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# Bionormativity and the Construction of Parenthood

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## **BIONORMATIVITY AND THE CONSTRUCTION OF PARENTHOOD**

**Katharine K. Baker\***

Despite the political intrigue generated by the gay marriage debate, there is a growing consensus that family law as a discipline is shifting from a set of rules designed primarily to regulate sexual relationships between adults to a set of rules designed to regulate parental relationships between adults and children.<sup>1</sup> The law has not abandoned its regulation of horizontal relationships between adults. It is just that the need for extensive regulation has diminished. Increased reliance on private ordering,<sup>2</sup> decreased demand for marriage as an institution to take care of women's economic dependency<sup>3</sup> and relaxed norms with regard to sexual activity have simply made marriage less primary than it used to be. In contrast, the need for extensive regulation of parenthood has increased.

There is much talk about how the diminished importance of marriage harms children by destabilizing homes and breeding competing loyalties,<sup>4</sup> but the diminished importance of marriage affects children in a more fundamental way. Without the law of marriage, we do not know who parents are. For the most part, the law of marriage has always determined the law of parenthood. More particularly, the marital status of one's mother determined who one's legal father was, and, indeed, if one had a legal father. This marital presumption of parenthood was, for a very long time, essentially irrebuttable. In

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<sup>1</sup> See JUNE CARBONE, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW* xiii (2000) ("the code of family responsibility is being rewritten in terms of the only ties left – the ones to children"); JOHN EEKELAAR, *REGULATING DIVORCE* (1991) ("Indissoluble marriage has been replaced by the indissoluble responsibility of parenthood."); Martha Fineman, *Why Marriage?*, 9 VA. J. SOC. POL'Y & L. 239, 245-246 (2001) ("The pressing problems today do not revolve around the marriage connection, but the caretaker-dependent relationship"). A recent annual review from the Family Law Quarterly put it this way: "Parentage and Assisted Reproduction Take Center Stage". See Linda Elrod & Robert G. Spector, *A Review of the Year in Family Law: Parentage and Assisted Reproduction Take Center Stage*, 39 FAM. L.Q. 879 (2006)

<sup>2</sup> See Brian Bix, *The Public and Private Ordering of Marriage*, 2004 U. CHI. LEGAL F. 295, 313 (discussing deference to separation agreements); Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 505 (2005) ("husbands and wives have wide-ranging authority to contract about how to distribute their property during marriage and at divorce.")

<sup>3</sup> See *Orr v. Orr*, 440 U.S. 268 (1979) (alimony statute providing support only to women struck down because it was based on the inappropriate presumption that women are economically dependent on their spouses and men are not).

<sup>4</sup> See, e.g., WILLIAM GALSTON, *A Liberal-Democratic Case for the Two-Parent Family*, THE RESPONSIVE COMMUNITY 1 (1990-91) (tying various social ills to the absence of two parent families); Andrew Cherlin, Lindsay Chase-Lansdale & Christine McRae, *Effects of Parental Divorce on Mental Health through the Life Course*, 63 AM. SOC. REV. 239-49 (1998) (finding more emotional disturbance in children of divorce). For a general review of the literature see Paul Amato, *Life-Span Adjustment of Children to Their Parents' Divorce*, 4 THE FUTURE OF CHILDREN: CHILDREN AND DIVORCE 143-164 (Spring 1994)

England, spouses were forbidden from testifying against the presumption.<sup>5</sup> The strictness of that procedural rule dissipated over time, but the substantive problem of proving paternity did not. Until very recently, the marital presumption made it exceedingly difficult to establish paternity in anyone other than the husband, so marriage remained the primary arbiter of parenthood. In the last 20 years, two factors have combined to severely compromise the importance of the marital presumption. First, reliable genetic testing makes it very easy to overcome the marital presumption of paternity. Second, the growing number of children born to unwed mothers renders the marital presumption irrelevant for a significant portion of our population.<sup>6</sup>

Many people may presume that these two factors have allowed “biological truth,” i.e. genetic connection, to replace marriage as the primary legal arbiter of parenthood. Indeed, some scholars have suggested that biological truth is actually what the marital regime aimed for all along. It was “designed to ensure that children would be raised by their genetic parents,”<sup>7</sup> but because there was no way of determining biological connection, the system used marriage as a proxy. Still, the willingness of the legal system to actually impose parental status based on anything other than marriage is relatively recent<sup>8</sup> and the ability of a legal regime to enforce systematically a regime of biological parenthood is extremely recent.<sup>9</sup> It has only been in the last 20 years that genetic testing procedures have been reliable enough to determine biological parentage.<sup>10</sup>

Perhaps we should consider ourselves lucky that the remarkable explosion in genetic science arrived just in time to fill the void left by the decreased significance of marriage. Without marriage, we are in desperate need of a system to determine parenthood. Biology, which for years has played a kind of background role, can now play the exclusive role. But do we want it to?

Given where we are, at the demise of the marital regime and the potential rise of the biological one, it seems appropriate to ask some fundamental questions about why the

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<sup>5</sup> Neither husband nor wife could testify to non-access, unless the husband was “beyond the four seas” of England. *Goodright v. Moss*, 2 Cowp. 291, 98 Eng. Rep. 1257 (1777).

<sup>6</sup> The Center for Disease Control reports that 35.8% of all births were to unmarried women in 2004. CDC, National Vital Statistics Reports, Vol. 55 no. 1, Sept. 29, 2006. The rate of birth unmarried women has risen particularly fast for older women. The Atlantic Monthly reports that the number of children born to unmarried women over age 30 rose by 290 percent from 1980 to 2002. (Lori Gottlieb, *The XY Files*, THE ATLANTIC MONTHLY 142, Sept. 2005).

<sup>7</sup> June Carbone & Naomi Cahn, *Which Ties Bind?: Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1024 (2003).

<sup>8</sup> The first legal paternity proceedings were introduced in England in 1565. *See infra* 24-25.

<sup>9</sup> One cannot base legal status on a condition that is impossible to determine with any real accuracy. Until the advent of DNA testing, it was simply impossible to really know who the genetic father was. *See* David L. Faigman et al. *Modern Scientific Evidence: The Law and Science of Expert Testimony* § 19-1.4 (1997) (reliable genetic testing now allows us to determine paternity in a way that HLA and blood group testing never could).

<sup>10</sup> For purposes of this article, the terms genetic parenthood and biological parenthood have the same technical meaning, to wit, a parent-child relationship based on the fact that the parent’s genetic material is present in the child. I have chosen not to simply replace the term “biological” with “genetic” because the two terms retain different social meanings. The term “biological” tends to connote an organic, natural process of family formation, whereas the term “genetic” tends to connote the opposite.

law should care about biological parenthood. This essay attempts to do that by exploring the benefits and byproducts of a parental regime based on biology. It suggests that what makes a biological, or what I will label “bionormative,” regime attractive to many is not so much the importance of the genetic connection between parent and child, but is instead the way in which a bionormative regime constructs parenthood as *private* (meaning that the state has no legitimate interest in regulating, but also no requirement to finance, parenthood), *exclusive* (meaning one’s parental status may not be usurped by anyone else), and *binary* (meaning there are two and only two parents).<sup>11</sup> These ancillary qualities of bionormativity may have as much to do with our attraction to biology as does biology itself. As technology allows us to both ascertain and tinker with genetic connection, and as the traditional nuclear family gives way to a myriad of other family structures, it is critically important that we think about not only the importance of biological connection, but also the other aspects of bionormativity that make it appealing.

The article proceeds as follows. Part I explains why, despite what appears to be common consensus in favor of bionormativity,<sup>12</sup> a bionormative regime is not historically, biologically or morally compelled. Part II then starts to unpack the appeal of bionormativity for three important constituencies, the state, parents and children. Part IIA explores the state interest. Because a biologically based system appears to make parenthood a pre or extra legal fact, a liberal state is attracted to bionormativity for financial and administrative reasons.<sup>13</sup> Part IIB analyzes parents’ interests in bionormativity and suggests that parents’ interests parallels the state’s. While the state is attracted to a regime that makes parental *obligation* a function of pre or extra legal fact, parents are attracted to a regime that makes parental *rights* a function of pre or extra legal fact. As a matter of biology, one either is a parent of “x” or one is not and that fact is forever. In a bionormative world, biological parents do not have to worry about significant state regulation of parenthood and they do not have to worry about someone else usurping their exclusive status as parents. Both parents and the state are also attracted to the binary qualities of bionormativity. Because biological parenthood is always binary, parenthood is always conceptualized as binary and that conceptualization allows both the state and parents to balance the need to provide for children with the desire to limit the class of people entitled to parent any one child. Part IIC analyzes

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<sup>11</sup> There is overlap, though not identity, between the concepts of exclusive and binary parenthood. For short hand purposes, one can think of a non-exclusive regime as one that incorporates more than two parents, while a non-binary regime is a regime that allows only one. This is a little misleading though because an exclusive regime could allow one (and only one) parent and a non-binary regime could allow for more than two parents.

<sup>12</sup> Martha Minnow writes there is “a remarkable degree of consensus . . . [that]. . . [p]eople who produce children should provide for their support.” MARTHA MINNOW, *How Should We Think About Child Support Obligations?*, in FATHERS UNDER FIRE 302 (Irwin Garfinkel ed., 2001).

<sup>13</sup> A discussion of the various definitions and qualifications for the terms “liberalism” or “liberal state” is well beyond the scope of this essay. For the purposes of this article, I use the term “liberal state” only to suggest a state that perceives itself as ideally serving a limited role of “provid[ing] a framework of rules and guidelines designed to enable society very largely to run itself.” JOSE HARRIS, *Society and the State in Twentieth-Century Britain*, in THE CAMBRIDGE SOCIAL HISTORY OF BRITAIN, 1750-1950, 67 (F.M.L.Thompson ed., 1990). See generally, JULIA O’CONNOR, ANN SHOLA ORLOFF & SHEILA SHAVER, STATES, MARKETS, FAMILIES: GENDER, LIBERALISM, AND SOCIAL POLICY IN AUSTRALIA, CANADA, GREAT BRITAIN, AND THE UNITED STATES 3 (1999).

children's interests in bionormativity. It suggests that children share some interests in the private and exclusive qualities of bionormativity, though possibly not an interest in its binary nature. More important, children, unlike the state and parents, may have a compelling interest in the biological aspect of bionormativity, though the evidence in this regard is not conclusive.

Part III proceeds to evaluate how the core attributes of bionormativity, privacy, exclusiveness, binariness and biology are threatened by contemporary parenting practices. The extent of child poverty, the rejection of (even the appearance of) life-time monogamy and the use of donated gametes all work to destabilize a bionormative regime. In short, there are many people who now have an interest in making parenthood less private, less exclusive, less binary and/or less biological. The law is often receptive to their claims. Part III concludes with some queries about which attributes of bionormativity may be most vulnerable and what the consequences of jettisoning them would be. Part IV, the conclusion, makes two points. First, it is clear that the most disruptive force to the defining features of biological parenthood is not human manipulation of the biological reproductive process, but adult living patterns that expose children to many parent-like figures. Because contemporary adult relationships are less likely to be permanently binary and exclusive, so is parenthood.<sup>14</sup> When parenthood becomes less binary and exclusive, it becomes less private and less biological as well. The more the legal system feels compelled to recognize functional parent relationships, the greater the erosion of all of the core features of bionormativity. Second, a regime in which the legal system does recognize multiple parental relationships is likely to be a regime in which we see not only more than two parents, but different degrees of parenthood, greater and lesser parenthood. To the extent that the law already creates greater and lesser forms of parenthood at divorce, it is controversial. The analysis here suggests that recognizing degrees of parenthood may be an inevitable byproduct of a system that rejects bionormativity.

This essay does not endorse or reject biological parenting or any of its core qualities. It does suggest that it is important to separate out different aspects of bionormativity in order to balance the competing priorities that inform a conceptualization of parenthood. Given the decreased importance of marriage and the increased ability to perfect a biological system, we have to come to terms with what we really care about. There is much to be said in favor of a regime that is private, exclusive, binary and biological. If we cannot or do not want to hold on to all of these qualities of parenthood, we may at least want to hold on to some. Doing so will require an articulation of normative commitments and priorities. These normative commitments will, in turn, define the contours of parenthood in the coming century.

## I. The History, Nature and Morality of Bionormativity

### A. History

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<sup>14</sup> The non-binary and non-exclusive nature of adult relationships has everything to do, of course, with the decreased ubiquity of permanent marriage.

As suggested, biology has not always played a primary role in determining parentage. Under Roman Law, the parentage of children born to married women (or women in recognized concubinage relationships) was a function of who the state recognized as their mothers' partner, but children born to unmarried mothers were *filius nullius*, or children of no one.<sup>15</sup> The illegitimate children of royalty or other rich men were often provided for, but such care was up to the whim of the biological father.<sup>16</sup> Women who could not depend on this kind of largesse often abandoned their babies so that others could care for them.<sup>17</sup> As John Eekelaar has noted, abandonment was an "informal method of transferring responsibility for the care of children from parents to others in the community."<sup>18</sup> Abandonment was commonplace for centuries, yet none of Ancient, early Christian or later European society attempted to impose serious sanctions on the practice.<sup>19</sup>

The idea of compelling a biological father to support his children originated in Europe in 1234, when Pope Clement III issued an edict declaring that fathers had a duty to support their children, regardless of whether the children were born to a marriage.<sup>20</sup> Ecclesiastic courts, in local parishes, enforced this edict by entertaining suits to establish paternity and imposing support obligations.<sup>21</sup> The Church's primary motivation for imposing the obligation may have been financial. Responsibility for children who were not provided for privately fell to individual parishes.<sup>22</sup>

By the 16<sup>th</sup> century, with increased urbanization, more clustered poverty and decreasing canonical influence, secular governments throughout Europe began to assume more responsibility for the poor.<sup>23</sup> Children born to unmarried mothers were usually poor. Accordingly, in 1576, as part of the Poor Laws, the British Parliament adopted the first

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<sup>15</sup> Richard Helmholz, *Support Orders, Church Courts, and the Rule of Filius Nullius: A Reassessment of the Common Law*, 63 VA. L. REV. 431, 435 (1977) (Roman law required biological fathers to support children born to the recognized form of Roman concubinage).

<sup>16</sup> See, for instance, the story of how Charles II provided for his numerous illegitimate children, described in JENNY TEICHMAN, *ILLEGITIMACY: AN EXAMINATION OF BASTARDY* 57-58 (1982).

<sup>17</sup> John Boswell has documented how parents of all social standing abandoned children throughout Europe from antiquity through the middle ages. He estimates that 20-40% of Roman children were abandoned. JOHN BOSWELL, *THE KINDNESS OF STRANGERS* 428 (1988).

<sup>18</sup> John Eekelaar, *Are Parents Morally Obligated to Care for Their Children?* 11 OXFORD J. LEGAL STUD. 340, 341 (1991).

<sup>19</sup> Christian writers sometimes assailed the irresponsible sexuality that led to the abandonment, but they did not condemn the abandonment itself. See Boswell, *supra* note 17 at 429-430.

<sup>20</sup> *Id.* at 434

<sup>21</sup> The standards for proof appeared to be more lax in medieval England than they were in the modern United States, *Id.* at 440, but the support amounts ordered also appear to have been quite modest. Also interesting is the fact that, once established, the claims were reciprocal, children were responsible for the aged parents just as parents were responsible for their dependent children. *Id.* at 435.

<sup>22</sup> LAWRENCE STONE, *THE FAMILY, SEX, AND MARRIAGE IN ENGLAND, 1500-1800* 520 (1977). The legitimacy and efficacy of these courts may well have been aided by the small close-knit communities in which they operated. The range of potential defendants was limited as was the ability of a defendant to evade the ecclesiastical court's judgment. Still, the number of claims brought for enforcement of existing orders suggest that then, as now, it is difficult to get non-marital fathers to pay support on a consistent basis. See Helmholz, *supra* note at 445.

<sup>23</sup> See TEICHMAN, *supra* note 16 at 60.

secular paternity suit.<sup>24</sup> These first paternity actions were brought by Justices of the Peace to seek reimbursement from the biological fathers of children who were receiving support from the state.<sup>25</sup> Both the Church and Parliament emphasized the immorality of extra-marital sex when imposing a duty of support on unwed fathers and legislation regarding paternal duties to support remained deeply imbued with moral judgments about extra-marital sex until the late 17<sup>th</sup> and early 18<sup>th</sup> centuries.<sup>26</sup> Indeed, many commentators argued that the obligation to support was rooted in the illicit sexual activity, not paternity itself.<sup>27</sup> This line of argument augured in favor of holding multiple men responsible for support if it could be established that all had intercourse with the mother at a time that could have produced a child.<sup>28</sup>

By the 18<sup>th</sup> century, the increasing secularization of European societies tended to shift legislative concern toward economic conditions of the child, not the immorality of its conception.<sup>29</sup> It was not until 1845 though, that unwed mothers (as opposed to the state) in England acquired the right to sue a biological father for support.<sup>30</sup> Only at this point did the secular law of England fully accept the idea that biological paternity gave rise to an obligation for reasons having nothing to do with state expenditures or immoral activity or marriage.

The degree to which other countries made biological fathers responsible varied widely. In France, in the 17<sup>th</sup> and 18<sup>th</sup> centuries, an unmarried man could be found responsible for a child born to an unmarried woman, but a married man could not be sued in paternity.<sup>31</sup> By the mid-nineteenth century, section 340 of the Napoleonic Code, which applied to vast portions of Europe, eliminated all paternity actions and forbade any tracing of paternity.<sup>32</sup> The Dutch adopted this prohibition as well.<sup>33</sup> The tradition among Germanic tribes (who may not have adopted the Napoleonic Code) was to impose paternity only if the biological mother and father were of equal class or race.<sup>34</sup>

In this country, until approximately 40 years ago, the nature and even existence of a biological parent's duty to support his children depended on wildly inconsistent state

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<sup>24</sup> Lawrence P. Hampton, *Overview*, in DISPUTED PATERNITY PROCEEDINGS § 1.02(1)-(3) (2004).

<sup>25</sup> *Id.*

<sup>26</sup> Stone, *supra* note 22.

<sup>27</sup> J. E. Scholtens, *Maintenance of Illegitimate Children and the Exceptio Plurium Concubentium*, 72 S. AFR. L. J. 144, 150-51 (1955).

<sup>28</sup> *Id.* The idea of holding all men who slept with the mother responsible is practiced in modern day India and in various tribes throughout South America. *See infra* text accompanying notes 69-70.

<sup>29</sup> Stone, *supra* note at 634-35.

<sup>30</sup> Hampton, *supra* note 24 at § 1.02(1) – (3). Prior to this, it was up to individual parishes whether to distribute any of the proceeds of their collection to the mother for care of the child. *See* TEICHMAN, *supra* note 16 at 64.

<sup>31</sup> *See* Teichman, *supra* note 16 at 154. The children of the married putative fathers who could not be sued for support were cared for in foundling homes run by religious orders. *Id.* The bar prohibiting the establishment of paternity in a married man also existed in modern, Islamic Turkey. BELMA BAYAR, *TURKEY: LAW ON LEGITIMACY* 16 (1981).

<sup>32</sup> *See* Scholtens, *supra* note 27 at 148-149.

<sup>33</sup> *Id.*

<sup>34</sup> TEICHMAN, *supra* note 15 at 55.

law.<sup>35</sup> Some states imposed no obligation on unwed biological fathers;<sup>36</sup> some states let judges impose discretionary obligations on unwed fathers;<sup>37</sup> other states mandated that genetic fathers provide fixed monthly amounts of support for illegitimate children;<sup>38</sup> still other states made the unwed biological parent duty to support equivalent to that of a divorced parent.<sup>39</sup> For a long while states also expressed a variety of views regarding the reason for the parental obligation: for some it was punishment for extramarital sex, for some it was punishment for refusing to marry the mother and for some it was simply a liability owed to the child.<sup>40</sup>

This haphazard and unequal treatment of biological parenthood might have continued in this country were it not for the federalization of social welfare benefits. Because most American 20<sup>th</sup> century social welfare programs, many of which were targeted to help poor children, drew on federal funds, the federal government acquired a keen interest in paternity law. Like the British Poor Laws of 1576, the United States Federal Child Support Act of 1984 sought to recoup funds that the government was paying out to support the children of unmarried fathers.<sup>41</sup> It sought to do this by demanding more comprehensive enforcement of biologically based paternity laws. The 1984 Child Support Amendments required all states to allow children to sue their biological father for paternity until the child's eighteenth birthday and to promulgate child support guidelines that imposed child support payments commensurate with a biological parent's income.<sup>42</sup> Thus, the 20<sup>th</sup> century American legislation made the obligation to support a child a function of a parent's ability to pay and it imposed that obligation regardless of the child's extant economic situation. These rules remain in place today.

## B. Nature and Evolutionary Biology

Perhaps aware that the non-ecclesiastical justifications for paternity laws have always been somewhat opaque, Blackstone, as early as 1688, felt the need to clarify why biological fathers should be financially responsible for their children. He wrote:

The duty of parents to provide for the maintenance of their children, is a principle of natural law; an obligation laid on them not only by nature itself, but by their own proper act, in bringing them into the world . . . . By begetting them, therefore, they have entered into a voluntary obligation to endeavor, as far as in

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<sup>35</sup> HARRY D. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 22-25 (1971).

<sup>36</sup> Idaho did not impose a support duty on the father of an illegitimate child until 1969, *Id. Stat. Ann.* § 7-1101 et seq.; It was not until 1973 that the U.S. Supreme Court struck down Texas' law imposing a support liability on parents of legitimate children but not on parents of illegitimate children, *Gomez v. Perez*, 409 U.S. 535 (1973).

<sup>37</sup> KRAUSE, *supra* note 35 at 23.

<sup>38</sup> *See e.g.*, *Fla. Stat. Ann.* § 48-7-4 (1966).

<sup>39</sup> KRAUSE, *supra* note 35 at 23.

<sup>40</sup> For a discussion see *State v. M.*, 233 A.2d 65, 67 (9 N.J. Super. Ct. App. Div. 1967)

<sup>41</sup> 42 U.S.C. § 600 et seq. (2000).

<sup>42</sup> *Id.*



them lies, that the life which they have bestowed shall be supported and preserved.<sup>43</sup>

In this excerpt, Blackstone identifies two potential sources of parental obligation: nature and causality. Neither explanation survives scrutiny.

What Blackstone put in terms of natural law, contemporaries might well put in terms of evolutionary biology. It is natural for biological parents to support their children because biological parents are the ones most likely to be willing to support their offspring. Science tells us that the genes that survive are the genes best able to reproduce themselves and the best way to ensure reproduction is to support the bodies that contain the genes. That, in a much simplified form, is the core tenet of modern evolutionary biology.<sup>44</sup> Biological parents will support their children because by supporting them they will ensure their own genes' survival. Thus, nature seems to ensure responsible biological parenthood.

This is a neat, parsimonious explanation, but if nature really ensured responsible biological parenthood, neither Pope Clement in the 13<sup>th</sup> century, nor the British Parliament in the 16<sup>th</sup> century, nor the U.S. Congress in the 20<sup>th</sup> century would have worried about mandating biological parenthood. Quite obviously, we have mandatory child support laws precisely because biological parents often do not support their children. The familiar failure of some biological parents to support their children does not render the evolutionary evidence irrelevant, however. Indeed, evolutionary biology can help explain why some biological parents might not support their children. In doing it so it also raises questions about the extent to which the law should impose an obligation on biological parents who do not accept it voluntarily.

If the first tenet of evolutionary biology is that the genes that survive are the ones that compel us to behave in ways that maximize the likelihood of survival, the second tenet of evolutionary biology may well be that men and women are different. They are (on average) different -- in their sexual behavior, in their mating requirements, in their parenting patterns, in their aggression and along numerous other axes -- for one simple reason: the female gamete is much bigger than the male gamete and this larger size means that females contribute disproportionately to the reproductive process.<sup>45</sup> The bigger female gamete size allows the female to contribute the food reserves that the fertilized egg needs to grow, but it also keeps the female from producing the number of (smaller) gametes that a male can produce. This means that a female has to care more about any one gamete than does a male.

Moreover, because human beings are fertilized and gestated inside the female, mothers are biologically compelled to contribute more to each fertilized egg. Indeed, after

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<sup>43</sup> WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 435 (1765).

<sup>44</sup> See generally, RICHARD DAWKINS, THE SELFISH GENE (1976); MATT RIDLEY, THE RED QUEEN, SEX, AND THE EVOLUTION OF HUMAN NATURE (1993); RICHARD WRIGHT, THE MORAL ANIMAL (1994).

<sup>45</sup> Richard Dawkins writes that "it is possible to interpret all the other differences between the sexes as stemming from this one difference." DAWKINS, *supra* note 45 at 141.

fertilization and before birth, with the exception of possible male donations of food to the mother, the mother is the only one who invests in the reproductive process, and her investment is enormous.<sup>46</sup> Evolutionary biology tells us that disproportionate female investment, pre-birth, coupled with the fact that (until the last 20 years) a male could never be absolutely sure that a child born to his sexual partner actually had his genetic material, make women, on average, invest much more in born children than do men.<sup>47</sup> This lopsided investment pattern works well for men because “[i]f one parent can get away with investing less than his or her fair share of costly resources in each child . . . he will be better off, since he will have more to spend on other children by other sexual partners, and so propagate more of his genes.”<sup>48</sup> A gene that routinely encouraged a parent to abandon all of his young might not survive as well because none of his offspring would get the benefit of his continued investment, but a reproductive strategy that involved some support of some of his children, and meager support of others (particularly if those others might be supported adequately by the mother or another male) might be very successful. Indeed, Richard Dawkins predicted exactly that kind of behavior.<sup>49</sup> In short, a study of nature reveals that failing to support (at least some of) one’s children is perfectly natural.<sup>50</sup>

The fact that biology suggests that many men will not voluntarily support their young does not mean that the law should not try to compel them to do so. Evolutionary biology suggests that many people are inclined to many pernicious behaviors (rape, marital exploitation, child abuse), that the law need not condone.<sup>51</sup> Neither, however, do the insights from evolutionary biology suggest that the law should compel biological parents to contribute to the welfare of their children if the parents do not want to. What nature, or biology, tells us is that if we are to compel unwilling parents to support their children we may well be compelling them to do something that is contrary to their reproductive interests. The law can choose to do that, but it should only choose to do that if in so doing it is fulfilling a normative agenda.<sup>52</sup> Thus, while Blackstone may have thought

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<sup>46</sup> See Eileen McDonough, *My Body, My Consent: Securing the Constitutional Right to Abortion Funding*, 62 ALB. L. REV. 1057, 1073-74 (1999) (describing the severe physical burdens of pregnancy).

<sup>47</sup> See generally ROBERT TRIVERS, *Parental Investment and Sexual Selection* in SEXUAL SELECTION AND THE DESCENT OF MAN 136, 139 (Bernard Campbell ed., 1972)

<sup>48</sup> DAWKINS, *supra* note 44 at 140.

<sup>49</sup> Dawkins made this prediction using game theory and arbitrary numbers, but his premise remains strong with most numbers. In any given population, there are likely to be some proportion of men, or some propensity in most men, to produce some children that they do not support. *Id.* At 151-154

<sup>50</sup> The history of abandonment, discussed briefly earlier, also suggests that failing to support some of one’s biological issue is common enough to be considered natural.

<sup>51</sup> For a discussion of how the law might deal with the insights of evolutionary biology for rape and exploitation within marriage see Katharine K. Baker, *Biology for Feminists*, 75 CHI-KENT L. REV. 805 (2000). For a discussion of the tendency of step-parents to abuse children, 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).

<sup>52</sup> As I have previously argued, biology can reveal how brutal life looks like without normative convictions, but it cannot tell us what our normative convictions are or should be. See Baker, *supra* note 51 at 806 (“[b]y laying bare the harsh reality of nature, [biology can] force[] us to embrace our normative convictions”). See also DAWKINS, *supra* note 44 at 3 (“a society based simply on the gene’s law of universal ruthless selfishness would be a very nasty society in which to live.”)

that nature answered the question of who should support children, all nature does is tell us that some biological parents will and some biological parents will not.

### C. Causation and Morality

This brings us to the second reason Blackstone gave for why biological parents should support their children – causation. To many, this may also seem like an obvious, moral justification for holding biological parents responsible.<sup>53</sup> One is responsible for that which one creates. Recent philosophical inquiries into this simple reasoning suggests that a system of bionormativity is far from logically inevitable, however. Though their reasoning differs, the scholars who have analyzed whether causation serves as an adequate justification for holding biological fathers responsible for child support uniformly find that it does not.

In her article on this subject, British feminist scholar Sally Sheldon highlights what most legal philosophers accept as a matter of course, “factual causation does not fix legal or ethical duties without something more.”<sup>54</sup> She then discusses what Blackstone and others suggest as the “something more” -- the *voluntary* act of intercourse on the biological parents’ part. Because a woman and man voluntarily have sex, and that sex could result in a pregnancy, that woman and man are responsible for the child. Voluntariness does not do the work that one would need it to in order to impose the obligation either though. Given that in most Western societies the decision to carry a pregnancy to term is vested solely in the woman,<sup>55</sup> the voluntary decision to engage in sex seems at least one step removed from the critical decision of whether to bring a child into the world.<sup>56</sup> The woman carrying the fetus, who has the exclusive right to terminate the pregnancy or not, is the much better proximate cause of the child’s birth.<sup>57</sup>

Sheldon focuses on abortion, but contemporary adoption law places a comparable degree of control in the mother’s hands. If the father wants to relinquish the child for adoption and the mother does not, the child is not surrendered and the biological father is still responsible for child support. In this sense, a mother is able to cause a father’s on-going responsibility, by refusing to let him relinquish it. He is not able to do the same thing.

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<sup>53</sup> Carbone and Cahn, *supra* note 7 at 1025; Minnow, *supra* note 12.

<sup>54</sup> Sally Sheldon, *Unwilling Fathers and Abortion: Terminating Men’s Child Support Obligations?*, 66 MODERN L. REV. 175, 181 (2003), citing H.L.A. HART AND A.M. HONORE, CAUSATION IN THE LAW (1959).

<sup>55</sup> While it is true that many women in the United States have difficulty securing access to or finances for abortions, no state makes a man’s obligation to support his biological children dependent on whether the mother had the opportunity to terminate the pregnancy.

<sup>56</sup> In this country, voluntariness could fail for another reason. Men who are legally incapable of voluntarily consenting to sex (because they are too young) are held responsible for child support. *See County of San Luis Obispo v. Nathaniel J.*, 57 Cal. Rptr. 2d 843 (Ct. App. 1996); *State ex rel. Hermesmann v. Seyer*, 847 P.2d 1273 (Kan. 1993); *Mercer County Dep’t of Soc. Serv. v. Alf M.*, 589 N.Y.S.2d 288, 289 (N.Y. Fam. Ct. 1992).

<sup>57</sup> This is not the forum to go into all of Sheldon’s arguments, but she does examine and reject the claims that not all women feel that abortion is a choice available to them and that continuing a pregnancy is a unique, fundamental right so that a decision to continue it cannot be seen as a cause of anything. *See Sheldon, supra* note 54 at 181-187.

If the mother wants to put the child up for adoption and the father does not, she can simply “lose” the biological father, by running away from him, by not telling him that she is pregnant or by saying the biological father is someone else. These strategies may not be completely legal, but neither are they uncommon.<sup>58</sup> He has a very difficult time forcing her to accept parenthood. The mother simply has much more control over whether and in what circumstances the child can come to be. Again, this makes her far more responsible for causing the child and its dependency.

Sheldon goes on to argue that even if the decision as to whether to bear the child were equally shared, factual causation with an element of voluntariness could not be all that is necessary to impute responsibility or parents would be responsible for their dependent adult children also. Most societies accept collective responsibility for dependent adults in a way they do not for dependent children and the answer as to why does not have to do with voluntary causation.<sup>59</sup>

A British philosopher, John Eekelaar, asks a question akin to Sheldon’s in his article, “Are Parents Morally Obligated to Care for their Children?” He concludes maybe.<sup>60</sup> What any one individual’s duty to others is will depend on the circumstances in which one finds oneself and others.<sup>61</sup> If a man is drowning while a mother and a baby sit on an adjacent beach, we do not say that the drowning man is dependent on the baby. He depends on the mother because she has the ability to help him. And, if there were another adult on the beach, we would probably say that the drowning man is dependent on the

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<sup>58</sup> Raquel X is probably the most famous example of the mother not being able to proceed with the adoption over the father’s wishes, *In the Matter of Raquel Marie X*, 559 N.Y.S.2d 855 (1990) (father has right to block adoption of newborn). However, if the mother in that case had managed to keep the pregnancy hidden from the father, or blocked him out of the baby’s life for a sufficient period of time, there would be little the father could have done. The mother in *Lehr v. Robertson*, 463 U.S. 248 (1983) refused to let the father see the child and then kept the child from him for over a year before wanting to have the child adopted by someone else. The Supreme Court found that the father did not have a sufficiently strong constitutional interest in being the father because he had not developed a sufficiently strong relationship with the child. The mother in *In Re: Baby Girl Clausen*, 502 N.W.2d 649 (Mich. 1993) knowingly named the wrong man on the original adoption papers and the mother in the *In Re Kirchner*, 649 N.E.2d 324 (Ill. 1995) ran away from the father. These later two cases became infamous only after the mothers recanted and decided they wanted their children (and their children’s father) back, but without a mother’s subsequent change of heart, it is very hard for a biological father to know enough about the existence of his child to assume parental responsibility.

<sup>59</sup> Sheldon, *supra* note 54 at 190. Sheldon also points out that the voluntary creation of dependency does not automatically lead to financial responsibility. Doctors and good Samaritans create needy people by saving those who would have otherwise died and are subsequently unable to live an independent life. Sheldon suggests that the “voluntary creation of need is only convincing as a basis for financial liability, when such need results from harm to third parties.” *Id.* at 189. If one creates a need that the affected (needy) person would not have chosen, given his or her alternatives, then one is responsible. To hold biological parents responsible under this rationale one would need to find that the needy children created by their biological parents would rather not have been born. This is not a novel argument necessarily, but it is certainly a controversial one.

<sup>60</sup> Eekelaar, *supra* note 18.

<sup>61</sup> See Jeffrey Bluestein, *Child Rearing and Family Interests* in *HAVING CHILDREN* 115, 116 (O’Neill & Ruddick eds., 1979) (“The biological fact that parents have caused their children to exist is not itself morally decisive. The moral issue is not who caused the child to exist but who is to bear primary responsibility for preventing harm or suffering that might come to this needy being.”)

second adult, because we would assume that the mother needed to care for the baby. Comparably, we do not say that an orphan is dependent on her biological parents -- they are not there; she must depend on someone else. Who she depends on will depend on the social networks available, just as who the drowning man depends on will depend on the social networks available. The moral duty toward specific children therefore “frequently fall[s] primarily [on parents] for no other reason than their physical proximity to their children.”<sup>62</sup> That physical proximity can vary widely across cultures, however. Different cultures assign responsibilities for providing for children (and the elderly) differently.<sup>63</sup>

Eekelaar is a scholar of law and philosophy, but a brief foray into the anthropological literature strongly bolsters his argument. As has been known for decades, many cultures employ notions of both social fathers and biological fathers.<sup>64</sup> Social fathers are often the ones who assume the primary responsibility for providing for the child. This custom is particularly widespread in Africa, where fosterage (sending one’s children to be raised by others) is common. In Botswana, the role of social father is often assumed by a mother’s brother or a mother’s subsequent husband. In either case, the biological father is not held responsible for support of the child.<sup>65</sup> The Baatombu society of North Benin encourages all severance of biological ties so that “an individual expresses shame when claiming ownership over his biological children.”<sup>66</sup>

Other cultural practices include sexual and marital arrangements in which it is very difficult for anyone to determine biological paternity. One polyandrous culture in West India assigns paternity by lot, by mother’s choice or by birth order of the fathers, depending on the situation.<sup>67</sup> Children in this community are often acknowledged by many fathers, but only one mother.<sup>68</sup> The idea of multiple paternity is also common throughout the tribal regions of South America. These cultures believe that more than one man’s genetic connection is necessary for conception. A child’s fathers include every man that has had intercourse with the mother around the time of conception and all of a child’s fathers help provide for the child.<sup>69</sup>

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<sup>62</sup> Eekelaar, *supra* note 18 at 351.

<sup>63</sup> For an examination of the different legal approaches to filial responsibility laws, see generally, Seymour Moskowitz, *Adult Children and Indigent Parents: Intergenerational Responsibilities in International Perspective*, 86 MARQ. L. REV. 402 (2002) (discussing different state statutes and national laws that require children to provide for their parents)

<sup>64</sup> ALFRED RADCLIFFE-BROWN and CYRIL DARYLL FORDE, *AFRICAN SYSTEMS OF KINSHIP AND MARRIAGE* (1950).

<sup>65</sup> Nicholas Townsend, *Men, Migration and Households in Botswana*, 23 J. OF S. AFRICAN STUD. (1997).

<sup>66</sup> Erdmut Alber, *Denying Biological Parenthood: Fosterage in N. Benin*, 68 ETHOS 487.

<sup>67</sup> Geraald Berreman, 2 AMERICAN ETHNOLOGIST 127-1278 (1975). The marital arrangements usually involve one woman marrying several brothers, but sometimes there are several mothers marrying several brothers. The children of these arrangements are acknowledged by all of the fathers, but not necessarily by all of the mothers.

<sup>68</sup> *Id.*

<sup>69</sup> This practice embodies the approach suggested in the 19<sup>th</sup> century when the paternity obligation was seen more as a punishment for extramarital sex. See Scholtens, *supra* note 27 at 150-51.

The historical and cultural evidence thus easily sustains Eekelaar's ethical conclusion that "the duty to care for children is embedded in the conjunction of two sources. One is the a priori duty to promote human flourishing . . . The other is derivative from the society itself, for social practice determines the application of that duty within its structure."<sup>70</sup> He concludes that parents are obligated to support their children not because they are biologically related, but because our society says that biological parents should support their children. He finds no ethical justification in the biological connection itself.

Tackling the issue of parental duties to support children in this country, family law scholar Scott Altman finds a justification for current child support laws, but not in any of the traditional places. Like Sheldon and Eekelaar, Altman quickly rejects causation as a valid basis of support because "although causation is relevant to legal and moral duties, it is neither necessary nor sufficient for a duty, and is generally an unappealing principle for distribution."<sup>71</sup> Altman argues that causation serves as a necessary precursor to duty usually only when coupled with some other factor, like being especially well-suited to meet a need, benefiting from the conditions that created the need, or committing a wrong in the creation of a need. Some parents fall into these categories, but not all do.

Most biological parents may be particularly well-suited to meet the dependency needs of their children, but that does not mean that a moral duty to support exists in those parents who are not. Biological parents who engaged in heterosexual sex may also have derived some benefit from creating the needy child, but, as Altman argues, the passing joy of sexual pleasure is awfully small compared to the very large financial liability of child support. Moreover, it is not appropriate to assume that all reproductive acts involve sexual pleasure, even for men. Finally, while traditional paternity law was very much rooted in the idea that a wrong had been committed in the creation of the need,<sup>72</sup> extramarital sex is no longer seen as a valid basis for punishment. Thus it is not clear that there is "another factor" that makes the causation rationale persuasive.

Altman discusses and dismisses a number of other justifications for placing the child support burden on parents, including the idea that child support represents the pre-payment of a debt,<sup>73</sup> or meets policy goals of gender equality,<sup>74</sup> and population control.<sup>75</sup> His ultimate rationale for our child support system is not rooted in any of these ideas, but instead reflects tort-like damages for what Altman identifies as two parental wrongs (i) failing to demonstrate love for a child and (ii) failing to maintain a sustainable

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<sup>70</sup> Eekelaar *supra* note 19 at 351. *See also* Bluestein, *supra* note 61 at 117 ("biological parents may be responsible for children simply because they are in the best position to help")

<sup>71</sup> Scott Altman, *A Theory of Child Support*, 17 INTL. J. OF L. POL. & THE FAM. 173, 177 (2003) .

<sup>72</sup> "Filiation statutes are generally considered to represent an exercise of the police power for the primary purposes of denouncing the misconduct involved, punishing the offender or shifting the burden of support from society to the child's natural parent." *State v. M.*, 233 A.2d 65, 67 (N.J. Super. Ct. App. Div 1967)

<sup>73</sup> Altman, *supra* note 71 at 181-182 (pay so that kids will pay for you, but why "seek such a limited and financially random insurance pool" Public support does the job better.)

<sup>74</sup> *Id.* at 182-183 men should pay because women do so much else – but women are probably better off with a state system of support that doesn't rely on men

<sup>75</sup> *Id.* at 183-186. While child support enforcement probably does curb population growth somewhat, this is a controversial goal particularly for the United States.

relationship with the other parent. This first wrong depends on Altman's premise that children experience a parent's failure to pay child support as a sign that the parent does not love the child. Payment of child support prevents the child from feeling abandoned. The second wrong relies on the evidence that children do better in two parent households.<sup>76</sup> If one fails the child by forcing it to grapple with the competing loyalties of a separated family, one must pay for that harm.

Altman's tort theory is provocative and may well justify the current legal models for child support in cases of divorce<sup>77</sup> but it is not a model that explains biological parenthood liability at all. Indeed, it is a model deeply evocative of the marital regime we are supposedly leaving behind. Among other things it would seem to place the child support duty on a husband who was not biologically related to a child of the marriage before it placed liability on the biological father. This may well be an appropriate result,<sup>78</sup> but is hardly one that suggests that biological truth should trump marital presumption. Altman's theory also provides weak support for the realistically atypical but theoretically prototypical "one-night stand" father.<sup>79</sup> If it is no longer appropriate to punish the adults who engage in casual sex because casual sex is not itself immoral, it is hard to see why we should operate from a baseline which assumes that two people who sleep together have a moral obligation to commit to an on-going family relationship. More important, Altman's theory of harm simply does not work if the child's psychological needs for love and stability are met by someone other than biological parents.<sup>80</sup> Thus, though he explains why the break-up of a traditional family should engender child support liability in the adults who split up, he does not explain a biologically-based child support system.

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The strength of the norm for biological parenthood thus must be found in places other than, or at least in addition to, history, nature and morality. Biological parents may be the adults most likely to take care of children, but that does not prove that we have always

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<sup>76</sup> See CARBONE, *supra* note 1 at 11-119.

<sup>77</sup> Most of these marginal expenditure models determine liability based the amount the obligor would pay "if he were sharing a home with the child and the other parent," AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, § 3.03(2)(c) (2002) (hereinafter, PRINCIPLES)

<sup>78</sup> See *Nygaard v. Nygaard*, 401 NW2d 323, 327 (Mich. Ct. App. 1986) (holding man who married pregnant woman knowing that he was not the biological father and promised to raise the child as his own is responsible for child support); *Clevenger v. Clevenger*, 11 Cal. Rptr. 707 (Cal. Ct. App 1961) (same); *Peitros v. Peitros*, 638 A2d 545, 548 (RI 1994) ("voluntary and continuous course of conduct as the child's only father" and the fact that the mother's choice not to terminate the pregnancy was "a direct result of [man's] assurances that he would assume parental role" made non-biologically related man responsible for child support); *Monmouth County Div. of Soc. Serv. v. R.K.*, 757 A.2d 319 (NJ Super Ct. Ch. Div 2000) (man never married mothers but acted as a father and therefore estopped from denying paternity).

<sup>79</sup> Most unwed fathers have relationships of significant duration with the mother. See Katharine K. Baker, *Bargaining or Biology*, 14 CORNELL J. L. & PUB. POL. 1, 35-36 (2004) (2/3 of paternity suites involve men who were present at the birth of the child; 80% of unwed fathers support the mother during pregnancy; approximately 85% of unmarried fathers who are involved with a teenage mother continue the relationship for over 2 years after the child's birth).

<sup>80</sup> Perhaps he believes that children's psychological needs have biological roots and cannot be met by non-biological parents, but he neither makes nor substantiates this claim. For related claims, see *infra* text accompanying notes 138-142.

required them to, that they have a biological interest in doing so, or that they are morally compelled to do so. Biological parents do help create a child's dependency, but so do other people and so do the social norms into which the child is born. The next section takes a closer look at why certain interest groups might have a particular interest in maintaining the norm of biological parenthood.

## II. Who Benefits from Bionormativity

### A. State's Interest

The history discussed in Part I suggests one obvious state interest in a bionormative system, money. A bionormative system helps identify two private sources of financial support for each child. The more children are provided for by private parties, the less the state needs to provide for them. Because a bionormative system appears to make parenthood a pre or extra legal fact, the state is also able to avoid, for the most part, qualitative assessments of parenting. Biology determines who parents are, the state does not. In addition, a bionormative system reifies the binariness of parenthood. There are two and only two biological parents of a child. A discussion of how the state benefits from all of these attributes of bionormativity follows.

The British Poor Laws in the 16<sup>th</sup> century and the United States Federal Child Support Act in the 20<sup>th</sup> century were both motivated by a desire to recoup state funds paid to poor children. Not all countries are as motivated to pass the cost of children on to private parties,<sup>81</sup> but many clearly are. The United States, with its steadfast resistance to greater state support of children,<sup>82</sup> leads the industrialized world in its resistance to public support of children.<sup>83</sup> This resistance to supporting children reflects basic principles of classical liberalism, which views the state's role as limited to protecting people's negative rights<sup>84</sup> and depends on a clear divide between the public (where all individuals are seen as equal rights-bearing citizens) and the private (where inequalities may exist but needs of dependents are met altruistically, without state interference).<sup>85</sup> For a variety of reasons, the United States' allegiance to the norms of classical liberalism appear stronger

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<sup>81</sup> As indicated, France has always had a much more limited paternity enforcement. *See supra* text accompanying notes 31-32. Today, in Europe, virtually all states assume substantial responsibility for ensuring that children's basic needs are met. *See infra* 166-171.

<sup>82</sup> The drafters of the recent American Law Institute's Principles of the Law of Family Dissolution wrote "What distinguishes the United States from other wealthy western countries is its disinclination to act as a primary guarantor of children's economic adequacy." *See* PRINCIPLES, *supra* note 77 at §3.04 cmt. g at 429.

<sup>83</sup> Ironically, by maintaining a stricter allegiance to bionormativity, that is, by giving biological parents both more responsibility and more rights, the United States may actually stifle the extent to which biological parenthood is established. *See* W. Craig Williams, *The Paradox of Paternity Establishment: As Rights Go up, Rates Go Down*, 8 U. FLA. J.L. & PUB. POL'Y 261 (1997) (arguing that by giving fathers more rights and responsibility, the United States may actually decrease the willingness of biological mothers to name fathers or fathers to come forward)

<sup>84</sup> *See* C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* 263-267 (1962).

<sup>85</sup> *See* generally, O'CONNOR ET AL., *supra* note 13 at 45-46.



than many of its peer countries.<sup>86</sup> A state that sees itself as responsible for supporting children needs not only figure out what children need, it needs to articulate why children are entitled and where the entitlement should come from. A minimalist state can avoid establishing the apparatus necessary to answer these questions by passing the obligation for children onto private actors.

One of the ways the United States passes that obligation onto private actors is in our child support doctrine. Any child not residing with an adult who is legally responsible for providing for that child is entitled to child support payments from the non-resident parent. The state determines this obligation, but what the child is entitled to is a function of what her parents earn, not a function of what the child needs. Child support doctrine purposively ignores the question of how much it costs to raise a child.<sup>87</sup> Defenders of this methodology contend that inquiries about what children need lead to “answers that focus on some minimum level of subsistence.”<sup>88</sup> Focusing on what children need thus might disadvantage children of wealthier parents who, arguably, should receive more than just what they need. So, in the name of making sure wealthy children get their share (or perhaps in the name of ensuring that wealthy men pay their share), we conceptualize a child’s entitlement as having little to do with the child and everything to do with the parents.<sup>89</sup> This leads to a nation in which 13.5 million children live below the poverty level and 29.2 million live in households that cannot meet their children’s basic needs.<sup>90</sup> This childhood poverty is not perceived to be the responsibility of the state precisely because children are the responsibility of their biological parents.<sup>91</sup>

Another way in which the state passes the child support obligation onto private actors is, in some instances, to ignore biological parenthood. Although these cases seem at first to reject bionormativity, in some respects, they affirm it. A survey of cases in which non-biologically related men were found responsible for child support suggests that paternity doctrine can be as much about biparenting as it is about biology.<sup>92</sup> When confronted with an extant parenting relationship that is not rooted in biology, courts often refuse to make

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<sup>86</sup> O’CONNOR ET AL., *supra* note 13 at 55-56. This stronger allegiance to classical liberalism may be the result of the historical moment when the United States broke from Britain (a moment at which notions of classical liberalism were at their zenith) and/or the absence of an historically strong central church or state presence in the United States.

<sup>87</sup> See generally, Ira Ellman, *Fudging Failure: The Economic Analysis Used to Construct Child Support Guidelines*, 2004 U. CHI. LEGAL F. 167.

<sup>88</sup> THOMAS J. ESPENSHADE, *INVESTING IN CHILDREN: NEW ESTIMATES OF PARENTAL EXPENDITURES 1-2* (Rub. Inst. 1984).

<sup>89</sup> This schema for determining child support further undermines the theory that biological parents are responsible for child support because they *caused* the child and his or her dependency. Tort law makes one responsible for the extent to which one *caused* injury to (or dependency of) another, but a tortfeasor takes the plaintiff as he finds her and is only required to pay for any additional hardship he has caused. The millionaire tortfeasor and the pauper tortfeasor owe the same amount of money if they caused the same kind of injury. The same is not true of the millionaire and pauper parent. (I am grateful to Susan Appleton for pointing out this analogy.)

<sup>90</sup> National Center for Children in Poverty, *Basic Facts About Low-Income Children: Birth to Age 18*, [http://www.nccp.org/public\\_06.html](http://www.nccp.org/public_06.html).

<sup>91</sup> For further discussion on why welfare provisions like Temporary Aid to Needy Families (TANF) do not adequately supplement parental income, see *infra* text accompanying notes 161-162..

<sup>92</sup> Baker, *supra* note 79 at 16.

biology primary. The marital presumption is the most famous example of this, but even as its importance ebbs, courts find other ways of ignoring biology if biological parenthood runs the risk of leaving the child without adequate resources. Sometimes a non-biological father is held responsible simply because the biological father cannot be found.<sup>93</sup> In other cases, a biological father may be available but the non-biological father was there first or is better able to provide, so the court refuses to order biological tests.<sup>94</sup> Other times courts favor finality (of a prior paternity order) over biological evidence.<sup>95</sup> As long as the child is being supported by two parents, the law often blinks the biology question.

Obviously, at some level, these cases suggest weak state support for bionormativity – after all, these cases vest parental responsibility in someone other than a biological parent - but these cases also show a very strong allegiance to binary parenthood. These courts do not contemplate the idea of tripartite parenthood (even though there are often 3 obvious candidates for parental status), and they are very resistant to leaving a child with just one parent (even if there often only one person who is biologically related.) The arbitrariness of this system, in which whether a biological father is roped into or free to establish his fatherhood depends on a set of situations he may have nothing to do with, and whether the non-biological father remains a father can depend on the fortuity of being able to locate the biological father, might strike us as quite odd, were it not for the undeniable *binariness* of biological parenthood. Biologically there are always two and only two parents. The law adheres to biology’s binary commandment even as it ignores biology itself. If biological parenthood weren’t the norm, this allegiance to two would be much harder to justify.

The allegiance to two – particularly a heterosexual two - is very important to a liberal state though. The state wants two parents because if there is only one, that one is likely to be a woman and women often do not have enough resources to raise a child.<sup>96</sup> Enforcing a minimum of two makes it much more likely that men’s resources will get to children. But more than two gets tricky. The more people with claims to a child, the more courts have to make decisions with regard to what is in a child’s best interest because the more likely it is that one of the parents will be challenging the parenting work of others. Whenever legal parents are separated, the court is responsible for resolving child-rearing disputes between them.<sup>97</sup> Given the number of children of divorced or never married parents today, courts already do a great deal of this work, but no one thinks courts are

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<sup>93</sup> See *Monmouth City Div of Soc Servs. v. R.K.*, 757 A.2d 319, 327 (N.J. Super. Ct. Ch. Div 2000) (citing *Miller v. Miller*, 478 A.2d 351 (N.J. 1984).

<sup>94</sup> See *In re Kiana A. v. Mario A.*, 93 Cal. App. 4<sup>th</sup> 1109 (2001).

<sup>95</sup> *In re Paternity of Cheryl*, 746 N.E.2d 488, 496 (Mass. 2001) (refusal to order blood test appropriate in light of “the weight of authority enforcing the finality of paternity judgments”).

<sup>96</sup> Evolutionary biology can explain both why women are more likely to be the one parent (if there is only one), see *supra* text accompanying notes 44-48, and why men are likely to have more resources (they can spend their time gathering resources because they have to invest less in each child). Even if one rejects any and all theory stemming from evolutionary biology, history clearly shows that women are much more likely to be single parents than are men and men have more resources than women.

<sup>97</sup> Importantly, when parents are not separated, they are afforded great latitude to parent as they wish. See *infra* text accompanying notes 109-114 .

particularly good at it, and courts resist it.<sup>98</sup> The more parents with competing claims to a child, the higher the likelihood that the state becomes involved in the day-to-day business of parenting. A liberal state does not covet this role and may not be well served by it.<sup>99</sup> “[A]ffirmative sponsorship of ethical, religious or political beliefs [that is, much of what constitutes parenting] is something we expect the state *not* to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice.”<sup>100</sup> Thus, a liberal state prefers a parental norm that keeps parental legal disputes to a minimum, while ensuring access to enough resources for the child. By minimizing the number of people who can claim parental rights, while ensuring that there are at least two potential sources of support for a child, bionormativity serves the state’s interest.

Finally, and related, the state is attracted to a bionormative system because just as it allows the state to avoid day-to-day parenting decisions, it allows the state to avoid most initial parentage determinations. Most biological parents do want to take on the emotional and financial burdens of parenthood. Because they do, the state does not have to expend resources establishing parental status. By rooting parenthood in biological fact rather than, for instance, intent to parent or ability to parent, a bionormative system requires no *ex ante* evaluation of parents. Adoption, which usually involves a state-required examination of the potential adoptive parents is the one traditional exception.<sup>101</sup> For all other parents, the state appears to leave the parentage decision to nature.<sup>102</sup>

The state thus benefits from the privacy of bionormativity because the state does not have to pay for children. It benefits from the exclusivity of bionormativity because the state does not have to entertain competing claims to parenthood. It benefits from the binariness of bionormativity simply because the number two appears to appropriately balance the first two state priorities, relying on private funding and limiting the class of parents. Finally, the state benefits, indirectly, from the biology of bionormativity because it appears to make parenthood a function of a question that the state has no expertise to answer. This interest is not in biology, *per se*, but just in the fact that biology usually provides a parentage answer so that the state does not have to.

## B. Parents’ Interest in Bionormativity.

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<sup>98</sup> For a summary of some of the criticisms of courts applying the best interest of the child standard, see Katharine K. Baker, *Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection*, 59 OHIO ST. L. J. 1523, 1559-60 (1998).

<sup>99</sup> Various scholars, of different political stripes, have argued that the government benefits when parents are free to inculcate their own children with their own values. This kind of value-laden education helps nurture autonomous adults who can function well in a pluralistic society. See Katharine Bartlett, *Rethinking Parenthood as an Exclusive Stats: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 890-93 (1984); Bruce C. Hefen, *The Constitutional Status of Marriage, Kinship and Sexual Privacy – Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 480-82 (1983); Stephen Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 960 (1996).

<sup>100</sup> *Bellotti v. Baird*, 443 U.S. 622, 638-39 (1979).

<sup>101</sup> For more on how a bionormative system incorporates (with some difficulty) the idea of adoption see *infra* text accompanying notes 193-196.

<sup>102</sup> Though, the need for paternity establishment as a legal matter and the need for the marital presumption show that the state has always been aware that nature does not always provide two parents.

The idea that biological parents might have an interest in bionormativity seems at once ridiculously obvious and curiously difficult. It seems obvious because of course biological parents want to parent their own biological children and not someone else's. Instinct, evolutionary biology and the rapidly growing reproductive technology business all suggest that if possible, people would rather parent children who share their genetic material.<sup>103</sup> The fact that most people who want to parent would prefer a genetic link does not mean that all people who have a genetic link want to parent, however. What interest do biological parents have in a system that confers parental status on those who do not want it? Phrased this way the question seems much harder. The argument that follows suggests that biological parents, like the state, are attracted to the private and exclusive nature of bionormativity.

Most people probably decide to parent because they believe that the emotional and financial costs of having children are worth the benefits that one receives.<sup>104</sup> Indeed, scholars argue that the child support obligation might be justified as the legitimate price to be paid for the benefits that parents receive from parenting.<sup>105</sup> Support for this supposition comes with the data showing that the vast majority of child support that gets paid gets paid without any state enforcement effort.<sup>106</sup> That is, most parents willingly embrace their responsibility to support their children. These parents also might embrace financial aid from the state to help ease the financial burden of parenting, though. Why turn down money? The answer to that turns on how an acceptance of government aid could undermine the private nature of parenting.

It is interesting to note that in this country, unlike peer countries, when the government does provide aid to any parents other than the very poor, it does so in the form of a tax cut or tax exemption, not a universal child allowance.<sup>107</sup> Aid is thus packaged as money being returned, not as active state participation in parenting. This conceptualization conforms to notions of a minimalist liberal state, a state that plays no role in the support of children. In doing so, this conceptualization also protects what has emerged in this country as a fairly solid understanding of parental autonomy. Along with the responsibility to raise children on their own, comes the right to raise children without state interference, a right protected because it is part of the "private realm of family life which the state cannot enter."<sup>108</sup>

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<sup>103</sup> Of course, some people who can have their own genetic issue also choose to adopt.

<sup>104</sup> Some people may have children only because they feel pressured to do so and it is extraordinarily hard to assess either the costs or the benefits of having children, so it is difficult to say whether the benefits of children do exceed the costs for many people.

<sup>105</sup> See Altman, *supra* note 71 at 186-87 (considering, though ultimately rejecting this idea because it demeans children to think of child support as a "user's fee."); Ann Estin, *Love and Obligation: Family Law and the Romance of Economics*, 38 WM. & MARY L. REV. 989 ("acting rationally a couple will choose to have children only if they parenthood as more pleasurable than the other pleasures their time and money can buy")

<sup>106</sup> Leslie Joan Harris, *Reconsidering the Criteria for Legal Fatherhood*, 1996 UTAH L. REV. 461, 476.

<sup>107</sup> Lee Rainwater and Timothy Smeeding, *Doing Poorly: The Real income of American children in a Comparative Perspectiv*, Luxemboug Income Study 8 21 (1995).

<sup>108</sup> *Prince v. Mass*, 321 U.S. 158, 166 (1944).

Although not without controversy,<sup>109</sup> the constitutional right to “bring up [a] child in the way he should go”<sup>110</sup> is safely vested in parents.<sup>111</sup> “The “primary role of the parents in the upbringing of their children is . . . established beyond debate as an enduring American tradition.”<sup>112</sup> A child must not be viewed as “the mere creature of the state.”<sup>113</sup> Vesting the right to raise and socialize children in parents is thought critical to ensuring a pluralistic citizenry, one that has proper respect for the concept of individual liberty and individual rights.<sup>114</sup>

Vesting parents with the “right, coupled with the high duty”<sup>115</sup> to socialize children clearly serves parents’ interests. Human rights charters, constitutions and popular sentiment often consider parenthood central to human flourishing.<sup>116</sup> It is thought central to people’s lives because children provide unique bonds of love that give meaning and depth to our lives.<sup>117</sup> Rearing children is often also a deeply expressive activity. “Child-rearing is one of the ways in which people fulfill and express their deepest values about how life is to be lived.”<sup>118</sup> The degree of sacrifice and the relentless need to step outside of one’s own self-interest allow parents to achieve a transcendent form of selflessness that is very difficult to replicate in any other context.<sup>119</sup>

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<sup>109</sup> See Woodhouse, *Who Owns the Child, Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992)

<sup>110</sup> *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944). (“It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” *Id.* at 166)

<sup>111</sup> Sixty years of *Meyer v. Nebraska* and *Pierce v. Soc’y of Sisters* were decided, Justice Brennan commented “I think I am safe in saying that no one doubt the wisdom or validity of those decisions.” *Michael H. v. Gerald D.*, 491 U.S. 110, 143 (1989) (Brennan, J. dissenting).

<sup>112</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

<sup>113</sup> *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925).

<sup>114</sup> See *Meyer v. Nebraska*, 262 U.S. 390, 401-02 (1923). The court contrasted the state run socialization practices envisioned by people like Plato with the American tradition and suggested that the Greek tradition was one “wholly different from the ones upon which our institutions rest. . . .”

<sup>115</sup> *Pierce*, *supra* note 113 at 535.

<sup>116</sup> “The project of parenting – having, nurturing and educating one’s children – is central to our conception of human flourishing.” Gilles, *supra* note 99 at 962 (1996). See the International Covenant on Civil and Political Rights, 1966, Article 21 § 2 (“The right of men and women . . . to found a family shall be recognized.”) <http://www.ohchr.org/english/law/ccpr.htm>; Charter of Fundamental Rights of the European Union, Chapter II, Article 9 (“the right to . . . found a family shall be guaranteed . . .”) [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf) ;

<sup>117</sup> See Bluestein, *supra* note 61 at 118 (Adults parent “not because . . . [children] will continue the family, or are potential sources of relief and aid, but because they are new bonds of love.”); Kenneth Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 632 (1980) (“to be human is to need to love and be loved.”)

<sup>118</sup> David A.J. Richards, *The Individual, The Family, and The Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1, 28 (1980).

<sup>119</sup> See Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 301 (1988) (parenthood allows parents to realize their “ennobled selves”; Bruce Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 B.Y.U. L. REV. 1, 40 (parents can be amazed at the level of patience, perseverance that they can muster in pursuit of helping their children achieve their goals); JANE SWIGART, *THE MYTH OF THE BAD MOTHER 188-199*, quoting an anonymous father (“You can’t love children in the abstract, not if you take care of them every day . . . You have to get into self-sacrifice . . . But it’s been the best thing that’s ever happened to me.”) .

To a certain extent, these expressive and constitutive aspects of parenting require privacy. In order to rear children in a manner that expresses “our deepest values about how life is to be lived,” we must have freedom from too much state intervention in the process.<sup>120</sup> In order to feel genuine love, one must generate the sentiment from within, not have it imposed from outside. Comparably, in order to achieve the kind of ennoblement that parenthood can provide, one must find that selflessness inside oneself. The ability to realize a rich and ennobling life as a parent thus may depend in part on a conceptualization of parenting as a private enterprise.

Government support of children jeopardizes that parental privacy. Once the government starts financing activities that have been protected as private, the protection usually falls away.<sup>121</sup> Parents’ right to be free from a meddlesome government dictating how their children are to be reared, educated, and loved depends on the government delegating (or, perhaps, never entertaining the idea of accepting) the rights and responsibilities of parenthood.<sup>122</sup>

Biological parents also clearly have an interest in the exclusive nature of biological parenthood. In a system in which the status of parent is a direct function of genetic connection and only genetic connection, biological parents simply do not have to worry about that status being taken away. As a matter of biology, one is or is not a parent. The only qualifying characteristic biology demands is genetic connection and nothing in nature can sever that genetic connection. The exclusivity of biology delegitimizes attempts by others or by a not-so-liberal state to dictate the terms pursuant to which one is allowed to become a parent or stay a parent.

A parental regime that was based on something like parental effort, or intent, or assumed responsibility, would require much more state interference. Depending on the situation in which the child was born and raised, there could be many people claiming parental rights. The state would have to determine parental status based on nuanced and difficult-to-document evidence of love and investment, not on clear objective evidence of genetic connection. Thus, willing biological parents who would parent and support their children

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<sup>120</sup> Emily Buss analogizes the parental right at issue to other fundamental rights, like speech or religion, and notes that the court usually protects the ability to make bad or dangerous decisions with regard to speech or religion precisely because it is the decision-making process itself, not just the result of that decision enhances autonomy and human flourishing. Emily Buss, *Parental Rights After Troxel v. Granville*, 2000 SUP. CT. REV. 279, 291.

<sup>121</sup> *Doe v. Bolton*, 432 US 464 (1977) (right to abortion, grounded in privacy, does not include right to government financing even if government funds other health services); *Wyman v. James*, 400 US 309 (1971) (fourth amendment right to protection from unreasonable searches and seizure does not require social services workers to obtain a warrant before the investigate the home of a parent receiving state support payments).

<sup>122</sup> We do have an extensive public education system that tries to do much of the rearing and educating that was traditionally left to parents. Parents who send their children to public school may relinquish a good deal of their parental authority. As in many other aspects of parenting, though, the extent to which one must relinquish control in the education setting is largely dependent on class. Not only can more wealthy parents home school their children or send their children to parochial or other private schools, wealthy parents can choose to live in politically and culturally homogeneous communities in which their children will likely only be exposed to ideas that conform to the parents’ value systems.

anyway benefit from a regime that imposes parental status on unwilling biological parents because such a regime, for the most part, keeps the state out of the parenting process. Bionormativity reifies the notion that children are a private good, not public responsibility and it thereby reinforces willing parents' claims to freedom from too much state intervention.

Parents' attraction to binary parenting is a little more nuanced. As individuals, parents might prefer a regime that vested exclusive parental rights in one, not two parents. Divorcing parents fighting over custody almost certainly feel this way, as do many never-married mothers.<sup>123</sup> Thus, parents' attraction to binary parenthood probably depends on the existence of state support. If a parent could assume state support, that parent would probably have little interest in a binary norm. If that parent wanted to share the parenting process, he or she could, but the choice would be up to the parent, not the state. Parental rights could be exclusively granted to one.<sup>124</sup> If one cannot assume state support, though, binary parenthood allows adults to share the duties of providing and caring. Supporting a child, while simultaneously caring for that child, is often simply too onerous for a single parent. Binary parenting allows the burdens to be shared without allowing the benefits to become too diffuse. A strong allegiance to two helps keep third parties at bay. In other words, a strong allegiance to binary parenthood is a strong allegiance to exclusive parenthood and serves parents' interests in freedom from too much intrusion from others. On balance, then, given uncertainty as to state support, traditional parents probably favor a binary regime.

Finally, parents have some interest in a biological norm simply because most people parenting are parenting their own genetic issue. These parents need not go through a qualification process before they are considered parents (though if their parenthood is challenged, they might have to submit to testing). Such a qualification system might be onerous (a judicial determination of intent or ability to parent, for instance) or incredibly easy (conclusive parenthood vested in whosever name was on a birth certificate), but, at the moment, most parents are able to assume parental status without having to go through any registration system at all.<sup>125</sup>

### C. Children's Interest

Any discussion of children's interests should probably start with the premise that it is incredibly difficult to ascertain children's interests in the abstract. With the exception of some unassailable truths about children needing love, support, and attention, little can be

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<sup>123</sup> Almost half (43%) of never-married mothers who do not receive child support from the child's father say that they do not want receive support from the father. ANDREW BELLER & JOHN GRAHAM, *SMALL CHANGE: THE ECONOMICS OF CHILD SUPPORT* 21 (1993).

<sup>124</sup> See MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER 20<sup>TH</sup> CENTURY TRAGEDIES* (1995). (advocating a regime in which the family was defined by a caretaker-child dyad, not marriage or genetic parenthood).

<sup>125</sup> In most states today, a name on a birth certificate or a voluntary acknowledgement of paternity sets up a presumption of parenthood, but one that can be easily rebutted later. See e.g., Uniform Parentage Act § 4(5) (1973). Failure to list a name on a birth certificate in no way precludes one from trying to assert parenthood later, but, in an alternative regime, it could.

proved about what is best for children because multiple causation problems make reliable empirical studies of family life almost impossible to design.<sup>126</sup> Nonetheless, most people agree that we must consider children's interests in any question about parenthood and many people probably think that children's interests should be primary. As this section will show, children's interests in bionormativity are not the same as the state's or parents'. While most children share an interest in the private aspects of bionormativity, their interest in exclusive parenthood is more muted and their interest in binary parenthood is more muted still. Moreover, children seem to have what is potentially the strongest interest in the biology of biological parenthood. There is evidence that children may be best served if raised by their biological parents, though the evidence is far from definitive.

To the extent that norms a bionormative regime usually provides children with homes in which they are loved and reared without meddling from the state or other third parties, children benefit. Children need to feel like they belong somewhere.<sup>127</sup> The less a child belongs to any one parent, or set of parents, the less that child may feel like he belongs to someone or something. Children also need to know and be taught not only specific values, but a belief system from which they can evaluate the world around them.<sup>128</sup> Children need to know "what it is to have a coherent way of life . . . [in which they experience] caring, long-term relationships with others."<sup>129</sup> As Emily Buss writes, "[p]arents' strong emotional attachment to their children and considerable knowledge of their particular needs make parents the child-specific experts most qualified to assess and pursue their children's best interests in most circumstances."<sup>130</sup> If children's dependency and child-rearing needs are seen primarily as public obligations, not private responsibilities, children may be deprived of the intense, value-laden socialization processes that private homes can provide.

Children's interest in the exclusive nature of bionormative parenting is somewhat more complicated. To the extent that children benefit from stable, non-acrimonious home environments, they benefit from a regime in which parents and potential parents are not fighting with each other over parental rights. The more adults debate and clash over how to raise a child the less coherent the child's way of life. The fewer adults with potential relationship rights to a child, the less likely that there will be a fight. But to the extent that children develop important emotional relationships with adults other than their legal parents, they may also have an interest in multiple parenthood. Exclusive parenthood often deprives children of some of the most meaningful relationships in their lives.<sup>131</sup>

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<sup>126</sup> See Lee Teitelbaum, *Moral Discourse and Family Law*, 84 MICH. L. REV. 430, 437 (1985).

<sup>127</sup> Many scholars argue that one needs a sense of belonging before one can grow into a sense of autonomy. See JENNIFER NEDELSKY, RECONCEIVING AUTONOMY: SOURCES, THOUGHTS AND POSSIBILITIES 1, 24 (1989) (a precondition for feeling autonomous if feeling connected); Martha Minnow, *Forming Underneath Everything that Grows: Toward a History of Family Law*, 1985 WIS. L. REV. 819, 894 ("belonging is essential to becoming")

<sup>128</sup> Baker, *Property Rules*, *supra* note 97 at 1543-44.

<sup>129</sup> Gilles, *supra* note 98 at 941.

<sup>130</sup> Emily Buss, *Parental Rights*, 88 VA. L. REV. 635, 647 (2002).

<sup>131</sup> See *infra* note 184-190.



The more likely it is that those meaningful relationships will develop with non-traditional parents, the less interest children have in exclusive parenthood.

As far as children's interest in binary parenting is concerned, much has been written about how much children benefit from the presence of two parents. Sara McLanahan, probably the leading researcher on the subject of children in single parent families concludes "children who grow up apart from one of their parents are disadvantaged across a broad array of outcomes. In fact, in almost any measure child well-being that you look at, these children are disadvantaged."<sup>132</sup> McLanahan concludes that half of the disadvantage that children of single parents experience is due to economic factors: single parent homes have less money than two parent homes. But, there is still a significant amount of hardship that children of single parents endure for reasons that have nothing to do with economic resources. Much of it probably comes from the fact that parenting involves emotional and physical investment, not just financial investment. One person simply cannot provide as much emotional and physical support as can two. Numerous scholars cite this as proof that children benefit from having two parents for reasons that have nothing to do with economics.<sup>133</sup>

It is important to underscore what McLanahan's research does not say though. Most important, it says very little about the advantages of having two separated parents. All of McLanahan's work focuses on the effects of having (or not having) two parents in the household, not two parents in existence. In other words, McLanahan has something to say about how divorce and failure to marry affects children, but little to say about how binary parenthood affects children.

Children with more than one parent have more potential resources available to them. Thus, children may be attracted to binary parenthood for the same reason that the state is, but McLanahan herself has suggested that the harms from the conflict associated with collecting support from never-married fathers outweighs the benefits of the extra money.<sup>134</sup> If this is right, forcing parenthood on unwilling parents is not in children's interest. Moreover, children of high-conflict marriage suffer real harm as a result of that conflict and children of divorce are often hurt by the conflict and tension that divorce breeds.<sup>135</sup> The custodial parent's anxiety level is the most important factor in predicting child well-being after divorce.<sup>136</sup> Thus, though on the surface it might seem

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<sup>132</sup> Carbone, *supra* note 1 at 112, quoting McLanahan interview on Frontline (Public Broadcasting System): *The Vanishing Father* (1995; documentary)

<sup>133</sup> Marsha Garrison, *Law-Making for Baby-making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV 835, 887 (2000)(citing McLanahan and Sandefeur and claiming that children therefore need two parents); DAVID POPNOE, *LIFE WITHOUT FATHER* (1996) (arguing that children psychological health depends on having a male and female parent); DAVID BLANKENHORN, *FATHERLESS AMERICA* (1995) (same).

<sup>134</sup> SARA McLANAHAN, *Child Support Enforcement and Child Well-Being: Greater Security or Greater Conflict?*, in *CHILD SUPPORT AND CHILD WELL-BEING* 239, 254 (Irwin Garfinkel et al. eds., 1994).

<sup>135</sup> See F. FURSTENBERG AND A. CHERLIN, *THE FAMILY AND PUBLIC POLICY: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART* 64 (1991) (children hurt by high conflict regardless of whether parents divorce); P. AMATO AND A. BOOTH, *A GENERATION AT RISK* 204 (1997) (children "residing with parents in poor-quality marriages, divorce does not appear to have negative long-term consequences.")

<sup>136</sup> See FURSTENBERG AND CHERLIN, *DIVIDED FAMILIES* 75 (1991) .

like children were attracted to binary parenting for the same financial reasons the state is, children's interest is more conditional. Children appear to have an interest in two sources of support only if the process of getting that second source of support is not too conflict-ridden. While the number two seems to make sense for both the state and parents, because of the way in which it balances the need for resources with the desire for limited access, children may not benefit from two. Even though two ensures more resources, children may be better off without those resources if there is too much conflict associated with securing them. At the same time, if there are serious claims for parental rights based on a real established relationship with a third adult, children may be better off if those rights are respected. Binariness for binariness' sake does not appear to meet many children's interests.

What really marks the difference in children's interest in bionormativity though is children's interest in the biology of biological parenthood. Children may benefit from the state imposing parental status on unwilling adults precisely because those unwilling adults contributed genetic material to a child. There are, currently, medical benefits associated with knowing the health histories of one's genetic relatives. Being raised by one's biological parents helps ensure access to genetic information that can play an important role in medical treatment. The rapid advances in genetic science have increased the utility of this information, though advances will also, most predict, make genetic history irrelevant. As we come to know more about the human genome and are able to predict and treat based on an individual's presenting DNA, family history, which at best suggests likelihood of traits, will become much less important.<sup>137</sup>

There may also be psychological benefits associated with being raised by one's biological parents though. Some people argue that in order to have a healthy understanding of oneself, one needs to know the source of one's genetic material. Proponents of this theory usually cite Erik Erikson for the idea that a healthy sense of identity requires integrating one's past into one's present and one's vision of the future.<sup>138</sup> Living and being cared for by one's biological parents is arguably the best way to achieve that healthy identity.

Identity theory owes its current legal prominence to the open adoption movement which, in the 1960s, began to question whether the secrecy that had been employed to protect both birth mother and adoptee actually hurt both birth mother and adoptee. Psychologists

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<sup>137</sup> See Robert F. Service, *The Race for the \$1000 Genome*, 17 SCIENCE 1544-46 (2006) (describing rapid advances in genome sequencing and suggesting that inexpensive genome treating will be available soon.)

<sup>138</sup> See e.g., Sullivan and Lathrop, *Openness in Adoption: Retrospective Lessons and Prospective Choices*, 26 CHILDREN AND YOUTH SERVICES REVIEW 393-411 (2004) (discussing Erikson's claim that identity involves a subjective sense of sameness and continuity); Harold D. Grotevant, *Coming to Terms with Adoption: The Construction of Identity from Adolescence into Adulthood*, 1 ADOPTION Q. 1, 10 (referring to Erikson's work discussing an aspect of identity as "continuity across past, present and future."); See also BARBARA WOODHOUSE, ARE YOU MY MOTHER? (discussing others' work on identity) and June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1315 (2005) (incorporating Woodhouse's work).

Interestingly, Erikson, who was raised by his biological mother and an adoptive father, chose not to find his biological father when presented with the opportunity to do so. BETTY JEAN LIFTON, JOURNEY OF THE ADOPTED SELF 206 (1994).

suggested that keeping biological origins secret led to a sense of “genealogical bewilderment”<sup>139</sup> in adoptees. They noted that many adoptees experienced a sense of loss that was thought “more pervasive, less socially recognized and more profound” than the kinds of parental losses other children might endure.<sup>140</sup> As one psychologist put it, “the desire to know one’s biological origins and parentage results from a deeply felt psychological and emotional need, a need for roots, for existential continuity and for a sense of completeness.”<sup>141</sup> The psychologists argued that an adoptee “los[es] his place on the intergenerational chain of being.”<sup>142</sup>

In a concerted effort to address these harms, adoption professionals began discouraging sealed records and encouraging what has become known as open adoption. Now it is the rule, rather than the exception, for a birth mother to know the family into which her biological children will go. Adopted children and their families know and often keep in contact with their biological mothers.<sup>143</sup> For most adoptees today the black biological box, that had been the hallmark of adoption, has been opened. Preliminary evidence suggests that, while not perfect, open adoption systems work well.<sup>144</sup>

There is also another small, but growing, class of children searching for their biological origins. Children born by virtue of artificial insemination, either into a married couple, into a gay couple or to a single parent have begun to search for information about the person who donated the gamete(s) with which they were conceived.<sup>145</sup> Worldwide, there is a growing trend to help them in their search. Great Britain recently passed legislation ensuring that children born through egg or sperm donation have the ability to trace their genetic origins.<sup>146</sup> In response to an intense lobbying campaign by some ethicists, Canada has enacted a prohibition on compensation for anonymous sperm or egg donation.<sup>147</sup> Sweden and New Zealand also have known-donor systems.<sup>148</sup> In this country, children of anonymous sperm donors cannot always find their genetic fathers,

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<sup>139</sup> H.J. Sants, *Genealogical Bewilderment in Children with Substitute Parents*, 37 BRIT. J. MED. PSYCHOL. 133 (1964)

<sup>140</sup> DAVID M. BRODZINSKY ET AL. BEING ADOPTED 9 (1992) (comparing the loss of adoption to that of others children might experience like divorce or death of a parent).

<sup>141</sup> Fernando Colon, *Family Ties and Child Placement*, 17 FAM. PROCESS 289, 302.

<sup>142</sup> Grotevant, *supra* note 138.

<sup>143</sup> The degree of contact with and even knowledge of biological parents is less than one might expect given the claims of genealogical bewilderment. In a study of one New York county, which looked at children adopted between 1992-1994, 40% of the adoptees knew the names of the biological mothers, but only 17% kept in contact with her. Only 25% of the adoptees knew the names of their biological fathers and only 7% kept in contact with him. Rosemary Aver, *Information Disclosure and Openness in Adoption*, 20 Children and Youth Services Review 51, 69 (1998)..

<sup>144</sup> Adoptive families often report wanting more contact with the birth mother.

<sup>145</sup> The vast majority of these cases involve sperm, not egg donation. Reproductive specialists have used donated eggs for no more than 10 years. Sperm banks have been widely utilized for closer to 70 years.

<sup>146</sup> *Are you My Father?* TORONTO STAR, April 16, 2005.

<sup>147</sup> *Eggs Shouldn't Go the Highest Bidder*, TORONTO GLOBE AND MAIL, June 4, 2005.

<sup>148</sup> *Id.*

but they have had considerable success using the Internet to find half-siblings.<sup>149</sup> Many of these children are deeply curious about their genetic origins.

This policy movement in the adoption and technological reproduction areas suggests that genetic connection matters to children. Perhaps that is all we need to conclude that therefore children, a particularly vulnerable interest group, have an interest in maintaining a biological parental regime. A closer look at the data may give us pause, however, because while the data involving adopted children and children born with donated gamete indicates that genetic connection matters, it does not tell us much about why it matters.

Consider the sense of loss that has been identified as stemming from not knowing who one's biological parents are. This loss can easily be conflated with the loss of having been relinquished. If the children born with the help of donated gametes ("DG children") turn out to experience the same amount of loss and confusion as adoptive children, then it will be much easier to identify genetics as the source of the loss, but at the moment there is too much static in the data. To date, DG children tend to express their motivations more in terms of curiosity than pain.<sup>150</sup>

An adoptee is able to understand that she existed as a person, albeit a newborn infant, when her biological parents, or at least her biological mother, relinquished parental status. The adoptee existed as a baby and her birth mother left. The same cannot be said for the genetic descendent of a sperm or an egg donor, whose genetic parents never know her to exist at all and who relinquish parental status only in the remotest sense. Moreover, as one adoption researcher put it, "adoption situations are not generally the first choice for any member of the triad."<sup>151</sup> Such is not the case for children born to single women by choice or into gay couples, whose birth situation often was their parents' first choice.<sup>152</sup>

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<sup>149</sup> *Hello, I'm Your Sister*, N.Y. TIMES, Nov. 20, 2005, Web site, Most US sperm banks still only distribute sperm from anonymous donors, but some do have provisions for donors who are willing to be contacted at some time in the future.

<sup>150</sup> Although not universally the case, the adoption narratives suggest much more pain and anger than do the stories from the DG children. Compare the interviews from the recent newspaper articles on DG children, e.g. *Who's My Daddy?* TORONTO GLOBE AND MAIL, June 18, 2005; *Who's the Daddy?*, THE GUARDIAN (London) January 3, 2006, with the stories in LIFTON, *supra* note 138. The consistent exception to this is the DG children born to heterosexual couples who were not told about the circumstances of their birth until they were quite old. Those children usually feel strong anger at having been lied to. See AJ Turner, A. Coyle, *What Does It Mean to be a Donor Offspring*, 15 HUM. REPROD. 2041, 2049 (2000) ("Secrecy in families is damaging.")

<sup>151</sup> Michael McGinn, *Attachment and Separation: Obstacles for Adoptees*, J. OF SOC. DISTRESS AND THE HOMELESS 273, 273 (2000). The triad consists of the biological mother (who often would rather not be pregnant or be in a position to keep the child), the adoptive parents (who would rather be having their own genetically related child) and the child.

<sup>152</sup> Golombok and MacCallum conclude that the DG children of lesbians and single mothers by choice, most of whom are told from the beginning about the circumstances of their birth, are very well-adjusted. S. Golombok & F. MacCallum, *Practitioner Review: Outcomes for parents and children following non-traditional conception*, 44 J. OF CHILD. PSYCHOL. & PSYCHIATRY 303, 311 (2003). Secrecy is not an option for these non-traditional families and their embrace of a non-traditional family structure makes it clear that they did not wish for something else. In contrast, DG children of heterosexual families are often not told

Just as important, any discussion of literature on biological connection and adoption cries out for a recognition of gender differentiation. As several commentators have suggested, adoptees who struggle with scant information and fantasies about their biological origins usually have a picture of their birth as an immaculate conception.<sup>153</sup> They are “virtually amnesiac” about their birth father.<sup>154</sup> Adoptees almost always search for their birth mother first and their birth father, if at all, only after they have found their birth mother.<sup>155</sup> What they yearn for and dream about is a relationship with their birth mother. If identity is about being rooted in one’s genealogical past, why do adoptees clearly care more about their mothers? The disparate treatment of mothers and fathers by adoptees suggests either that cultural scripts play a huge role in constructing the adoptees’ mental health or that it is something other than genetic material per se that adoptees care about.<sup>156</sup>

It is unlikely that we will get accurate answers as to how much biological connection really matters to children before we have to make policy decisions about the importance of genetic parenthood in a technologically advanced age. As mentioned, many countries have already enacted legislation making it very difficult to erase the concept of biological parenthood. If one is persuaded that the evidence from adoption is applicable and

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about the circumstances of their birth because of family embarrassment and stigma associated with not being able to reproduce “naturally.” *Id.* at 308. See also, Tuner and Coyle, *supra* note at 2049.

<sup>153</sup> LIFTON, *supra* note 138 at 191; FREEARK, et al., 75 AM. J. ORTHOPSYCHIATRY 86, 95 (2005)

<sup>154</sup> Freeark, et al., *supra* note 153.

<sup>155</sup> LIFTON, *supra* note 138 at 191. Practical considerations may explain why adoptees search for birth mothers so much more frequently. The mother’s identity is always recorded. The father’s identity, if recorded, is based on the mother’s word and sometimes on her guess. (All states an adoption to go through without the father’s consent if he has abandoned the mother and even when a father gives his consent, there is no way of verifying that he is actually the biological father.) Searching for one’s biological mother instead of one’s biological father may simply be a logical expenditure of resources because one must always discount the fact that the man one finds may not be the actual biological father. Thus, practicality may explain why there are more searches for mothers than fathers, but it does not explain why, when adoptees are still quite young and well before they start to search, they fantasize about and yearn for a birth mother not a birth father.

<sup>156</sup> Either explanation is perfectly plausible. Culturally, motherhood and fatherhood are lived and perceived as very different experiences. Mothers invest much more time and energy than fathers in parenting their children. See JOAN WILLIAMS, UNBENDING GENDER (1999); Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN’S STUD. 133 (1992) Being a “good mother” as that term is culturally understood requires deep emotional investment in one’s children. Being a good mother is also seen as an integral part of being a grown woman. In contrast, being a “good father” can be limited to providing financially. Adoptees may yearn for their biological mothers because they are told that it is mothers that really matter in the parenting enterprise.

Biology provides a slightly different reason for why adoptees care more about their mothers: mothers had more to do with them being born. Although not quite immaculate, the biologists’ account of human conception involves remarkably little work on the male’s part. See *supra* text accompanying notes 47-48. Intercourse often begins and ends the biological father’s contribution. If an adoptee feels connected to, love for and anger at the people responsible for bringing him into the world and then relinquishing him, than the adoptee should feel more of all of that for his mother. She had much more to do with it.

Both the cultural and biological explanations of why adopted children search for their mothers not their fathers, could also explain why birth mothers are much more likely to search for their biological children than are birth fathers.

persuasive in the donated gamete context then one should question whether we should ever allow intending parents to obtain genetic material from others. If one is skeptical of the adoption data and eager to facilitate more ways for different kinds of parents to become parents, then one might be happy to make biological connection irrelevant. At this point, the best one can probably say is that children *may* have an important interest in maintaining a biologically based parental regime.

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In sum, while the state, parents and children all have an interest in maintaining a bionormative system, what attracts each group to bionormativity differs and the strength of that attraction can vary. The state seems most attracted to the financial ramifications of a private regime. Parents seem most attracted to the parental autonomy associated with a private and exclusive regime. Both the state and parents also benefit from a binary principle that balances the need for resources with a preference for exclusivity. Children, on the other hand, though they have some interests in privacy and exclusivity, have a growing interests in non-exclusive parenthood, little interest in a binary principle, but perhaps the greatest interest in biology for biology's sake.

### III. The Costs of Bionormativity

Despite the numerous advantages of bionormativity suggested above and notwithstanding our remarkable modern ability to perfect a biological system, the norm of biological parenthood appears to be in a bit of a crisis. The economic reality, reproductive practices and parenting arrangements of a growing number of parents seem to belie bionormativity's universal desirability. In particular, the qualities of bionormativity that make it attractive, its private, exclusive, binary and biological nature, are growing increasingly controversial. This Part explores that controversy.

#### A. Funding for Children

The brief history of the paternity suit, explored earlier, suggests that money is one of the main reasons the state is attracted to biological parenthood. The private construction of parenthood allows the state to absolve itself of economic responsibility for children. The desire of states to pass off responsibility for children explains why parish courts had such an incentive to go after unmarried fathers in medieval England;<sup>157</sup> it explains why Parliament included paternity provisions in the British Poor Laws;<sup>158</sup> and it explains why the U.S. Congress mandated that states develop biological paternity rules and strict guidelines for child support payment.<sup>159</sup>

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<sup>157</sup> See *supra* notes 20-22 .

<sup>158</sup> See *supra* note 24.

<sup>159</sup> See *supra* note 41.

Child support policy of the last 50 years makes clear, however, that a state eschews economic responsibility for children at poor children's expense. The United States, which more than any other industrialized country insists that a bionormative regime can amply provide for children, leads the western industrialized world - by a big margin - in child poverty.<sup>160</sup> As indicated, just under 30 million children in this country live without the resources necessary to meet their basic needs.<sup>161</sup> This poverty is not just a function of single mothers or deadbeat dads. The average unwed father earns just over \$16,000 a year.<sup>162</sup> Just under half of low-income children live with married parents.<sup>163</sup> Over half of low-income children have at least one parent who works full-time, year-round.<sup>164</sup> The economies in which many of these parents live simply do not pay enough to support children.

The private construction of parenthood does help the children of wealthy parents. Children who live in families with incomes in the top 20% of the United States distribution have higher standards of living than any other children in the world.<sup>165</sup> Of the 18 United States peer countries studied by Lee Rainwater and Timothy Smeeding, only the wealthy children of Switzerland and Canada had standards of living within 20% of the wealthiest U.S. children.<sup>166</sup> Middle income children in the United States also do well, though not as well comparatively. Most middle income children in the industrialized world come within 20% of the United States' standard.<sup>167</sup>

The reason that the United States defines the extremes of childhood wealth and childhood poverty among industrialized nations is that virtually all modern governments - except the U.S. - transfer a significant amount of money from wealthy households to poor

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<sup>160</sup> See Economic Policy Institute, *Economic Snapshots*, June 23, 2004, [http://www.epinet.org/content.cfm.webfeatures\\_snapshots\\_06232004](http://www.epinet.org/content.cfm.webfeatures_snapshots_06232004) (21.9% of children in the United States live below the poverty line. The next highest rate of child poverty is New Zealand's at 16.3%. Denmark has a child poverty rate of 2.4%. The average child poverty rate for 16 developed countries, excluding the U.S., is 10.7%).

<sup>161</sup> National Center for Children in Poverty, *Basic Facts About Low-Income Children: Birth to Age 18* (Jan. 2006).

<sup>162</sup> Lauren M Rich, *Regular and Irregular Earnings of Unwed Fathers: Implications for Child Support Practices?* 10 (Bendheim-Thoman Ctr. For Research on Child Wellbeing, Working Paper No. 99-10FF, July 1999) available at <http://crrw.princeton.edu/workingpapers/WP99-10-FF-Rich.pdf>. This figure has probably gone up some in 8 years and Rich suggests that if one adds in underground employment it goes up even more. But it is highly unlikely that it goes up sufficiently to adequately support a child in another household.

<sup>163</sup> National Center for Children in Poverty, [http://www.nccp.org/pub\\_lic06.html](http://www.nccp.org/pub_lic06.html), *Basic Facts About Low-Income Children: Birth to Age 18* (Jan. 2006).

<sup>164</sup> *Id.*

<sup>165</sup> At least any other children in any other major country. See Rainwater and Smeeding, *supra* note 107 at 8.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*, Figure 2. Middle income Danish children actually have the highest standard of living for middle income children.

ones.<sup>168</sup> In doing so, they reject a private construction of parenthood in favor of an ethic that makes the well-being of children a collective responsibility. Rainwater and Smeeding found that every one of the countries they studied (except the United States) had a form of child or family allowance that went to children regardless of need.<sup>169</sup> Most of these countries also instituted a minimum guaranteed level of child support to single parents in case the noncustodial parent could not or would not pay.<sup>170</sup> In some countries these guaranteed payments all but eliminated the economic disadvantages that single parents faced. “In Denmark, Norway, Sweden and the UK, poverty rates for single parent children are close enough to couples’ rates to not make a great difference in the overall poverty rate.”<sup>171</sup>

All of the United States’ comparison countries have some provision for naming a biological father and trying to secure support from him.<sup>172</sup> None of these countries reject the idea of biological parenthood completely, but neither do they construct bionormativity as a private system from which emanates the totality of a child’s entitlement. Nor do they seem to perceive parenthood as essentially binary. The European states’ primary response to poverty is not to extract more or better support from biological parents; it is to provide children with more support from the state. Much of this support goes to single parents.<sup>173</sup> As conservative critics rightly point out, this kind of state intervention legitimates single parenthood.<sup>174</sup> By doing so, state policy in Europe undermines the essential binariness of biological parenthood.<sup>175</sup>

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<sup>168</sup> Economic Policy Institute, *Economic Snapshots*, supra note 160 (transfer payments from rich to poor are able to reduce child poverty by half in most industrialized countries); Rainwater and Smeeding, supra note 107. Transfer payments from rich to poor also, of course, decrease the gap between rich and poor.

<sup>169</sup> Rainwater and Smeeding, supra note 107 at 21-22.

<sup>170</sup> Id.

<sup>171</sup> Rainwater and Smeeding, supra note 107 at 13.

<sup>172</sup> See generally Marie-Therese Meulders-Klein, *The Status of the Father in European Legislation*, 44 AM. J. COMP. L. 487, 498-504 (1996)

<sup>173</sup> “The European reaction [to divorce and single parenthood] has been to institute a minimum guaranteed level of child support to single mothers.” Rainwater and Smeeding, supra note 107 at 21.

<sup>174</sup> Patrick Fagan, *The Real Root Causes of Violent Crime: The Breakdown of the Marriage, Family and Community*, The Heritage Foundation, March 17, 1995 (available at <http://www.heritage.org/Research/Crime/BG1026.cfm>) (payments to single mothers “discourage the formation of intact families.”); Michael Bauman, *Dangerous Samaritans*, (available at <http://michaelbauman.com/dangeroussamaritans.htm>) (“aid to single mothers and their children made low income husbands extraneous) Rush Limbaugh, *The Ways Things Ought to Be*, 19912 “Because it has become societally acceptable to have an illegitimate child with the government being substituted as the family’s breadwinner in lower and lower-middle classes, the fathers of these children are, in their own minds, free to shirk the responsibility and consequences of their actions.” These criticisms, notwithstanding, it is important to note that the United States, which subsidizes single mothers less than European countries do, still has a higher rate of single parenting. Rainwater and Smeeding, supra note 107 at 21. This suggests that payments to single mothers may not cause single parenthood, though it still can work to legitimize it.

<sup>175</sup> In several European countries, unwed biological fathers have very few rights. See Williams, supra note 84 (suggesting that the Netherlands and Germany assign unwed fathers few rights.); Meulders-Klein, supra note 172 (Europe beginning to recognize fathers’ presence more, but has traditionally been much less concerned with affording the unwed father any rights.)



If the United States were to assume substantially more responsibility for children, however, it is likely that notions of parental autonomy would suffer. Recall that one of the reasons that parents were willing to accept the private obligations of a bionormative regime was that the right to parental autonomy seemed to follow. Conceptualizing parenthood as a private enterprise, outside of the state's legitimate sphere of influence or duty, helps maintain a strong parental rights ethic. The state has no business interfering in parenting decisions because the state has no business in parenting period. The more the state assumes financial obligations for children, the more precarious a notion of parental autonomy may become. The extent to which parental autonomy is not respected for poor parents in this country certainly suggests as much.<sup>176</sup>

For instance, in *Wyman v. James*, the Supreme Court condoned a social worker's search of a welfare recipient's home and endorsed the social worker's intrusive questions about parenting simply because the mother was receiving state aid. The court justified the intrusion because it was the child, not the mother, who was the object of the state's concern, and because the state had a "paramount interest and concern in seeing and assuring that the intended and proper objects of . . . assistance are the ones who benefit."<sup>177</sup> If this reasoning is persuasive, then an expansion of state aid would likely eviscerate parental autonomy.

The demise of parental autonomy is not inevitable though. In cases in which the child's family is not receiving public assistance, concern for the child has not, traditionally, justified state intrusion.<sup>178</sup> The cases from which parental autonomy doctrine emanates actually suggest that children benefit from state deference to parents and are hurt by state regulation of parents.<sup>179</sup> If children benefit from a home environment in which parental authority is clear and parents are free to transmit their own values,<sup>180</sup> and if children benefit from an authoritative structure in which parents, who have unique expertise vis a

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<sup>176</sup> Annette Appell, *Protecting Children or Punishing Mothers: Gender, Race and Class in the Child Protection System*, 48 S C L REV 577, 585 (1997) (discussing how the state interferes more with the parenting practices of the poor, in part because the poor interface with state agencies more and in part because state actors often view poverty itself as deviant and neglectful).

<sup>177</sup> *Wyman v. James* 400 US 309, 318-19 (1970).

<sup>178</sup> See *Meyer v. Nebraska*, 262 US 390 (1923) (state cannot prohibit parents from paying a teacher to teach their children German); *Pierce v. Soc. Of Sisters*, 268 US 510 (1925) (state cannot compel students to attend public school); *Wisconsin v. Yoder*, 406 US 205 (1972) (state cannot compel Amish children to go to school after 8<sup>th</sup> grade), but see *Prince v. Mass.*, 321 US 1258 (1944) (state can prohibit child from selling newspapers on a street corner, even if accompanied by a parent); See generally, Gilles, *surpa* note 99 at 941-42 (children benefit from the non-neutral, value-laden nurturance that unregulated parents are free to provide).

<sup>179</sup> See *Pierce*, 268 US at 535 ("fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only"); *Yoder*, 406 US at 232 (the "primary role of the parents in the upbringing of their children is now established beyond debate," in part because "history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children.")

<sup>180</sup> Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 Harv. L. Rev. 1348, 1371-72 (1994) ("For children, civil freedom brings nothing less than the right to grow into moral autonomy, because the child-citizen . . . flowers to moral independence only under authority that is flexible in ways that states . . . cannot manage, and temporary in ways that states . . . cannot tolerate.")

vis their own children, make decisions on behalf of them,<sup>181</sup> then increased state support for children need not necessarily lead to more state oversight of parenthood. If the government was willing to spend money on children without setting up an apparatus to make sure that the money was spent appropriately, then parenting could remain a private right for the middle and upper class and could become a private right for the poor parents who currently suffer from very intrusive state monitoring.<sup>182</sup>

Thus, in theory, it is possible to separate out obligations for children from rights to children. It is possible to give the state more responsibility for financing children without giving the state more of a right to raise children, but this would require a strong re- invigoration of parental autonomy doctrine and a clear understanding of the reasons why such a doctrine served children's interests. In short, if the plight of poor children compel making obligations to children more of a public responsibility, then it is likely that the parents will lose much of the autonomy that they now enjoy, unless they are willing to champion a strong child-centered parental autonomy doctrine that applies to rich and poor alike.<sup>183</sup>

## B. Functional Parenthood

If poor children and their advocates question the advantages of keeping responsibility for children a private obligation, another constituency of children and their advocates question the advantages of keeping parenthood an exclusive status. Recall that Part II argued that some parents may be attracted to bionormativity precisely because a biological norm underscores the exclusivity of parental status. Only two very specific people can ever be the biological parents of a child. Today, though, an increasing number of people are calling on courts to recognize as parents adults who have invested time and money and love in children, regardless of whether they have a biological link. Many of these functional parents are asking the state to reject the exclusivity of bionormativity in order to reward them with rights, and some legal parents are asking the state to reject the exclusivity of bionormativity in order to demand that those who have enjoyed the status of parent continue to meet parental obligations.

Thousands of children in this country are parented by adults who are not their biological parents. A number of studies and emerging caselaw suggest that a remarkably high number of children are not biologically related to the man who thinks he is or has acted as their father.<sup>184</sup> The non-genetic relationships in these family configurations often

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<sup>181</sup> See Buss, *supra* note 130 at 647 (parents best suited to make decisions for their children), Appell, *supra* note 176 at 585 (parents know children better than state does)

<sup>182</sup> The support for this state deference would be more powerful in a regime in which all parents received support for their children because middle and upper class parents are not likely to have a great deal of patience for the social worker who appears at their doorstep asking questions about bedtime and snacks.

<sup>183</sup> Losing parental autonomy vis a vis the state does not necessarily mean that parents will lose their exclusive status vis a vis other adults. More state support of children may give the state more of a right to monitor children, but it does not give third parties more of a claim to children. Parenthood can stay an exclusive status even with increased state support.

<sup>184</sup> S. Macintyre & A Sooman, *Non-paternity and Prenatal Genetic Screening*, 338 LANCET 869 (Oct. 5, 1991) (discussing various studies that suggest non-paternity rates [rates at which the biological father of the

present very sympathetic claims for legal recognition, as do the scores of relationships in blended families. Almost 5 million children live with a step-parent and another 2.1 million live in households in which one of their biological or adoptive parents cohabits with another adult. Another 2 million children live with a relative who is not a parent. The non-parent adults in these children's lives often want parental rights.

A variety of doctrines have grown up to allow non-related parents to acquire some parental rights. Under the equitable parent doctrine, courts often estop a legal parent from denying the parental status of someone who has acted as a parent and developed emotional ties with the child.<sup>185</sup> Courts also compel non-biological fathers on whom children have acted as fathers and on whom children have relied to fulfill the legal obligations of parent.<sup>186</sup> In states that do not allow second parent adoption<sup>187</sup> and even in some states that do, gay and lesbian parents rely on notions of equitable or de facto parenthood if they are to secure custody or visitation rights to children that they have helped support and raise.<sup>188</sup> Some states do not explicitly endorse either equitable or de facto parent theories, but nonetheless allow adults who have formed parent-like bonds to sue for visitation.<sup>189</sup> In recognition of and sympathy for this line of cases, the American Law Institute's recently adopted Principles of the Law of Family Dissolution acknowledge rights of both non-biological equitable parents (who are given relationships rights equivalent to legal parents) and non-biological de facto parents (who are given somewhat lesser, but still substantial visitation rights).<sup>190</sup>

For some time, scholars have endorsed this less exclusive approach to parenthood in order to recognize and honor the variety of rich and important connections that children

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child is not the husband or current partner of the mother] are anywhere between 5 – 20%. 10% is the most commonly used figure, though, the authors suggest, this is probably high). Traditionally, this was not a troublesome legal issue because the husband of the mother was automatically considered the father of the child. For cases see *Gallagher v. Gallagher*, 539 NW2d 479 (Iowa 1995) (husband not the father of child he thought was his); *Markov v. Markov*, 758 A.2d 75, (Md. 2000) (husband not the father of twins he had thought were his own); *In re Cheryl*, 746 NE2d 488 (2001) (man who had been paying child support for over 10 years because he thought he was the biological father, found out that he was not).

<sup>185</sup> See *Pettinato v. Pettinato*, 582 A.2d 909 (R.I. 1990) (mother estopped from challenging paternity in divorce proceedings when she originally told husband that he was the father and let him act as father); *Jean Maby H. v. Joseph H.*, 67 NYS.2d 677 (App. Div. 1998) (mother estopped from denying paternity of husband when both husband and wife know all along that he was not the biological father but nonetheless held the husband out to the child and the world as the child's father); *In re Gallagher*, 539 NW2d 479, 482 (Iowa 1995) (wife estopped from denying husband's paternity when she concealed fact that he was not the biological father from him).

<sup>186</sup> See cases cited *supra* note 78.

<sup>187</sup> Second-parent adoption is the term of art for adoption by a second parent of the same gender. See *Sharon S. v. Superior Court*, 73 P.3d 554 (Cal. 2003).

<sup>188</sup> *Rubano v. DiCenzo*, 759 A.2d 959, 968 (R.I. 2000) (lesbian co-parent's right to visitation based on de facto parent relationship); *A.C. v. C.B.* 829, P.2d 660 (N.M. Ct. App. 1992) (agreement with biological mother unenforceable, but lesbian co-parent can seek visitation based on her relationship with child).

<sup>189</sup> *Simpson v. Simpson*, 586 SW2d 33 (Ky. 1979) (step-mother who lived with child from 17 months to age 6 months deserves opportunity to show that visitation would be in child's best interest); *Holtzman v. Knott*, 533 NW12d 419, 435-36 Wis. 1995) (visitation appropriate if adult and child lived together in the same household and established a parent-child like bond with the biological parent's consent).

<sup>190</sup> See PRINCIPLES *supra* note 77, §§2.03(1)(b) and 2.03(1)(c).

develop with adults.<sup>191</sup> Recognizing these relationships also rewards adults who, in some sense, seem to have earned parental status. These calls to recognize more people as parents, though, necessarily call for a rejection of traditional parental autonomy. There is no way to pass judgment on these new relationships and at the same time honor the parental prerogatives that the Constitution has previously protected. The only reason non-legal parents are in court is because a legal parent does not want them to enjoy the kind of access to the child that the non-legal parent wants.<sup>192</sup> In order to assess whether a non-legal parent should be granted legal rights, judges must make qualitative assessments of emotional investment and connection and commitment. The extant parents are not free to bring up children “in the way they should go,” nor do they have the “right coupled with the high duty” to raise their children if it is the state’s job to determine parental status or parental rights based on who has done a sufficiently good job of developing a legally cognizable emotional connection with a child. In giving legal status to these relationships, courts, thus, at once, make parenthood less private, less exclusive, less biological and less binary.

### C. DG Families

A wholly different group of people, one that is probably perfectly content with the notion of private and exclusive parenting, but who use donated gametes to produce children that they want to parent, is putting pressure on the *biological* dimensions of bionormativity. To a certain extent, adoption law has always put pressure on the biological dimensions of bionormativity, but adoption was always something of a special case. For the most part, adoption has been viewed as a necessary, next-best solution, not an equal to biological parenthood.<sup>193</sup> The law has never been fully comfortable ignoring adoptees biological origins,<sup>194</sup> and adoption was seen as the answer to a situation in which both the biological parents failed (by producing a child that they did not want or could not rear) and the adoptive parents failed (by not being able to produce a child).<sup>195</sup> In contrast, the biological parents of children born through gamete donation have often not failed at anything and the ultimate parents of DG children often prefer, from the outset, not to produce a child the traditional way. Adoptive parents are seen as sympathetic but normative because of their desire but inability to produce biologically; DG parents are seen as non-normative because of their desire to circumvent the traditional biological process.

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<sup>191</sup> Bartlett, *supra* note 98 (examining why thinking of parenthood as exclusive does not reflect reality for many families) ; Bartlett, *supra* note 108 293 (1988) (suggesting that parenthood should not be thought of in terms of parental possessiveness or self-centeredness); Naomi Cahn, *Reframing Child Custody Decision-Making* 58 OHIO ST. L. J. 1 (1997) (advocating the designation of a variety of adults as parents).

<sup>192</sup> If the legal parent wanted to share parental rights with a non-parent he or she could simply do so without any court interference.

<sup>193</sup> See generally, Naomi Cahn, *Perfect Substitutes or the Real Thing*, 52 DUKE L. J. 1077 (2003) (both intestacy and incest laws treated adoptees differently than other children). It’s important to remember too, of course, that the law did not treat all biological children the same either. Who one’s mother was married to had much more to do with one’s parentage than did who one’s biological father was.

<sup>194</sup> *Id.* at 1138.

<sup>195</sup> See *supra* note 151 (adoption is not the first choice of any of the triad).

The way in which DG parents circumvent the traditional biological process is also unnerving to some. For the most part, they use something like a contract to produce a child. Most people who donate gametes for others to use or who use gametes that others have donated, sign some form of document delineating who shall be considered parents of the child. A donor who leaves his sperm with a sperm bank signs a document absolving himself of rights and obligations with regard to any child produced with his sperm.<sup>196</sup> Egg donors sign similar documents. Surrogate mothers who become pregnant with donated genetic material from others also sign contracts in which their rights as parents are terminated. Although there is some controversy over whether courts enforce these contracts as signed or look more carefully (than traditional contract doctrine would require) at the intent of the parties,<sup>197</sup> there is agreement that the preconception intent of the parties is critical to the determination of who ultimately retains parental rights and responsibilities.<sup>198</sup> The standard for determining parentage in cases without explicit elaboration of the future rights and obligations of the parties is also often one of preconception intent.<sup>199</sup> Thus, whether a woman goes to a sperm bank or gets in informal donation from a friend, whether a man uses his spouse's eggs to impregnate a surrogate or uses donated eggs to impregnate his spouse, courts will usually determine parentage not based on who contributed to the child's genetic make-up, but who intended to parent the child.<sup>200</sup> An intent standard also makes true single parenthood possible. One woman or one man can acquire the necessary reproductive material and services with the intention of parenting alone.

By itself, a parental regime based on intent to parent is perfectly coherent. The law grants parental rights and responsibilities to those who caused a child to come into being with the intent of parenting that child once it was born. The problem, of course, is that the system is wholly inconsistent with bionormativity and paternity doctrine, the purposes of which are and always have been to make men who did not intend to parent, parents. Preconception contracts allocating parental status for babies conceived through conventional reproductive activities have always been void.<sup>201</sup> We have never let men and women agree to waive parental status before or after the intercourse that can lead to conception.<sup>202</sup> Indeed, paternity doctrine makes men who are incapable of consenting to sex liable for child support and it makes men who were the victims of misrepresentation

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<sup>196</sup> Most states also have statutes that terminate any parental rights or responsibility that a sperm donor might have, see e.g., UNIFORM PARENTAGE ACT § 702 (“donor is not a parent of a child conceived by means of assisted reproduction.”).

<sup>197</sup> Compare, Baker, *supra* note 80 at 26-30 (arguing that courts let contract govern in reproductive technology cases) with JANET DOLGIN, *DEFINING THE FAMILY: LAW, TECHNOLOGY AND REPRODUCTION IN AN UNEASY AGE* 180-81 (1997) (arguing that courts look to intent, not contract because of their discomfort with contract rhetoric in the family setting).

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

<sup>199</sup> See *R.C. v. J.R.*, 775 P.2d 27, 35 (Colo. 1989) (reviewing the commentary and caselaw and concluding the preconception intent is the appropriate standard).

<sup>200</sup> But see, *JF v. DB*, 66 Pa D & CV 4<sup>th</sup> 1 (2004) (rejecting the intent standard).

<sup>201</sup> *Budnick v. Silverman*, 805 So.2d 1112, 1113 (Fla. Dist. App. 2002) (“rights of support and meaningful relationship belong to the child, not the parent; therefore neither parent can bargain away those rights”); *Ferguson v. McKiernan*, 60 D & C 4<sup>th</sup> 353 (Dauphin Cty 2002) (oral contract between parties in which biological mother agreed to release biological father from child support obligation void).

<sup>202</sup> See, Baker, *supra* note 80 at 11-12.

of fraud (with regard to birth control) parents.<sup>203</sup> Inquiries into intent to be a parent thus have everything to do with the parentage of DG children and nothing to do with the parentage of children conceived through sexual intercourse.

The receptivity to the intent-based regime for DG children may not be surprising, though, if one views the overriding concern of bionormativity as securing adequate resources for children. Most of the people intending to create a child using reproductive technologies (like most people who adopt children) have the resources to provide for the child. After all, one needs resources to buy gametes and, in many instances, health care services. So the exigency that arguably made paternity doctrine necessary in the first place is not present. If the state does not need the biological parent's money, it may care less about biological connection.

Most of these reproductive technology contracts also draw a complete parentage picture. As long as a court enforces the contract – or the preconception intent of the parties – it is not called on to determine who will make the best or most appropriate parent; the parties themselves decided that. To the extent that the state would rather steer clear of making parentage determinations, enforcing these contracts allows it to do so.

Thus, there is much about the allocation of rights and responsibilities in these reproductive agreements that conforms to the bionormative construction of parenthood – parenthood is a private, exclusive arrangement that brings with it full financial responsibility for children. As long as one doesn't ask too many questions about the origins of the child, DG families fit very neatly into the traditional bionormative construction of parenthood. And DG parents clearly benefit from the privacy and exclusivity associated with bionormativity. It has been the private provision of health care services that has allowed the reproductive technology business to thrive,<sup>204</sup> and precisely because there are others with a biological link to their children, this group probably feels very strongly that parenthood should not be a flexible or temporal status. The more permanent and fixed their status as parents, the less they have to worry about others encroaching on their rights.

The extent to which a parental regime based on intent must be a binary regime is somewhat controversial. As suggested, single women (and occasionally single men) can

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<sup>203</sup> County of San Luis Obispo v. Nathaniel T. , 57 Cal Rptr 2d 843 (Ct. App. 1996); ex rel. Hermesmann v. Seyer, 847 P2d 1273 (Kan 1993); Mercer Cty Dept. of Soc. Serv. V. Alf M. 589 NYS2d 288, 289 (NY Fam Ct. 1992) (all holding that an inability to give meaningful consent to sexual activity does not void any child support obligation that flows from that sexual activity); Wallis v. Smith, 22 P3d 682, 686 (NM 2001); Pamela P. v. Frank S. 449, NE2d 713, 715 (NY 1983); Moorman v. Walker, 773 P2d 887, 889 (Wash Ct. App 1989) (all holding that potentially deceitful behavior by a woman before or during sexual activity does not void the child support obligation).

<sup>204</sup> Most European countries have much more regulation of reproductive technological services, in part because the vast majority of medical services are provided by the state. Among other things, this means that many European states refuse to allow single mothers or gay parents to access reproductive technologies. See Nancy Polikoff, *Recognizing Partners but not Parents / Recognizing Parents but not Partners: Gay and Lesbian Family Law in Europe and in the United*, 17 NYL Sch. J. Hum Rts. 711,716 (2001)

intend to parent alone.<sup>205</sup> Some state courts have made clear that single women using donated sperm should not be subject to any kind of interference suit by the donor if she intended to parent alone.<sup>206</sup> On the other hand, courts often resist finding only one parent,<sup>207</sup> and at least one commentator has written that the law should not validate any reproductive arrangement that contemplates only one parent for a child. Marsha Garrison argues that because it is important for children to have two parents, single men and women should not be able to contract for genetic material unless there is another adult (either the donate provider or someone else) willing to assume full parental duties.<sup>208</sup> If no other adult is named, Garrison would make the gamete donor a parent.

Garrison's proposal suggests that the use of donated gametes does not necessarily undermine a notion of binary parenting. An intent standard by itself legitimates the notion of single parenthood, but the law could override that conceptualization of parenthood if binariness itself is considered important. In other words, the state can impose a binary requirement even as it allows people to buy gametes for reproductive purposes. Thus, deliberately subverting biological reproduction does not actually undermine most of the core attributes of bionormativity. A system that incorporates the use of donated gametes can stay private, exclusive and even binary.

At this point, we can design a table that helps synthesize the analysis presented thus far. The interests of the constituencies that were discussed in Part II are outlined in Table 1, Rows 1-3. The interests of the constituencies that have been discussed in Part III are outlined in Rows 4-6. A "Y" indicates that a given constituency (Rows 1-6) have an interest in the attribute (columns A-D) listed in the column. An "N" indicates that a constituency is hurt by the given attribute. A "N/Y" suggest that he constituency may be split in its interest of a given attribute. A "Ø" indicates that the constituency is neutral as to the attribute.

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<sup>205</sup> Valerie s. Mannis, *Single Mothers by Choice*, 48 FAM. REL 121 (1999) (women often choose to parent alone); Jane D. Bock, *Doing the Right Thing? Single Mothers by Choice and the Struggle for Legitimacy*, 14 GENDER AND SOC. 1 (2000) ("In 1990 alone, more than 170,000 single women older than 30 gave birth,. Among white women and women who attended college, the percentage who became mothers without marrying more than doubled during the 1980s; for women with professional or managerial jobs, it nearly tripled"); Jennifer Egan, *Wanted A Few Good Sperm*, NY TIMES MAG. , 3/19/06 (interviews with single women by choice).

<sup>206</sup> Calif. In *Jhordan C v. Mary K*, 179 Cal App 3d 386, 392 (Cal. Ct. App 1986) ("The California Legislature has afforded unmarried as well as married women a statutory vehicle for obtaining semen for artificial insemination without fear that the donor may claim paternity . . .") In re R.C., 775 P.2d 27, 35 ("an unmarried woman does not lose the protection of the artificial insemination statute simply because she knows the donor . . .").

<sup>207</sup> See *JF v. DB*, 66 Pa D & CV 4<sup>th</sup> 1 (2004) (assigning parental rights to gestational mother and sperm/donor intending father because child needs two parents); *Jhordan C.*, 179 Cal. App. 3d at 396 (finding, against mother's wishes, that the sperm donor may have intended to be a parent); *Jf v. DB*, 66 Pa D & C 4<sup>th</sup> (finding gestational surrogate to be the mother because the surrogacy contract did not otherwise provide for a legal mother); *Monmouth Cty. Div. of Soc. Serv. V. RK*, 757 A.2d 319, 327 (NJ Super Ct. Chanc Div. 200) (non-biological father held responsible because biological father could not be located).

<sup>208</sup> Garrison, *supra*, note 133 at 902.

**Table 1**

	<b>A. Private</b> (no state \$; no state oversight)	<b>B. Exclusive</b> (no 3P parents)	<b>C. Binary</b> (2 and only 2 parents)	<b>D. Biological</b> (Genetic)
1. Minimalist State	Y	Y	Y	∅
2. Traditional Parents	Y	Y	Y*	Y
3. Traditional Children	Y	N/Y	N	Y(?)
4. Poor Parents And Children	N**	Y	N	Y
5. Step or Other Functional Families	N	N	N	N
6. DG Families	Y	Y	Y	N

\* If parents can assume state support of their children, their interest in binary, as opposed to unitary, parenthood diminishes. If a parent can be assured of some state help in the financial cost of raising a child, they might prefer to have their parental rights be exclusive. But, state support would likely also mean more state intrusion, so parents might well prefer a binary regime that keeps parenthood private and includes two potential sources of support.

\*\* Unlike most parents who prefer a conceptualization of parenthood as private so that their parental autonomy is protected, poor parents have little lose in terms of parental autonomy (their rights are already limited) and much to gain from greater state support of children. If, however, an increase in state funding was accompanied by a strong, child-centered defense of parental rights, the square should have a N/Y, indicating that support could be public, while parents were still given privacy to parent as they chose.

Table 1 brings some important conclusions into relief. First, the number of Ys scattered throughout the chart, but particularly in the fist three rows, suggests that many people benefit from the qualities associated with a bionormative regime. Second, the string of “Ns” in row 5 makes clear that the practice that is most inconsistent with the core attributes of bionormativity is not substituting state responsibility for parental responsibility (row 4) or substituting one person’s genes for another (row 6), but giving legal recognition to the relationships that, in fact, define children’s lives. Indeed, the practice that one might suspect of being most at odds with a bionormative regime, that is, a practice of purposively substituting biological contributions (row 6), seems to threaten the core attributes of bionormativity very little. Meanwhile, more state support of children (row 4), while it undermines the private construction of parenthood and its essential binariness, is perfectly consistent with a regime that limits the number of people who can be parents to any one child and with a regime that still puts a premium on biological connection.



## E. Policy Implications

Below is a discussion of the consequences that are likely to flow from the different policy decisions that might be implemented in response to the pressure currently being put on bionormativity. Lest there be any doubt, allegiance to the various different attributes of bionormativity does not break down on conventional political lines. Consider how different people traditionally found on the Left might view the importance of parental privacy. The last thing a middle class lesbian mother wants is a parental regime in which children are seen as public goods so that here home life is subject to public regulation. A poor woman on welfare is probably much more interested in seeing all children viewed as a public responsibility because she needs more financial help and her parenting practices are already subject to regulation. By the same token, consider how people traditionally found on the Right might view the importance of biology. Some conservatives might insist on downplaying the importance of biology because they see the marital family and not the biological one as what will best hold society together. Other conservatives might advocate a strict biological regime so as to curb potentially reckless male behavior, minimize state support and discourage scientific tinkering with God's design. Comparably someone eager to legitimate gay families may be enthusiastic about a binary requirement for parenthood because a binary rule makes it more likely that a non-biologically related partner/parent will retain legal status.<sup>209</sup> Single parents eager to be able to parent on their own may have little patience for a binary requirement.

### 1. State Support

If, like the traditional state (Row 1), one's primary concern is in making sure that the United States does not adopt the kind of child welfare systems that operate elsewhere, then one must be wary of the extent to which one endorses any state regulation of parenthood and one must be wary of granting third party rights. The more the state is involved in regulating parental decision-making and the more it is involved in allocating rights between interested adults, the less legitimate is the claim that the relationship between parent and child is a private one and that the state has no obligation to support children financially.

On the other hand, if one is primarily concerned with getting more state money to children, particularly poor children, then Box 4A indicates that one must be prepared for a likely increase in state regulation of parental behavior. State regulation of parental

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<sup>209</sup> The gay rights organizations that have played a role in disputes between biologically-related and non-biologically related gay parents almost uniformly argue on behalf of the non-biologically related gay parent. As one top gay family advocate explained, "our families are foreclosed from legal respect in most places, and we think it breeds further disrespect for our families when one of the parties takes the position that there is a biological trump card. . . ." E-mail from Mary Bonauto, Civil Rights Project Director, GLAD, 2/23/07 (on file with author); see also William Rubenstein, *Divided We Propagate: An introduction to Protecting Families: Standards for Child Custody in Same Sex Relationships*, 10 UCLA WOMEN'S L. J. 143, 144-45 (1999) (discussing ethical standards for gay organizations representing gay parents in custody disputes).

behavior does not necessarily lead to a greater acceptance of third party claims, however (Box 4B). State support may give the state a greater claim to an interest in how a child is parented, but it does not give third parties' a greater interest. As indicated, it is also possible to claim that children are entitled to more money from the state without accepting greater state oversight, if one is prepared to make a strong child-centered defense of parental autonomy. (See \*\* in Box 4A). With that regime, though, would almost certainly come a less binary approach to parenthood because deference to parents in an age of many divorced and separated parents means the state must prioritize parents and choose which parent it will defer to.

State support of children would also diminish the need for a second source of support and thus diminish the need for paternity doctrine. A decreased reliance on paternity doctrine would, in turn, have implications for our general allegiance to biology (and thus our approach to gamete donation) because there would be less need to rely on biology in order to establish parental status in unwilling parents. In sum, more state funding of children would likely lead to a less binary approach to parenthood whether it was accompanied by a strong or weak parental rights doctrine and it would likely diminish our allegiance to mandatory parenthood for biological parents.

## 2. Functional Parenthood

If one is concerned with giving legal recognition to the variety of relationships that children experience as important, then one may need to dispense with most of the core elements of bionormativity. There is much to be said in favor of recognizing functional parenthood,<sup>210</sup> but as Column B suggests, many people have an interest in parenthood as an exclusive status. All of the child-centered arguments that favor a strong parental autonomy doctrine,<sup>211</sup> disfavor a more functional approach to parenthood because the more the state is involved in dispensing parental rights to others, the more the state is involved in orchestrating a child's life. The more people who claim a right to rear a child, the less coherent and unified a child's sense of belonging is likely to be. The more people who have rights with regard to a child, the more likely that the child will be the subject of litigation battles – the consequences of which are notoriously bad for children.<sup>212</sup>

There is also a certain asymmetry in expanding parenthood in this manner. As I have argued elsewhere, there seems to be much greater affinity for expanding the rights of

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<sup>210</sup> See Bartlett, *supra* notes 99 and 109; Cahn, *supra* note 191.

<sup>211</sup> See *supra* text accompanying notes 126-130.

<sup>212</sup> See Janet Johnston, *High-Conflict Divorce*, in FUTURE CHILDREN, Spring 1994 at 172, 175 (Children of high conflict divorce two to four times more likely to be clinically disturbed); MClanahan et al, *Child-support Enforcement and Child Well-Being*, *supra* note at 254 (increased conflict associated with collecting child support from never-married fathers may increase dangerous stress enough to outweigh benefits of money)

third parties than expanding the obligations of third parties.<sup>213</sup> What the increasing recognition of functional parenthood seems to be creating, in other words, is not just a regime that contemplates more parents, but a regime that contemplates different levels of parenthood, greater and lesser parenthood. Some parents have rights and obligations; other parents just have rights.<sup>214</sup> To the extent we are willing to accept greater and lesser degrees of parenthood, we need to question the trends elsewhere in family law to treat all parents as equal. Arguments for joint custody,<sup>215</sup> arguments against the labels of “custody” and “visitation” (precisely because they suggests a hierarchy),<sup>216</sup> and much of the rhetoric from Father’s Rights groups,<sup>217</sup> reject a notion of hierarchical parenthood. It is important to recognize, therefore, that a movement to recognize more parents – which is almost certainly a movement to recognize different classes of parents - exists in some tension with movements to equalize parental status.

Recognizing functional parenthood also has clear implications for other core attributes of a bionormative regime. Because the process of recognizing functional parents requires court intervention, parenthood becomes less private. This makes arguments against state funding less compelling and thus makes state funding more likely. More state funding leads to the consequences just discussed, less binary parenthood, lesser need for paternity doctrine, potential degrees of parenthood. Recognizing functional relationships also clearly makes parenthood less biological and that has implications for the question of what kind of regime should govern for children born with donated gametes.

### 3. Binary Parenthood

As discussed, Marsha Garrison has made the case for binary parenthood. Garrison argues that children are better served by a regime that insists on two parents. She would thus prohibit the current practice of single adults acquiring genetic material from a bank or some other party and parenting alone. Nothing in Garrison’s argument precludes an expansion of parental rights beyond two people, but a strong belief in two does weaken

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<sup>213</sup> Katharine K. Baker, *Assymetric Parenthood*, in RECONCEIVING THE FAMILY 121 (Wilson ed. 2006) (critiquing ALI’s liberal approach to granting rights to non-traditional parents with its reluctance to hold non-traditional parents responsible for child support).

<sup>214</sup> The European approach to paternity, discussed briefly in Part II, actually reflects an opposite scheme, one in which some parents (particularly fathers) have some obligation, but very limited rights. See generally, Williams, *supra* note 83 (comparing the relative paternal rights and paternity establishment rates in the United States, Denmark, the Netherlands and Germany). Some scholars in this country have also suggested this approach, Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415 (1991) (fathers should have responsibilities without necessarily having rights).

<sup>215</sup> See June Carbone, *The Missing Piece of the Custody Puzzle: Creating a New Model of Parental Partnership*, 39 SANTA CLARA L. REV 1091, 1110-13 (1995) (after it was first adopted in California in 1979, joint custody spread rapidly, though its popularity has waned in recent years).

<sup>216</sup> See ALI, PRINCIPLES, *supra* note 77, § 203 cmt. e (replacing traditional custody and visitation language in order to “avoid the win-lose conceptualization”).

<sup>217</sup> See Mathew Bowers, *Fathers Fight Back*, VIRGINIAN-PILOT & LEDGER STAR, June 6, 1995 at E1 (fathers role should be more than just “sending a monthly check”); Chris Sturgis, *Fathers Group Pushes for Shared Role*, TIME UNION (Albany, NY) Oct. 27, 1996 at C6 (quoting president of Father’s Rights’ Society saying “father should be more than a paycheck”).

the argument for governmental support of children because two parents provide two sources of income. In essence, she argues that the financial incentives that encouraged states to insist on two parents inure to children's psychological benefit. Children's emotional needs and the state's bottom line are both served by insisting on two parents.

Requiring two parents in a world with non-monogamous living patterns and readily available genetic material will put pressure on the idea of equal parenthood, however. When we compel an unwilling person to be a parent or force a person who wants to parent alone to name a co-parent, we are likely, again, to endorse a parental regime in which there are degrees of parenthood. There will be one parent who does the overwhelming amount of parental work and who is likely, therefore, to be afforded more parental rights. Children in these situations will experience their second parent as many children of "single mothers" do today, a person who is known to exist and might play a marginal role in the child's support, but does not play a significant emotional, financial or physical role in the child's life.<sup>218</sup>

In analyzing the recent history of child custody, David Meyer has posited that we have seen the pendulum swing from the "old" regime in which non-custodial parents (usually fathers) were clearly considered lesser parents,<sup>219</sup> to a belief that parental rights and responsibilities should be equally shared,<sup>220</sup> and now maybe a bit back again (at least for constitutional purposes) to a regime in which non-custodial parents have decidedly fewer parental rights.<sup>221</sup> There may be nothing wrong with this unequal treatment of parents. In some ways it reflects what some feminist family law scholars have advocated when they call for greater legal recognition of the obvious social fact that women do the vast amount of caretaking work.<sup>222</sup> It also reflects the stability values that Freud, Goldstein and Solnit emphasized years ago when they encouraged courts to award custody to the one real psychological parent.<sup>223</sup>

Recognizing one parent as primary when there are other parents has costs though. It legitimates the idea of degrees of parenthood and thereby makes it harder for everyone to view parenthood as an equally shared enterprise. This hinders the efforts of other feminist reformers who yearn for men and women to share parenting work more equally,<sup>224</sup> and it

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<sup>218</sup> See R. Emery, R. Otto and W. O'Donohue, *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System*, 6 PSYCH. SCI IN THE PUBLIC INTEREST 1, 15 (2005) (in "an analysis of the 1998 US Census data, 40% of nonresident fathers and 22% of nonresident mothers had had no contact with their children in the previous year. Among the 60% of nonresident fathers who had seen their children, contact occurred on an average of 69 days per year.")

<sup>219</sup> David Meyer, *The Constitutional Rights of Non-Custodial Parents*, 34 HOFSTRA L. REV. 1461, 1470 (2006).

<sup>220</sup> *Id.* at 1472-74

<sup>221</sup> *Id.* at 1480-1483 (discussing *Elk Grove Village v. Newdow* 542 US 1 (2004); *Brittain v. Hansen*, 451 F.3d 982 (9<sup>th</sup> Cir. 2006); *Crowly v. McKinney*, 400 F.3d 965 (7<sup>th</sup> Cir. 2005).

<sup>222</sup> See Fineman, *supra* note 125 (advocating a mother-child dyad as the critical family relationship worthy of state recognition); Becker, *supra* note 156 at 142-53 (1992) (advocating preference for maternal custody). I say ironically because it seems unlikely that the Supreme Court in *Newdow* or Judge Posner in *Crowley* endorsed mother's greater rights in the name of feminism.

<sup>223</sup> GOLDSTEIN ET AL., *BEYOND THE BEST INTEREST OF THE CHILD* (1973).

<sup>224</sup> See WILLIAMS, *supra* note 156.

hinders the efforts of non-custodial parents who yearn to play a more significant role in their children's lives. One could have a regime in which parents who invested unequally were treated unequally and parents who invested equally were treated equally, but determining the equality of parental investment is notoriously difficult. Different parents parent in different ways and invest in different ways. The very existence of second-class parenthood makes it harder for people who want equal treatment because they will likely have to prove that they are equal. Enforcing a binary requirement increases the number of unwilling and reluctant parents and therefore increases the number of unequal parenting arrangements. It thus probably clearly does damage to a presumption of equal parenting.

#### 4. Biology

Finally, if one is moved by the arguments in Part IIC that children benefit from being raised by biological parents, then one must turn one's attention to Table 1, Column D. Boxes 5D and 6D suggest that if biology is a real concern, then one must be wary of granting third party rights to non-biological parents and one must be wary of allowing any donation of gametes. If children really are best served by being raised by biological parents then perhaps we should ban not only anonymous gamete donation,<sup>225</sup> but all gamete donation. A ban on gamete donation, in the name of protecting biological links, would be perfectly consistent with and might even countenance greater state support for children. If one thinks that parenthood really should, if at all possible, be defined by a biological connection, then one probably would endorse greater state support of children because greater state support makes it more likely that poor parents have access to the resources necessary to raise their children.

The data with regard to the importance of biology is far from clear, however.<sup>226</sup> If one rejects the importance of biology completely, one can readily accept not only gamete donation but anonymous gamete donation.<sup>227</sup> If, instead, one would prefer to hedge one's bets and make biology relevant though not necessarily primary, then a solution might lie, as it appears to elsewhere, in degrees of parenthood.<sup>228</sup> Gamete donation would be permissible as long as children produced with donated gametes had access to their donees. If children can avoid the feelings of abandonment and isolation discussed in Part IIC by simply knowing and having some access to the people who gave them their genetic material, then, again, what we may need is a more fluid understanding of

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<sup>225</sup> See countries that are doing so, *supra* note 146-148.

<sup>226</sup> Hence, the (?) in Box 3D.

<sup>227</sup> If one endorses a regime in which gamete donors can relinquish all parental rights and responsibilities, one must still come to terms with paternity doctrine. To date, we still do not have an answer for why it is permissible to walk away from a sperm bank when it is not permissible to walk away from a one night stand. See *supra* text accompanying notes 201-204 .

<sup>228</sup> Louisiana may already be moving in this direction. It appears to be the one state that has recognized that a child can have two fathers, one, the marital father who is primarily responsible for child support, and a biological father who can act as a guarantor for support and whose identity is known to the child. See *Smith v. Cole*, 553 So.2d 847, 855 (La. 1989). For greater discussion of Louisiana law see Carbone, *supra* note 138 at 1342-43; Note, *State Ex Rel Wilson v. Wilson: Determining the Proper Payor of Child Support in the Context of Dual Paternity*, 51 *Loy. L. Rev.* 203, 211-216 (2005). .

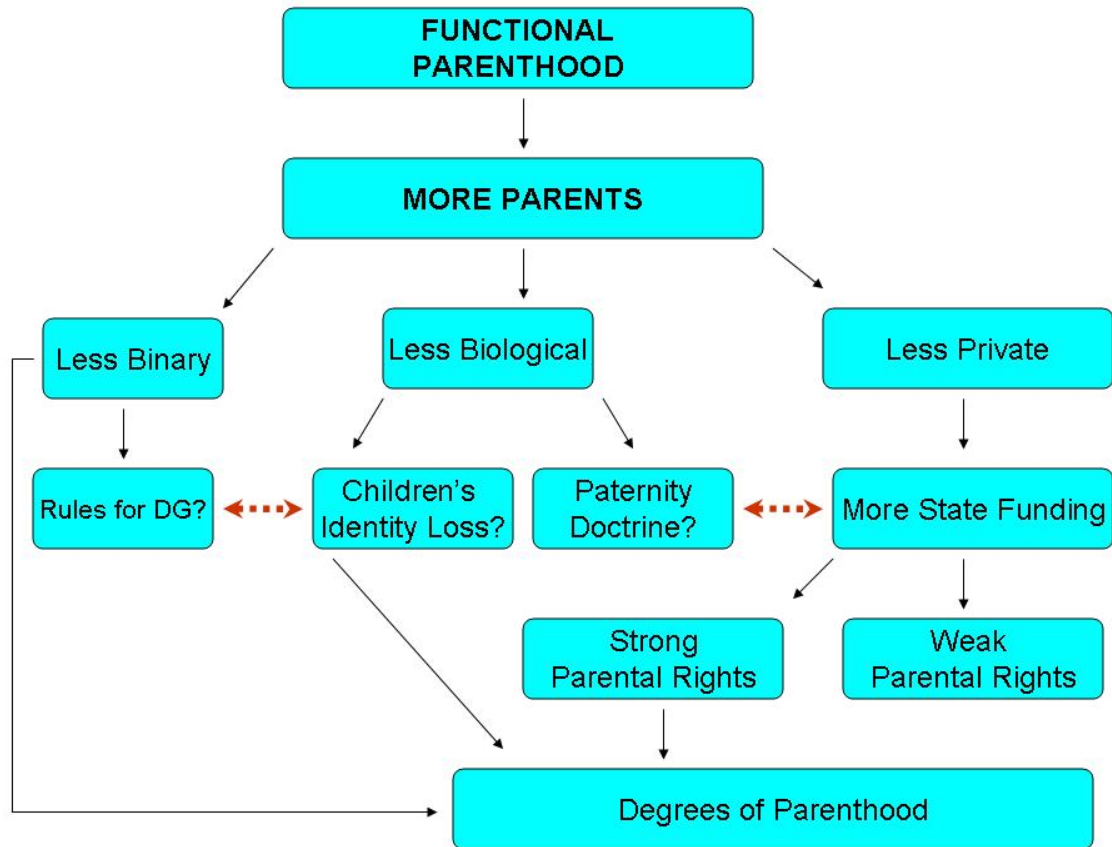
parenthood, one that involves a variety of adults who may have different levels of rights and responsibilities. A genetic parent would not likely be responsible for child support, but might have some form of visitation rights. This is a construction of parenthood that looks very much like the world of parenthood that is emerging to meet the needs of functional families, discussed above (Table 3, Row 5): Parenthood as a non-exclusive status, that often involves multiple adults with different rights and responsibilities and necessarily leaves room for the state to mediate the disputes that arise between those adults.

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The arguments against this more fluid construction of parenthood are the arguments for exclusivity and privacy (Columns A and B) and the arguments for equal parenting. If children really do benefit from strong parental rights and a limited number of adults who claim a role in rearing them; if children are hurt when a Big Brother State starts dictating parenting practices, if many mothers and fathers would prefer a world in which the obligations of parenthood were shared equally, then the benefits of constructing a more fluid understanding of parenthood may not be worth the costs. Moreover, if parents really benefit from having the confidence and assurance that their parenting is not subject to second-guessing then there is real danger in creating new classes of parents with different rights and responsibilities. Policymakers must decide whether the importance of genetic connection trumps the advantages of privacy and exclusivity, just as they must decide whether the importance of established relationship trumps the advantages of privacy and exclusion. In doing so, they must be careful to be collaterally consistent. A regime that favors the exclusive rights of intended parents who used donated gametes should probably not simultaneously champion a functional parenthood approach because functional parenthood assessments severely undermine parental privacy and exclusivity. Comparably, if one believes that children must be granted rights of access to their genetic parents, one must be prepared to embrace other forms of multiple parenthood. If one accepts multiple parenthood with the recognition that there will be greater and lesser forms of parenthood, one must reject the presumption of equal parenthood in more traditional divorce contexts as well.

Diagram 1 help illustrate the interconnected nature of the consequences of all of these policy decisions:

Diagram 1:



#### IV. Conclusion

The analysis presented here makes clear that legal parenthood need not be synonymous with biological parenthood. It has not been historically and it need not be ethically. A biological regime still holds many attractions though, not just because biological connection itself may be an appealing basis for parenthood, but because of the way in which a biological regime constructs parenthood as a private, exclusive and binary enterprise. This paper has evaluated how these core attributes of biological parenthood are threatened by contemporary parenting practices. Two conclusions and a host of normative questions emerge.

First, it is the erosion of exclusive parenthood that poses the greatest threat to the totality of attributes that we associate with biological parenthood. As Diagram 1 makes clear,

recognizing functional, non-exclusive parenthood undermines all of the core qualities associated with biological parenthood. Ironically, given how transformative the idea of non-exclusive parenthood may be, it has not been particularly controversial.<sup>229</sup> Few people decry the recognition of grandparent and step-parent rights as corrosive of the family, yet the expansion of parental rights clearly does undermine biological norms. In contrast, contemporary family practices, like single parenting and test-tube babies, that are often portrayed as severely undermining the modern family, pose relatively little threat to much of what makes bionormativity attractive.

The relative lack of controversy surrounding non-exclusive parenthood could stem from what, in retrospect, seems like a somewhat obvious observation: as adults cease to live monogamous and stable lives, conceptualizations of parenthood grow less binary and more fluid. But, of course, biology is binary and fixed. The movement we see toward a greater number of parents and degrees of parenthood may suggest that the traditional marital presumption did not necessarily act as a proxy for biology so much as it acted as a proxy for adult-child relationship. The married people in a child's household were the ones most likely to have an important, legally cognizable relationship with that child. The less stable marriage is, the less able it is to serve as a proxy for either biology or important relationship. Still, that leaves us with the question of whether we want parenthood to be stable and exclusive.

The second conclusion that emerges from the foregoing analysis is that many roads lead to a concept of parenthood that is more inclusive, but also more hierarchical. A regime that makes room for different kinds of legal parents allows adults with different kinds of investment – genetic, emotional, financial – to retain some legal rights without commanding the kind of authority or responsibility that parents have traditionally enjoyed. In many of these situations, there will be one primary and several ancillary parents. Parenthood will not be viewed as an equal enterprise for the people in it. A regime that accepts the idea that there can be different degrees of parenthood will have an easier time relegating a non-custodial parent to second class parental status precisely because there will be such thing as second class parental status.

This result is not inevitable, particularly if one is able to identify and endorse those attributes of bionormativity that may be worth fighting for in their own right. Maintaining allegiance to the notion that parenthood should be private makes it less likely that the state will be supporting children and therefore less likely that the state will be regulating parenthood and making parental rights more diffuse. Maintaining allegiance to the notion that parenthood should be an exclusive status makes it all but impossible for multiple parents to emerge. Accepting the legitimacy of single parenthood decreases the prevalence of unequal parenthood and thus helps sustain a notion of equal parenthood. Maintaining allegiance to biological or genetic connection because it is good for children makes men and women's parental contributions seem equal and precludes those who do not contribute biologically from asserting parental status. .

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<sup>229</sup> All 50 states have some form of third party visitation statute, some just for grandparents, but others for third parties generally. See Buss, *supra* note 131 at 638.



It seems clear that the time has come for the law to choose the relative weight it gives to the qualities of parenthood that accompany a bionormative regime. A premium on biology is not mandated by history, evolutionary theory, or morality, but a premium on biology does bring with it attributes that may have real value, and different attributes have different value for different constituencies. Contemporary living patterns demand some sort of change, but any change will come with costs to some and maybe even costs to all. The policy priorities in this area are not easy or obvious, but they should be defined in recognition of the consequences that are likely to follow.