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Asymmetric Parenthood

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ASYMMETRIC PARENTHOOD

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What is it that makes someone financially responsible for a child? Perhaps surprisingly, that is a remarkably difficult question for the law or common consensus to answer. There are some situations in which it is relatively easy to decide that someone should be responsible, usually those occur in the context of what is, at least in popular culture, our normative ideal: A man and woman, married to each other, who had reproductive sex with each other in order to produce and raise a child, and who proceed to do so[1] I will call this the binary biological ideal. Our allegiance to this ideal is so strong that we continue to use it as a model for the child support obligation, despite the fact that well over half of the children in this country do not spend their childhood within the confines of the model.[2] Given that reality, it is not obvious that we should continue to use this model in all situations. The more varied and diverse the reality of parenthood becomes the more we need to understand why it is that certain people have

[1] This seemingly overly detailed and dry description of the ideal is actually necessary. As this article will show, a huge amount can turn on how the conception happened, whether the parties were married, whether the parties intended to produce a child and whether the parties willingly accepted parental responsibility.

[2] Sara McLanahan, Gary Sandefur, Growing Up with a Single Parent: What Helps, What Hurts 2 (1994) ("Well over half of this children born in 1992 spend all or some of their childhood apart form one of their parents.") There have not been significant enough changes in either the divorce rate or the rate of children born to unmarried parents to suggest that the numbers today are any different than they were in 1992. US Dept.of the Census, Population and Family Characteristics.

obligations to children while others do not.

The ALI seems remarkably uninterested in explaining the question of why someone should be financially responsible for a child. This lack of curiosity and analysis contrasts, quite sharply, with the ALI's interest in exploring why someone might have custodial rights to a child. The different treatment of non-traditional parents' rights and obligations presents an obvious asymmetry in the ALI's picture of parenthood.

Section I of this paper explores the different treatment of rights and obligations. It contrasts how Chapter 2 of the Principles bestow rights with how Chapter 3 imposes obligations. Put simply, Chapter 2 significantly expands the class of people entitled to parental rights; Chapter 3 barely alters the traditional rules regarding who should be responsible for children. Section II of this paper analyzes the implications of those differences. First, it shows how the binary parent norm rejected in Chapter 2 is deeply embedded in chapter 3, both in determining who is obligated and in determining how much an obligated parent owes. This means that chapter 3 not only limits parenthood to two people, it treats as irrelevant all functional aspects of parenthood. Functional relationship does not give rise to obligation and the obligation one has is based on what is often an entirely hypothetical idea - that the two legal parents actually lived together and shared resources. Second, the expansion of non-traditional parents' rights in chapter 2, which expands the state's role in child-rearing, is not accompanied by an expansion of state responsibility for children. By increasing the number of people who can assert relationship rights, chapter 2 necessarily increases the likelihood that courts, not parents, will be deciding what is in a child's best interest. Parents' rights are diminished and the state's power is increased without chapter 3 making any provision for diminishing parental obligation or increasing state

responsibility. Third, the protection of established emotional relationships in chapter 2 without a protection of established financial relationships in chapter 3 suggests a prioritization of children's emotional needs over their financial needs. The ALI opts to protect emotional reliance more than financial reliance without any justification or explanation as to why. Finally, the one justification that does emerge for finding non-traditional parents liable for support, i.e., an intent to accept responsibility as a parent, is strikingly inconsistent with the ALI's concurrent reliance on state parentage acts, which reject intent as a basis for parenthood. It is also inconsistent with the treatment of obligation elsewhere in the Principles. This leaves us with a good deal of confusion about when and why intent to parent should matter in determining parental obligation.

In sum, Section II shows how the treatment of rights rejects the binary parent model and the supremacy of biology, while embracing increased state participation in children's emotional well-being. In contrast, the treatment of obligation endorses the binary parent model and the supremacy of biology while eschewing state responsibility for children's financial well-being. Section III, the Conclusion, explores some tentative justifications for this asymmetry. Given the political realities of child support and our uncertainty about the answers to certain empirical questions, it may be that the drafters of the ALI got it right. We may be better off living with an asymmetric understanding of parenthood than with either a restrictive one in which both rights and obligations are limited, or a more capacious one, in which both rights and obligations are expanded.

I. The Categories

A. Chapter 2 and Relationship Categories

Chapter 2 of the Principles outlines who has standing to assert relationship rights with a

child. A person who asserts relationship rights claims a right to have the state protect his or her relationship with a child. Chapter 2 bestows relationship rights on four categories of people: legal parents, parents by estoppel, de facto parents and biological parents who are not legal parents.[3] The last category, a biological parent who is not the legal parent, is the most straightforward. A birth mother or sperm donor who does not intend to be the legal parent but wants to retain, through contract, certain relationship rights, can do so.[4] The first category, legal parents, may seem the most obvious, though as the next section makes clear, the category of legal parent is far more fluid and contextual than one might initially think. The two other categories codified in §2.03 need more explanation.

A parent by estoppel is someone who lived with the child for at least two years or since the child's birth and either: reasonably believed he was the biological father of the child and accepted responsibility as father of the child, found out he was not the biological father of the child (after believing he was) but continued to accept responsibilities as father of the child, or accepted responsibilities as a parent of the child pursuant to an agreement with the child's other parent or parents.[5] The parent by estoppel category was created in order to prevent legal parents

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[3] Procedurally what this means is that anyone in these categories has standing to participate in and indeed initiate a child custody proceeding. Section 2.04 delineates who may "bring an action under this Chapter" and/or "be notified of an participate as a party in an action filed by another." 2.04(1)

[4] There may be some ambiguity around what constitutes biological parent, however. Is an egg donor who did not carry the child to term, or a gestational surrogate who did not provide an egg a biological parent? The ALI preserves rights for *biological* parents who, through prior agreements with the child's legal parent(s), have retained some parental rights or responsibilities, Sections 2.04(1)(d) and 2.18(2)(b), but it does not define biological parents..

[5] If the child is under age 2, the agreement with the child's parent must have been formed prior to the child's birth.

from blocking a functional parent's potential custodial rights on the basis of biology or legality. For the most part, parents by estoppel and legal parents are treated comparably by the ALI,[6] though parents by estoppel may not hold the full panoply of constitutional rights that legal parents do.[7] Nonetheless, both legal parents and parents by estoppel have a presumptive right to the amount of custodial time allocated in a uniform rule of statewide application.[8] They also both have the right to object if a de facto parent is awarded a majority of the custodial time.[9]

A De Facto parent is someone who, for not less than two years, lived with the child and, for reasons other than financial compensation and pursuant to an agreement with a legal parent to form a parent-child relationship, performed at least half of the caretaking for the child. This category allows people who have developed a substantial emotional relationship with a child to assert custodial rights. De Facto parents have a form of lesser parental status. They have the right to petition for custodial time, but this right is temporally limited – they must assert it within 6 months of having lived with the child;[10] unlike parents-by-estoppel, they cannot assert a

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[6] "A parent by estoppel is afforded all of the privileges of a legal parent under this Chapter." P.110

[7] For instance, it is not clear whether a parent by estoppel should be considered a parent for constitutional purposes, and thereby protected from certain forms of state interference, though it is unlikely that they are. See Emily Buss, "Parental Rights,"88 Va. L. Rev. 635, 642 (2002) ("the ALI gives no indication that the custody proceeding can transform parents by estoppel into the sort of parents entitled to special constitutional protection under the Due Process Clause . . .")

[8] §2.08(1)(a) ("a legal parent or a parent by estoppel who has performed a reasonable share of parenting functions [is entitled to]. . . not less than a presumptive amount of custodial time set by a uniform rule of statewide application."

[9] Section 2.18(a)(a).

[10] 2.04(1)(c)

right based on the provision of food or shelter or services (they must have provided caretaking);[11] and their entitlement is supposed to be less than that which legal parents or parents by estoppel receive.[12]

B. Chapter 3 and Obligation Categories

Chapter 3 outlines who should be held responsible for child support and how much they should be held responsible for. There are only three categories of potential obligors: legal parents, parents by estoppel and people required by state law to support a child despite termination of that person's parental rights.[13] To make matters particularly confusing for the uninitiated, parents by estoppel under Section 3.03 are not defined the same way as parents by estoppel under Section 2.03. Whereas Section 2.03 is designed to estop a legal parent from barring a non-legal parent from asserting custodial rights, Section 3.03 is designed to estop a non-legal parent from denying a support obligation. Anyone who is estopped from denying a child support obligation under Section 3.03 is entitled to custodial rights as a parent by estoppel under Section 2.03, but the obverse does not hold.[14] In other words, the ogligor is always

[11] Parenting functions include caretaking functions, but they may also involve providing economic support, non-caretaking labor for the household and decision-making. 2.03(6).

[12] 2.18(1)(a). The court "should not allocate the majority of custodial responsibility to a de facto parent over the objection of a legal parent or a parent by estoppel who is fit and willing. . . "

[13] This last category is probably limited to those rare instances in which a state terminates someone's parental rights (probably for reasons of abuse or neglect) but nonetheless demands a support obligation from that person. In any other instance it would be inconsistent with other provisions of the Principles, see section 3.03 cmts d and e and discussion infra . to hold someone obliged to pay, without allowing him or her to assert custodial rights.

[14] "In some cases estoppel may be mutual, but in other cases it may not be. Whether the parties are estopped to deny parenthood for the purpose of custodial responsibility is determined

entitled to rights, but the rights holder is not always obligated to pay.

Chapter 3 makes very clear that non-legal parents should only be obligated to pay child support in rare circumstances. The first part of Section 3.03 states that a parenthood by estoppel for support purposes should be found "only" in "exceptional" circumstances, and only in cases in which the potential obligor's "affirmative conduct" renders an estoppel appropriate. The Drafters were clear that obligation should grow from deliberate action not circumstance.[15]

The second part of Section 3.03 limits the circumstances in which a parent by estoppel for support purposes can be found even further. Section 3.03(2) discourages the imposition of obligation if the potential obligor did not "supplant[] the child's opportunity to develop a relationship with an absent parent and to look to that parent for support." Nor should an obligation be found if there are two other parents "who owe the child a duty of support and are able and available to provide support."

The concern about supplanting the child's opportunity to develop a relationship with his or her legal father in §3.03(2) parallels, or perhaps gives content to, the affirmative conduct requirement in §3.03(1). It does so, however, without clearly defining what constitutes action sufficient to warrant an obligation. Illustration #2 in § 3.03 explains that an obligation can be imposed if a step-parent counsels his wife not to pursue child support against the legal father and

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by Chapter 2 . .. However, estoppel is always mutual if a child-support obligation is actually imposed under [Chapter 3]." 3.03 cmt d.

[15] Moreover, by specifically stating that a Chapter 2 parent by estoppel is not necessarily a Chapter 3 parent by estoppel, the drafters must have meant that "accepting full and permanent responsibilities as a parent, pursuant to an agreement with the child's parent(s)" which entitles one to relationship rights in Chapter 2 should not mean the same thing as "affirmative conduct" constituting "an explicit or implicit agreement or undertaking . . . to assume a parental support obligation" which obliges one in Chapter 3.

urges her to pursue termination of the legal father's support obligation.[16] The far more likely scenario involves less dramatic action. Suppose the step-father simply assumes the duty to support so that the legal mother does not bother to pursue child support.[17] The step-father may even say he is happy to help, which can be true but fall far short of encouraging the legal parent not to pursue child support. The step-parent may also develop a bond with the child, though not because he deliberately tried to exclude the legal father. It is incredibly common for the legal father to simply drift away.[18] The non-legal parent's "affirmative conduct" in these very common situations often consists of little more than filling the vacuum left by the absence of the other legal parent. Once established, however, that relationship can be a powerful and important presence in both the child's and the custodial parent's life.[19] It is a relationship that entitles the step-parent to relationship rights as a De Facto parent, but (apparently) not the child or his mother to a right of support.

The restrictive conditions under which Chapter 3 is willing to impose obligations on non-legal parents demonstrates a desire to rely on legal determinations of parental identity in order to determine child support obligations. Although this might seem like an appropriate, clear rule - only legal parents should be obligated to pay - an examination of how the law of parental

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[16] Se Illustration #2, p. 416.

[17] Enforcement proceedings are emotionally and physically costly. She is much less likely to pursue if there is enough other money available.

[18] Frank Furstenburg and Kathleen Mullan Harris, When Fathers Matter / Why Fathers Matter: The Impact of Paternal Involvement on the Offspring of Adolescent Mothers in The Politics of Pregnancy: Adolescent Sex and Public Policy 217 (D. Rhode ed.) (1993)

[19] Children living with stepfathers are more likely to define their stepfather as part of their family than they are to define their biological father as a family member. F. Furstenburg

identity operates shows the category of "legal parent" to be much messier than might be expected. The Uniform Parentage Act, and virtually all state parentage acts, presume certain people to be legal parents. For women, the rule works without incident most of the time: whoever gives birth to the child is the mother.[20] Fatherhood is, and always has been, more complicated. Most parentage acts incorporate the common law presumption that a man married to the mother at the time of birth or conception is the child's father.[21] The man listed on the birth certificate is also often presumed to be the legal father,[22] as is a man who resides with a newborn child and "openly holds out the child as his natural child."[23] It is not uncommon for these presumptions to clash with each other or with biological evidence.[24] In cases where non-

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and C Nord, 47 J. Marriage Fam 893, 899 (1985).

[20]Surrogacy arrangements can make motherhood determination complicated also. A gestational surrogate may well not be the genetic mother of a child. An intending mother who gets impregnated using an ovum from another woman is not a genetic mother either. Almost all of these new arrangements are accompanied by private contracts in which the parental rights of the relevant parties are spelled out. For the most part, courts accept the legitimacy of these contracts and let private ordering determine both rights and obligations. See Katharine K. Baker, Bargaining or Biology ---- Cornell J. of Law and Public Policy -----.

[21] Uniform Parentage Act §204(a)(1)and (2) (2002).

[22] See e.g., 750 Ill. Comp. Stat 45/5(a)(2) (2003); Ala. Code §§ 26-17-1 - 26-17-21; Cal. Fam. Code §7611(c)(I) (2004).

[23] UPA §204(a)(5); Cal. Fam. Code § 7611(d)(2004); C.R.S. 19-4-105(1)(d) (Colo. 2003).

[24] NAH v. SLS, 9 P.3d 354, 357 (Colo. 2000) (Husband was identified on the birth certificate as the father and accepted the child as his own, but genetics testing showed another man was the biological father); Davis v. La Brec, 549 S.E.2d 76 (Ga. 2001) (Man in a long term relationship with the mother was named as the father on the birth certificate and obtained full legal custody of the child, but years later, a DNA test proved another man was the biological father); County v. R.K., 757 A.2d 319 (N.J. Super. Ct. Ch. Div. 2000) (Man signed a voluntary admission of paternity and was believed to be the father for ten years, but paternity test revealed he was not).

biological presumptions clash, courts sometimes rely on biological evidence,[25] but other times simply make a Best Interest of the Child determination in order to determine paternity.[26] Comparably, in cases in which there has already been a paternity judgment without genetic testing, courts can refuse to order such testing even if a legal father has new reason to believe that he is not the genetic father.[27] Thus, neither the rules themselves nor judicial interpretation of those rules suggest that the "legal parent" is easily defined.

Acknowledging the confusion built into legal parentage determinations has important implications for the ALI Principles. Chapter 2 makes clear that legal parents have custodial rights, but one's status as legal parent can change quite quickly. Section 2.04(1)(e) states that once one has been allocated "responsibility or decisionmaking authority" under Chapter 2, one has continued standing to assert custodial rights, but what of someone who initiates a proceeding as a legal parent and finds out before an adjudication is complete that he is not one?[28] Obligation attaches in Chapter 3 automatically at the legal determination of paternity, but that legal determination can easily change after custodial rights have been established. This could mean that someone who got custodial rights as legal father would retain those rights but could

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[25] In re Marriage of Rebecca & David P., 54 Cal. App. 4th 471

[26] See NAH v. SLS, 9 P.3d 357 (Colo 2000) and Davis v. LaBrec, 549 SE2d 76 (Ga. 2001).

[27] In re Paternity of Cheryl, 746 NE2d 488 (Mass. 2001).

[28] See In re Roberts, 649 NE2d 1344 (Ill 1995) (In the midst of a divorce and custody battle over a child whom the husband and legal father presumed to be his own, the court determined that the husband was not the legal father of the child. The court nonetheless found that the husband had standing in the custody battle because at the initiation of the suit, he was the legal father.)

lose his obligation to pay because a new legal father had been found.

C. Summary

The Principles create different categories of individuals who may have relationship rights to children under Chapter 2 or financial obligation to children under Chapter 3. Chapter 2 gives relationship rights to legal parents, biological parents who contracted for them, De Facto parents and parents by estoppel. Chapter 3 limits financial responsibility almost exclusively to legal parents, with minor allowances for some parents by estoppel and abusive parents.[29] A person who has a right to estop a legal parent from contesting his or her parental status in chapter 2 has custodial rights equal to a legal parent, but that same person is not necessarily himself estopped from denying a support obligation in chapter 3. Comparably a person who was a legal parent at the time custodial rights were originally determined will always have standing to assert parental rights, but if that same person loses his status as legal parent, he may well be relieved of his support obligation.

The best way to summarize the distinctions between Chapters 2 and 3 may be to understand what each chapter does with and to the concept of legal parentage. The comments to Chapter 3 state that the determination of legal paternity is "a matter outside the scope of these Principles."[30] Presumably, in passing that buck, the drafters meant to avoid the messy determinations involving competing presumptions of fatherhood just discussed, but there is at least a partial tautology involved in doing so. The reason courts determine legal parentage is to

[29] It also provides for the very limited category of parents who are ordered to pay child support despite the severing of their legal status as parents. See supra note .

[30] P. 418.

determine who has rights and responsibilities with regard to children. The purpose of Chapters 2 and 3 of the Principles is to determine who has rights and responsibilities with regard to children. In determining rights and responsibilities, one is determining parenthood. Thus, in a very practical sense, the purpose of the Principles is to determine legal parentage. How could the very purpose of the Principles be beyond their scope?

The answer to this question lies in the way in which the ALI severs rights and responsibilities. Traditionally, whoever had rights had responsibilities and the only people who had rights and responsibilities were parents. The Principles now suggest a very different structure. People can have rights without having responsibilities, and a determination of legal parentage really only matters for the imposition of responsibility. Chapter 2 lays out who should be entitled to rights without much care for who the legal parents are. In doing so, Chapter 2 does a great deal of work in determining who is able to enjoy the benefits of parenthood and it makes clear that there can be more than two parents.[31] Parentage determinations are thus not outside the scope of Chapter 2. Chapter 3, on the other hand, restricts responsibility to legal parents and those rare individuals who have, in exceptional circumstances, willingly agreed to assume full parental responsibilities. By leaving it to others, i.e., those deciding legal parentage,[32] to decide who should shoulder the responsibilities of parenthood, Chapter 3 ignores the very questions that Chapter 2 resolves.

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[31] Those non-traditional categories of people who are now entitled to parental rights all have the word "parent" in them, "parents-by-estoppel," "de facto parents," "biological parents who have a prior agreement with legal parents."

[32] The others would presumably be drafters of a Parentage Acts and the judges who interpret them.

II. The Implications

A. Two-Parent Model

By adopting an expansive view of parental rights, Chapter 2 rejects the binary parent model. More than two people can have relationship rights to children. This is evident not only in the extension of relationship rights to de facto parents, but in the incorporation of biological parents who are not legal parents but have an agreement with a legal parent to reserve some parental rights. Chapter 2 even contemplates the idea that two parents could agree to have a third party assume full parental duties and thereby become a parent-by-estoppel.[33]

Chapter 3 is far less receptive to the idea of multilateral responsibility. As discussed, non-legal parents can only be held responsible in exceptional circumstances and are particularly unlikely to be held accountable if there are "two [other] parents who owe the child a duty of support." More practically, the Child-Support Formula adopted in §3.05 embodies not only a two-parent norm, but a two-parents-who-have-shared-a-household norm. "The marginal expenditure measure requires that a child support obligor continue to contribute to the marginal support of the child as he would if he were sharing a home with the child and the other parent."[34]

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[33] 2.03(b)(iii) and (iv) suggests that a biological mother and father (who would be the legal parents of the child) could enter into a co-parenting agreement with a third person in which that third person agreed to raise the child with full parental rights and responsibilities. If such an agreement was in place, the third party would acquire parent-by-estoppel status if he or she had lived with the child since birth or for at least two years. The notes to Chapter 2 suggests that it is unlikely that a parent-by-estoppel relationship will be formed if there are two legal parents, but it is not impossible. P. 115

[34] P. 444. See also p. 427(A non-residential parent "has an interest in contributing no more to the support of a child than if he were living with the child in a two parent household, that is, in not being required to pay any more than he would were the family intact.") and P. 445. ("Base percentages . . . may be selected . . . from estimates of marginal expenditure on children . . . in two-parent families.")

What someone owes his or her child is determined based on the standard of living the child would enjoy if the obligor were living with the residential parent (and she was not living with somebody else). This formula may well reflect the best way to ensure fair and efficient transfer of resources to children born to the biological binary parent ideal, but it uses as a baseline a nonmajoritian norm. Children are just as likely not to live in a family composed of two biologically related parents and biological siblings as they are to live within that model.[35] Thirty percent of the children in this country are born to non-married mothers. To base the entire child support structure on the binary biological ideal when it is so transparently not reality for millions of children seems a little odd.

Allocating responsibility based on this model without considering the behavior and circumstances that led to the obligation also seems a little odd. A man who never wanted and never intended to have a child, but sired one in a one night stand, owes the exact same amount of child support as a comparably earning man who intended to sire and willingly reared his child. The quality and content of the adult-child relationship that is critical to the assessment of rights under Chapter 2, is irrelevant to the assessment of obligation. Moreover, what the man in the one night stand owes is a function of an entirely hypothetical situation. Section 3.05 asks a court to determine what he would contribute if he were living and sharing resources with the mother

[35] Stacy Furukawa, US Dept of Commerce, The Living Arrangements of Children: Summer 19991 1. This study, based on 1991 data, found that only one out of two children lived with their biological parents and their biological siblings. See also Dowd at 27 (same conclusion based on 1994data).

and child, despite the fact that he has never lived with the mother or the child.

The drafters of the Principles justify this scheme in the name of alleviating the "economic plight of children in single-parent households."[36] Children of single parents were clearly of critical concern to the drafters. "Widespread economic inadequacy in one-parent families is not only a grievous harm to children; it is also an unwise underinvestment in a vital social resource."[37] For sure, though, we could alleviate much of that suffering by casting the obligor net wider. We would not even have to cast it in arbitrary directions. Indeed, we could simply net in the very same people who are entitled to relationship rights in Chapter 2.

Such an approach would not only deepen the pool of resources available to children. It would better reflect parental reality as it is experienced by both adults and children. In many communities, serial fatherhood is the norm. "The responsibilities of fathers are carried from one household to the next as [men] migrate from one marriage to the next. Some men who become stepparents or surrogate parents in a new household often transfer their loyalties to their new family."[38] "For men, marriage and co-residence usually define responsibilities to children. Regardless of their biological ties to children, men share time and resources with the children of their wives or female partner."[39] Of children who live in mother-only households, 20% live with

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[36] P. 429

[37] P. 424

[38] Frank Furstenburg and Kathleen Mullan Harris, When Fathers Matter / Why Fathers Matter: The Impact of Paternal Involvement on the Offspring of Adolescent Mothers in The Politics of Pregnancy: Adolescent Sex and Public Policy 217 (D. Rhode ed.) (1993)

[39] Judith Seltzer, Consequences of Marital Dissolution For Children, 20 Am. Rev. Sociol. 235, 237 (1994)

an adult male.[40] Of children that live in father-only households, 40% live with an adult female.[41] Of children in single-parent households generally, another 20% live with an adult of the same sax sex as their residential parent. [42] These children, and there are literally millions of them,[43] do not live the biological binary parent ideal but they are living with at least two adults, many of whom will be entitled to parental rights. Chapter 3 ignores these functional relationships and instead links obligation to determinations of legal parenthood made elsewhere and to a model of parental relationships that applies to less than half of the children in this country.

B. The Expansion of State Power

In granting relationship rights to non-legal parents, the Principles also endorse an expanded view of state power. The state has the right to protect a child's emotional well-being by ensuring the continuation of certain relationships even if the custodial parent(s) want to end or diminish the strength of those relationships.[44] With this expansion of state power comes a diminishment of negative parental rights.

Others have written about the ALI's weak allegiance to parental rights.[45] By giving non-

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[40] Dowd at 28

[41]Id.

[42]Id.

[43] 44% of children who live with a single parent also have a another adult present in the household. Http://www.divorces.com/stats.html

[44] Theoretically, the state can do this pursuant to the parens patraie power that allows the state to act on behalf of children because children are not fully able to protect themselves. See Prince v. Massachusetts, 321 US 158, 162 (1944).

[45] See Buss, supra note .

parents rights to petition for custody and decision-making authority, the ALI weakens "the primary role of the parents in the upbringing of their children." [46] Traditionally, parents were protected from state interference into upbringing decisions.[47] Only if the state could prove by clear and convincing evidence that a parent was abusing or neglecting her children, could the state usurp a parent's role.[48] In the famous string of substantive due process cases announcing parental rights,[49] the justification that emerged for protecting parental rights stemmed from the belief that parents, not the state, should socialize children. States would not be particularly good at socializing a diverse population,[50] and parents have a protected interest in socializing their

[46] Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

[47] Parents had the right to make decisions about discipline, religion, education (within limits) and association. See Katharine Bartlett, Rethinking Parenthood as an Exclusive State: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed 70 Va. L. Rev. 870, 884-85 (1984). Mandatory school attendance laws abridge a parent's right to not educate his or her child, but parents are given wide latitude to provide whatever education they want. And, if the reasoning seems sound enough, parents can get an exemption from mandatory school attendance laws. See Wisconsin v. Yoder, 406 U.S. 205 (1972).

[48] Santosky v. Kramer455 US 745 (1982).

[49] The string includes, Meyer v. Nebraska, 262 US 390 (1923), Pierce v. Society of Sisters, 268 US 510 (1925), Prince v. Massachusetts, 321 US 158 (1944); Wisconsin v. Yoder, 406 US 205 1972). The Supreme Court's most recent foray into the parental rights area, Troxel v. Granville, 530 US 57 (2000), suggests a much more limited enthusiasm for parental rights.

[50] "[A]ffirmative sponsorship of ethical, religious or political beliefs is something we expect the state *not* to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice." Bellotti v. Baird, 443 U.S. 622, 638-39 (1979). In Meyer v. Nebraska, 262 US 390 (1923), the Supreme Court noted if the state were to assume the job of socialization children, the result would be a kind homogeneity that is "wholly different from [the individualism] upon which our institutions rest." In Moore v. East Cleveland, 431 U.S. 494, 503-04 (1977) , the Court held "[i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." See also, Bartlett, supra note at 890 (describing the view that protecting parental rights serve instrumental goals).

children as they want to.[51] Moreover, parents are likely to know their children best and therefore be best able to act in their children's best interest.[52] By allowing non-parents to compete with others to socialize children, the ALI diminishes the control and the ability of parents to "bring up [a] child in the way he should go."[53]

Arguably, however, the negative parental rights that the substantive due process clause protects have never extended to non-married parents.[54] That is because a non-married parent has the positive parental right to invoke the state's judgement when challenging a decision of another parent.[55] When non-married parents disagree, it is the state that makes the very decisions that negative parental rights prevent the state from making for married parents.[56]

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[51] Justice Steward has argued:

> If a State were to attempt to force the breakup of a natural family, over the objections of parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on the "private realm of family life which the state cannot enter." Smith v. OFFER, 431 U.S. 816, 862-63 (1977)

See also Stephen Gilles, On Educating and Rearing Children:? A Parentalist Manifesto, 63 U. Chi. L. Rev. 937 (1996) (arguing that the parental rights doctrine protects critical expressive rights for parents because raising children is a form of self-expression)

[52] Parham v. J.R. 442 US 584, 602 (1979) (Parents are entitled to a presumption that they are acting in the best interest of their children.)

[53] See Prince, 321 U.S. at 164.

[54] All of the parents in the original parents rights cases, see supra note , were married and asserting their parental rights jointly. The recent case that gave only a lukewarm endorsement to the notion of negative parental rights, Troxel v. Granville, involved a parent who had never married the father of her children and who had split with him before he died.

[55] See Katharine K. Baker, Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection, 59 Ohio St. L. J. 1523, 1545-46 (1998)

[56] Mentry v. Mentry, 190 Cal Rptr 843, 850 (Cal. Ct. App. 1983) (court evaluates

The rights that a parent by estoppel or de facto parent asserts under Chapter 2 will likely be asserted against a non-married parent, i.e. someone whose negative parental rights are already severely restricted by the positive parental rights of another parent. Thus, by giving rights to parents by estoppel and de facto parents, Chapter 2 may not be infringing that significantly on a parent's negative parental rights because that parent's rights are already compromised by her single status.[57]

Perhaps, then, because they will emerge in situations in which the negative parental rights of the parent(s) can already be challenged, Chapter 2's entitlements do not pose a particularly large threat to the parenting practices of legal parents. There is at least one group of parents whose rights are likely to be significantly restricted though, the single custodial parent who has an absentee-but-still-legal co-parent. Ironically, this is the same often poor custodial parent that the comments to Chapter 3 say we must help. The absentee-but-still legal parent does not usually challenge the parenting decisions of the custodial single parent. His absentee status

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decisions about religious practices); Felton v. Felton, 418 NE2d 606, 611 (Mass. 1981) (id.); Jarett v. Jarett, 400 NE2d 421, 427 (Ill. 1980)(custodial mother loses custody because of her belief that she need not marry her sexual partner); Peterson v. Peterson, 434 NW2d 732, 738 (S.D. 1989) (it is up to court to determine "realistic needs of the children.") Moreover, the Supreme Court has just held that an unmarried non-custodial father does not have standing to challenge unconstitutional state practices that effect his daughter. See Elk Grove Village v. Newdow ― US ---- (2004). This is standing that the constitution clearly affords to married parents if they proceed together. See Yoder, supra note ; Meyer, supra note .

[57] To be a parent by estoppel one has to have lived with the child for two years (or since birth, §3.03(1)(b)(3)) and agreed with both parents that one should "accept full and permanent responsibility as parent." It is possible, but not likely, that two married parents would agree to have a third person to accept full and permanent responsibility. To be a de facto parent, one has to have lived with the child for two years and assumed more than half of the caretaking functions. Again, it is possible that a married couple would welcome someone like this into their home, but not particularly likely. Thus, de facto parents are not likely to be competing with married parents either.

precludes it. The absence of the absentee parent gives the single parent freedom, but it also often compels the single parent to look for caretaking help from a de facto parent.[58] The person who (for free) provides that caretaking help can become a de facto parent and thereby diminish the rights of the single parent.

To be sure, there is a certain justice to diminishing the single parent's rights in these situations. If a parent has asked a non-parent to share caretaking burdens, she may have to be prepared to share caretaking rights. Moreover, there are some situations in which the new de facto rules do little more than curtail the rights of the absentee-but still-legal parent.[59]

There are other situations in which the assertion of such rights is considerably more controversial. The infamous *Painter v. Bannister*[60] case is an example. In *Painter,* maternal grandparents who had taken care of their grandson after the death of their daughter were able to take custody from the child's father when the father asked to take his son back. The case generated considerable commentary,[61] many people thinking it perfectly appropriate for the

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[58] De Facto parents are also likely to emerge in situations in which one divorced parent re-marries a person who assumes primary caretaking responsibility for a child from the first marriage. The step-parent who assumes such a role can be a de facto parent, but the relative infringement she will cause is small because each legal parent's parenting decisions are already subject to challenge by the other parent.

[59] Consider Illustration #2, in the comments to §2.18. Three year old Perry lived with his mother, Lois, and grandmother, Glenna, since birth. Lois performed more than half of the caretaking. The legal father, Hank, had seen Perry only six times and had never provided child support. When Lois went to jail, Glenna had standing as a de facto parent and could be awarded a majority of the custodial responsibility. If she did not have standing, Hank would have had sole rights and responsibility for Perry. Making room for Glenna to assert rights in this case seems unquestionably sound.

[60] Painter v. Bannister, 140 NW2d 152(Iowa 1966).

[61] For a discussion of Painter's influence, see Gilbert A. Holmes, The Tie That Binds:

father to ask for help from his in-laws and not at all fair to deprive him of custody later. It is clear that Chapter 2 would treat the grandparents in *Painter* as de facto parents with standing to assert a custody claim.[62]

Consider also what would happen if we slightly tweaked the facts of one of the ALI's examples. The mother in illustration #3 in Chapter 3 has been institutionalized with a mental inllness.[63] The father has custodial rights but because of his work schedule, the child resides with grandmother during the week (or gets dropped off at grandmother's before breakfast and picked up after she has gone to sleep). The ALI makes clear that the grandmother in this situation would qualify as a de facto parent, and it also makes clear that "ordinarily, [she would have] no duty of support."[64] What this means is that if father begins to disagree with how Grandmother is raising the child or if he re-marries and would like to have the child stay in his home during the day because his new wife will willingly assume the role of caretaker, he may well not be able to do so.[65]

The Constitutional Rights of Children to Maintain Relationships with Parent-Like Individuals, 53 Md. L. Rev 358, 384 (1994).

[62] It is also likely that, although there would be a presumption against awarding them a majority of the custodial time, the circumstances (Painter lived in California; the Bannisters lived in Iowa) might allow for the Bannisters to retain a majority of the custodial time. Section 2.18(1)(2) allows a court to award a majority of the custodial responsibility to a de facto parent over the objection of a legal parent if the "available alternatives would cause harm to the child."

[63] See Illustration #3, chpt. 3 at 414.

[64] P. 414

[65] The grandmother will have standing in any custodial hearing and if the parties' disagree, the ALI offers competing guidance: grandmother should not get a majority of the custodial time because she is "only" a de facto parent, but if the parties disagree, the court should look to past practices. Past practices suggest that grandmother should get a majority of the custodial time. Thus, it is unclear what the grandmother would get, but it is very likely she

Regardless of how one comes down on the question of whether the de facto parents should get significant custodial awards in these situations, one fact is plain. Giving de facto parents rights increases state involvement in the child-rearing process. The more people with claims to relationship rights, the more people who can petition a court to alter or solidify a custodial arrangement, and the more a court ends up deciding what is in a child's best interest.

Giving the state authority in these situations and recognizing that the state routinely exercises its authority in cases involving unmarried parents, demonstrates increased comfort with state participation in child-rearing decisions. Changing norms with regard to marriage and parenting, coupled with the ALI's expansive view of relationship rights means that the state now has ultimate decision-making authority for at least half of the children in this country. Chapter 2 soundly endorses this increased state participation, while Chapter 3 specifically eschews any increased state financial responsibility for children.[66] The ALI diffuses parents' rights without diffusing parents' obligation.[67]

2. Emotional Over Material Needs

The Drafters explicitly acknowledge that their goal in protecting relationship rights in chapter 2 is to protect children's emotional well-being.[68] Embracing an expansive approach to

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would get substantial custody time against the wishes of the primary parent.

[66] See infra ...

[67] The state could diffuse parents' obligation either by assuming some of the support duty itself, as virtually every other industrialized country does, see Social Security Administration, Research Report #65, SSA Publication No. 13-11805, Social Security Programs Throughout the World - 1997 xxvi xx-xxxv, xxvi, or by imposing obligation on the people that are dissipating traditional rights.

[68] "The continuity of existing parent-child attachments after the break-up of a family unit

children's emotional health while at the same time maintaining a restricted, traditional approach to children's financial well-being suggests one of two things: Either the Drafters thought that children's emotional health was more important than their financial health or they thought that diminishment of traditional parental rights was not as significant a state interference as the imposition of financial obligation on a non-traditional parent would be.

Consider Illustration #4 in Chapter 3, the kind of scenario in which someone is likely to have de facto parent rights under Chapter 2, but not have financial responsibility under Chapter 3. Fred, a widowed father of two, cohabited with Allen for five years. Then they separated. During their cohabitation Fred and Allen shared their earnings and the children benefitted from the increased household income. Assume also that Fred and Allen shared caretaking responsibilities, with Allen doing as much as Fred.[69] Allen would have custodial rights as a de facto parent, but, absent "affirmative conduct . . . [indicating] . . . an agreement to assume a parental support obligation" – and even then only in "exceptional" circumstance – Allen would not be responsible for any child support. [70]

Perhaps this makes sense because a child's emotional well-being is simply more important than his material well-being. Generations of happy, productive people who were raised without many resources by loving parents or quasi-parents might compel such a conclusion.

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is a factor critical to the child's well-being. Such attachments are thought to affect the child's sense of identity and later ability to trust and form healthy relationships" ALI Comments, p. 98.

[69] There could be any of a number of reasons for this, including the rather benign one that Allen's schedule afforded him more flexibility and therefore it was easier for him to attend to the children's schedules.

[70] The Comments make clear that Allen is not responsible for child support even though Fred is a widower. There is no other parent available to provide support.

What is odd, though, is that the ALI does not cite any data supporting this conclusion, nor does it even mention the fact that it is treating emotional relationships as more important than financial ones. Perhaps then the issue is really that, regardless of what actually is more important to the child, the child perceives the emotional relationship as more important. In other words, in an important psychological sense, the child relies on the emotional relationship. This is the argument that various scholars have put forward when advocating expansive notions of parenthood.[71] The problem with this as a rationale for the ALI is that Chapter 2 specifically rejects reliance as a rationale. The "focus [is] on function, rather than on detrimental reliance."[72] To the extent that Chapter 2 invokes a concept other than function, it suggests that the "expectation of the parties" [as to the relationship continuing] can be relevant.[73] Why, then, cannot the focus for obligation be on function and expectation also? If the concern is consistency, certainly Fred's children will experience more consistency if they can count on some financial assistance from Allen, rather than suffer a significant decline in their standard of living.[74] Empirical work suggests that it is the relative decline in income, rather than the

[71] See Bartlett, supra note at 903-906; Naomi Cahn, Reframing Child Custody Decision-Making, 58 Ohio St. L. J. 1, 49-50 (1997)

[72] "While these circumstances typically contain a component of reliance by the individual claiming parent status, the goal of the Chapter is to protect parent-child relationship presumed to have developed under these various circumstances rather than reliance itself. Accordingly, the requirements of § 2.03(1)(b) focus on function, rather than on detrimental reliance."

[73] Comments, p. 112

[74] "Stepfathers are an important source of children's income. . . Children who live with stepfathers generally benefit from these men's investments in improved housing and neighborhood location and from step father contributions to daily needs." Seltzer, Consequences of Marital Dissolution for Children, 10 Am Rev. Sociol. 235, 250 (1994).

absolute income level, that is most likely to hurt children.[75] The recent trend among courts that impose obligation on non-traditional parents has been to look to the extent of the reliance by the child, the custodial parent or both.[76] The ALI appears to reject this trend. By refusing to let obligation grow from function, reliance or expectation, the ALI preferences emotional connections over financial ones without giving us a reason why.

Possibly, then, the ALI Drafters simply thought it less intrusive for the state to interfere with traditional parental rights than it was for the state to impose nontraditional obligation. The liberty taken from traditional parents by diminishing their rights might be seen as less important than the property we would take from non-traditional parents if we imposed a child support obligation on them. Construing the relationship of rights and obligation in this way, particularly in light of the fact that divorce and non-marital births have already dissipated the strength of parental rights, may make sense, but it actually reverses both traditional liberal thinking and more contemporary communitarian thinking. John Locke wrote , "[t]he power. . . that parents have over their children, [arise] from that duty which is incumbent on them, to take care of their

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[75] See McLanahan and Sandeffur, Growing Up with a Single Parent: What Helps, What Hurts 94 (1994) ("These finding provide strong evidence that it is not just low income per se but the *loss* of economic resources associated with family disruption that is a major source of lower achievement of children of divorce." See also JS Wallerstein and JB Kelly, Surviving the Break-Up: How Children and Parents Cope with Divorce (1980) and JS. Wallerstein and S. Blakeslee, Second Chances: Men, Women and Children a Decade After Divorce (1990) (Children feel and resent the sense of loss associated with the decreased standard of living after separation)

[76] In re Paternity of Cheryl, 746 NE2d 488, 496 (Mass. 2001) ("Cheryl knew and relied on [the man who had been supporting her] as her father"); Monmouth County v. R.K., 757 A2d 319, 331 (NJ Super. Ct. Ch. Div 2000) ("[child] has been financially reliant upon [man who had been supporting her]"); Wright v. Newman, 467 S.E.2d 533, 535 (Ga. 1996) (both mother and child "relied upon [man's] promise to their detriment") Markov v. Markov 759 A.2d at 83 ("it is incumbent upon Appellee . . . to prove sufficiently that her reliance upon Appellant's prior conduct and verbal representations has resulted in a . . . loss.")

offspring during the imperfect state of childhood."[77] In other words, the duty comes first. One has rights to bring up the child "in the way he should go" because one has an obligation to the child. Hegel thought comparably, writing that what gave parents the right to their children's services was the obligation parents had to provide for them.[78] This kind of relationship between rights and responsibilities is also a common feature of communitarian thinking. Amitai Etzioni writes that the rights that society bestows on its members "requires community members to live up to their social responsibilities."[79]

Traditional thinkers almost certainly saw rights to children in very different terms than we do today. Children no longer provide parents with the kind of services that they used to.[80] Nonetheless, as every person who fights for custodial privileges will attest, children are still critically valuable resources, not just to society but to the individuals who wish to maintain relationships. Being able to take a child to the park may be the modern day equivalent of being able to use a child's labor on the farm, but in both cases the adult gains value from the child. Chapter 3 ignores the foundational thinking about the relationship between rights and responsibilities.

The only explicit reason the Principles give for inverting the traditional relationship between rights and obligations emerges in a close reading of the Reporter's Notes. Chapter 3's

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[77] John Locke, Two Treatises of Government 2nd Treatise §58.

[78] Hegel, Elements of the Philosophy of Right § 174.

[79] Amitai Etzioni, The Responsive Community: A Communitarian Perpective, 199 American Sociological Review 1, 9 (1996).

[80] Naomi Cahn, Perfect Substitutes or the Real Thing, 52 Duke L.J. 1077, 1988 (2003) (children were economically valuable until the middle of the 19th century)

Notes cite Miller v. Miller,[81] a New Jersey case which explained that imposing a support obligation on step-parents would discourage too many people from becoming step-parents. In other words, if Allen is worried that he might some day be responsible for child support, he will never move in with Fred and start supporting his children. The fear is that the children will lose both the temporary support that Allen can provide and the chance for long term support that Allen would provide if he and Fred stayed together.

There are several curious things about this rationale. First, it is not at all clear that potential step-parents' demand curves are as elastic as the reasoning suggests. Often times, when someone moves in with or marries another adult with children, potential future liability is a distant and not particularly relevant concern. Common experience and available data suggest that people are wildly optimistic about relationships in their early stages.[82] The Drafters' own call for scrutiny of prenuptial agreements in Chapter 7 is based on what they acknowledge as people's tendency to overvalue present benefits, over discount future benefits and treat low probability events as zero probability events.[83] If potential step-parents behave like everyone else, they will heavily discount the chances of breaking up and thus are unlikely to be dissuaded by potential child support obligation that might follow if they do.

Second, the Miller logic assumes that the potential obligors care more about foregoing obligation than embracing rights. The chance to live with and provide for children allows

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[81] Miller v. Miller, 478 A.2d 351 (N.J. 1984).

[82] Lynn A. Baker and Robert E. Emery, When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage, 17 Law & Human Behav. 439, 443 (1993).

[83] P. 986

potential obligors to enjoy all of the relationship benefits that lead adults to fight for custodial privileges in Chapter 2. Some of the courts that have been willing to impose child support obligations on non-legal parents have done so precisely because the non-legal parent enjoyed the benefits of parenthood.[84] The ALI Principles reject this rights/obligation trade-off out of fear that too few people will enter into relationships with children if they are worried about future liability. Query though, why we should be so eager to award someone rights under Chapter 2 if that same person would not have developed the relationship had she known that there might be a financial cost. How strong can a person's emotional commitment to a relationship be if she would let the financial implications of the relationship control her decision to start it or stay in it?

In sum, the preference for protecting children's emotional interests over their financial interests is inconsistent with liberal and communitarian thinking about the relationship between parental rights and obligations and seems somewhat blind to the recognition that the very same concerns for consistency and expectation that underlie the expansion of relationship rights could support the expansion of financial obligation. It also assumes that potential future obligation will significantly detract from one's willingness to parent a child.

D. Obligation From Volition

[84] See Wade v. Wade, 536 S. 2d 1158 (Fla. Dist. Ct. App. 1088) ("the benefits of his representations as the child's father, including the child's love and affection, his status as father . . . and the community's recognition of him as the father" justify imposing a support obligation.); Gonzalez v. Andreas, 369 A.2d 416, 418 (Pa. Super Ct. 1976)

As the previous discussion makes clear, the ALI Principles reject the idea that obligation can flow from functional relationship. It appears to flow only from an agreement expressing an intent to support. To impose obligation a court must find "affirmative conduct," and a clear agreement to assume the support obligation either before or after the child was born.[85] Marriage or cohabitation at the time of the child's birth, coupled with affirmative conduct, can also trigger responsibility. Agreeing to marry or cohabit with a pregnant woman serves as a proxy for an agreement to support the child. For the most part, the intent to agree to support must be obvious to all concerned.[86]

At first blush, this may seem like a sensible structure for parental obligation. We should bind as parents only those people who agree to be parents. If one does not intend to be a parent to a child, one should not be saddled with the obligations of a parent. Further scrutiny renders this principle problematic, however. Chapter 3's reliance on notions of *legal* paternity strongly suggest that intent should not be determinative of parenthood, and intent can be trumped if there is another parent in the picture. Moreover, the principles applying to the dissolution of marriage and cohabiting couples suggest that obligation can and should grow from function as well as intent. First, thinking about parenthood, or at least fatherhood, in terms of intent, is inconsistent

[85] §3.03(1) requires "an explicit or implicit agreement or undertaking by the person to assume a parental support obligation to the child." §3.03(1)(c) requires that the child be "conceived pursuant to an a agreement between the person and the child's parent that they would share responsibility for raising the child."

[86] There is some wiggle room within the ALI suggesting that one need not make one's intent explicit. Section 3.03(1)(a) says that an *"implicit* agreement or undertaking to assume a parental support obligation" can render one responsible, but that implicit agreement still has to involve "affirmative conduct" and should only be found to render one liable in "exceptional" circumstances, probably one in which a second parent is not available.

with the ALI's reliance on notions legal and biological parenthood.[87] Traditional paternity rules have never required a finding of intent to parent or intent to provide support before saddling someone with child support payments. For unmarried men, biological connection not intent was traditionally and still is the single most important factor in determining paternity. Boys who are statutorily raped[88] and men whose partners' lie to them about their use of birth control[89] - neither of whom have any intent to parent - are still held responsible for child support. The justification for these rules is usually that the right to child support is the child's right and therefore the malfeasance of the mother should not defeat the child's right to support.[90] In one recent case, a Florida man who, before having intercourse, entered into a Preconception Agreement with his partner, in which she agreed not to identify him as the father or sue him for paternity, was nonetheless held responsible for child support pursuant to a paternity adjudication because, the court held "the rights of support and meaningful relationship belong to the child, not the parent; therefore neither parent can bargain away those rights."[91] It is hard to find a more complete

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[87] According to most state parentage acts, legal and biological paternity are one in the same category, at least once all the biological facts are known. The biological father is the legal father. Courts often reject this simplicity, however, in an effort to award the "better" father with parental rights. See supra text accompanying notes . . .

[88] Kansas ex re. Hermesmann v. Sayer, 847 P2d 1273 (Kan. 1993); San Luis Obispo v. Nathaniel J. 57 Cal. Rptr. 2d 843 (Ct. App. 1996); Mercer County Dep't of Soc Serv v. Alf M., 589 NYS2d 288 (Fam. Ct. 1992).

[89] Wallis v. Smith, 22 P.3d 682 (N.M. 2001) (father cannot sue in tort to recover compensatory damages stemming from girlfriend's misrepresentation about birth control); Moorman v. Walker, 773 P.2d 887, 889 (Wash. 1989); Pamela P. v. Frank S., 449 NE2d 7134, 715 (NY 1983).

[90] See supra notes (2 previous)

[91] Budnick v. Silverman, 805 So.2d 1112, 1113 (Fla. Dist. Ct. App. 2002)

rejection of intent as a basis of parenthood.

To be fair, the ALI's reliance on intent to determine obligation is consistent with one growing field of parentage cases, those involving assisted reproduction. For children born as a result of any process other than heterosexual intercourse, preconception intent is emerging as the predominant paradigm for determining parentage. If friends get together and informally agree that one will donate sperm so that the other can get pregnant, the preconception intent of the parties, as manifested in explicit or implicit agreements, governs who will be held financially responsible.[92] If parties sign a surrogacy contract or participate in another arrangement that relies on the variety reproductive technologies now available, most courts enforce those contracts in the name of respecting the intent of the parties.[93] What this means is that the reproductive process is critical to determining whether intent to parent matters. For babies born the old-fashioned way, as in *Budnick*, intent to parent is irrelevant. For babies born the modern way, as in surrogacy or insemination situations, intent to parent is determinative. By relying so heavily on legal definitions of paternity, the ALI embraces this inconsistency. Parentage statutes continue to use blood and presumptions and Best Interest of the Child determinations, none of

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[92] See R.C. v. J.R. 129 P.2d 27 (Colo. 1989) reviewing the legal commentary on the subject and most of the decided cases. The court held that the determinative question for support purposes is whether the sperm donor and the mother "at the time of insemination agree that [the sperm donor] will be the natural father."

[93] See Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); McDonald v. McDonald, 608 NYS2d 477 (App. Div. 1994). See also John Lawrence Hill, What does it Mean to be a Parent? The Claims of Biology as the Basis for Parental Rights, 66 NYU L. Rev. 353 (1991); Lori Andrews, Legal and Ethical Aspects of New Reproductive Technologies, 29 Clin. Obstet. & Gyn 190 (1986). But see Marsha Garrison, Law making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage, 113 Harv. L. Rev 835 (2000) (arguing that parental determinations in cases of reproductive technologies should be governed by existing family law rules, many of which do not honor intent)

which necessarily measure intent, while the reproductive technology contracts and the exceptional circumstances delineated in the ALI will rely on intent to determine parental obligation.

Second, the volitional acts that could render someone responsible for child support do not necessarily render someone liable for child support if there is a source of income elsewhere. The restrictions in §3.03(2) caution against finding a support obligation if "the child otherwise has two parents who owe the child a duty of support and are able and available to provide support." It is not clear, from either a child-centered perspective or an obligor-centered perspective, why this alternative source of revenue should be relevant to the volitional actor's responsibility.

From a child-centered perspective, the potential parent-by-estoppel may be providing critical amounts of support. As discussed earlier, a step-parent or step-parent like figure can provide a child with a standard of living to which the child becomes accustomed and the loss of which could cause the child significant harm.[94] Another legal parent who is "able and available to provide support" may only be able to provide a fraction of what the potential parent-by-estoppel can provide.[95] This appears to make little difference to the ALI.

From a obligor-centered perspective, the support duty, despite its volitional character, seems remarkably arbitrary. One's ultimate responsibility depends not on what others relied on nor what one promised nor what one actually did, it depends on the availability of someone whom one likely does not know and may never have met. Consider the not-so-uncommon

[94] See supra notes .

[95] The amount an obligor owes is based on a what the obligor earns. If the legal parent does not have much, there is not much to get from him.

situation of a man who finds out that he actually is not the biological father of his wife or girl-friend's child.[96] He can accept that child as his own, provide for the child financially, develop or continue a relationship with the child and still be relieved of obligation if the biological father surfaces.[97] If the biological father does not surface, he can be held responsible. His obligation is based largely on the chance finding of the biological parent.

Finally, Chapter 3's insistence on volition is inconsistent with the treatment of obligation elsewhere in the Principles. Chapter 6 allows obligation between cohabitants to grow from either "losses that arise from the changes in life opportunities and expectations caused by the adjustments individuals ordinarily make over the course of a relationship"[98] or from "disparities in the financial impact of a short relationship on the partners' postseparation lives."[99]
In other words, there is a recognition that adults adjust their lives and expectations in the course of sharing a household with someone. Chapter 6 endorses the view that the law should mediate some of the harshness that can follow when the household breaks up, regardless of whether the parties agreed to provide for each other after they separated. This means that one's former cohabitant can incur an on-going duty to support despite never having manifested an intent to assume that obligation. Thus, it is actually easier to become obligated to an adult who

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[96] Markov v. Markov, 758 A.2d 75 (Md. 2000) (husband did not know he was not the biological father of twins born 10 months into the marriage): In re Cheryl, 746 NE2d 488 (Mass. 2001) (ex-boyfriend was told and believed that he was the biological father of the child).

[97] See Markov, 758 A.2d at ― (husband's responsibility for child support depends on whether the biological father can be found); Monmouth Cty v. R.K., 757 A.2d 319 (NJ Super Ct. Ch.Div. 2000), citing Miller v. Miller, 478 A2d 35 (NJ 1984) (same)

[98] §6.02(1)(b)(ii)

[99] §6.02(1)(b)(iii)

theocratically has some ability to provide for him or herself, than it is to become obligated to a child, who has no such ability.

III. Conclusion

In embracing the case-by-case functional approach to rights in chapter 2, the ALI Comments quote a Maryland court with approval: "Formula or computer solutions in child custody matters are impossible because of the unique character of each case and the subjective nature of the evaluation and decisions that must be made."[100] The Comments offer no reason for why particular *obligations* are rooted *less* in unique or subjective factors than are custody decisions, but as the foregoing makes clear, the Principles clearly reject the case-by-case approach to obligation. Severing the approach to rights and responsibilities in this way, even if done without explanation, may nonetheless make sound, risk-averse policy sense. If the state is unwilling to accept responsibility; if men will not form relationships with women or children if those relationships could lead to obligation, if we have so little faith in judges' ability to make case-by-case support determinations, then Chapter 3's approach may be our best option.

The most straightforward way to alleviate the harm done by too few financial resources for children would be for the United States, like almost all industrialized countries, to develop a more comprehensive system of state support for children. This kind of system would correspond with Chapter 2's expansion of state control over child-rearing decisions. Politically, however, as the Drafters acknowledge, this country is a long, long way from accepting significantly more communal responsibility for children.[101] Tinkering with the traditional approach to obligation

[100] Comments p. 104 (Taylor v. Taylor)

[101] "What distinguishes the US from other wealthy western countries is its disinclination

without being able to use the state as a guarantor may simply to be too risky.

Moreover, once we cease holding traditional parents automatically accountable and instead start relying on notions of function, expectation, reliance, or intent we run the risk that no one other than a primary parent will actually incur the legal obligation to support. Perhaps, as the *Miller* court in New Jersey warned in the step-parent situation, non-biological fathers will not marry or move in with women who already have children. Perhaps men will cease providing for children in the way they do now. Perhaps grandparents like the Bannisters and grandmothers everywhere will cease forming bonds with children out of fear that such bonds will lead to financial obligation. If these are realistic fears, then the asymmetric approach to rights and obligation may protect children in the best way we can. We protect children's emotional expectations and not their financial ones because the protection of their financial expectations would undermine the very existence of potential emotional relationships.

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to act as a primary guarantor of children's economic dependency." Comments p. 429

If we moved to a support system based more on notions of function, expectation or reliance, we would also likely have to return to non-mechanistic measures of obligation. The binary parent formula offered in §3.05 may be based on an idealized binary biological model of parenthood, but, like all child-support formulas adopted in the last 30 years, it takes away the discretion and bias that led to wildly inconsistent and often unacceptably small child support awards.[102] Premising a support system on function, reliance or expectation would most likely require tailoring different support awards to reflect the extent of function, reliance and expectation. This type of case-by-case analysis would preclude the use of formulas. It might be that we have so little faith in the judiciary's ability to formulate and enforce case-specific orders that we are better off living with formulas based on counterfactual norms than with theories of support based on parenthood as lived.

The rigidity of the proposed model does diminish the likelihood that the parties, negotiating on their own, will trade custody for support. A bright line rule with regard to support, like the one offered in the Principles, reduces the opportunities for strategic bargaining. The comments make no mention of this concern, but it may have played a role in their strict allegiance to a formula. There are several ways to expand and/or incorporate certain formulas (thus reducing strategic behavior) while recognizing the heterogeneous nature of contemporary parenthood, however. First, the formula could still be used in situations involving the binary biological ideal or in all divorce proceedings. Second, relatively blunt, alternative models that allocated responsibility based on a percentage of visitation time could provide enough clarity to

[102] See Nancy Thoennes et. Al. The Impact of Child-Support Guidelines on Award Adequacy, Award Availability and Case Processing Efficiency, 25 Fam.L. Q. 325, 326 (1991) (citing studies).

reduce strategic bargaining while incorporating different theories of obligation. Third, courts could adopt a presumption in favor of a primary formula, but that presumption could be overcome with facts comparable to the kind that lead to multiple parenthood under Chapter 2. In short, it would be perfectly possible to minimize strategic behavior with regard to bargaining over custody, without limiting our ability to incorporate multiple sources of parental obligation.

Finally, Chapter 3's ambivalent treatment of intent may be necessary in light of the uncertainty surrounding men's behavior in the absence of biological obligation. To embrace intent as the standard by which we should determine parenthood, the way courts now do in the reproductive technology area and the way the ALI reluctantly starts to do with its acknowledgment that affirmative conduct plus agreement can lead to obligation, could lead to the erosion of traditional paternity law. Traditional paternity law roots obligation in genetic connection. If the law uses intent, not blood, as the lynchpin of parenthood then some men could escape parental obligation. Men who are unwilling to forego reproductive sex but have no intent to parent can currently be held responsible for child support. If we dispensed with biology, these men could have reproductive sex without having to worry about child support. Of course, currently, most of these men probably end up living with children and functioning as fathers.[103] Therefore, they could be held accountable under a functional, reliance or expectation approach to obligation, but again, if they were worried enough about future liability, they might not enter into those relationships.[104]

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[103] See Furstenberg and Nord, supra note at 903; Dowd, supra note .

[104] This seems unlikely. If these men tended to worry about future obligation, chances are they would be much more diligent about using birth control.

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Changes in both social norms and technology have altered, fundamentally, how people become and function as parents. It blinks reality to assume that children will be cared or provided for within the confines of a binary biological norm. The binary biological model may still express our ideal but it does not reflect our world. Chapter 2 of the Principles embraces reality. Chapter 3 of the Principles holds on tight to the traditional ideal, unwilling to answer the question of what should make someone responsible for a child, and perhaps fearful of how little support would actually be there, if we embraced the reality of contemporary parenting.