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# GUIDING PRINCIPLES FOR PICKING PARENTS

ELIZABETH BARTHOLET\*

## I. INTRODUCTION

We live in an era in which DNA testing enables definitive proof as to the existence of genetic links between an adult and a child in situations where, until recently, such proof was not possible. We need to decide whether this means that the law should place greater emphasis on biology than it has previously in defining parentage. I title this Article “Guiding Principles for Picking Parents” to emphasize the societal choice inherent in all decisions about parentage. While many talk of DNA “parentage testing,” I deny that this kind of testing, whatever it may be called by its proponents, is truly parentage testing. DNA tests can determine whether there is a genetic link between two people—whether a given man’s sperm helped create a given child—but not whether that man is or is not that child’s *parent*. In fact, biology has never been all-determinative in defining parentage, whether in nature or under law. In nature some animals are raised by both biological parents, but in most species “fathers” exist only in the sense that they create life.<sup>1</sup> Further, like humans, animals sometimes “adopt” others’ offspring.

For as long as law has governed various family matters among humans, it has looked at biology as only one among a number of factors to be used in deciding how to allocate parental rights and responsibilities. Since society will, through law, decide on *some* parent-picking principles, we need to think what those principles should be. We want principles that will work for the larger society, which means principles that will work

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\* Professor of Law, Harvard Law School; LL.B., Harvard Law School, 1965. This Article grew out of a talk given at a conference, Genetic Bonds and Family Law: The Challenge of DNA Parentage Testing, which took place March 27–28, 2003, in New Orleans, Louisiana, and was organized by the American Society of Law, Medicine & Ethics, the Institute for Bioethics, Health Policy and Law, University of Louisville, and The Hastings Center. A version of this Article was also presented as part of a panel entitled Developments in Family Law: Our Families, Ourselves at Celebration 50 at Harvard Law School on May 3, 2003, and will also appear in *GENETIC TIES AND THE FUTURE OF THE FAMILY: THE IMPACT OF PATERNITY TESTING ON CHILDREN AND FAMILIES* (Mark A. Rothstein et al. eds.) (forthcoming 2005).

<sup>1</sup> See David Popenoe, *The Evolution of Marriage and the Problem of Stepfamilies: A Biosocial Perspective*, in *STEPFAMILIES: WHO BENEFITS? WHO DOES NOT?* 3, 8 (Alan Booth & Judy Dunn eds., 1994). Some sociobiologists argue that the human marital family represents an evolutionary adaptation designed to capture the male adult in order to address the needs of the human young during their uniquely lengthy dependency. *Id.* at 8–9.

for children so that they grow up healthy, happy, and able to function as adults to make that society work.

Today many men who have been functioning as social fathers are in a position to discover that they are not biological fathers. Some of them are demanding, often in the context of divorce, to be released from their parental responsibilities. This is not a small problem: recent studies show that surprisingly high percentages of children born in the context of marriage or marriage-like relationships are not genetically related to their mothers' partners, the men who have been functioning as their fathers.<sup>2</sup> It seems beyond obvious that if we really care about children we should give them the permanent parenting that child psychiatrists and child welfare specialists have told us for generations that children need. Once a child-parent relationship has been created, we should not let it be destroyed simply because there is no DNA match. Parenting, once undertaken, is or should be a lifetime responsibility.

However, not all courts and legislatures agree that this is obvious. Many are releasing men who have established parenting relationships from any parental responsibilities on the basis of DNA or similarly definitive proof that they have no genetic link to the children at issue.<sup>3</sup> For example, an appeals court in Pennsylvania recently ruled that it was appropriate to release a man from his parental support obligations for a child he had fathered for some eleven years from the time of her birth during his marriage to the mother, through several years of marriage, and through the years after his divorce until the time that DNA testing revealed that he was not the genetic father. At that point, as the trial court tolerantly put it, he "as gently as possible removed himself from the child's life in a way that he felt would cause the child the least amount of anguish and

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<sup>2</sup> See Mary R. Anderlik & Mark A. Rothstein, *DNA-Based Identity Testing and the Future of the Family: A Research Agenda*, 28 AM. J.L. & MED. 215, 221-24 (2002); Mary Welstead, *The Influence of Human Rights and Cultural Issues*, in THE INTERNATIONAL SURVEY OF FAMILY LAW 143, 151-52 (Andrew Bainham ed., 2003) (noting that "[s]cientific authorities vary in their estimates of misattributed fatherhood but it is generally accepted to be between 5% and 10% depending on wealth and status"). Robert Wright asserts that in some urban areas more than one-fourth of the children may be the genetic product of a man other than the father of record. ROBERT WRIGHT, *THE MORAL ANIMAL: EVOLUTIONARY PSYCHOLOGY AND EVERYDAY LIFE* 70 (1994).

<sup>3</sup> See Paula Roberts, Ctr. for L. & Soc. Pol'y, *Truth and Consequences: Part I: Disestablishing the Paternity of Non-Marital Children*, available at [http://www.clasp.org/DMS/Documents/1046817229.69/truth\\_and\\_consequences1.pdf](http://www.clasp.org/DMS/Documents/1046817229.69/truth_and_consequences1.pdf) (last visited Feb. 15, 2004); Anderlik & Rothstein, *supra* note 2, at 225-27. By contrast, see the Canadian Supreme Court's recent decision in *Chartier v. Chartier*, [1999] 1 S.C.R. 242 (Can.), holding that a man who functioned as a father figure for his wife's daughter from a previous relationship was responsible for ongoing financial support when he and his wife divorced, on the grounds that the child had become "a child of the marriage" by virtue of the de facto parenting relationship and thus the stepparent should not be allowed to abandon the parenting role that had been voluntarily assumed: "The interpretation that will best serve children is one that recognizes that when people act as parents toward them, the children can count on that relationship continuing . . ." *Id.* at 257.

hurt” and moved to terminate support.<sup>4</sup> Comparable cases abound.<sup>5</sup> Likewise, some state legislatures have passed, and others are considering, laws that would as a general matter release men from parental responsibilities based on proof that they are not the genetic fathers.<sup>6</sup> The fathers’ rights movement has been active in promoting these judicial and legislative developments.

Many of our societal rules for defining parentage were developed in an era when children were ordinarily the genetic product of the husband and wife who raised them, and it was in any event difficult to know if they were not. The world has changed. We now have DNA tests that can easily and conclusively establish whether or not there is any genetic link between parent and child. We now have a significant breakdown in the nuclear family, with men and women moving with far greater freedom in and out of different marital and marital-like relationships, same-sex as well as opposite-sex, and with children more often being raised at least in part by stepparents or stepparent equivalents. We now have reproductive technologies that enable the use of third parties’ eggs, sperm, gestational services, and embryos to produce children to be raised by parents who may have no genetic or biological connection to them. This newly available DNA information, these newly complex family arrangements, and these new reproductive technologies have together produced a raft of new questions about how to define parentage.

This Article provides some guiding principles for picking parents in this new era. While I do not get into the specifics of designing model legislation or analyzing individual hard cases, my hope is that these principles will prove useful to those enterprises.

## II. CORE PRINCIPLES

### A. Law Governs

Law decides who is and who is not a parent and whether and on what basis someone who is a parent is allowed to stop being one. Some today talk as if something they might call *natural* law governed—as if once you know the DNA you know who *is* and who *is not* the parent. The highest court in Massachusetts recently decided in *In Re Paternity of Cheryl*,<sup>7</sup> that a man who had functioned as a social and support father for six years

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<sup>4</sup> *Doran v. Doran*, 820 A.2d 1279, 1281 (Pa. Super. Ct. 2003).

<sup>5</sup> See Roberts, *supra* note 3 available at [http://www.clasp.org/DMS/Documents/1046817229.69/truth\\_and\\_consequences1.pdf](http://www.clasp.org/DMS/Documents/1046817229.69/truth_and_consequences1.pdf); Anderlik & Rothstein, *supra* note 2, at 225–27; see also, e.g., *Sokol v. Delsantro*, 763 A.2d 405 (Pa. Super. Ct. 2000), *aff’d*, 833 A.2d 1157 (Pa. Super. Ct. 2003); *Kohler v. Bleem*, 654 A.2d 569 (Pa. Super. Ct. 1995).

<sup>6</sup> See Roberts, *supra* note 3 available at [http://www.clasp.org/DMS/Documents/1046817229.69/truth\\_and\\_consequences1.pdf](http://www.clasp.org/DMS/Documents/1046817229.69/truth_and_consequences1.pdf); Anderlik & Rothstein, *supra* note 2, at 227.

<sup>7</sup> 746 N.E.2d 488 (Mass. 2001).

would continue to be responsible for child support even after DNA testing revealed that he was not the genetic father. On talk shows I found myself defending the decision against attack by men who shouted at me that it was unfair to make this "nonfather" pay child support. They did not want to hear me explain that the court had decided that in fact he *was* the father, by virtue of the extended parenting relationship, regardless of whether he was genetically linked to the child. In our system the law decides who is a parent.

It is true that law has traditionally accorded significant weight to biology in defining parentage. For example, the law assigns those who give birth presumptive rights to parent their progeny. It is also true that in a few cases the U.S. Supreme Court has spoken in natural law terms, citing fundamental pre-law human rights, in upholding genetic parents' rights as protected under the federal Constitution.<sup>8</sup> These cases seemed to put some limits on the degree to which states can deny parenting rights to people who have a combination of biology and social relationship on their side. However, in a more recent case, *Michael H. v. Gerald D.*, the Supreme Court upheld a California law that defined a sperm father who had a significant social parenting relationship with his progeny as a nonfather, instead defining the husband of the child's mother as the legal father.<sup>9</sup> So today's U.S. Supreme Court has signaled its willingness to provide the states with significant leeway to determine who is a parent and how prominently biology should figure in that determination.<sup>10</sup>

Parenting law has often defined as parents persons who have no biological link to the child in preference over those who have such a link. Traditionally state law has defined husbands as parents of the children born to their wives during the marriage, regardless of any evidence that might exist indicating that other men were actually the sperm fathers.<sup>11</sup> This was the kind of law upheld as constitutional in the *Michael H.* case<sup>12</sup> noted above. Adoption law defines as full legal parents persons who have no biological link to the child.<sup>13</sup> For decades state law has defined husbands as the fathers of children their wives produce using sperm from other men through artificial insemination.<sup>14</sup>

The dominant trend in law today is in the direction of reducing the importance of biology as a factor in defining parentage.<sup>15</sup> Increasing em-

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<sup>8</sup> See, e.g., *Stanley v. Illinois*, 405 U.S. 645 (1972); *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816 (1977).

<sup>9</sup> *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), *reh'g denied*, 492 U.S. 937 (1989).

<sup>10</sup> See also *Lehr v. Robertson*, 463 U.S. 248 (1983).

<sup>11</sup> See Anderlik & Rothstein, *supra* note 2, at 222-23.

<sup>12</sup> 491 U.S. 110.

<sup>13</sup> See ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION 48 (1999) [hereinafter BARTHOLET, FAMILY BONDS].

<sup>14</sup> Anderlik & Rothstein, *supra* note 2, at 222-23.

<sup>15</sup> See June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1020

phasis is being placed on established and intended parenting relationships, with these factors sometimes weighing equally with or even outweighing biology.<sup>16</sup> Law has focused increasingly on *established* parenting relationships in part to deal with the new complexity of family life, as the nuclear family has broken up and children are more often dependent on nurturing relationships with people other than their genetic parents. Both courts and legislatures have helped develop the functional parent doctrine, giving those who have developed actual parenting relationships with children the right to come into court and compete for some piece of the total parenting rights package with those who became parents through biology.

Some courts have held that those who have functioned as unmarried coparents with biological parents have developed true parenting rights by virtue of their de facto parenting and are entitled at the point of “divorce” to fight for visitation and even for primary custody.<sup>17</sup> Some legislatures have given those traditionally treated as nonparents the right to come into court to ask for visitation rights based on some prior relationship with the child that would make visitation consistent with the child’s best interests. While the U.S. Supreme Court struck down one such law in the recent *Troxel v. Granville*,<sup>18</sup> that case involved a “breathtakingly broad”<sup>19</sup> statute that gave rights to people who had not established a functional parent relationship. The actual parties asking for visitation rights in the case were grandparents who claimed only a classic grandparenting relationship. *Troxel* makes it clear that “parents” are constitutionally protected against inappropriate intervention in their families by nonparents, but it does nothing to limit how states may define parents and thus little to limit development of the functional parent trend.<sup>20</sup> The influential American Law Institute gave important backing to the functional parent doctrine in its 2002 *Principles of the Law of Family Dissolution*.<sup>21</sup> These Principles create two new classes of parent, parents by estoppel and de facto parents, according nonbiological parents who have functioned as parents varying degrees of parental status.

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(2003) (asserting that “[m]odern family law proceeds from the dismantling of the system designed to insure that children would be raised by their genetic parents”).

<sup>16</sup> See *Developments in the Law: IV. Changing Realities of Parenthood: The Law’s Response to the Evolving American Family and Emerging Reproductive Technologies*, 116 HARV. L. REV. 2052, 2052–74 (2003).

<sup>17</sup> See, e.g., *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000).

<sup>18</sup> 530 U.S. 57 (2000).

<sup>19</sup> *Id.* at 67.

<sup>20</sup> *Troxel* does, however, hint that the doctrine might be limited by the nuclear family tradition, indicating that whoever are determined to be the true parents are entitled to keep others out of the family, even if those others have played important nurturing roles. *Id.* at 72; see also *infra* text accompanying note 82.

<sup>21</sup> AM. LAW INST., *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* § 2.03 (2000).

*Intended* parenting is also an increasingly important determinant of parentage as reproductive technology multiplies the numbers of people involved in producing a child.<sup>22</sup> Those who want to parent but cannot produce a child with their own bodies have more and more options in today's world. They can look to others for genetic material—sperm, eggs, and embryos—and for pregnancy and birthing services. They generally use the private law of contract to make deals with the providers of these goods and services to try to guarantee that they, the intended parents, are recognized in the end as the actual parents. While there are few guarantees today that these contracts will be honored by the courts if it comes to a legal battle, for the most part people do honor their contracts and intent wins out. Thus, for example, it is well known that only a tiny percent of the birth mothers involved in surrogacy arrangements change their minds after birth and decide to keep their child, even though it is extremely unlikely that their contracts to surrender their children would be specifically enforced by the courts.

Public law has generally not interfered in these contractual arrangements to insist that biology should trump intent. Indeed public law seems to be moving in the direction, albeit slowly, of ensuring that intent will govern, and that these arrangements whereby people agree that children should be spun off by their biological creators to be raised by others are legitimate.<sup>23</sup> In the adoption world, universally applicable public law forbids the use of money to persuade birth parents to surrender their progeny for others to raise, largely in deference to the importance of biology as a parent-defining factor. It requires screening of adoptive parents for parental fitness in order to address concerns about the parenting capacity of unrelated parents. But in the reproductive technology world, there is almost no public law that requires fitness screening for genetically unrelated parents or forbids the sale of genetic material, pregnancy services, or, after the baby's birth, parental rights. There could be few stronger social statements as to the *unimportance* of biology to parenting in this modern world of child production.<sup>24</sup>

From the perspective of the intending *parents*, biology is of course extremely important in terms of what drives the various practices of the assisted reproductive technology world. Those buying sperm, eggs, and embryos often do so in the hope that at least one of the two intended parents will have a genetic or at least a gestational connection to the future child. Even when there will be no such connection, the intended parents tend to search for genetic contributors who will produce a child that looks a lot like the child that the parents might have produced with their own genes. But in the end, intended parents are to a great degree settling

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<sup>22</sup> See BARTHOLET, FAMILY BONDS, *supra* note 13, at 218–29.

<sup>23</sup> See generally *id.*

<sup>24</sup> See *id.* at 220–29.

for biologically unrelated parenthood. Moreover, from a social policy-making perspective, our law's failure to regulate reproductive technology the way we do adoption indicates at a minimum significant societal ambivalence about the relevance of biology to parenting.

### *B. Biology: Only a Factor*

#### *1. The Background Debate*

As discussed above, our law treats biology as only one factor relevant to defining parentage, and as one of increasingly limited relevance. However, the fact that science today gives us new possibilities for determining who is and who is not biologically related has provided new energy for those who think that biology *should* be determinative. We *can* figure out who produced the child biologically, therefore we *should* declare those persons the parents and all others the nonparents—so goes the thinking of these new geneticists.

We need to figure out just how important a factor biology should be in determining parentage. We need to address the demands made by the men who are running into court waving their DNA test results to demand that they be relieved of parenting responsibilities.<sup>25</sup> And we need in any event to address the growing schism between the traditional family law realm, which makes biology extremely important in defining parentage, even if not always determinative, and the reproductive technology realm, which treats biology as quite unimportant.

My own view is that biology is clearly not *all*-important, as the new geneticists claim, nor is it *as* important as traditional family law makes it. I have critiqued elsewhere the claims made by many in the adoption world that genetics should be seen as central to parenting, claims that children raised by nonbiological parents are doomed to suffer genealogical bewilderment, and that birth parents deprived of the opportunity to raise their birth children are similarly doomed to suffer forever from the breach in genetic continuity.<sup>26</sup> Such claims rely on little other than psychological theorizing, together with junk science. Empirical studies show that children fare just as well when raised by adoptive parents as when raised by birth parents, so long as they are placed in infancy so that they have one set of nurturing parents from early on.<sup>27</sup>

I have also argued in previous work, and laid out there the relevant empirical evidence, that the law's traditional emphasis on biology as key to parentage is harmful to children, driving parents who could provide

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<sup>25</sup> See *supra* text accompanying notes 3–5.

<sup>26</sup> See BARTHOLET, FAMILY BONDS, *supra* note 13, at 51–61.

<sup>27</sup> See *id.* at 164–86.



nurturing adoptive homes away from children in need<sup>28</sup> and keeping children with biological parents who put them at risk of serious abuse and neglect.<sup>29</sup>

## 2. *Evolutionary Psychology's Contribution*

Sociobiology, or evolutionary psychology, is enjoying something of a revival today, providing new energy for claims that genetics should play a yet more important role than it has traditionally in defining parentage.<sup>30</sup> Some of its adherents claim that, because of "biological favoritism," child rearing by nonrelatives is "inherently problematic." They say that human beings, like the rest of the animal kingdom, are genetically programmed to produce and to favor their own progeny over others': "It is not that unrelated individuals are unable to do the job of parenting, it is just that they are not as likely to do the job well."<sup>31</sup> Richard Dawkins, who has done much to popularize evolutionary psychology, describes adoption as a "mistake," a "misfiring of a built-in rule."<sup>32</sup> He claims that "the generous female is doing her own genes no good by caring for the orphan. She is wasting time and energy that could be investing in the lives of her own kin, particularly future children of her own."<sup>33</sup> Martin Daly and Margo Wilson, leading proponents of evolutionary psychology, write in their well-known *Homicide* book:

Perhaps the most obvious prediction from a Darwinian view of parental motives is this: Substitute parents will generally tend to care less profoundly for children than natural parents, with the result that children reared by people other than their natural parents will be more often exploited and otherwise at risk. Parental investment is a precious resource, and selection must favor those parental psyches that do not squander it on nonrelatives.<sup>34</sup>

Sexual strategies theory promotes a related claim—that men are genetically programmed to choose women who will faithfully raise their progeny. Thus, when DNA evidence shows that a child a man thought was his

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<sup>28</sup> See generally BARTHOLET, FAMILY BONDS, *supra* note 13.

<sup>29</sup> See generally ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE (1999) [hereinafter BARTHOLET, NOBODY'S CHILDREN].

<sup>30</sup> See WRIGHT, *supra* note 2, at 3–8 (discussing the "rediscovery of human nature"—the increasing recognition of biology's influence on human behavior).

<sup>31</sup> See Popenoe, *supra* note 1, at 19.

<sup>32</sup> RICHARD DAWKINS, THE SELFISH GENE 101 (2d ed. 1989).

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

<sup>34</sup> MARTIN DALY & MARGO WILSON, HOMICIDE 83 (1988) [hereinafter HOMICIDE]; see also *id.* at 17–35, 37–59, 72, 85. See also STEVEN PINKER, THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE 164–65 (2002).

biological child is not his, revealing that the woman has betrayed him, he reacts with anger toward both the woman and the child.<sup>35</sup>

Evolutionary theorizing of this kind has been subject to powerful critiques in recent years.<sup>36</sup> While it does seem likely that biology *matters* in parenting, as the sociobiologists quoted above claim, the important issues are how much it matters, how much factors other than biology, including socialization, matter, and what values we want to promote. Evolutionary theory provides little help in addressing these issues.

Sociobiologists who promote the biological favoritism theory have produced little empirical support for its validity in the realm of human parenting.<sup>37</sup> Those claiming that empirical support exists all point to Daly and Wilson's well-known study of stepparenting.<sup>38</sup> This study purports to provide empirical grounding for the biological favoritism claim, by demonstrating higher rates of abuse, both physical and sexual, in stepparent households and by stepparents as compared to genetically related parents within households.<sup>39</sup> However, some highly respected research questions the generally accepted conclusion that stepparents are in fact disproportionately responsible for abuse.<sup>40</sup> Even assuming the higher abuse rates

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<sup>35</sup> David M. Buss & David P. Schmitt, *Sexual Strategies Theory: An Evolutionary Perspective on Human Mating*, 100 *PSYCHOL. REV.* 204, 216–18 (1993).

Wherever men invest parentally, selection should favor men who act to ensure that their investment is directed toward their own children and not to the children of another man. Sexual jealousy is one adaptation to the problem of paternity uncertainty. Male sexual jealousy apparently functions to guard a mate and to dissuade intrasexual competitors, thus lowering the likelihood of alien insemination.

*Id.* at 216 (citations omitted).

<sup>36</sup> See, e.g., H. Allen Orr, *Darwinian Storytelling*, *N.Y. REV. BOOKS*, Feb. 27, 2003, at 17 (reviewing STEVEN PINKER, *THE BLANK STATE: THE MODERN DENIAL OF HUMAN NATURE* (2002)); JERRY FODOR, *THE MIND DOESN'T WORK THAT WAY: THE SCOPE AND LIMITS OF COMPUTATIONAL PSYCHOLOGY* 79–100 (2000); Stephen Jay Gould & Richard C. Lewontin, *The Spandrels of San Marco and the Panglossian Paradigm: A Critique of the Adaptationist Programme*, in *CONCEPTUAL ISSUES IN EVOLUTIONARY BIOLOGY* 73 (Elliot Sober ed., 2d ed. 1994).

<sup>37</sup> See Orr, *supra* note 36, at 17; Carbone & Cahn, *supra* note 15, at 1027. In an article that helps put sociobiology in perspective, Carbone and Cahn assess the likelihood that genetic parents are more likely than others to be nurturing parents, saying that, while sociobiology's "premises are plausible[,] its explanations seductive," it is not subject to proof: "[I]t is difficult to separate cultural influences from natural inclination, and we cannot ethically conduct a controlled experiment to determine whether a different method of socialization can eliminate or even significantly alter traits . . ." *Id.*

<sup>38</sup> See PINKER, *supra* note 36, at 164, for a recent example.

<sup>39</sup> MARTIN DALY & MARGO WILSON, *THE TRUTH ABOUT CINDERELLA: A DARWINIAN VIEW OF PARENTAL LOVE* 18–36 (1999) [hereinafter *CINDERELLA*]; see also *HOMICIDE*, *supra* note 34, at 85–93.

<sup>40</sup> See Richard J. Gelles & John W. Harrop, *The Risk of Abusive Violence Among Children with Nongenetic Caretakers*, 40 *FAM. REL.* 78 (1991). Gelles and Harrop review Daly and Wilson's findings, note their consistency with the majority view, design a study to test the proposition that the risk of abusive violence is greater for stepparents, and find it not proven. They report:

claimed, Daly and Wilson's arguments are notably unpersuasive because they fail entirely to address the many obvious factors other than genetics that could explain disproportionate abuse in stepparent households.<sup>41</sup>

A recent law review article applying evolutionary theory to child abuse also relies on Daly and Wilson's stepparent data as proof<sup>42</sup> but acknowledges the potential validity of alternative explanatory theories.<sup>43</sup> Author Owen Jones claims that policymakers ignore evolutionary theory in devising policy and argues that appropriate deference to evolutionary theory would result in policies premised on the assumption that adults will prefer genetically related children. While in the end Jones makes only the relatively modest claim that genetics should count for *more* in policy-making related to parenting, even this claim is unpersuasive. He fails to acknowledge the degree to which current policy is already heavily influ-

The data . . . reveal no statistically significant differences between genetic and nongenetic parents in the rates of severe and very severe violence towards children. Genetic parents report higher rates of overall violence towards their children than do stepparents . . . This examination of the data . . . injects a strong note of caution for those who would see stepparents as being a risk for abusing their children.

*Id.* at 82. They do note that the risk of sexual abuse might be higher in stepfamilies, and that they did not examine that issue. *Id.* See also Marilyn Coleman, *Stepfamilies in the United States: Challenging Biased Assumptions*, in STEPFAMILIES: WHO BENEFITS? WHO DOES NOT?, *supra* note 1, at 29, 31, for research questioning the notion that stepparents are disproportionately responsible for abuse. For other research questioning Daly and Wilson's findings, see CINDERELLA, *supra* note 39, at 51–55, noting conclusions by the Council on Scientific Affairs of the American Medical Association (AMA), adopted by the AMA, that "it is unclear if stepparents are more likely to perpetrate abuse than are genetic parents" and that child welfare reports of the kind relied on by Daly and Wilson may be biased by welfare workers' assumptions that nongenetic caretakers are more likely to be abusive.

<sup>41</sup> These include, but are by no means limited to: that a stepparent is by definition not the legal parent, creating obvious issues as to parenting authority; that a legal out-of-household parent will often exist, competing with any parental role played by the stepparent; that stepparents will usually enter the family after the child has established parenting relationships with others; that stepparent households are, as the authors concede, generally more contentious and unhappy; that stepchildren typically bring problems to the family dynamics; and that sexual relationships between stepparents and stepchildren are not subject to the same taboo as those between biologically linked parents and children. For a discussion of the complex dynamics of stepfamilies and the wide range of factors other than absence of genetic link that might contribute to disproportionate abuse rates, see generally Judy Dunn & Alan Booth, *Stepfamilies: An Overview*, in STEPFAMILIES: WHO BENEFITS? WHO DOES NOT?, *supra* note 1, at 217–23.

Evolutionary theorists themselves argue that stepparent and particularly stepfather relationships are more problematic than other nongenetic parenting relationships because men are genetically programmed to demand that women devote themselves to nurturing the men's genetic product, and we are all programmed to resist "exploitation of one partner's efforts for the other's fitness benefit." HOMICIDE, *supra* note 34, at 82–84.

<sup>42</sup> Owen D. Jones, *Evolutionary Analysis in Law: An Introduction and Application to Child Abuse*, 75 N.C. L. REV. 1117, 1200–04 (1997).

<sup>43</sup> *Id.* at 1221–22. These include social science theories attributing stepparent abuse to a combination of the stresses in stepfamily life, "the tensions attributable to the ambiguity, newness, and conflicting expectations surrounding the stepparenting role," and the related "lack of institutionalized norms." *Id.* at 1221.

enced by the assumption that genetics matter, even if this is more because of what policymakers understand as “natural” than because they have mastered and are believers in evolutionary theory. There is, after all, a rather common assumption that “blood is thicker than water,” which has translated into laws and policies placing significant emphasis on genetics in all matters related to parentage. Jones makes no persuasive showing that genetics should count for more than it already does.

The stepparent evidence is in any event countered by powerful evidence that looks in the opposite direction, which these sociobiologists fail to address in any significant way. Adoption studies show adoptive parent-child relationships working essentially as well as biological parent-child relationships.<sup>44</sup> Daly and Wilson admit that adoption apparently does work well, without ever adequately explaining how this could be true if genetics are so central to parenting capacity.<sup>45</sup> Jones similarly makes only the most modest attempt to explain away adoption’s success.<sup>46</sup>

Carbone and Cahn’s analysis of studies of fathers who move from one adult relationship to another show that these men appear to care more for the nonrelated children with whom they are living than the related children they left behind. Apparently, any “biological favoritism” that may exist is outweighed by the adult relationship factor.<sup>47</sup> Carbone and Cahn show that biological favoritism theorists typically fail to take into account the complexity of human beings and their institutional lives:

Humans act not just through direct provisions for their children and indifference (or even hostility) toward others but through the creation of complex customs and institutions that instill values and habits including altruism and selfishness. The trick in using sociobiology to make sense of parental behavior therefore lies in identifying the competing tendencies and the possible trade-offs among them.<sup>48</sup>

They show the complexity of trying to figure out, based on sociobiology’s insights, available empirical evidence and efforts to predict the impact of societal norms on human behavior—what parentage-defining policies will maximize the likelihood of providing children with nurturing parents.

Biology may matter. Human beings may be genetically programmed to prefer their genetic offspring over other children. But factors other than biology also matter in shaping parenting desires and capacities. Social

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<sup>44</sup> See *supra* text and accompanying note 27.

<sup>45</sup> See HOMICIDE, *supra* note 34, at 84; CINDERELLA, *supra* note 39, at 45–46.

<sup>46</sup> Jones, *supra* note 42, at 1207 n.298 (noting that “[a]doptions are expected to yield different patterns because they require more self-selected, additional, and affirmative acts than does becoming a stepparent”).

<sup>47</sup> Carbone & Cahn, *supra* note 15, at 1031–39.

<sup>48</sup> *Id.* at 1028–29 (citation omitted).

conditioning has a huge impact. Moreover, it seems likely that we would maximize human happiness if we were to shape our culture in ways that reduced rather than reinforced any natural tendency to prefer our genetic relatives over others.

Increasingly, even sociobiologists who promote the biological favoritism thesis admit and even assert that the "is" is not the same as the "ought," that culture matters, that humans are different from other animals, and that part of the point of human existence is to overcome nature.<sup>49</sup> Dawkins writes that human beings have the capacity to defy their genetic programming and to cultivate altruism deliberately.<sup>50</sup> Robert Wright argues that an important point of understanding our genetic nature is to figure out how to move beyond it towards conscience, sympathy, and love for unrelated others.<sup>51</sup>

### 3. *Biology in Its Place*

Thus, for many reasons I think we should reject the various voices proclaiming that DNA is and should be the key to determining true parentage. However, I am not yet ready to jettison biology entirely as a factor in defining parentage. I worry about the way in which our society seems to be doing just this in the reproductive technology realm. I think that it will be better for parents and children as a general matter if we encourage adults to conceive children with the intention of raising rather than selling or otherwise disposing of them, and if children are as a general matter raised by biologically linked parents rather than biological strangers. There are many reasons to think that this kind of parenting regime will be better for children, some of which I have explored elsewhere.<sup>52</sup>

Commercialization of reproduction and of parenting rights creates risks of exploitation and of devaluing both parenting relationships and children. Apart from commercialization, treating the creation of a new life as a relative nonevent for the creator, an act that does not necessarily entail any long-term responsibility for the life created, seems unlikely to encourage in society generally the kind of committed nurturing that children need. While adoption works extremely well for those who choose to pursue it and for their adopted children, it still seems reasonable to think that most adults might, as a general matter, do better parenting genetically related children than unrelated children. Many are likely to find it

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<sup>49</sup> See WRIGHT, *supra* note 2, at 10, 40, 151, 261–62, 327–44, 377–79; Edward O. Wilson, *Human Decency is Animal*, N.Y. TIMES, Oct. 12, 1975, § 6 (Magazine), at 38 (arguing that "[t]he trap is the naturalistic fallacy of ethics, which uncritically concludes that what is, should be"); Matt Ridley, *What Makes You Who You Are*, TIME, June 2, 2003, at 54 (describing the growing recognition among scientists of the *interaction* between genes and the environment as key to understanding human behavior).

<sup>50</sup> DAWKINS, *supra* note 32, at 200–01.

<sup>51</sup> WRIGHT, *supra* note 2, at 77–79.

<sup>52</sup> See BARTHOLET, FAMILY BONDS, *supra* note 13, at 223–29.

easier to relate to children somewhat like themselves, and genetic links increase the chance for similarities. Also, a weak version of the biological favoritism thesis seems plausible and fits with a broadly shared sense that it is “natural” to want to create and raise genetic progeny. It should be possible to cater to this desire while simultaneously encouraging love for unrelated others. Finally, using biology as one guiding factor helps keep the state out of decisionmaking in this important area, thus contributing to the autonomy and diversity values that our society deems so important. So in my view we should count biology as one factor among others in defining parentage.

Children also have at least some significant interest in knowing their biological heritage. Certainly this is true in a society that places the high value ours does on that heritage.<sup>53</sup> But also, if there is something natural about wanting to create and raise genetic progeny, there may be something natural about wanting to connect to one’s genetic forebears.<sup>54</sup> And, if it is important to encourage adults to act responsibly when they create life, we should encourage them to demonstrate care and concern even for those children who have been assigned to others for primary parenting purposes. So in cases where it does not make sense for the genetic parent to be the legal parent, we should consider giving children at least an informational link with the genetic parent. This is complicated, because in a society that over-values genetics, as I believe ours does, creating that informational link risks exacerbating this problem, adding to the sense that genetics are overwhelmingly important. It may also create pressure to define the biological parent as the legal parent. However, we need to move forward to a stage where we can put biology in its place and keep it there. We need to recognize that in some situations the genetic contributor is a relevant person, but a nonparent, and the social parent is a fully real legal parent.

### C. *Best Interests of the Child: A Central Factor*

Children’s best interests *should* be, as we generally say they are, the guiding principle for the law in all matters involving children. This is not because adult interests do not matter but because children are not able to fight for their interests, either in the absence of law, or in designing law, so there is always a major risk that their interests will not be protected. It

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<sup>53</sup> *Id.* at 164–86.

<sup>54</sup> *Id.* at 227–29; *see id.* at 58–61 (discussing access to birth heritage information in the adoption context). *See also* Carbone & Cahn, *supra* note 15, at 1025 (arguing that “as scientific understanding of the role of genes in producing personality, behavior, illness, and success increases, a child’s genetic heritage is becoming an increasingly important constituent of identity”).

also serves the interests of the larger society to treat its children well because they are the future.<sup>55</sup>

Our legal system's claim that the best interests of children serve as the guiding principle for all law relating to children is regularly ignored in reality. Thoughtful observers of the law's impact regularly remark on this problem.<sup>56</sup> In my own work, I have seen it demonstrated in our restrictive regulation of adoption, which drives prospective parents away from the children who need homes, in our free market approach to reproductive technologies, which exposes children to health and other risks,<sup>57</sup> and in our emphasis on family preservation in the face of child abuse and neglect, which protects parents at the expense of their children.<sup>58</sup> Several national commissions have examined our treatment of children and found it wanting, one designating child abuse and neglect a "national emergency."<sup>59</sup> The problem is not uniquely American; civilizations throughout history have subjected children to various forms of horrible abuse.<sup>60</sup>

Since children cannot participate in reshaping the law or in actively protecting their own interests, and since their interests have been inadequately protected by the law throughout history, we need to make a very self-conscious effort to take their best interests seriously in all law reform efforts. We must be suspicious of the claim that protecting adult parenting rights will equate with protecting children, a claim that constitutes a major rationale for the deference our system has traditionally paid to parental rights.<sup>61</sup>

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<sup>55</sup> See BARTHOLET, *NOBODY'S CHILDREN*, *supra* note 29, at 60 (citations omitted):

[T]here are particular problems involved in subjecting our children to maltreatment. Since children need good parenting to grow up healthy and whole, when we mistreat them we risk not only destroying their childhood but damaging their entire future lives. Their loss is thus arguably greater than when adults are abused, and the damage to the whole community is more devastating. Children subject to abuse and neglect are high-risk children, unusually likely to suffer in the future and to inflict suffering on others.

<sup>56</sup> See, e.g., Martha Minow & Richard Weissbourd, *Social Movements for Children*, 122 *DAEDALUS* 1 (1993) (analyzing why social movements for children generally fail); Martha Minow, *What Ever Happened to Children's Rights?*, 80 *MINN. L. REV.* 267, 294-95 (1995) (describing liberal and conservative support for family autonomy); Barbara Bennett Woodhouse, *Children's Rights*, in *HANDBOOK OF YOUTH AND JUSTICE* 377 (Susan O. White ed., 2001); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 *CARDOZO L. REV.* 1747 (1993).

<sup>57</sup> See generally BARTHOLET, *FAMILY BONDS*, *supra* note 13.

<sup>58</sup> See generally BARTHOLET, *NOBODY'S CHILDREN*, *supra* note 29.

<sup>59</sup> U.S. ADVISORY BD. ON CHILD ABUSE & NEGLECT, U.S. DEP'T OF HEALTH & HUMAN SERV., *CHILD ABUSE AND NEGLECT: CRITICAL FIRST STEPS IN RESPONSE TO A NATIONAL EMERGENCY* (1990).

<sup>60</sup> See Robert W. ten Bensel et al., *Children in a World of Violence: The Root of Child Maltreatment*, in *THE BATTERED CHILD* 3 (Mary Edna Helfer et al. eds., 5th ed. 1997).

<sup>61</sup> See, e.g., BARTHOLET, *NOBODY'S CHILDREN*, *supra* note 29, at 40 (discussing *Santosky v. Kramer*, 455 U.S. 745 (1982)).

This means that in defining parentage, obviously a central issue for children's well-being, we need to make some basic changes in the way the law allocates rights. Typically the law packages parental rights with parental responsibilities but in the end gives undue emphasis to rights. The law talks of children's best interests as determinative but in the end generally lets adults' interests trump children's. We must adjust the law to place greater emphasis on *parental responsibilities* and *children's rights to receive responsible parenting*.

### III. RELATED RULES OF THE ROAD

With the above as the core principles, we can move on to some modestly more specific guidelines for an appropriate parent-picking system.

#### A. *Provide Children Early in Life with Permanent Parents*

Developmental psychology, social science, and common sense all demonstrate clearly that children need nurturing parents from early infancy on and that they need permanency.<sup>62</sup> This reality about children's needs has a different quality than the reality some sociobiologists claim about adults' preferences to parent biologically related children.<sup>63</sup> First, there is a great deal of empirical evidence showing that children do better with permanent parenting and, as discussed above, little or none showing that biologically related parents do better than unrelated parents.<sup>64</sup> Second, there is no reason to think that we would create a better society by trying to condition children to live without permanent nurturing whereas, as discussed above, there is reason to think that we would do well to try to temper any tendency that may exist to prefer relatives over others.<sup>65</sup> Finally, it is unlikely that we could succeed in changing human nature to the point of enabling children to surmount their need for stability in nurturing relationships. It is true that many children are able to survive and even thrive despite disruption in familial relationships, but it does not seem plausible that we could create a world in which most children would do as well under such conditions as they would with permanent nurturing parents. By contrast, we should be able to condition adults not to create dependent children unless they are willing to stay the course, and adoption studies

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<sup>62</sup> See JOSEPH GOLDSTEIN ET AL., *THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* (1996); see also BARTHOLET, *FAMILY BONDS*, *supra* note 13, at 102-03; BARTHOLET, *NOBODY'S CHILDREN*, *supra* note 29, at 177.

<sup>63</sup> Thanks to my colleague Jerry Kang, Visiting Professor at Harvard Law School 2003-04, Professor of Law at the University of California, Los Angeles, School of Law, for encouraging me to think about this comparison.

<sup>64</sup> See *supra* notes 37-47 and accompanying text.

<sup>65</sup> See *supra* text accompanying notes 49-51.



demonstrate that adults are capable of parenting unrelated children very successfully with relation to both their and their children's needs.<sup>66</sup>

Ideally our legal system should decide definitively who will be a child's parents from birth through entry into adulthood.<sup>67</sup> The new Uniform Parentage Act<sup>68</sup> would improve current law by providing children with earlier resolution of parentage, but it does not go far enough in this respect. It allows proceedings to resolve disputed parentage to be brought in a variety of situations for up to two years after a child's birth and allows "presumed fathers" in certain situations to bring proceedings at any time.

An appropriate parentage system could look to any of a variety of factors, including many that the current system considers: who the birth parent is, who the genetic parents are, who the intended parents are, whether the child is born in the context of a marriage, whether there is any established parenting relationship, and what parenting relationship gives the best prospects for being an ongoing, permanent, and nurturing one. More important than the weight given to particular substantive factors is for the system to have clear rules establishing permanent parenthood early. So, for example, the system could mandate that if a child is born into a marriage, the husband will be the permanent father. Or it could declare that all children shall be genetically tested at birth and matched if possible with their genetic fathers, who would then be declared their legal permanent fathers even if the mother is married to another. Or it could say that, although such testing should be done, it would be designed simply to give children information about their genetic heritage, leaving their birth mother's husband as their legal permanent father.<sup>69</sup> Or the law could provide for some variation on the above themes.

Policymakers should choose among such systems with a view toward maximizing the chances of giving children at or close to birth a father who will be a permanent nurturing parent, and they should design the rules so that parenthood, once established, cannot be easily dissolved. The model for any limited escape route should be surrender for adoption, whereby in situations where it clearly makes sense for a new parent to take over for an inadequate or uninvolved one, the original parent is allowed to surrender parenting rights, and the new parent is allowed to adopt and become the full legal parent.<sup>70</sup> Completely unacceptable is the unfortunately frequent modern phenomenon of allowing men with estab-

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<sup>66</sup> See *supra* note 27 and accompanying text.

<sup>67</sup> See Carbone & Cahn, *supra* note 15, at 1066–70 (emphasizing the importance in today's world of parents who will stay the course beyond infancy).

<sup>68</sup> Unif. Parentage Act §§ 607, 609 (2000).

<sup>69</sup> By contrast, the Uniform Parentage Act provides that admissible genetic testing results shall be determinative of paternity. Unif. Parentage Act § 631 (2000).

<sup>70</sup> See, for example, the system proposed by Carbone and Cahn, *supra* note 15, at 1066–70 (providing for mandatory paternity determination at birth, by virtue of genetic testing or voluntary acknowledgment of parenthood, resulting in an indissoluble bond).

lished parenting relationships to exit those relationships solely because they have proof that they are not the biological fathers.<sup>71</sup> They may not be *worthy* fathers, but they should be held responsible as legal fathers. While these fathers' unfortunate children may get little more than support payments, future children will benefit from parentage rules designed to condition men to understand that once they take on parenting responsibilities they cannot easily shed them.

### *B. Provide Children with Nurturing Parents*

This idea sounds obvious, but the point is that in choosing between different parental candidates, we should put a very high value on finding a parent who will establish a powerful emotional, caretaking relationship. For example, in choosing between the genetic father and the husband of the birth mother, we should design our legal system to maximize the chances of selecting a father who is likely to provide high-quality nurturing on an ongoing basis.<sup>72</sup>

We should also be prepared to surrender the traditional idea that parents provide all the financial support that children need. At present, parentage policy is unduly driven by the felt need to find a bill payer. Genetic tests are used to go after deadbeat dads with the goal of getting financial support. We should not choose "the father" based primarily on the need to find a source of financial support. Obviously it is problematic from the child's perspective to be given a father who has no interest in the nurturing piece of parenting simply because the man might have wages available to be garnished. If there is another man available who seems suitable for the nurturing piece of parenting, we should consider him for the parent role regardless of whether he can take care of financial support responsibilities. We could look to the state to take on more support responsibilities in cases where a child's nurturing parents cannot provide for the child's financial needs. Alternatively, we could pursue genetic fathers incapable of nurturing for financial support without giving them parenting rights. Adults should not be seen as having a necessary right to have all of the entire parenting package or none of it. Parent and child rights should not be seen as necessarily reciprocal, with fathers who provide financial support entitled as a matter of absolute right to receive the benefits of the parenting relationship because the child who receives support is deemed to owe the father something. We should place a higher value on children's rights to a nurturing upbringing than on parents' rights to control their progeny.

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<sup>71</sup> See, e.g., *Doran v. Doran*, 820 A.2d 1279 (Pa. Super. Ct. 2003) (discussed above at text accompanying note 4). See generally Roberts, *supra* note 3; Anderlik & Rothstein, *supra* note 2, at 226–27.

<sup>72</sup> See Carbone & Cahn, *supra* note 15, at 1012 (discussing the complexity of this assessment).

*C. Hold Parents Responsible*

Adults are in the position of making decisions to create children and thus to create children's dependency—decisions in which the children at issue can play no part. Accordingly, it is appropriate to hold adults responsible for children.<sup>73</sup>

We should feel free to hold men responsible regardless of whether they were in some way misled into parenthood by women. Children should not be penalized in a way that denies them fundamental nurturing and support because of the actions of their mothers. We already apply this principle in the area of biological parenting. We hold men responsible for children they conceive even if they were deceived by the mothers' false claims that they were using birth control. We hold men responsible for children they conceive if they had wanted the women involved to have abortions but the women refused. We hold men responsible for the lives they participate in creating, and this is right.

However, some men have twisted this principle of responsibility in order to avoid responsibility. Male resentment at being required to provide financial support for the children they have produced is a major factor in the new move to dissolve parenting responsibility in situations where men have genetic proof that they did not produce the children at issue. Men claim that if a DNA match alone can be used to force them into parenthood, then the absence of a DNA match should enable them to escape parenthood.

Such arguments ignore the fact that there are different ways for men (and women) to create children for whose dependency they are morally responsible. The high court in Massachusetts made this principle quite clear in the *In Re Paternity of Cheryl* case discussed above.<sup>74</sup> A few months after Cheryl's birth, the man named by her mother as the father formally acknowledged paternity. He then functioned as a noncustodial visitation and support father for several years. He apparently thought that he was the genetic father for some of that time, although later he suspected that he might not be. Five and a half years after the paternity judgment, just after the court ordered an increase in his support obligation, he moved for genetic testing and for revision of the paternity judgment should the testing indicate he was not the genetic father. Although this motion was denied, he took Cheryl for testing on his own, and when the results revealed she was not his genetic child, he again moved the court to relieve him of any parental support obligations, now some six years after the paternity judgment. The Massachusetts high court held him to his paren-

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<sup>73</sup> See *id.* at 1023 (arguing that “[p]erhaps children’s strongest claim [on their genetic parents] is the demand that the parents responsible for their existence provide for their care” and that “[a] child has an unequivocal moral claim on those responsible for conception who have not made alternative provisions for the child’s well-being”).

<sup>74</sup> See *supra* text accompanying note 7.

tal responsibilities. Since the situation was quite parallel to the biological parentage cases discussed above, only undue obsession with biology as the basis for parentage could explain the outrage hurled at the court by enraged men and other critics.<sup>75</sup> The child in this case grew up as this man's child, calling him "daddy" and receiving not just his financial support but his parental visits.<sup>76</sup> The man created this child as his child and is responsible for her dependency on him, much as the man who contributes sperm to create a child is responsible for that child's existence and related dependency. He should be held responsible under law. It is irrelevant, as the Massachusetts court found, whether the mother tricked him into thinking the child was biologically his or not. He could have avoided creating the dependency, in this case by getting genetic tests done at birth if biology were so important to him, and then deciding not to act like a parent when those tests showed him not to be the genetic parent. By contrast, the child had no choice in whether or not to become his child.

We should also feel free to hold parents responsible without believing that we have to give them reciprocal rights in all cases. As discussed above, in some situations it would be appropriate to hold men responsible for financial support without giving them parenting rights.<sup>77</sup> We might also want to hold genetic parents responsible for providing biological heritage information to children who are being raised by other parents,<sup>78</sup> without giving the genetic parents any reciprocal rights. We might decide, as some countries have, to give not just adopted children but also the children of reproductive technology the right to access identifying as well as nonidentifying information about their genetic parents. This does not mean that we have to create rights for the genetic contributors to get a piece of the parenting pie, by giving them, for example, visitation rights during the child's growing-up period. Again, adults and the children they create are not in a state of equality appropriate for reciprocity thinking. Adults who agree to a deal whereby one sells his sperm so that another can obtain a child to raise make their deal with one another, ob-

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<sup>75</sup> See *supra* text accompanying notes 3–6.

<sup>76</sup> The court's description of the relationship includes the following details:

In the years following the entry of the paternity judgment, the father behaved as though he were Cheryl's father . . . . In 1995 and again in 1996, the father, acting pro se, sought successfully to expand and enforce his visitation rights with his daughter. According to the mother, Cheryl, now seven years old, has always called the father "Daddy" and "is bonded to and loves him as her father." Cheryl also has a relationship with the father's parents and siblings, whom she knows as her grandparents, aunt, and uncles. . . . [T]he father has fostered "a substantial relationship" with Cheryl. From December, 1993, the father has regularly paid child support to the mother on Cheryl's behalf.

*In re* Paternity of Cheryl, 746 N.E.2d 488, 492 (Mass. 2001) (citations omitted).

<sup>77</sup> See *supra* Part III.B.

<sup>78</sup> See *supra* text accompanying note 54.

vously without consulting the child-to-be. If children born by virtue of this kind of arrangement have a significant interest in accessing information about their birth heritage, then we should provide it, based on the principle that adults are to be held responsible to the children they create.

In the same way, if we make a birth mother's husband the legal father of a child born during the marriage, we might choose to give the child a right to access birth heritage information by requiring genetic testing at birth and recording the information. We should not feel compelled to give the genetic fathers so identified any visitation rights simply because they are held responsible to their progeny to the degree of having their identities revealed.

*D. Give Family Privacy Its Due—or Don't Unduly Knock the Nuclear Family*

It is popular in many quarters to argue that it is our societal obsession with the nuclear family that is responsible for a range of family problems, and that if one or two parents are good for children, three or four would be even better. But more may be less, or at least less good.

Family privacy in the parenting context means, among other things, that as a general matter parents are left alone by the state to raise their children, with the state intervening only to insist on certain minimal protections, like vaccination and education, and beyond that only intervening in cases where parents are proven unfit. This aspect of family privacy is justified in part by the understanding that children will generally be better off if their parents have primary decisionmaking responsibility and in part by the values our society places on autonomy and diversity.<sup>79</sup>

Family privacy gets sacrificed to an enormous degree in the context of divorce. When parents split up, both are treated by law as ongoing parents. One may be the primary and one the visitation parent, but both have parenting rights, enforceable by courts. Increasingly, the law permits and even mandates joint parenting post-divorce, with parents given equal decisionmaking power and often even equal parenting time, posing the likelihood of yet more need for courts to resolve disputes. When courts are called upon to decide which of two warring parents should prevail, they are forced into the intimacy of the family and required to decide how the child should be raised, in direct conflict with family privacy principles. They will necessarily be second-guessing one parent based on the other parent's demands. The child will not experience the kind of stable parental authority that many think central to children's best interests. It is for these reasons that the authors of the famous *Beyond the*

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<sup>79</sup> See GOLDSTEIN ET AL., *supra* note 62; Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1370–71 (1994).

*Best Interests of the Child*<sup>80</sup> argued that sole custody should be given to one parent after divorce, so that one parent could have exclusive authority, and post-divorce families would not surrender classic family autonomy.

Modern life presents us with many situations in which children might be deemed to have a multiplicity of parents—one set of social parents and one, or two, or three biological parents. A child born in the context of marriage can have a husband father as well as a sperm father if the child was conceived by virtue of the wife's nonmarital relationship or via artificial insemination. A child born in the context of gestational surrogacy can have an egg parent, a sperm parent, a pregnancy parent, and a couple of social/rearing parents.

Today we may know who the genetic parents of a child are because those parents can so easily get genetic tests done. Law may in any event insist that we know, on the grounds that genetic heritage information is important for children. We need to decide whether we want to make all these arguable parents legal parents in any sense—whether we want to give all of them part of the parenting rights pie. We could give all noncustodial “parents” legal visitation rights, if they choose to ask for and exercise them. But we do not have to and I think we should not. There is real wisdom behind the family privacy presumption, even if it has been taken too far in many respects, putting children at undue risk of abuse and neglect because the state is so reluctant to intervene in the family.<sup>81</sup> The U.S. Supreme Court recently affirmed the importance of letting a child's parents decide as a general matter what is in their child's best interests and the related right to decide when and whether to allow visitation by others, rather than permitting the state to impose visitation by concededly loving grandparents in the absence of any showing that there was a powerful reason to interfere with the parents' judgment.<sup>82</sup> Children deserve to grow up if at all possible with parents in charge, rather than in the shadow of the court. We put the children of divorce in the latter less-than-ideal situation because we feel compelled to do so because of their parents' “rights” and the often significant parenting relationships already developed prior to divorce. There is no such need to put all the children with multiple parents that the modern world may produce in that situation. And if we are to be guided by the best interests of children, we will not do so.

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<sup>80</sup> GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 90–92 (1973); GOLDSTEIN ET AL., *supra* note 62.

<sup>81</sup> *See generally* BARTHOLET, *NOBODY'S CHILDREN*, *supra* note 29.

<sup>82</sup> *Troxel v. Granville*, 530 U.S. 57 (2000). *See also* *Sharon S. v. Superior Court of San Diego County*, 31 Cal. 4th 417 (Cal. 2003) (holding that a lesbian coparent has a right to second-parent adoption, with an opinion concurring in part and dissenting in part arguing for statutory interpretation that would more clearly limit the number of legal parents to two rather than allowing three or more).

## IV. CONCLUSION

Modern developments present us with many new and complex issues in defining parentage. It is important to focus on the basics. The key issues are social, political, and legal, not scientific. *We can do what we will.* DNA tests cannot force us to decide that one person is a "real" parent and another is not. *We should do what will serve children.* What children need are ongoing, stable, nurturing relationships with parents, whether or not those parents are genetic relatives.