marriage market). Lancaster emphasizes that, the greater the stratification in male power and resources, the more likely better off families are to compete through control of their daughter's sexuality. *Id.* Feminists, of course, respond that this is a major source of women's oppression. See SARAH BLAFFER HRDY, *THE WOMAN THAT NEVER EVOLVED* 177 (1981) (“On one point there is an extraordinary consensus: woman's readiness to engage in sexual activity is great enough that the majority of the world's cultures — most of which determine descent through the male line — have made some effort to control it.”).

<sup>94</sup> Jerry Adler et al., *Adultery: A New Furor Over an Old Sin*, NEWSWEEK, Sept. 30, 1996, at 2.

<sup>95</sup> Where the double standard is necessarily at work, however, is a more complicated issue. Orlando Patterson's analysis of differences in racial attitudes indicates that African-American women are less willing to forgive infidelity than white women, suggesting a large role for culture in the formation of attitudes. ORLANDO PATTERSON, *RITUALS OF BLOOD*:

Sandra Hofferth and Kermyt Anderson have attempted to test how some of these factors interact. They compared paternal investment in children in biological, step-parent and blended families. When the researchers compared the results across families, they confirmed what sociobiologists suspected: Fathers invest more in biological children than stepchildren.<sup>96</sup> When the researchers compared the amount of time fathers spent within families, that is, the amount of time fathers spent on biological and stepchildren living within the same household in blended families, they found little difference.<sup>97</sup> Biological children living in blended families received similar care and attention as did biological children living in biological families, and the differences between biological children and stepsiblings living in the same households were small. The researchers concluded that the results were part of a complex pattern consistent with at least a measure of "selection bias."<sup>98</sup> Those stepfathers who invested most in the relationship may be the ones most likely to persuade their wives to bear additional children and thus the ones most likely to produce blended families. Those stepfathers in families who did not produce new children may be fathers less likely to invest in their own children as well.<sup>99</sup> Not all stepfamilies are equal.<sup>100</sup>

What thus emerges from the evolutionary account is a complex picture in which paternal tendencies to father as many children as possible and to invest more in biological than non-biological children are offset by maternal preferences and the role of intimate relationships in mediating paternal involvement. In hunter-gatherer societies, the vulnerability of mothers and their nursing children made securing assistance essential to survival. Helen Fisher argues that pair-bonding, as an adaptive response to the earlier births made necessary by upright posture, was a critical factor in the evolutionary development that separated homo sapiens from

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CONSEQUENCES OF SLAVERY IN TWO AMERICAN CENTURIES 85–86 (1998).

<sup>96</sup> Sandra L. Hofferth & Kermyt G. Anderson, *Are All Dads Equal? Biology Versus Marriage as a Basis for Paternal Investment*, 65 J. MARRIAGE & FAM. 213, 230–32 (2003).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* Selection bias suggests that the two groups tested may be systematically different in traits other than the degree of investment in children. While studies can control for easily measurable factors, such as income or education, they cannot necessarily account for variables such as personality that may make certain men less able to maintain a relationship or less likely to spend time with their children.

<sup>99</sup> In addition, the researchers observed that, even if fathers are otherwise inclined to spend more time on their own children, it may be more difficult to do so in the context of a blended family where the children are ordinarily together much of the time. *Id.*

<sup>100</sup> From the children's perspective, stepparent relationships are complicated further by the fact that they are less likely to endure. Marriages with children are more likely to last than marriages without; first marriages of all kinds are more likely to last than second marriages; second marriages with children born to the marriage are more likely to last than those without. The differing lengths of stepparent relationships may aggravate the differences between biological and stepparent families.

earlier proto-hominids<sup>101</sup> and our closest animal relatives, the apes.<sup>102</sup> In these early societies, pair-bonding reached its greatest importance in providing for nursing infants and their mothers; a larger group of adults was available to help supervise and train older children. Fisher emphasizes that the pairs were not necessarily monogamous, nor did they necessarily last for a lifetime.<sup>103</sup> Instead, the most distinctive evolutionary feature was development of the ability to construct contracts that facilitated assumption of “mutual duties, obligations, and responsibilities.”<sup>104</sup> The terms of the parental relationship, and not just the fact of paternal investment, contributed to children’s well-being, and the ability to form lasting individual commitments was an important factor in the evolution of human society.

The tendencies that followed from the hunter-gatherer experience may or may not relate directly to the needs of a modern industrial society. The child’s infancy may still be the period in which parents are most likely to bond with a child and in which the mother may feel the greatest need to secure the involvement of a mate, particularly one who will contribute directly to the children she already has. Yet male assistance is no longer essential to infant survival, and fathers may be less important as the primary source of newborn assistance in societies in which hunting is no longer a major source of quality protein.<sup>105</sup> At the same time, however, paternal involvement may be more important to the well-being of older children. With the rise of agricultural societies, inheritance along the male line became a major component of adult status. With an increased role for skilled craftsmen, apprenticeships arranged through family connections mattered more. In today’s society, assistance with adolescence and investment in higher education have assumed dramatically greater importance.<sup>106</sup> With these modern developments, the

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<sup>101</sup> Indeed, Fisher argues that: “[Pair] bonding did much more than help the young survive. With time it would initiate such primal human emotions as jealousy and altruism, the human drive to categorize people in terms of kin, the human ability to communicate by sophisticated language, the human capacity for complicated thought, the human need to make tools, weapons, houses, governments, rules, enemies, gods, and afterworlds.” FISHER, *supra* note 79, at 221.

<sup>102</sup> Fisher notes that apes do not pair bond, and the emergence of the human line included the loss of estrus, an increase in the frequency of birth, and the development of language, all traits she links to the emergence of pair bonding. *Id.* at 219–23.

<sup>103</sup> *Id.* at 221.

<sup>104</sup> *Id.* at 222.

<sup>105</sup> For a summary of the debate on the distinctive importance of fathers, see CARBONE, *supra* note 17, at 111–22; *see also* DOWD, *supra* note 44, at 31–37 (arguing that primary parents benefit from additional adult support from someone but that the biological father’s role is not distinctively critical).

<sup>106</sup> Judith S. Wallerstein & Tony J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L.Q. 305, 312 (1996).

genetic connection may or may not be critical, but the strength of pair-bonding remains a significant factor in securing paternal assistance and in determining the importance of the care for the child's well-being.<sup>107</sup> The issue for children therefore is to determine what set of relationships between the adults is most likely to promote children's well-being and how to encourage those relationships in a modern society.

### III. THE LEGAL STATUS OF THE GENETIC TIE: CONSTITUTIONAL RIGHTS AND THE PROMOTION OF CHILDREN'S INTERESTS

Constitutional decision-making has overwhelmingly focused on parents' rights: Do unmarried fathers have the right to veto the adoption of their newborn children; do custodial parents have the right to determine the terms of grandparent visitation; do biological parents have constitutional rights with respect to their children? Such rights nonetheless involve a measure of reciprocity with children's interests. As we noted above, family law decision-making for younger children generally involves a triad of parties: either mother-father-child, or parent-child-state. The assertion of a *right* by one almost inevitably involves restricting the rights of the others. If, for example, the father has a constitutional right to veto the mother's decision to place a child up for adoption, then the child lacks a corresponding right to compel the adoption in accordance with a best interest standard. The absence of a right, on the other hand, does not necessarily dictate a particular outcome. Instead, it may leave the issue open to public policy balancing. If, for example, a father does not have a constitutional right to veto an adoption favored by the mother, then a state may choose either to defer to the mother's judgment or to permit the adoption in accordance with a best interest determination. In such a setting the formal determination of children's rights may be less critical than the question of who is most likely to act in the child's interests: the mother, the father, or a third party arbiter selected by the state.<sup>108</sup>

Nonetheless, parents, regardless of how *Troxel* is interpreted,<sup>109</sup> clearly have a constitutionally protected interest in the "care, custody, and control" of their

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<sup>107</sup> See Michael E. Lamb, *Fathers and Child Development: An Introductory Overview and Guide*, in THE ROLE OF THE FATHER IN CHILD DEVELOPMENT 13 (Michael Lamb ed., 3d ed. 1997).

<sup>108</sup> Carbone has argued that the mother of a newborn, who has gone through the process of pregnancy and delivery, is more likely to act in the child's interests than a father whose principal contact with the process may have been conflict with the mother over either her decision to end the relationship or to place the child for adoption. Carbone, *supra* note 9, at 1103.

<sup>109</sup> See *Troxel v. Granville*, 530 U.S. 57 (2000). For a pre-*Troxel* example, see *Meyer v. Nebraska*, 262 U.S. 390 (1923) (invalidating a law prohibiting instruction in German).

children, and parents<sup>110</sup> can ordinarily be expected to act in their children's interests. Whether children have reciprocal rights is, however, much less settled. While children are recognized as capable of holding and exercising constitutional rights, such rights are most practically asserted where parents and children agree<sup>111</sup> or where the child seeks to exercise rights in criminal or administrative proceedings.<sup>112</sup> A child's relational rights<sup>113</sup> have only infrequently been addressed, in part because the assertion of a separate right on behalf of the child realistically requires the willingness to override established parental decision-making.<sup>114</sup>

*Michael H.* is one of the few Court cases to address children's relational rights, and it directly presents the issue of the importance of a child's relationship with a biological father. The case also involves difficult trade-offs between marriage and biology that may be the legacy of our hunter-gatherer ancestry as the mother, who secured the support of the biological father during the child's infancy, reunited with her husband when she was ready to bear a second child. The mother, Carole, an international model, was married to French oil executive Gerald when she had an affair with her neighbor, Michael. Their child, Victoria, was born in May, 1981,

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<sup>110</sup> That is, parents in intact families can be expected to do so. Separated parents' interests may diverge from each other's and from the child's.

<sup>111</sup> For discussion of this, see, for example, Emily Buss, *What Does Frieda Yoder Believe?*, 2 U. PA. J. CONST. L. 53, 59-60 (1999). Professor Buss "tentatively conclud[es]" that, even where there is a conflict between parent and child, children are nonetheless entitled to free exercise protections. *Id.* at 63; see also Ross, *An Emerging Right*, *supra* note 5, at 224 (arguing that mature minors have a right to receive information over their parents' opposition).

<sup>112</sup> See Barbara Bennett Woodhouse, *The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights Into Constitutional Doctrine*, 2 U. PA. J. CONST. L. 1, 8-9 (1999).

<sup>113</sup> See, e.g., Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077, 1078 (1998) (arguing that the right of privacy is not an individual right but a right to freedom within intimate relationships, and focusing on the adult members of those relationships).

<sup>114</sup> See, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982) (holding that before a state could sever completely and irrevocably the rights of parents in their natural child, due process required that the state support its allegations by at least clear and convincing evidence, without discussion of the children's separate interest in the proceeding). The Court found that the "fair preponderance of the evidence" standard was inconsistent with due process because the private interest in parental rights affected was substantial and the countervailing governmental interest favoring the preponderance standard was comparatively slight. *Id.* at 758. For discussion of judicial bypass of parental notice statutes involving minors seeking abortions, see Jennifer C. Friedman, *Parental Notice in State Abortion Statutes: Filling the Gap In Constitutional Jurisprudence*, 29 COLUM. HUM. RTS. L. REV. 437, 445-46 (1998). For arguments that children should have an independent liberty interest in their relationships with their parents, see Gilbert Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358 (1994).

with Gerald listed as the father on the birth certificate. Carole lived in Jamaica for three months with Michael and Victoria but eventually reconciled with Gerald, and by the time the case reached the Supreme Court, she, Gerald and Victoria were living in New York with two other children born to the marriage. The Supreme Court, in a badly fractured opinion, upheld the constitutionality of the marital presumption, concluding that Michael H. had no right either to recognition as a parent on the basis of the blood tests that showed him to be the likely biological father or to continuation of the relationship he had established with Victoria.

Victoria had also asserted a right to a relationship with Michael that was independent of his right to a relationship with her.<sup>115</sup> While Victoria was too young to assert her interests directly, the lower court had appointed a guardian ad litem to represent her. In turn, the guardian, Michael H., and Carole agreed to the appointment of an expert who would help the guardian ad litem determine whether maintaining a relationship with Michael was in Victoria's best interest. When Dr. Norman Stone submitted his recommendations, he determined that Victoria's principal attachments were to Carole and Michael.<sup>116</sup> In her brief to the Supreme Court, Victoria's guardian argued, "A child's need for continuity in her parental relationships, particularly those formed in early childhood, outweighs the state's interests in preserving the apparent integrity of the matrimonial family or protecting the child from any stigma flowing from her mother's marital status at the time of her conception."<sup>117</sup> The Court utterly rejected her argument:

We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship. We need not do so here because, even assuming that such a right exists, Victoria's claim must fail. Victoria's due process challenge is, if anything, weaker than Michael's. Her basic claim is not that California has erred in preventing her from establishing that Michael, not Gerald, should stand as her legal father. Rather, she claims a due process right to maintain filial relationships with both Michael and Gerald. This assertion merits little discussion, for, whatever the merits of the guardian ad litem's belief that such an arrangement can be of great psychological benefit to a child, the claim that a State must recognize multiple fatherhood has no support in the history or traditions of this country. Moreover, even if we were to construe Victoria's argument as forwarding the lesser proposition that, whatever her status vis-à-vis Gerald, she has a liberty interest in maintaining a filial relationship with

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<sup>115</sup> *Id.* at 130–32.

<sup>116</sup> Brief of Appellant Victoria D., Michael H. v. Gerald D., 491 U.S. 110 (1989) (No. 87-746).

<sup>117</sup> *Id.*



her natural father, Michael, we find that, at best, her claim is the obverse of Michael's and fails for the same reasons.<sup>118</sup>

The dissent, which vigorously argued for recognition of Michael's paternal rights on the basis of the familial relationship he had established, did not separately address the failure to recognize Victoria's interest in the relationship.<sup>119</sup>

Perhaps the most controversial aspect of the decision was the plurality's effort to define the liberty clause in terms of those rights (whether of the parent or the child) which have historically received protection. Scalia's opinion repeatedly refers to Michael as the "adulterous natural father" and reiterates that it is the adultery part that has never been protected.<sup>120</sup> The dissent treats Scalia's reliance on marriage as anachronistic and inconsistent with precedent given the line of Supreme Court cases extending constitutional recognition to the rights of unmarried fathers.<sup>121</sup> If the Supreme Court is to rely on the historical status of institutions such as marriage for resolving paternity, however, what happens when the significance of such institutions evolve with time?

The opinions provide little guidance, in part because they only obliquely reveal their assumptions about the continuing connections between marriage and parenthood. For Scalia, that connection appears to come from the historical aspect of marriage with the least modern salience, *viz.*, its brightline distinction between acceptable and unacceptable sexuality. Scalia can barely disguise his distaste for Michael and Carole's conduct. He further treats Victoria's argument that her equal protection rights have been violated because, unlike her mother and presumed father, she had no opportunity to rebut the presumption of her legitimacy, as

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<sup>118</sup> *Michael H.*, 491 U.S. at 130–31.

<sup>119</sup> See Holmes, *supra* note 114 (noting that courts failed to examine this issue from a child-centered perspective). Dean Holmes argues that the law should recognize that children have a liberty interest in maintaining relationships with functional parents, regardless of the biological relationship at issue. See also David Meyer, *Lochner Redeemed: Family Privacy After Troxel and Carhart*, 48 UCLA L. REV. 1125, 1166 n.214 (comparing Justice Stevens's *Troxel* dissent, in which he alleges that the Court has not "elucidate[d]" the contours of the child's liberty interest in maintaining familial bonds with Justice Scalia's plurality opinion in *Michael H.*).

<sup>120</sup> See *Michael H.*, 491 U.S. at 120 nn.6–7, 130.

<sup>121</sup> That is, unmarried biological fathers in cases in which the mother was also unmarried and the father had established a relationship with the child. See CARBONE, *supra* note 17, at 165–73. In cases involving the rights of a married mother against an unmarried father, even when the mother was unmarried at the time of birth, the unmarried father appears to have fewer rights. The most important factor is whether the unmarried father and mother had lived as "unitary family" and the father had established a paternal relationship before the mother remarried. This pattern accords with the sociobiology literature suggesting that the relationship, not biology, is key. See Carbone, *supra* note 9.

“wholly without merit.”<sup>122</sup> He apparently assumes that any interest the child may have in a relationship with her biological father requires abrogation of her status as a child of an extant marriage, and that it cannot possibly serve a child’s interests to be recognized as “illegitimate.”<sup>123</sup> Yet, the Supreme Court has systematically dismantled the distinctions among children that depend on their parents’ marital status (even though it continues to opine that the Constitution does not require states to recognize the rights of unmarried fathers against an intact marriage), and Victoria’s lack of an interest in a relationship with Michael cannot convincingly rest, as it might have in an earlier era, on the stain that would come from the adulterous affair that produced her.

Scalia’s dismissal of Carole’s adulterous relationship with Michael obscures discussion of Victoria’s separate interest in a continuing relationship with the biological father with whom she had bonded. The plurality rejects the dissent’s interpretation of the *Stanley* line of cases as staking recognition of a liberty interest to “biological fatherhood plus an established parental relationship,” factors that Scalia concedes existed in *Michael H.* as well.<sup>124</sup> Insisting that such an interpretation distorts the rationale of those cases, he explains that: “As we view them, they rest not upon such isolated factors but upon the historic respect — indeed, sanctity would not be too strong a term — traditionally accorded to the relationships that develop within the unitary family.”<sup>125</sup> It is the family relationship, not the parental one, that Scalia sees as entitled to constitutional protection, and family appears to be defined by law — and history — more than function.<sup>126</sup>

<sup>122</sup> *Michael H.*, 491 U.S. at 131.

<sup>123</sup> Scalia rejects, as historically unfounded, the possible recognition of multiple fathers. See *Michael H.*, 491 U.S. at 130–31.

<sup>124</sup> Scalia insisted, moreover, that:

[W]hat is at issue here is not entitlement to a state pronouncement that Victoria was begotten by Michael. . . . What Michael asserts here is a right to have himself declared the natural father *and thereby to obtain parental prerogatives*. What he must establish, therefore, is not that our society has traditionally allowed a natural father in his circumstances to establish paternity, but that it has traditionally accorded such a father parental rights, or at least has not traditionally denied them.

*Michael H.*, 491 U.S. at 126.

<sup>125</sup> *Id.* at 123.

<sup>126</sup> Brennan’s dissent, though it treated Michael’s relationship with Victoria as the constitutionally salient relationship, would also have recognized Michael, Carole and Victoria as a “unitary family” on the basis of the time they spent together. *Id.* at 143–44. Scalia disagreed, insisting that:

The family unit accorded traditional respect in our society, which we have referred to as the “unitary family,” is typified, of course, by the marital family, but also includes the household of unmarried parents and their children. Perhaps the concept can be expanded even beyond this, but it will bear no resemblance to traditionally respected relationships — and will thus cease to have any

The dissents do not fare much better in articulating children's interests. Both place their primary emphasis on the relationship between father and child. Neither considers the relationship, however, from the child's perspective as opposed to the father's, nor do they directly assert that "biology plus" makes continuation of the parental relationship necessarily in the child's interest, either empirically or as vindication of the child's constitutional interest in such a relationship. Justice White's dissent, in particular, simply substitutes biology for marriage in determining parenthood without addressing children's interests at all. He begins with the observation that "the fact that Michael H. is the biological father of Victoria is to me highly relevant to whether he has rights, as a father or otherwise, with respect to the child" and concludes that Michael H. has a liberty interest that cannot be denied without due process of the law.<sup>127</sup> For White, marriage is simply a way of insuring biological connection.<sup>128</sup>

Brennan's dissent, in contrast, emphasizes the standard that had been established in the earlier cases such as *Lehr*: "although an unwed father's biological link to his child does not, in and of itself, guarantee him a constitutional stake in his relationship with that child, such a link combined with a substantial parent-child relationship will do so."<sup>129</sup> Because, according to Brennan's opinion, "Michael H. is almost certainly Victoria D.'s natural father, has lived with her as her father, has contributed to her support, and has from the beginning sought to strengthen and maintain his relationship with her," his paternal status should receive constitutional protection.<sup>130</sup> The relationship with the mother, her competing relationship with her husband, and the child's status within an intact family are irrelevant to the analysis.

The Supreme Court was sufficiently scarred by the divisions *Michael H.*

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constitutional significance — if it is stretched so far as to include the relationship established between a married woman, her lover, and their child, during a 3-month sojourn in St. Thomas, or during a subsequent 8-month period when, if he happened to be in Los Angeles, he stayed with her and the child.

*Id.* at 123 n.3.

<sup>127</sup> *Id.* at 157.

<sup>128</sup> See Justice White's dissent in *Lehr v. Robertson*, observing that:

[T]he usual understanding of 'family' implies biological relationships, and most decisions treating the relation between parent and child have stressed this element." The "biological connection" is itself a relationship that creates a protected interest. Thus the "nature" of the interest is the parent-child relationship; how well developed that relationship has become goes to its "weight," not its "nature." Whether *Lehr*'s interest is entitled to constitutional protection does not entail a searching inquiry into the quality of the relationship but a simple determination of the *fact* that the relationship exists.

*Lehr v. Robertson*, 463 U.S. 248, 272 (1983) (White, J., dissenting) (citations omitted).

<sup>129</sup> *Michael H.*, 491 U.S. at 142–43.

<sup>130</sup> *Id.* at 143. See, however, Scalia's rejection of this characterization of the relationship, discussed *supra* note 124.

revealed that it has stayed away from similar cases over the intervening decade and a half. We therefore are left to ponder what it is about the “unitary family” that may merit constitutional protection and whether children’s interests are better served by the dissent’s recognition of the parent-child relationship standing on its own. We believe that, from a child-centered perspective, *Michael H.* presents a particularly difficult case on its facts. At the time Michael first legally asserted his paternal interest in Victoria, that is, in May 1984, at the point where his relationship with Carole ended, Victoria was three years old, Michael had been living with her and her mother for the preceding eight months, he had bonded with her, blood tests established that he was the likely father, and Carole had what appears to be at best a strained relationship with Gerald. At this point, we believe the appropriate outcome would have been to recognize Michael as a father (if not *the* father). Victoria viewed Michael as her father, Michael presented himself to the world as Victoria’s father, and even Carole appears to have treated Michael as the father.<sup>131</sup>

By the time the case reached the Supreme Court five years later, however, the situation had changed significantly. Victoria was living in New York with Gerald and Carole, two new children had been born into the marriage, and Gerald had legally and practically assumed the responsibilities of fatherhood. The lower court’s refusal to recognize Michael’s parental status in 1984 cut off Victoria from an established relationship with the man she regarded as her “Daddy.” Reestablishing the relationship in 1989, however, would have disrupted an otherwise “unitary family.” Gerald and Carole had made a commitment to each other and to Victoria. Michael’s involvement would occur over their objections; it might have interfered with the relationship among the siblings, and it might have been difficult to manage as Michael and Victoria lived on different coasts.

Rather than resolve these issues, the Supreme Court attempted to reaffirm the older rules that deny recognition to extra-marital relationships, leaving the creation of any new regime to other institutions and other times. The case nonetheless identifies the questions, left open by the decision, that remain essential to a full understanding of children’s interests and that are critical to distinguishing functional and/or biological parenting relationships. First, do children have an interest — and a corresponding constitutional right — in the truth of the paternity determination? Scalia resolved the matter by insisting that biological paternity, as opposed to the legal consequences of parenthood, was not at issue in the case. Although another case may more squarely pose the issue of the child’s right to know the identity of his biological father,<sup>132</sup> we believe that children may have an

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<sup>131</sup> And, indeed, if the case were decided today, California law might do so as well. See *infra* notes 161–65 and accompanying text (discussing *Brian C. v. Ginger K.*, 92 Cal. Rptr. 2d 294 (Ct. App. 2000)).

<sup>132</sup> But see *McDaniels v. Carlson*, 738 P.2d 254 (Wash. 1987), observing that: A paternity suit, by its very nature, threatens the stability of the child’s world. .

interest in knowing their genetic forbearers that is independent of custody and visitation issues.<sup>133</sup>

Second, does a child ever have a liberty interest in a relationship with a nurturing parent? The Supreme Court had recognized that nurturing fathers do have such an interest in other cases.<sup>134</sup> Does the child have a corresponding right, and is it necessarily identical to the father's right? The *Michael H.* plurality indicated that at least one of Victoria's claims failed because it stood on the same ground as Michael's claim,<sup>135</sup> but the Court left open the issue of the child's rights in circumstances in which the Court might be more willing to recognize the father's claim as well.<sup>136</sup> For the reasons discussed throughout this paper, we are skeptical of the ability of the courts to administer children's rights except as part of the promotion of a regime designed to advance their interests. Such a regime, however, combined with the protections the Court already extends to unmarried fathers would almost certainly recognize that children have some interest in the continuation of an on-going relationship with a biological parent. The *Stanley* line of cases gives constitutional recognition to unmarried fathers (though not de facto parents or the child) on the basis of biology *plus*. If *Michael H.* had been decided immediately after Carole's return to Gerald, should the ongoing paternal relationship have been allowed to trump the marital one? At a minimum, recognition of marriage should not foreclose the child's interest in the continuation of a well-established relationship with her biological father.<sup>137</sup>

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. . . [I]t is possible that in some circumstances a child's interests will even better served by no paternity determination at all. . . . The best interests of the child standard does not entitle a court to presume that paternity determination is *automatically* in the child's best interest.

*Id.* at 261 (citations omitted) (emphasis in original); see also *Marriage of Ross*, 783 P.2d 331, 338 (Kan. 1989) ("Once the judge, in the interest of judicial economy, ruptures the father/child relationship, the judge cannot return the parties to the position they were in prior to the blood test, no matter how wise or great his or her judicial power.").

<sup>133</sup> Full consideration of this issue is beyond the scope of this paper, see generally Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution: The Case for Opening Closed Records*, 2 U. PA. J. CONST. L. 150 (1999).

<sup>134</sup> See Carbone, *supra* note 9, at 1096–1107.

<sup>135</sup> *Michael H.*, 491 U.S. at 121–31 ("Victoria's argument . . . [that] she has a liberty interest in maintaining a filial relationship with her natural father, Michael, we find that, at best, her claim is obverse of Michael's and fails for the same reason.").

<sup>136</sup> Moreover, even conceding that she had no liberty interest under the Fourteenth Amendment in this situation, states can still protect such a relationship; that is, regardless of whether it would be constitutionally required to protect this relationship, as a prudential matter, a state might still do so in order to respect the child's psychological and emotional interests. See *In re Nicholas H.*, 46 P.3d 932 (Cal. 2002); *infra* note 142 (discussing *Nicholas H.*).

<sup>137</sup> See discussion *infra* Part IV.A (describing California cases recognizing biological fathers who have an existing relationship with children born to mothers married to someone

Third, to what extent does a relationship with a nurturing parent depend on that parent's relationship with the other parent? In failing to identify exactly what makes for a "unitary family" and what historically merited protection of the marital family beyond disapproval of adultery, *Michael H.* failed to provide a foundation for determining the role of partnership relationships as opposed to parental ones in provisioning for children. Both the evolutionary psychology literature and the contemporary psychological literature suggest that paternal involvement carries the greatest benefit for children when it supports rather than undercuts the primary custodian.<sup>138</sup> Here, Justice Scalia treated the "unitary family" of Gerald, Carole, Victoria, and her siblings as one of mutual commitment and the relationships between Carole, Michael, and Victoria as a casual arrangement lacking stability. While this may have been true at the time of the Supreme Court's decision, the relevant time frame is not clear. The failure to acknowledge the reality of modern relationships, in which marriage has become a less reliable predictor of stability, is the greatest failing in the decision.

Fourth, are children's interests best served by precommitment strategies or recognition of past events? Certainly a historic justification for marriage is that it locked father and mother to each other, and the child into a formal, public relationship, that cemented their emotional attachment and affirmed their legal and social obligations to each other and their children. Justice Scalia may well have treated marriage as necessarily involving such undertakings when he refused to consider the fact that Gerald and Carole did not have much of an ongoing relationship at the time Michael first legally asserted his right to recognition as Victoria's father.<sup>139</sup> Should marriage continue to be the primary vehicle for establishing such relationships, or should parenthood be subject to commitment strategies independent of the relationship between the parents? We believe that the latter solution is essential to protecting children's interests.

Finally, the Court has repeatedly ruled that a child's relationship with unwed fathers and unwed mothers can be treated differently because, in the words of a recent decision, "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood. The imposition of a different set of rules for making that legal determination with respect to fathers and mothers is neither surprising nor troublesome from a constitutional perspective."<sup>140</sup> The Court has

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else).

<sup>138</sup> CARBONE, *supra* note 17, at 116–18.

<sup>139</sup> Conversely, Justice White's substitution of biology for marriage would appear to treat biology as the new basis for recognition. *See Lehr*, 463 U.S. at 272; *supra* note 128 (discussing Justice White's dissent in *Lehr*).

<sup>140</sup> *Nguyen v. INS*, 533 U.S. 53, 63 (2001). This sentence, however, merits scrutiny. First, the reference to "proof" suggests that the parenthood determination is a matter of biology. If so, *Michael H.* is clearly Victoria's father. Second, to the extent the issue is the difficulty of determining paternity, modern advances make the determination far more certain. *See*

never been faced with a challenge to the rights of the biological mother to be recognized as the mother entitled to parental rights.<sup>141</sup> Instead, challenges to mothering have arisen in the context of defining the rights to which a biological mother is entitled. For example, in *Palmore v. Sidoti*,<sup>142</sup> the question was whether a white mother's relationship with a black man precluded her from continuing to have custody of her child. In *Troxel*, the issue was whether the mother could control her children's relationships with their grandparents.<sup>143</sup> These cases did not question the biological mother's status as mother. This suggests that, at least for mothers, biology alone may determine parental status, and this status is entitled to a measure of constitutional protection that may not necessarily be extended to fathers<sup>144</sup> — or children.<sup>145</sup>

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*infra* text accompanying note 149.

<sup>141</sup> Although the U.S. Supreme Court has never had to face such an issue, the California Supreme Court in *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), did address the issue of whom to recognize as a mother when an egg donor contributed an egg to a gestational surrogate, producing a child with biological ties to two women — the one who contributed her genetic inheritance, and the one who carried the child to term. The case raised equal protection concerns because there was never any question that the intended father who donated his sperm as opposed to the intended mother who donated her egg, was a legal parent. *Id.* at 785.

The *Johnson* court resolved the issue on statutory grounds by using intent as a tiebreaker to decide in favor of the genetic mother. *Id.* at 782–93. In the future, it will be possible to fracture the biological relationship even further as a fertility clinic has already produced a child genetically related to two women — an egg donor who contributed mitochondrial DNA and an intended mother whose nuclear DNA was added to the egg. If a child so conceived were then carried to term by a surrogate and nursed by another woman, there could conceivably be four women with a “biological” relationship to the child.

<sup>142</sup> 466 U.S. 429 (1984).

<sup>143</sup> *Troxel v. Granville*, 530 U.S. 57, 64 (2000).

<sup>144</sup> Indeed, these cases have overwhelmingly been framed in equal protection terms with fathers claiming that their right to recognition of a relationship with their children should stand on the same terms (i.e., primarily biology) as a mothers' claims. Justice White has come closest to the purest form of this position which would base the legal interest on the genetic tie. *See supra* note 128. Other members of the Court see the mother's interest as different because it combines the genetic tie with the bonding that occurs during the pregnancy, producing a relationship in which they believe the mother is more likely to act in the child's interests. Justice Burger's dissent in *Stanley v. Illinois*, 405 U.S. 645 (1972), which sounds like it could have been authored by an evolutionary psychologist, observed:

[T]he biological role of a mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male's often casual encounter. This view is reinforced by the observable fact that most unwed mothers exhibit a concern for their offspring either permanently or at least until they are safely placed for adoption, while unwed fathers rarely burden either the mother or the child with their attentions or loyalties. Centuries of human experience buttress this view of the realities of human conditions and suggest that unwed mothers of illegitimate children are generally more

The uncertainties in the *Michael H.* decision parallel those that emerge from considering hunter-gatherer preferences in a post-industrial world. Carole secured the assistance of a biological father during Victoria's infancy, the period in which assistance would have been most critical to survival in a hunter-gatherer society. Michael took efforts to ensure paternity (paternity tests) and bonded with Victoria, providing a firm foundation for their relationship. Carole then chose another mate, Gerald, when she was ready to bear a second child. Gerald's commitment to Carole, combined with the birth of other children to their relationship, made Gerald the type of step-father most likely to invest in Victoria on something close to an equal basis with his biological children.

In a hunter-gatherer society, Michael would either have fought Gerald's efforts to renew his relationship with Carole<sup>146</sup> or deferred to their new relationship.<sup>147</sup> With the rise of agriculture, marriage served to stigmatize non-marital sex and lock

dependable protectors of their children than are unwed fathers.

*Id.* at 665–66 (Burger, C.J., dissenting).

The issue of gender differences and the relative attachment of mothers and fathers to their children goes beyond the scope of this paper.

<sup>145</sup> A child's constitutional right to a relationship with her biological mother, however, is much more complex. It is relatively simple if it is treated as the reciprocal of the mother's right: A child always has an interest in developing a relationship with a willing biological mother. It is harder to imagine the child's right trumping parental desires, e.g., giving a newborn the ability to veto the mother's decision to place her up for adoption. The child's right would therefore have the greatest salience if it permitted a best interest test to trump the mother's constitutional interest, e.g., if a child had an independent right to custody with the parent best able to care for her irrespective of the other parent's wishes, but such decisions are rarely framed in terms of children's constitutional rights. A child's right to know her biological parent is much more straightforward. *See generally* Cahn & Singer, *supra* note 133; Naomi Cahn, *Perfect Substitute for the Real Thing?*, \_\_\_ DUKE L.J. \_\_\_ (forthcoming 2003).

<sup>146</sup> Indeed, many of the *Stanley* line of cases arise because the father fights to reestablish or control a relationship with the mother who placed the child for adoption. The dispute is as much about the relationship with the mother as the child, but only the father's paternal status is before the court. *See* Carbone, *supra* note 9, at 1148–49. Conversely, in some of the marital presumption cases, the mother asserts her husband's paternity as a way of cutting off a continuing relationship with a lover she has spurned. *See infra* notes 161–72 and accompanying text.

<sup>147</sup> To the extent that he might have paid special attention to Victoria later in life, it would either occur because of Gerald's death or as part of a communal adult interest in overseeing the activities of younger members of the group. Anthropological research suggests, though, that among the Ache's, uncertainty about paternity creates a reserve group of fathers who may assist with a particular child if the mate with the immediate relationship with the mother dies. Some evolutionary psychologists suggest that the mother may deliberately mate with several men, and thus keep paternity unknowable in order to secure the assistance of fallback fathers. *See* HRDY, *supra* note 68, at 246–49.



in longer term relationships.<sup>148</sup> Carole's adultery would thus either have been more carefully hidden or likely to lead to the end of the marriage to Gerald. In the modern era, the tension is between recognizing Michael's bond with Victoria and her new ongoing relationship with Gerald, with both fathers prepared to contribute to Victoria's college education. The issue of what *should* happen in this case, of which outcome best serves Victoria's interests and, indeed, of what moral obligations Michael and Gerald have in the absence of a legal ruling is very much up for grabs.

Given this level of uncertainty, discussing these issues under the rubric of a child's relational rights under the Constitution at most sets out a framework. In defining what best serves a child, rights are a crude method for achieving that goal; indeed, the facts of *Michael H.* illustrate that the concept of how best to serve a child is highly contested. By refusing to rule the marital presumption unconstitutional, issuing so fractured a set of opinions, and refusing to grant certiorari in subsequent cases, the Supreme Court has effectively given the states wide latitude in constructing children's relationships to their parents.

#### IV. THE LEGAL STATUS OF THE GENETIC TIE: THE RECONSTRUCTION OF PARENTHOOD AND THE PROMOTION OF CHILDREN'S INTERESTS

The states have adopted no more uniform an approach to determining the importance of a child's genetic tie to his father than the justices of the Supreme Court. Indeed, even categorizing the state approaches requires reconsideration of what the issue really is: Is the focus marriage, genetics, or function? The marital presumption, after all, arose in a time period when parenthood was unequivocally defined in terms of biology, but the biological tie was impossible to determine with certainty.<sup>149</sup> The presumption served most forcefully to keep out evidence, such as testimony about a wife's infidelity, that might disprove a husband's paternity or maliciously serve to undermine the reputation of the parties involved and call into question the child's identity and inheritance.

In today's world, paternity can be determined with certainty, and the marital presumption can be divided into a series of discrete issues. First, under what circumstances will the courts order paternity tests over the objections of marital parents? Second, are the courts willing to recognize someone other than a genetic father as a legal parent once blood test results are available? And third, is it more

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<sup>148</sup> See generally HELEN FISHER, ANATOMY OF LOVE: THE NATURAL HISTORY OF MONOGAMY, ADULTERY AND DIVORCE 75-87 (1992) (emphasizing, however, that adultery is common in most societies, including those with a heavy emphasis on marriage and female fidelity, but that the responses to cuckolding vary widely, with universal condemnation reserved for those who flaunt their unfaithfulness).

<sup>149</sup> See *Brian C. v. Ginger K.*, 92 Cal. Rptr. 2d 294, 299 n.4 (Ct. App. 2000).

important to confer legal parenthood on the person who has established a psychological bond with the child or a person who can be held responsible for the child's financial well-being? Courts, legislatures, and scholars have struggled with parenting relationships both within and outside of marriage.

The marital presumption starkly presents the issue of rules versus relationships, of biology versus institution. In dealing with the ongoing validity of the marital presumption, Diane Kaplan organizes the state responses into three categories: continued application of the marital presumption, complete rejection, and a case by case determination.<sup>150</sup> While this characterization is somewhat accurate, even within states that have clearly adopted one or the other of these rules, the cases vary more than the statement of the holdings might suggest. Moreover, regardless of what approach the state follows, the relationships among the possible parents and the child matter more than a simple statement of the marital presumption would suggest. All states to some degree permit existing relationships to overcome rigid rules even though the states are inconsistent on the policies most likely to promote children's interests. To illustrate the difficulties with a simple observation that a state follows or does not follow the marital presumption, we will start with California and its welter of potentially conflicting rules before examining the different regimes Kaplan catalogues.

### *A. California*

California statutory law contains three relevant provisions. At the outset, it recognizes that "the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage."<sup>151</sup> In other words, California still embraces the marital presumption. Notwithstanding this provision, however, where the experts conclude that a husband is not a biological father, "the question of paternity of the husband shall be resolved accordingly."<sup>152</sup> Finally, California permits a notice of motion for blood tests to determine paternity to be filed by the husband, the "presumed father," the child's guardian ad litem and, under certain circumstances,<sup>153</sup> the child's mother only within two years of the child's birth.<sup>154</sup> While California appears to adhere to the marital presumption, blood tests can be used to rebut it but only before the child's second birthday. The decided cases, however, are less clear cut than the statute,

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<sup>150</sup> Diane S. Kaplan, *Why the Truth is Not a Defense in Paternity Actions*, 10 TEX. J. WOMEN L. 69, 73, 76, 79 (2000).

<sup>151</sup> CAL. FAM. CODE § 7540 (1994).

<sup>152</sup> *Id.* § 7541(a).

<sup>153</sup> *Id.* § 7541(c) ("The notice of motion for blood tests under this section may be filed by the mother of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child.").

<sup>154</sup> *Id.* § 7541(b)-(c).

with its two year time period, would suggest.

First, even within the child's first two years, only the child's guardian, the mother, her husband, and the "presumed father" have standing to seek paternity tests. A presumed father is one who has married or attempted to marry the mother or who "receives the child into his home and openly holds out the child as his natural child."<sup>155</sup> Accordingly, a biological father who has not received the child into his home may not be able to compel blood tests over the objection of the mother and her husband even if the child is a newborn<sup>156</sup> or if the biological father later marries the mother.<sup>157</sup>

Second, paternity tests establishing biological paternity, even if court ordered

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<sup>155</sup> *Id.* § 7611(d).

<sup>156</sup> The California Supreme Court affirmed the constitutionality of this statute in 1998. In *Dawn D. v. Superior Court*, 952 P.2d 1139 (Cal. 1998), Jerry K. attempted to establish his paternity during Dawn's pregnancy. *Id.* at 1140. Dawn was married and had returned to her husband by the time of the child's birth, but she had been living with Jerry when she became pregnant. *Id.* Jerry, although he was almost certainly the biological father, did not meet any of the criteria to be a "presumed father" under the statute because he had never taken the child into his home. *Id.* at 1141-42. Jerry thus lacked standing to secure a blood test, and the California Supreme Court rejected his challenge to the constitutionality of the statute on due process grounds. *Id.* at 1145-48. In doing so, the court referred to the Supreme Court's decision in *Michael H.* and distinguished an earlier line of California cases granting some rights to fathers whose efforts to establish paternity were frustrated by the *unmarried* mothers of their children. *Id.* at 1148 (distinguishing *In re Adoption of Michael H.*, 898 P.2d 891 (Cal. 1995); *In re Adoption of Kelsey S.*, 823 P.2d 1216 (Cal. 1992)) ("[T]he interest for which Jerry seeks constitutional protection differs from the interest at issue in our adoption cases."). See generally Carol A. Gorenberg, *Fathers' Rights vs. Children's Best Interests: Establishing a Predictable Standard for California Adoption Disputes*, 31 FAM. L.Q. 169, 196 & n.161 (1997).

<sup>157</sup> *Miller v. Miller*, 74 Cal. Rptr. 2d 797 (Ct. App. 1998). In this case, the mother and her husband had three children. They separated when the youngest was two, and the mother began living with the husband's brother, whom she later married. *Id.* at 798. The divorce court found the three children to be children of the marriage and awarded the husband joint physical and legal custody. *Id.* After her separation from her husband, the mother told her husband's brother that he was the third child's father, and the brother sought to establish paternity several years later at a time when the mother was seeking sole custody of all three children. *Id.* Although blood tests established that the brother was the biological father of the youngest child, the court upheld application of the marital presumption, concluding that the brother did not have standing as a "presumed father" and could not therefore seek to rebut the presumption. *Id.* at 801. The court explained that, although the biological father had married the mother and held the child out as his own, he did not seek to establish paternity until the youngest child was six, two years after the decree recognizing her as a child of the marriage and four years after he learned of his paternity. *Id.* at 800.

The law differs where the mother is not married. In *In re Nicholas H.*, the California Supreme Court held that a non-biological father could be the presumed father of a nonmarital child where the biological father had never come forward to claim his rights. *In re Nicholas H.*, 46 P.3d 932, 936 (Cal. 2002).

for children under the age of two, do not necessarily determine legal parentage and rebut the marital presumption.<sup>158</sup> *Rodney F. v. Karen M.*<sup>159</sup> applied the conclusive presumption of paternity to sustain the parentage of the husband in an ongoing marriage despite blood tests ordered before the child was two, suggesting that the mother's paramour was most probably the child's biological father.<sup>160</sup> Whether paternity tests exist or not, and whether the child is under or over two, the marital presumption may still trump a biological demonstration of paternity.

Third, just as paternity tests are not necessarily controlling in determining the paternity of a child under two, neither is the marital presumption conclusive for children over two. In *Brian C. v. Ginger K.*,<sup>161</sup> the father had an affair with the mother during a period in which she was also living with, and having intimate relations with, her husband. The biological father's name appeared on the birth certificate, and he developed a close relationship with his daughter after her birth. The mother terminated their relationship when she reconciled with her husband, and the biological father first asserted his parental rights more than two years after the child's birth. The lower court applied the marital presumption to recognize the mother's husband, who had an on-going relationship with the child, as the legal father. The court of appeal, however, reversed on the ground that the biological father, and not the husband, had established a family relationship with the child.<sup>162</sup>

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<sup>158</sup> In 1997, the court in *In re Marriage of Rebecca and David R.* held that the courts, unlike the parties, were not constrained by the two-year statute of limitations and could order blood tests on their own authority. *In re Marriage of Rebecca & David R.*, 62 Cal. Rptr. 2d 730, 742 (Ct. App. 1997) (unpublished opinion). If the blood tests established that the mother's husband was not the father of the child, the blood tests would rebut the marital presumption irrespective of the husband's social relationship with the child or the child's best interests. *Id.* at 732. The court emphasized it was publishing its opinion in order to warn the trial courts that "they should not routinely order blood tests in such cases but instead must exercise their discretion." *Id.*; cf. *Freeman v. Freeman*, 53 Cal. Rptr. 2d 439 (Ct. App. 1996) (affirming application of the marital presumption to prevent a husband from evading child support in a dissolution proceeding, citing estoppel principles). Grace Ganz Blumberg's comments to the California Family Code note, however, that "[t]he holding of *Rebecca R.* is unpersuasive as a matter of statutory interpretation and social policy," BLUMBERG'S CALIFORNIA FAMILY CODE ANNOTATED § 7541 cmt., at 335 (Grace Ganz Blumberg ed., West 2000), and the opinion has since been depublished.

<sup>159</sup> 71 Cal. Rptr. 2d 399 (Ct. App. 1998).

<sup>160</sup> *Id.* at 403; see also *Miller*, 74 Cal. Rptr. 2d at 801 (stating that blood tests by the second husband demonstrating that he was the biological father of a child born to his wife during her first marriage could not override the conclusive presumption of CAL. FAM. CODE § 7540 (1994) because the tests were neither ordered by the court nor performed by court appointed experts, they were not performed within two years of the child's birth, and the second husband did not have standing to request blood tests because he was not a presumed father within the meaning of CAL. FAM. CODE § 7611 (1994).

<sup>161</sup> 92 Cal. Rptr. 2d 294 (Ct. App. 2000).

<sup>162</sup> *Id.* at 309-11.

The court emphasized that, unlike the child in *Michael H.*, this child was not born into an extant marital relationship.<sup>163</sup> Rather, the only family the child had known consisted of the mother and the biological father, with his name on the birth certificate and his presence as her father during the early years of her life. The court suggested that this relationship not only met the statutory definition for a presumed father, it merited constitutional protection, suggesting that any other statutory provision would be invalid.<sup>164</sup>

The court of appeal ruling turned on its distinction of *Michael H.* To do so, the court relied on Justice Scalia's characterization of Michael's relationship with Victoria as an informal arrangement in which he just "happened" to be staying with her. It viewed Carole and Gerald's marital relationship, including the period in which they were living in different cities and Carole was enjoying other paramours, as an "intact" marriage. The California court's conclusion that the traditional state interest in "upholding the integrity of the family" was relatively weak in *Brian C.* rested on its factual conclusion that there was no real marital family to uphold.<sup>165</sup>

Finally, the courts have often refused to apply the marital presumption to lock in a husband without an ongoing relationship with his wife's child. In *Alicia R. v. Timothy M.*,<sup>166</sup> for example, Alicia married Peter at a time when she was still legally married to someone else. A child was born into the marriage two years later, and Peter held out the child as his own, with his name appearing on the birth certificate.<sup>167</sup> When the parties divorced three years later, however, Alicia told Peter that he was not the father, and a blood test confirmed the news.<sup>168</sup> The court declared their marriage void, and Peter did not contest Alicia's legal efforts to have the court declare that the child was not a result of their union.<sup>169</sup> When Alicia later sought to have the biological father held liable for child support, the court held that the marital presumption did not prevent recognition of the biological father as the legal father of the child.<sup>170</sup> Neither Alicia nor the child had an on-going relationship

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<sup>163</sup> *Id.* at 309.

<sup>164</sup> *Id.* at 308–10.

<sup>165</sup> *Id.* The majority's reconstruction of the facts in this case is not substantially different from the interpretation of the facts by the *Michael H.* dissenters. They, too, emphasized that the relevant period of time was that surrounding the baby's birth. Michael H., like the biological father in *Brian C.*, lived with the mother and held the baby out as his own during at least a three month period in which the mother's husband had no role in the child's life and for an eight month period later on. The *Michael H.* dissenters came to the same conclusion as the court of appeals in *Brian C.*, viz., that the biological father had established a relationship with the child and that the relationship was entitled to constitutional protection. See discussion *supra* note 128 and accompanying text.

<sup>166</sup> 34 Cal. Rptr. 2d 868 (Ct. App. 1994).

<sup>167</sup> *Id.* at 869–70.

<sup>168</sup> *Id.* at 870.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 871.

with the husband of the valid marriage, and the relationship to Peter, who had acted as the child's father during the child's first three years, had been severed.<sup>171</sup> The court refused to allow the marital presumption to bar a child support action in such circumstances against the child's biological father.<sup>172</sup>

The court in *Brian C. v. Ginger K.*<sup>173</sup> attempted to reconcile this conflicting line of cases by emphasizing the nature of the underlying relationships. The courts have most consistently upheld the marital presumption in cases in which a biological father, without an established relationship with the child, has sought recognition of paternity over the objections of the mother and her husband in the context of an on-going marriage.<sup>174</sup> The California courts have been the most willing to discard the presumption where, in contrast, the husband never established a relationship with the child, and the biological father seeks to use the marital presumption to evade his responsibilities to the child.<sup>175</sup> Where the husband has assumed the father's role the courts appear determined to exclude those who would undermine the extant

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<sup>171</sup> *Id.* The result in this case might have been different if Peter had attempted to secure paternal status during the proceeding in which Alicia had their marriage annulled. The California courts recently held that an unmarried partner, who lived with the mother and held himself out as the child's father, could receive recognition as a presumed father notwithstanding the absence of a marital tie and blood tests excluding him as the child's biological father. *In re Raphael P. III*, 118 Cal. Rptr. 2d 610 (Ct. App. 2002) (recognizing the man whose name appeared on the birth certificate and who held himself out as the child's father as a presumed father even without a biological relationship); see also *In re Nicholas H.*, 46 P.2d 932, 936 (2002); *supra* note 157 (discussing *Nicholas H.*).

<sup>172</sup> *Alicia R.*, 34 Cal. Rptr. 2d at 871. The California courts reached a similar result in *County of Orange v. Leslie B.*, 17 Cal. Rptr. 2d 797 (Ct. App. 1993). In this case, the mother had separated from the father before the child was born, and he had no on-going relationship with the child. *Id.* at 797. The mother applied for welfare, and the state sought child support from the biological father, who like the husband had never formed a relationship with the child. The court rejected the marital presumption as a defense, noting that application of the presumption produced a "ridiculous result" because there was no family unit to be preserved, *id.* at 801, and that the presumption "was never intended as a financial prophylactic for men who have affairs with married women." *Id.* at 800.

<sup>173</sup> 92 Cal. Rptr. 2d 294 (Ct. App. 2000).

<sup>174</sup> "[T]he claimant in *Dawn D.* lost because he had no statutory standing to bring the action, and had no *relationship* on which to predicate a due process claim." *Id.* at 307 (emphasis in original). Indeed, the courts have repeatedly held, in applying paternity presumptions in non-marital cases, that the extant father-child relationship is to be preserved at the cost of biological ties. See *In re Nicholas H.*, 46 P.3d 932 (Cal. 2002) (recognizing the presumed father, who was not the biological father, as the legal father in a case in which the presumed father was the only father the child had known, the biological father could not even be located, and the mother was not competent to accept custody); see also *supra* note 157 (discussing *Nicholas H.*).

<sup>175</sup> *Alicia R.*, 34 Cal. Rptr. 2d at 871 ("While the state has a legitimate interest in promoting marriage and not impugning a family unit, that interest cannot be served here where there is no marital union or family unit to disrupt.").

relationship and to rebuff the husband's later efforts to renege on the obligations he had assumed.<sup>176</sup> The courts seem most ambivalent on facts like those of *Michael H.*, where the mother seeks to use the marriage she has betrayed to sever an established relationship between her lover and the child.<sup>177</sup>

### *B. Continued Application of the Marital Presumption*

The cases in states outside California that continue to apply the marital presumption follow similar patterns of examining the underlying affective relationships. In *John M. v. Paula T.*,<sup>178</sup> the Pennsylvania Supreme Court upheld the marital presumption on the basis of one of the strongest possible scenarios for its application. The husband and wife in the case were living together with four children who had been born within the marriage. The putative father claimed that he had had an affair with the mother before and during the marriage, and blood tests showed the putative father was ninety-seven percent more likely than a random man of the same race to be the father of the mother's second child. The putative father sought to compel the mother's husband to undergo blood tests that might conclusively establish he was not the biological father.<sup>179</sup>

Observing that "the 'presumption of legitimacy,' [was] one of the strongest presumptions known to the law," the court held that historically it could be overcome only by proof that the husband did not have access to his wife during the period of possible conception, or by proof of the husband's impotency or sterility.<sup>180</sup> Blood tests, however conclusive, were not necessarily enough. The court explained that:

There are other interests at stake in this case besides those of appellant-husband and appellee-putative father. Obviously, the needs and interests of the Child are of paramount concern, and the needs and interests of

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<sup>176</sup> The clearest exception in these cases may be where the mother and her husband agree to recognize the biological father rather than the husband as the child's father. *See id.*

<sup>177</sup> Compare *Brian C.*, 92 Cal. Rptr. 2d 294, with *Michael H.*, 504 U.S. 905. Compare also the *Stanley* line of cases (culminating with *Stanley v. Illinois*, 405 U.S. 645 (1972)) upholding the biological father's rights where he had established a relationship with the child under the mother's support, and refusing to recognize such rights for fathers without such a relationship, even where the mother's actions frustrated the willing father's efforts. *See Carbone*, *supra* note 9, at 1096-1102.

<sup>178</sup> 571 A.2d 1380 (Pa. 1990); *see also* *M.F. v. N.H.*, 599 A.2d 1297, 1299 (N.J. 1991) (analyzing the Act "in light of the strong public policy favoring the preserving of the family unit when neither the mother nor her husband have in any way disavowed the husband's paternity of the child.").

<sup>179</sup> *John M.*, 571 A.2d at 1381-83.

<sup>180</sup> *Id.* at 1383 n.2.

appellant-wife/mother are on a par with the “putative” and “presumptive” fathers. There is, in short, a family involved here. A woman and a man who have married and lived together as husband and wife, giving birth to and raising four children, have obvious interests in protecting their family from the unwanted intrusions of outsiders (even ones who have had serious relationships with the mother, father or children). The Commonwealth recognizes and seeks to protect this basic and foundational unit of society, the family, by the presumption that a child born to a woman while she is married is a child of the marriage.<sup>181</sup>

In upholding the marital presumption, the Pennsylvania court was more interested in allocating legal responsibility than in determining biological “truth.” It recognized the *family’s* interest in protecting their relationships “from the unwanted intrusions of outsiders” as a critical privacy interest outweighing the importance of the parenthood decision standing on its own.<sup>182</sup> To the extent that the court recognized children’s rights, it identified them with the child’s stake in the on-going family in which the child had been raised.<sup>183</sup>

Subsequent Pennsylvania cases, however, suggest that the courts may frame the issue differently when one of the functional parents, rather than a putative father, raises the issue. In *Miscovich v. Miscovich*,<sup>184</sup> for example, the Miscovichs divorced when the son born into the marriage was four. Two years after the divorce, the former husband had DNA tests performed that conclusively established that he was not the boy’s father.<sup>185</sup> He then unilaterally terminated his relationship with the six year-old and sought to overturn the child support award that had been entered. The court refused. Relying on a case decided in 1962, the court observed:

We recognize that there is something disgusting about a husband who, moved by bitterness toward his wife, suddenly questions the legitimacy of her child whom he had been accepting and recognizing as his own. . . . Where the husband has accepted his wife’s child and held it out as his own over a period of time, he is estopped from denying paternity.<sup>186</sup>

As the emphasis on legitimacy suggests, however, the analysis in 1962 was somewhat different in defining children’s interests than it might be today. The *Goldman* decision, from which the quote is taken, describes the husband’s act of

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<sup>181</sup> *Id.* at 1386.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 1387–88.

<sup>184</sup> 688 A.2d 726 (Pa. Super. Ct. 1997).

<sup>185</sup> *Id.* at 727–28.

<sup>186</sup> *Id.* at 732.



holding the child out as his own, rather than the personal relationship that had developed as the critical factor in its decision, and it links its "disgust" to the threat to render the child "illegitimate" rather than to anything about the future of the relationship.<sup>187</sup> While the 1997 decision in *Miscovich* uncritically cites *Goldman*, its emphasis is in fact quite different. In applying estoppel principles to the facts of the case, the court reasoned that:

Gerald [the husband] clearly had an established relationship with his son. Like in *Goldman*, he did not question it until after the relationship between him and his wife deteriorated. Although the family is not now intact . . . a familial relationship existed at the time the child was born and, more significantly, a parent-child bond was formed. Despite Gerald's unilateral termination of this relationship and his decision to notify the child that he was not his father, we find that a considered application of the myriad factors involved to the facts of this case warrant a finding that the relationship still exists at law. . . . Significantly, Gerald offers no evidence, other than his hunch of non-paternity based on eye color, that a relationship has been forged with a putative father . . . .<sup>188</sup>

The court thus suggested that it would not mechanically apply the marital presumption but rather would consider the facts of the relationship. Like the decision in *Goldman*, the court invoked estoppel principles,<sup>189</sup> but in this case the key factors were the husband's established paternal relationship and the absence of one with a putative father.

The Pennsylvania Supreme Court has embraced this case-by-case analysis that links the presumption with principles underlying estoppel.<sup>190</sup> Where the two

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<sup>187</sup> *Goldman*, 184 A.2d at 355.

<sup>188</sup> *Miscovich*, 688 A.2d at 733.

<sup>189</sup> In *Freedman v. McCandless*, the Pennsylvania Supreme Court defined estoppel as: Estoppel in paternity actions is merely the legal determination that because of a person's conduct (e.g., holding out the child as his own, or supporting the child) that person, regardless of his true biological status, will not be permitted to deny parentage, nor will the child's mother who has participated in this conduct be permitted to sue a third party for support, claiming that the third party is the true father. As Superior Court has observed, the doctrine of estoppel in paternity actions is aimed at "achieving fairness as between the parents by holding them, both mother and father, to their prior conduct regarding the paternity of the child."

*Freedman v. McCandless*, 654 A.2d 529, 532-33 (Pa. 1995) (citation omitted).

<sup>190</sup> The court observed that:

The presumption of paternity and the doctrine of estoppel, therefore, embody the two great fictions of the law of paternity: the presumption of paternity embodies

principles conflict, however, it is the marital presumption that has finally given way. In *Brinkley v. King*, Lisa Brinkley was married to and was living with George Brinkley in February 1991, when Lisa's daughter, Audrianna, was conceived.<sup>191</sup> George, however, moved out in July, 1991, four months before the child was born, and filed for divorce when he learned that she was pregnant by another man.<sup>192</sup> In contrast, Richard King, the baby's biological father, visited Audrianna in the hospital, visited every week, and paid monthly support for two years following her birth.<sup>193</sup>

The lower court applied the marital presumption because George and Lisa were living together at the time Audrianna was conceived, and Lisa could not establish that George had no access during that period. The Supreme Court reversed, holding that:

We now question the wisdom of this application of the presumption because the nature of male-female relationships appears to have changed dramatically since the presumption was created. There was a time when divorce was relatively uncommon and marriages tended to remain intact. Applying the presumption whenever the child was conceived or born during the marriage, therefore, tended to promote the policy behind the presumption: the preservation of marriages. Today, however, separation, divorce, and children born during marriage to third party fathers is relatively common, and it is considerably less apparent that application of the presumption to all cases in which the child was conceived or born during the marriage is fair. Accordingly, . . . we hold that the presumption of paternity applies in any case where the policies which underlie the presumption, stated above, would be advanced by its application, and in other cases, it does not apply.<sup>194</sup>

In *Brinkley*, the marital relationship had ended before Audrianna's birth, she had bonded with biological father, Richard, and she had a minimal relationship with her mother's husband. Because the marital presumption in this case would not promote

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the fiction that regardless of biology, the married people to whom the child was born are the parents; and the doctrine of estoppel embodies the fiction that, regardless of biology, in the absence of a marriage, the person who has cared for the child is the parent.

*Brinkley v. King*, 701 A.2d 176, 180 (Pa. 1997).

<sup>191</sup> *Id.* at 177.

<sup>192</sup> *Id.* at 177-78.

<sup>193</sup> *Id.* at 178. George visited his other child from the marriage but included Audrianna in the visits only when she was older and wanted to go with him. Audrianna saw Richard, not George, as her father. *Id.*

<sup>194</sup> *Id.* at 180-81.

the public policies underlying its adoption, the court ruled it should not apply.<sup>195</sup>

Subsequent Pennsylvania decisions have furthered the analysis. In *Fish v. Behers*,<sup>196</sup> for example, the Pennsylvania Supreme Court concluded that the marital presumption did not apply because the parties had been divorced since 1993, and “there [was] no longer an intact family or a marriage to preserve.”<sup>197</sup> Nonetheless, the court held that the husband was estopped from denying paternity of a boy he had treated as his own through the age of five, reasoning that: “The father-son relationship with appellant’s husband is the only such relationship this child has known. The alternative — forcing the child into a relationship with appellee, a man whom he does not know — is not in the best interests of this child.”<sup>198</sup> The court thus identified the child’s interests with the policies underlying estoppel principles and concluded that the lower court could not order the putative father tested despite blood tests conclusively establishing that the husband was not the biological father of the child.

### *C. Rejection of the Marital Presumption*

Unlike Pennsylvania, Massachusetts has chosen to reject the marital presumption. Much of the force of the marital presumption came from Lord Mansfield’s refusal to permit spouses to testify to the other’s lack of sexual access.<sup>199</sup> In Massachusetts, however, statutory law explicitly authorizes a husband and a wife to testify in a nonsupport action concerning the parentage of a child,<sup>200</sup> and the courts have allowed married women to testify to the illegitimacy of their children since at least 1914.<sup>201</sup> Permitting blood tests was thus a short additional

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<sup>195</sup> The court explained that:

The public policy in support of the presumption of paternity is the concern that marriages which function as family units should not be destroyed by disputes over the parentage of children conceived or born during the marriage. Third parties should not be allowed to attack the integrity of a functioning marital unit, and members of that unit should not be allowed to deny their identities as parents. Estoppel is based on the public policy that children should be secure in knowing who their parents are. If a certain person has acted as the parent and bonded with the child, the child should not be required to suffer the potentially damaging trauma that may come from being told that the father he has known all his life is not in fact his father.

*Id.* at 180.

<sup>196</sup> 741 A.2d 721 (Pa. 1999).

<sup>197</sup> *Id.* at 723.

<sup>198</sup> *Id.* at 724.

<sup>199</sup> See *supra* note 29 and accompanying text.

<sup>200</sup> MASS. GEN. LAWS ch.273, § 7 (2002).

<sup>201</sup> See *Commonwealth v. Rosenblatt*, 219 Mass. 197 (1914).

step in a state that has long placed greater emphasis on biology than marriage.<sup>202</sup>

Like Pennsylvania, however, Massachusetts recognizes the possibility of parenthood by estoppel, albeit on a narrower basis. In *A.R. v. C.R.*,<sup>203</sup> the husband sought blood tests to determine whether he was the father of his wife's two children. The mother was already pregnant with the first girl at the time the husband and his wife initiated a sexual relationship, and the child was born before they married. The second girl was conceived at a time when relations between the husband and the wife had "virtually ceased" and he was constantly on the road.<sup>204</sup> The husband nonetheless acted as the children's father until the divorce proceeding that occurred when the first child was two and one-half and the second nearly a year old. In responding to the husband's decision to contest paternity, the Massachusetts Supreme Court first inquired whether probable cause existed to find that the husband may not be the father.<sup>205</sup> While Pennsylvania would not permit introduction of blood tests so long as the husband had access to the wife, Massachusetts requires only a showing that the mother had relationships with other men during the relevant period.<sup>206</sup> If the tests show that the husband is unlikely to

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<sup>202</sup> *Symonds v. Symonds*, 432 N.E.2d 700 (Mass. 1982); *see also Callender v. Skiles*, 591 N.W.2d 182 (Iowa 1999) (declaring a marital presumption unconstitutional to the extent that it granted an unmarried father no standing to challenge husband's paternity). The Iowa Supreme Court observed that:

The traditional ways to establish legal parentage have dramatically changed in recent generations, as has the traditional makeup of the family. Scientific advancements have opened a host of complex family-related legal issues which have changed the legal definition of a parent. It has also made the identity of a biological parent a virtual certainty. Social stigmas have also weakened. If we recognize parenting rights to be fundamental under one set of circumstances, those rights should not necessarily disappear simply because they arise in another set of circumstances involving consenting adults that have not traditionally been embraced. Instead, we need to focus on the underlying right at stake.

*Id.* at 190. *But see Merkel v. Doe*, 635 N.E.2d 70 (Ohio Ct. C.P. 1993) (recognizing the mother and husband's fundamental interest in privacy and integrity of their family relationships); *Patrick T. v. Michelle L.*, 2000 Ohio App. LEXIS 5578 (Ohio Ct. App. Nov. 30, 2000) (declining to follow *Merkel* in circumstances where the mother and husband had not lived together for more than three years before the biological father's paternity action, which was filed during the pregnancy), *dismissed by* 744 N.E.2d 1195 (Ohio 2001) (mem.).

<sup>203</sup> 583 N.E.2d 840 (Mass. 1992).

<sup>204</sup> *Id.* at 841-42.

<sup>205</sup> The wife has not denied that she had sexual relations with other men within weeks of the marriage, nor has she denied the husband's claim that he had "virtually" no sexual relations with her around the time the child was conceived. That is enough to provide probable cause to believe, but not conclusive proof, that the husband is not the father of the second girl.

*Id.* at 845.

<sup>206</sup> *Id.*

have fathered the child, he will not be held liable for support. The court in *A.R.* then considered the possibility of estoppel and similarly found it wanting:

Because the first child was only two and one-half years old when the divorce action was commenced and the second child was less than one year old, it is doubtful that either child relied in any meaningful sense on any representation of paternity that the husband may have made. We need not decide whether emotional detriment, caused by reliance on representations of the husband, alone would be sufficient to uphold a claim of equitable estoppel, without any showing of economic detriment.<sup>207</sup>

The court concluded that the obligation to support a child rests primarily with the natural parents, and one who undertakes that task without any duty to do so generally “should not be punished if he or she should abandon it.”<sup>208</sup>

In *K.B. v. D.B.*,<sup>209</sup> the court refused to apply estoppel on the basis of an even longer relationship where the husband had acted as the child’s father until Sally (the child) was six,<sup>210</sup> and the court did not finally resolve the paternity issue until she was thirteen. The court explained the result as the product of the Massachusetts family policy:

On that question — whether one may lay down the burdens of fatherhood after voluntarily taking them on — State courts nationally have reached divergent results. . . . The first group [those more willing to apply estoppel] tend [sic] to focus on the loss to the child when the volunteer father asserts nonpaternity. . . .<sup>211</sup> The second focuses on not discouraging husbands from voluntarily assuming the role of father to illegitimate children born to their spouses. . . .<sup>212</sup> The common aim of

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<sup>207</sup> *Id.* at 843.

<sup>208</sup> *Id.*

<sup>209</sup> 639 N.E.2d 725 (Mass. Ct. App. 1994).

<sup>210</sup> *Id.* at 731.

<sup>211</sup> To be designated as an illegitimate child in preadolescence is an emotional trauma of lasting consequence. Having placed the cloak of legitimacy upon the child, having induced the child to rely upon its protection, the husband by abruptly removing it surely harms the child.”

*Id.* at 728 (quoting *Clevenger v. Clevenger*, 11 Cal. Rptr. 707, 714 (Ct. App. 1961)).

<sup>212</sup> “Such conduct is consistent with this State’s public policy of strengthening the family, the basic unit of civilized society. We encourage spouses to undertake, where feasible, the support, guidance, and rearing of their spouse’s children”; “[t]his type of family relationship should be encouraged rather than discouraged through the possible consequence of becoming permanently financially obligated for child support.”

the two groups is to foster the raising of illegitimate children within the protective wing of the family unit. The second group does so by encouraging husbands to assume the role of father voluntarily. The other does so by discouraging husbands from relinquishing that role.<sup>213</sup>

As a result of the policy differences, the courts diverge in their application of the technical elements of estoppel as well. Estoppel requires representation, reliance, and detriment. In paternity cases, presentation (the husband holding himself out as the father) and reliance (the child's acceptance of him as such) are rarely in dispute.<sup>214</sup> Instead, the stumbling block is the showing of detriment. In states that interpret estoppel broadly, the psychological harm that results from the termination of an established relationship is enough. In states such as Massachusetts that limit the application of estoppel, detriment may be limited to financial detriment, and it requires a showing that the husband's past provision of financial support has worsened the wife's and child's claim on other sources of support, such as the biological father.<sup>215</sup> In Sally's case, the husband had questioned paternity from the outset, and the court concluded that, despite the fact he had acted as her father for many years, there was no showing that the child would have been better off had he not done so. In Massachusetts, the courts may still act to protect on going relationships,<sup>216</sup> but they do not seek to lock in husbands who have assumed a paternal role.

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*Id.* at 728 (quoting *Knill v. Knill*, 510 A.2d 546 (Md. 1986); *In re Marriage of A.J.N. & J.M.N.*, 414 N.W.2d 68 (Wis. 1987)) (citation omitted).

<sup>213</sup> *Id.* The court also notes that no state precludes the possibility of estoppel. *Id.*

<sup>214</sup> *Id.* Some states, however, require that the husband have some reason to believe he is not the father in order to establish estoppel. *See, e.g.*, *Dews v. Dews*, 632 A.2d 1160, 1168 (D.C. 1993); *Masters v. Worlsey*, 777 P.2d 499, 503 (Utah Ct. App. 1989).

<sup>215</sup> *K.B.*, 639 N.E.2d at 728–29 & n.7.

<sup>216</sup> *See C.C. v. A.B.*, 550 N.E.2d 365 (Mass. 1990) (holding that the putative father must demonstrate a substantial relationship with the child as a prerequisite for paternity action).

The court must look at the relationship as a whole and consider emotional bonds, economic support, custody of the child, the extent of personal association, the commitment of the putative father to attending to the child's needs, the consistency of the putative father's expressed interest, the child's name, the names listed on the birth certificate, and any other factors which bear on the nature of the alleged parent-child relationship.

*Id.* at 372; *see also* Glennon, *supra* note 29, at 574–76 (summarizing different state approaches that condition putative father's standing on either a showing that such a relationship is in the child's interests or that the father already has a substantial relationship with the child).

*D. Case-by-Case Determinations*

A third group of states makes a case-by-case determination of paternity in accordance with the child's best interests. In New York, for example, paternity tests may be used to rebut the marital presumption, and estoppel may be used to establish the paternity of a man who could not have biologically fathered the child, but both paternity tests and estoppel are subject to a determination that they further the child's best interests.<sup>217</sup> While no single factor conclusively determines the child's best interests, the courts in these states build an approach through their definition of the child's needs. In *Hammack v. Hammack*,<sup>218</sup> for example, the New York court identified the availability of estoppel with the particular effect on the child. The court then set forth a laundry list of considerations, including:

[T]he child's best interest in knowing, with certainty, the identity of his or her biological father; whether the movant seeks to prove or disprove his paternity; if the latter, whether the identity of others who may be proven to be the father is known or likely to be discovered, and if so, their willingness and ability to assume that role; the traumatic effect, if any, the testing procedure may have on the child; and the impact, if any, that continuing uncertainty may have on the father-child relationship, if testing is not ordered."<sup>219</sup>

The court further observed that "the best interests of the children are generally served by maintaining their legitimacy," protecting the "status interests of [children] in an already recognized and operative parent-child relationship," and preventing fathers from "bastardizing children born during the marriage for [their] own self-interest."<sup>220</sup>

The key to the New York approach starts with the importance accorded legitimacy. The *Hammack* court identified the child's interests with the preservation of legitimacy and maintenance of the existing parent-child relationships. That interest is more likely to be offset where the husband's relationship to the child has already been undermined or where another man stands ready to assume the father's role.<sup>221</sup> In practice, therefore, the New York factors resemble Pennsylvania's factors; New York law simply grants the courts greater

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<sup>217</sup> Kaplan, *supra* note 150, at 80.

<sup>218</sup> 737 N.Y.S.2d 702 (App. Div. 2002).

<sup>219</sup> *Id.* at 704.

<sup>220</sup> *Id.*

<sup>221</sup> See, e.g., *Sandy M. v. Timothy J.*, 524 N.Y.S.2d 639 (Fam. Ct. 1988) (distinguishing between an intact marriage, where a judicially imposed relationship with a biological father would not be in the children's interests, from a putative father's claim (even if over the mother's objections) where no man has established a paternal relationship with the child).

discretion in applying them.

### *E. Convergences*

In evaluating the existing law of the marital presumption, it is important to recognize the broad cultural and legal changes that affect every court's decision. The marital presumption arose at a time when legitimacy could be critical to a child's future, the mere allegation of infidelity shattering to a woman's reputation, and paternity impossible to prove with certainty. Discouraging challenges to paternity was thus central in explaining the importance of the presumption. In the modern era, the stigma of illegitimacy is largely gone, the "sin" of the mother's infidelity is unlikely to be held against the child, and the biological facts of paternity can not only be determined with certainty, but the child is likely to discover them sooner or later whatever the court rules. Even where the marital presumption survives, the states share no consensus about either its purpose or its wisdom.

Nonetheless, a few broad areas of agreement emerge from the cacophony. First, all states recognize the importance and fragility of on going relationships. Thus, the states are considerably more reluctant to allow challenges to the marital presumption during an on going marriage than they are after the marriage has ended. *Michael H.*, at least based on the facts as they existed at the time of the Supreme Court opinion, thus remains one of the least likely scenarios to result in recognition of a biological father. Paternity actions brought by a spurned lover carry too great a risk of mischief to be freely encouraged.

Second, even those states that insist on preservation of the marital presumption do not necessarily apply it mechanically to destroy an on going relationship with the biological father. In California and Pennsylvania, where the marriage had effectively ended before the child's birth and the biological father had assumed the parental role, the courts ultimately rejected application of the presumption. Existing relationships matter more than potential ones, and it is quite possible that if *Michael H.* were decided in the California courts today, the outcome would be different.

The greatest differences between the states, therefore, lie not so much in the courts' evaluation of existing cases but in their conclusions about how to promote greater paternal involvement. Massachusetts believes that insistence on the marital presumption will discourage men with reason to doubt paternity from assuming the father's role. Pennsylvania, California, and New York place greater emphasis on locking in whatever man has bonded with a young child and holding him responsible financially, whatever the quality of his continuing relationship. The facts in these cases are nonetheless remarkably similar. Studies show that divorcing fathers, even with a biological connection, reduce their parental contributions



following divorce.<sup>222</sup> The breakup encourages the father to inquire into, or the mother to reveal, disconcerting facts about paternity both preferred to avoid while they wanted the relationship to last. Discovering in the process of a breakup that he is not the children's biological father increases the husband's inclination to withdraw. Legal rules that eliminate the child support obligation or standing to pursue custody with a finding of non-paternity accelerate this process. Both the states that embrace and those that reject the marital presumption would like to encourage men, whether biologically related to the child or not, to assume a parental role as part of their participation in family life. Where states disagree is on how to encourage the commitment in the first place.<sup>223</sup>

#### CONCLUSION: MANDATORY PATERNITY TESTING

Given the impermanence of marriage and the relative ease of genetic testing, relationships based on falsehood are unlikely to last. The sociological literature tends to parallel the insights of sociobiology — men are more likely to invest in the children of their current partners, and they are more likely to stay in touch with biological children than step-children after a break-up.<sup>224</sup> At the same time, men who want a relationship to endure are unlikely to inquire too closely into the paternity of the children produced until that relationship has ended and they either have little more to lose, or their former mates wish to sever the remaining ties.<sup>225</sup> The result encourages the formation of loose unions that may provide support for the child through infancy without the promise of stability.

Children today, however, have a relatively greater interest than they did in hunter-gatherer times in obtaining fathers who will stay with them beyond the end of the intimate partnership that produced them — or at least forged the parental bond. The only way to encourage paternal relationships that may survive the breakup is to base such relationships on the knowing acceptance of responsibility. If marriage no longer means a permanent commitment to either partner or child, and if fidelity no longer carries the same degree of sanctity, then the relationship to

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<sup>222</sup> See, e.g., David L. Chambers, *Fathers, the Welfare System, and the Virtues and Perils of Child-Support Enforcement*, 81 VA. L. REV. 2575, 2576 n.6, 2588 n.54 (1995) (citing a 1981 study showing that a quarter of divorced fathers paid nothing in child support and another quarter paid only part of what they owed).

<sup>223</sup> Complementing the marital presumption is the issue of functional relationships established by unmarried men who later discover that they are not biologically related to the child. These cases are discussed in our upcoming book.

<sup>224</sup> This proposition is difficult to test empirically given that biological and adoptive fathers have greater custody and visitation rights than step-parents.

<sup>225</sup> Mothers who wish to exclude estranged mates are often the source of the information that the would-be father is not a genetic one. Functional fathers who wish the relationship with the child to last are not the ones seeking paternity determinations in court.

children should be rebuilt in light of these changes. Fathers<sup>226</sup> are more likely to remain committed to their children if they are either certain of paternity, or they have, with or without the formality of adoption, knowingly accepted responsibility for someone else's child.

The only way to forge parental bonds likely to survive the child's minority therefore is to treat the issue of parenthood separately from the issue of partnership.<sup>227</sup> As a modest effort in this direction, we propose modifying existing law to require mandatory paternity, or second parent, determination at birth. The form of this determination may be either through biological tests or voluntary acknowledgment. Present law draws a clear distinction between married men, who are presumed on the basis of marriage to be fathers, and unmarried men, who must hold out a child as their own.<sup>228</sup> Proposed reforms would expand the scope of voluntary acknowledgments that allow unmarried men to establish paternity through declarations that they fathered a particular child.<sup>229</sup> The distinctions between married and unmarried men should largely be eliminated, and both should be subject to the following set of rules.

First, paternity testing should be encouraged at birth. That is, parents should be encouraged as part of the birth process to undergo and record the results of testing clearly establishing paternity. Biological tests, whether based on blood or DNA,<sup>230</sup> can resolve doubts at the beginning of the parent-child relationship or encourage the parties to discuss more honestly the basis for going forward. We therefore recommend that biological tests be made a routine part of the process of

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<sup>226</sup> This Article has focused on fathers. Non-biological second parents, whether or not of a different sex, and whether or not involved in an intimate relationship with the mother, face many of the same issues. Only fathers, however, combine the possibility of biological parenthood with "second-parent" status, and thus the analysis in this paper has largely been limited to these issues.

<sup>227</sup> This argument is not because of a lack of respect for marriage. Instead, more binding commitments to children may well prompt a change in attitudes toward the formation of intimate partnerships, encouraging greater commitment. See CARBONE, *supra* note 17, at 235-49.

<sup>228</sup> UNIFORM PARENTAGE ACT § 4 (1973).

<sup>229</sup> These proposals are controversial, in part, because they would appear to eliminate the possibility of a second parent, who knows that he or she is not biologically related to a child, acknowledging the child of a partner as his own.

<sup>230</sup> Widespread acceptance will be much more likely if the tests are publically funded, but DNA tests, in particular, can be expensive and can seem pointless if no one is contesting paternity. Robin Wright estimates that from five to twenty-five percent of all births to married women involve fathers other than the mother's husband. Wright, however, does not provide the particulars of the study on which he relies, and those statistics have never been established with certainty. See WRIGHT, *supra* note 51, at 70 ("Blood tests show in some urban areas that more than one fourth of the children may be sired by someone other than the father or record.").

recording births and parentage, subject to the limited exceptions noted above.

Second, waivers should be permitted, but only with a clear articulation of the consequences. Given the invasion of privacy that paternity testing represents and the possible religious and cultural objections, parties should be permitted to waive these tests. To do so, however, and still receive recognition as a parent, the mother's partner should be required to acknowledge the possibility that he is not a biological parent, and that he is nonetheless assuming the full responsibilities and obligations of parenthood. The mother should be required to join in the declaration recognizing her partner as the parent of the child notwithstanding any later finding that someone else fathered the child. Both parties signing such a declaration without paternity testing would then be estopped from later challenging the parental status established through the declaration.<sup>231</sup>

Such a system could easily be extended to both married and unmarried couples, to couples basing parenthood on the biological tie, and to same sex and other couples who know that the child is not the product of their physical union.<sup>232</sup> Nonetheless, we do not intend to discuss here the full implications of such a system for all of those to whom it might imply.<sup>233</sup> Instead, this proposal varies most from existing law in the extent to which it encourages married couples to routinely and voluntarily undergo paternity testing. If such testing became the norm, and if waivers were permitted only after counseling or a strong statement of warning, then greater certainty might be built into parental ties. The pre-commitment efforts historically focused on marriage would be repeated with childbirth.

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<sup>231</sup> Other parties, such as a newly identified biological father, would not be estopped, but our proposal would continue the existing limits on standing to raise such challenges. See *supra* text accompanying notes 155–57. In the case of paternity based on an incorrectly performed or fraudulent test, we would allow greater latitude for later challenging paternity. We would, however, estop later challenges by the mother and father signing the declaration to non-biologically based declarations even if the declarations were based on the mother's fraudulent representation of biological fatherhood.

<sup>232</sup> No position is taken here as to whether the acknowledgment process should be the same in both cases, but it may be useful to distinguish declarations based on both parties' belief that the two parents are both genetically related to the child from those cases in which the parties know that another person has contributed genetic material. In the former case, paternity testing should be the norm, and the acknowledgment process should require that the parties waive such testing at their own risk. The parental status that results, however, would be identical to that in any other case. In those cases in which the intended parents agree that no biological ties exist, paternity testing is pointless, and the acknowledgment process may be combined with existing procedures for second parent adoption or parenthood declarations under existing law. See Howard Fink & June Carbone, *Between Private Ordering and Public Fiat: A New Paradigm for Family Law Decision-Making*, 5 J.L. & FAM. STUD. (forthcoming 2003).

<sup>233</sup> We favor the extension of this system to all partners but do not believe that the utility of the proposal in the marital context depends on its extension to unmarried partners.

This system ensures stability for the child. While paternity (though not second parent) determinations may break up a number of relationships, the partnership dissolutions are likely to occur near the child's birth.<sup>234</sup> As a result of these early parenthood determinations, a man will be unable, upon divorce years later, to claim that he has no obligation to children for whom he has functioned as, and been determined to be, the father, nor can one lesbian co-parent prevent the other, upon termination of their relationship, from maintaining a parent-child relationship. Moreover, an unmarried man who has signed a voluntary paternity acknowledgment becomes a responsible legal parent unable to disavow his role at a later point. This proposal does not necessarily require the identification of a father (or second parent) for every child, but it does impose legal obligations on those who self-identify through voluntary acknowledgments or paternity testing at the time of a child's birth.<sup>235</sup>

By providing certainty when a child is born, a mandatory paternity or second-parent determination precludes subsequent denials of responsibility for a child. It does not necessarily, however, preclude subsequent terminations of responsibility once another person is willing to assume responsibility. Just as parents may now choose to place their children up for adoption, non-biological parents may choose to relinquish responsibility to another potential parent or to permit the child to accept support from another parent. Indeed, this proposal could be administered both within systems that recognize multiple parents<sup>236</sup> and within systems that preclude such a possibility. The one irreducible element of the proposal is that, once two parents are established on the basis of biology or acknowledgment at the child's birth, their parental status cannot be challenged or changed without consideration of the child's interests, which will ordinarily be presumed to lie with the continuation of the relationship. The goal should be certainty and security for the child, with the parties assuming parental responsibility on clear notice that the obligation they are assuming is not one to be taken lightly. We do not minimize the importance of the marital bond; indeed, a married father who does not undergo

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<sup>234</sup> Accordingly, even if Massachusetts is correct that extending liability to non-biological fathers will make them less likely to assume the responsibilities of fatherhood, the trade-off in securing fewer, but longer term fathers is worth making.

<sup>235</sup> While this proposal may seem similar to the federal mandate to try to ensure a father for every child (particularly poor children), this proposal is independent of the wisdom of such efforts. This proposal need not be imposed on single mothers who decline to identify a father, and it need not be intended to ensure adequate child support. Instead, we want to create stability for children and their parent(s), who are voluntarily willing to assume the parental role. *See Cahn, supra* note 145. *But see Garrison, supra* note 14 (favoring consistency in policies that promote two parent families).

<sup>236</sup> This is the Louisiana dual paternity solution. Louisiana has not yet definitively determined the respective rights of both fathers, although it is clear that the biological father is financially responsible for his child. *See T.D. v. M.M.M.*, 730 So. 2d 873, 876 (La. 1999).

paternity testing at a child's birth is treated differently from an unmarried father. The same literature that documents "the mating effort" also demonstrates that marriage acts independently to increase fathers' investment in children.<sup>237</sup> Accordingly, the married father<sup>238</sup> must take affirmative steps to disavow subsequent responsibility, whereas an unmarried father must undertake affirmative steps to assume responsibility. Our focus, however, is on the child's need for secure parental relationships, not merely the nature of the parents' relationship to each other at the time of the child's birth.<sup>239</sup>

Genetic lineage, separate and apart from the question of custody, is becoming an increasingly important component of identity at the same time that family forms have become increasingly flexible and fluid. The only way to reconcile these developments is to rebuild the lines of connection to children, and to do so on the basis of truth and commitment.

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<sup>237</sup> Hofferth & Anderson, *supra* note 96.

<sup>238</sup> We use the term "married father." In states that recognize same-sex marriage, we would modify this term to refer to the "married second parent." The married second parent is subject to the same rules.

<sup>239</sup> Of course, the parents' relationship remains important in other respects as well. Situations of high conflict and/or domestic violence between the parents make an evaluation of the child's interests extremely difficult and present a test of whether to allow second parent identification at birth in all cases. See Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041 (1991).