PARENTS BY THE NUMBERS

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I. INTRODUCTION

Family law, as part of the larger prevailing culture, has enshrined the number two. By constructing links among sex, marriage, and procreation and conceptualizing each as a practice for two, family law takes as its paradigm the couple or the pair.[1] Departures from the two-party model attract attention—triggering legal sanctions, inspiring scholarly debate, or simply capturing the collective imagination. Recent months have offered one case in point, as courts and a fascinated public followed the raid on the Yearning for Zion compound in Texas and the polygamous residents' challenge to the familiar spousal dyad.[2] The ongoing conversation about departures from the optimal parental number

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1. Even legal regimes designed to depart from the traditional marital model still focus on couples of one type or another. Thus, civil unions and domestic partnerships, no less than same-sex marriage, envision a two-party sexual relationship. *See generally In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (holding unconstitutional a California statute limiting designation of marriage to different-sex couples). And, Hawaii's Reciprocal Beneficiaries law, which does not assume a conjugal relationship, still applies only to "couples composed of two individuals who are legally prohibited from marrying under state law." HAW. REV. STAT. § 572C-1 (2006). As a result, relationships that include more than two challenge the conventional construction of family law. *See, e.g.*, Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV 189 (2007) (exploring how family law has ignored relationships among friends).

2. *See, e.g.*, *In re* Tex. Dep't of Family & Protective Servs., 255 S.W.3d 613, 615 (Tex. 2008) (holding the State's emergency seizure of 468 children from the Yearning for Zion Ranch unwarranted, despite allegations of "spiritual unions" involving underage females); Kirk Johnson & John Dougherty, *Raid on Sect in Texas Rattles Polygamist Faithful Elsewhere*, N.Y. TIMES, May 8, 2008, at A1. *See generally* Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277 (2004) (examining "the fantasy of monogamy" and contemporary polyamorous alternatives).

almost invariably includes criticism of single parents[3] and typically encompasses a wide range of topics, from welfare reform,[4] to marriage-promotion programs,[5] to the legal status of sperm donors who enable women to become single mothers by choice.[6]

Last year, however, a much more unusual numbers issue, whether particular children can or should have *more than two parents*, surfaced with seeming suddenness—even if some precursors and closely related developments had been percolating beforehand.[7] In 2007, two North American courts, one in Ontario[8] and one in Pennsylvania,[9] ruled that a child can have three legal parents: a biological mother, her same-sex

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3. *See, e.g.*, Institute for American Values et al., *Marriage Breakdown Costs Taxpayers at Least $112 Billion a Year: First-Time Research Reveals Staggering Annual Taxpayer Costs for Divorce and Unwed Childbearing*, Apr. 15, 2008 (press release), *available at* http://www.americanvalues.org/coff/pressrelease.pdf.

4. *See, e.g.*, DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 222-25 (1997); Note, *Dethroning the Welfare Queen: The Rhetoric of Reform*, 107 HARV. L. REV. 2012 (1994) (critiquing stereotypes permeating the calls for welfare reform).

5. *See, e.g.*, Healthy Marriage Initiative, 42 U.S.C. § 603(a)(2) (effective July 15, 2008); *see also, e.g.*, Julie Nice, *Promoting Marriage Experimentation: A Class Act?*, 24 WASH. U. J.L. & POL'Y 31, 35 (2007); Nancy Cambria, *Fighting Poverty With an "I Do"*, ST. LOUIS POST-DISPATCH, Dec. 19, 2007, at A1; Barbara Dafoe Whitehead, *Dan Quayle Was Right*, THE ATLANTIC, Apr. 1993, at 47, 71.

6. *Compare* Marsha Garrison, *Law Making for Baby Making: An Interpretative Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 903-12 (2000) (arguing for recognition of sperms donors as legal fathers, when single women use artificial insemination), *with In re* K.M.H., 169 P.3d 1025 (Kan. 2007) (applying statute to deny recognition as a legal father to a sperm donor, in the absence of written agreement), *cert. denied sub nom.* Hendrix v. Harrington, 129 S. Ct. 36 (2008), *and* Ferguson v. McKiernan, 940 A.2d 1236 (Pa. 2007) (upholding an oral agreement between the mother and the sperm donor that he would have no responsibility as a parent). *See generally* Jennifer Egan, *Wanted: A Few Good Sperm*, N.Y. TIMES MAG., Mar. 19, 2006, at 44 (detailing the experiences of several single women who used donor insemination to have children).

7. For an occasional previous examination of the issue, see, for example, R. Alta Charo, *And Baby Makes Three—or Four, or Five, or Six: Redefining the Family After the Reprotech Revolution*, 15 WIS. WOMEN'S L.J. 231 (2000) and Pamela Gatos, Note, *Third-Parent Adoption in Lesbian and Gay Families*, 26 VT. L. REV. 195 (2001); see also COMM'N ON PARENTHOOD'S FUTURE, INSTITUTE FOR AMERICAN VALUES, THE REVOLUTION IN PARENTHOOD: THE EMERGING GLOBAL CLASH BETWEEN ADULT RIGHTS AND CHILDREN'S NEEDS 10-15 (2006) [hereinafter THE REVOLUTION IN PARENTHOOD] (a survey of relevant developments in the United States and abroad, led by principal investigator Elizabeth Marquardt); Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309, 327-32 (2007) (discussing earlier developments that might be considered precursors). *Cf.* JAMES G. DWYER, THE RELATIONSHIP RIGHTS OF CHILDREN 285 (2006) (noting that the author's proposed parentage statute might allow "for addition of a third legal parent.").

8. A.A. v. B.B., [2007] 278 D.L.R. (4th) 519, 522, 533-34 (Can.), *leave to appeal denied sub. nom.* Alliance for Marriage & Family v. A.A., [2007] 3 S.C.R. 124.

9. Jacob v. Shultz-Jacob, 2007 PA Super. 118, ¶¶ 24-25, 923 A.2d 473, 482 (Pa. Super. Ct. 2007).

partner, and the sperm donor or genetic father. Contemporaneously, three scholars—Professors Laura Kessler, Katharine Baker, and Melanie Jacobs—each were writing largely supportive examinations of a concept called, respectively, "community parenting,"[10] "less binary parenthood,"[11] and "multiple parenthood."[12] Others, including Professor Nancy Dowd, were focusing more specifically on the possibility of multiple fathers.[13] Thus, these cases and scholars endorse the recognition of parents by the numbers—in the sense of accepting the possibility that a child might have numerous parents. (I shall call the position they advance "multi-parentage" and these scholars its "supporters," although their positions vary, ranging from mere openness[14] to enthusiastic advocacy.[15])

Meanwhile, *The Revolution in Parenthood*, a report issued by several organizations dedicated to preserving traditional family values,[16] along with a *New York Times* op-ed piece by the report's author, Elizabeth Marquardt, condemned these new developments as unprecedented and wrong-headed departures from what she dubs "the rule of two."[17] These authorities assert that family law should determine

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10. *See* Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL'Y 47, 49 (2007).

11. Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 655 (2008).

12. Jacobs, *supra* note 9, at 313; *see also* Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. ST. L.J. 809, 851-52 (2006) [hereinafter Jacobs, *My Two Dads*].

13. Nancy E. Dowd, *Multiple Parents/Multiple Fathers*, 9 J.L. & FAM. STUD. 231 (2007) [hereinafter Dowd, *Multiple Parents*]; Nancy E. Dowd, *Parentage at Birth: Birthfathers and Social Fatherhood*, 14 WM. & MARY BILL OF RTS. J. 909 (2006); Jacobs, *My Two Dads*, *supra* note 12. For additional examinations of the issue more generally, see Laura Nicole Althouse, *Three's Company? How American Law Can Recognize a Third Social Parent in Same-Sex Headed Families*, 19 HASTINGS WOMEN'S L.J. 171 (2008) and Brian Bix, *The Bogeyman of Three (or More) Parents* (Minn. Legal Studies Research Paper No. 08-22, Aug. 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1196562.

14. *E.g.*, Baker, *supra* note 11. Perhaps calling Baker a "supporter" overstates her position. In fact, her thorough analysis seeks to examine, without prejudging the outcome, what role we want biology or a system modeled on biology to play in our parentage regime. *See id.* at 653-56. In the course of this analysis, she interrogates the traditional two-parent model. Given her openness to departures from the traditional model, I place Baker—on the continuum of participants in the relevant discourse—closer to the supporters of multi-parentage than to the opponents, as described *infra* notes 16-18 and accompanying text.

15. *E.g.*, Kessler, *supra* note 10, at 72-74.

16. THE REVOLUTION IN PARENTHOOD, *supra* note 7, at 1. This report, which lists Elizabeth Marquardt, the Vice President of the Institute for American Values, as the principal investigator, bears the names of the Institute for American Values; the Institute for Marriage and Public Policy; the Institute for the Study of Marriage, Law, and Culture; and the Institute of Marriage and Family Canada. *Id.*

17. Elizabeth Marquardt, Op-Ed, *When 3 Really Is a Crowd*, N.Y. TIMES, July 16, 2007, at A13 [hereinafter Marquardt, *When 3 Really Is a Crowd*] ("[N]o court should break open the rule of

parents by the numbers—in the sense of making a numerical limit, two, dispositive in all cases. (I shall talk about this position as "bi-parentage"[18] and refer collectively to its organizational and individual adherents as "opponents of multi-parentage.")

Significantly, all of the contributions to the discourse invoke the interests of children in their analyses.[19]

Some contemporary debates—such as those about same-sex marriage and abortion—have become so consuming and so inseparable from a clearly identified side in the culture wars[20] that they have left little space for fresh analysis or insight. Despite the recent spurts of attention devoted to the question whether a child may have more than two legal parents,[21] however, this conversation has proceeded with less fanfare and in a more subdued register than those high-profile controversies. Precisely because the notion of multi-parentage remains both less familiar and less charged, the normative implications are still emerging.

Beyond normative implications, an examination of the recent discourse on multi-parentage—including the omissions from this discourse—yields several important observations about family law today. In particular, this discourse provides a lens that reveals not only family law's current practices and trajectory but also unfinished business, unspoken assumptions, and problematic inconsistencies. Using

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two when assigning legal parenthood."). This op-ed piece subsequently appeared in several other newspapers, albeit under varying titles. *See* Elizabeth Marquardt, Op-Ed, *When Three Really Is a Crowd: Mommy + Mommy + Donor*, INT'L HERALD TRIB., July 19, 2007, at 7; Elizabeth Marquardt, *If Two Parents Are Good for Children, Aren't Three Better?*, SEATTLE POST-INTELLIGENCER, July 18, 2007, at B7; *see also, e.g.*, Editorial, *Family Matters*, WASH. TIMES, July 17, 2007, at A18 (calling for reinforcement of "the two-parent, nuclear family"); Susan Reimer, *Roundup of News Items Worthy of Comment*, BALTIMORE SUN, Aug. 7, 2007, at C1. In addition, the *New York Times* published six letters to the editor in response to Marquardt's op-ed piece, including two from law professors. Letters to the Editor, *The Complex Parenting Network*, N.Y. TIMES, July 23, 2007, at A18 (including letters from Professors Melanie B. Jacobs and Richard F. Storrow).

18. Baker's work uses the term "bi-parenting." Baker, *supra* note 11, at 673; Katharine K. Baker, *Bargaining or Biology?: The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 16 (2004) [hereinafter Baker, *Bargaining or Biology?*].

19. *See infra* notes 321-29 and accompanying text.

20. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (accusing majority of "tak[ing] sides in the culture war").

21. This Article does not attempt to support the premise that family law has long followed, if not a "rule of two," then at least a two-parent norm. The scholarship examined here covers this territory quite thoroughly. For a few examples of case law articulating this norm, see *Michael H. v. Gerald D.*, 491 U.S. 110, 118 (1989) (Scalia, J., plurality opinion) ("California law, like nature itself, makes no provision for dual fatherhood.") and *Johnson v. Calvert*, 851 P.2d 776, 781 n.8 (Cal. 1993) (declining to recognize as a parent, along with the genetic and intended mother and father, the gestational surrogate).

the recent discourse on multi-parentage as a point of departure, this Article identifies several issues that family law must address to provide a coherent and credible frame for recent reforms. Along the way, while largely allying myself with the supporters of multi-parentage, I include some significant points and elaborations missing from their treatment of the topic.

The Article proceeds as follows: Part II introduces the recent discourse about parental numbers, including highlights of the competing normative positions and the two cases that brought multi-parentage to life in 2007. This Part then situates these cases within developments in the laws governing custody and child support for traditional bi-parent families that have paved the way for the nontraditional outcomes in these cases, specifically the rise of functional tests for parentage and the "deconstruction" of parental status. This analysis shows how family law is already equipped to recognize multi-parentage. In so doing, this Part rejects the both supporters' and opponents' characterizations of legally recognized multi-parentage as revolutionary and also difficult to operationalize, absent significant changes in family law.

Part III uses multi-parentage to illuminate the work still to be done on several issues that family law has begun to address, including the criteria for functional parenthood and the governing jurisdictional standards. As this Part points out, there has been an ongoing need for additional development of the law on these issues even in bi-parentage cases. The possibility of multi-parentage, however, makes more salient the uncertainties, shortcomings, and unarticulated assumptions that remain unaddressed. Addressing these problems, in turn, might well eliminate several of the reasons that seem to make multi-parentage troubling.

Part IV engages more theoretically with the recent discourse, considering the role of multi-parentage in identifying, achieving, and contesting some of family law's aspirations, such as the "deconstruct[ion of] traditional gender and sexuality norms."[22] In fact, however, existing evidence complicates the picture, by suggesting that expanded parental numbers might reinforce traditional norms and hierarchies instead of challenging them. This Part also explores how enlarging the conventional number of parents not only changes the legal status of some individuals previously considered outsiders or third parties, but also prompts rethinking parental status itself.

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22. Kessler, *supra* note 10, at 50.

Part V concludes, using the discourse on multi-parentage to consider the priority that family law professes to give to children's interests and to emphasize a few of the persisting difficulties of this approach.

II. SITUATING MULTI-PARENTAGE IN CONTEMPORARY FAMILY LAW

A. Introducing the Discourse

In making the case for multi-parentage, the supporters typically begin by acknowledging modern family law's reliance on both biology and non-biological connections in determining parentage.[23] Traditional principles identified a child's mother by birth and the father primarily on the basis of a man's marriage to the mother,[24] with adoption providing an alternative formal route to a legally recognized parent-child relationship. More recently, sophisticated genetic testing, use of donated gametes and gestational surrogates in assisted reproduction, and new applications of traditional formal rules—such as second-parent adoptions[25] and a presumption of legitimacy for some same-sex couples[26]—have multiplied the biological and formal connections[27] that adults and children might share. Similarly, all those scholars considering multi-parentage emphasize modern family law's functional turn[28]—the rise of standards that accord legal recognition to those who perform a family relationship, regardless of the absence of formal or biological connections.[29] Such functional tests have permitted the law sometimes to

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23. *See* Baker, *supra* note 11, at 651-53; Jacobs, *supra* note 7, at 309-10, 318; Kessler, *supra* note 10, at 47-48.

24. *See, e.g.*, Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 233-34 (2006).

25. *E.g.*, Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993).

26. *See generally* Appleton, *supra* note 24 (examining application of traditional parentage presumptions for same-sex couples).

27. By "formal connections," I mean those resulting from compliance with legal formalities, such as marriage or adoption.

28. *See* Baker, *supra* note 11, 679-99; Jacobs, *supra* note 7, at 333-35; Kessler, *supra* note 10, at 63-65.

29. For example, in some jurisdictions, a couple performing as married, regardless of gender, will be accorded some of the rights and benefits of formally married couples. *E.g.*, Braschi v. Stahl Assocs. Co., 543 N.E.2d 49, 54-55 (N.Y. 1989) (reading "family" broadly to recognize for deceased tenant's partner some rights of survivorship under rent control law); Vasquez v. Hawthorne, 33 P.3d 735, 737-38 (Wash. 2001) (permitting recognition of some equitable claims of entitlement to community property by surviving partner); *see also* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 6.01-.06 (2002) (specifying consequences of family dissolution for domestic partners). For an examination of such phenomena in an earlier era,

recognize parental status based on behavior and the resulting emotional ties and dependencies.[30] Of course, such criteria do not compel any particular numerical limits on parents for a given child.

The recent cases from Pennsylvania and Ontario provide useful illustrations of these observations at work. The Pennsylvania case, *Jacob v. Shultz-Jacob*,[31] relied on a mélange of biological, formal, and functional elements after the breakdown of a couple's relationship to reject the argument that only two adults could be accorded parental status.[32] In this case, two women, Jodilynn Jacob and Jennifer Shultz-Jacob, having celebrated a commitment ceremony and a Vermont civil union, had been rearing four children while living together. Two of the children were Jacob's nephews, whom she had adopted; the other two, her biological children, had been conceived with the assistance of friend, Carl Frampton, who served as semen donor but who also remained involved in the children's lives. The parties' had stipulated Shultz-Jacob's status as "*in loco parentis*" which, the court explained, affords her standing but does not make her equal to a "natural parent," who has a prima facie right to custody.[33] Using this weighted evidentiary scale, the court approved the lower court's decision that Shultz-Jacob would get partial physical custody and shared legal custody of three of the four children, that Jacob would get primary physical custody and shared legal custody of the same three children, and that Frampton would receive partial physical custody of his two biological children. Turning to the question of child support and rejecting the trial court's "view that the interjection of a third person in the traditional support scenario would create an untenable situation,"[34] the court vacated the decision below and

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see Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957 (2000).

30. *See, e.g.*, Kristine H. v. Lisa R., 117 P.3d 690 (Cal. 2005) (holding that a biological mother's conduct estopped her from denying a prior agreement with her same-sex partner); *In re* Parentage of L.B., 122 P.3d 161, 176-77 (Wash. 2005) (recognizing de facto parents). For other authorities on this point, see Kessler, *supra* note 10, at 64-65 n.105.

31. Jacob v. Shultz-Jacob, 2007 PA Super. 118, 923 A.2d 473 (Pa. Super. Ct. 2007).

32. *Id.* ¶¶ 2-5, 10, 14, 24-25, 923 A.2d at 476-77, 482.

33. *Id.* ¶ 10, 923 A.2d at 477.

34. *Id.* ¶¶ 24-25, 923 A.2d at 482. The superior court examined two precedents invoked by the trial court, *L.S.K. v. H.A.N.*, 2002 PA Super. 390, ¶ 17, 813 A.2d 872, 878 (Pa. Super. Ct. 2002) (using equitable estoppel to hold a mother's former partner liable for child support) and *Ferguson v. McKiernan*, 2004 PA Super 289, ¶¶ 6, 8, 855 A.2d 121, 123-24 (Pa. Super. Ct. 2004) (holding that a single mother and semen donor cannot "bargain[] away a legal right not held by either of them . . . but belonging to the subject children" and thus rejecting an agreement that the donor would have no responsibilities). *Jacob*, 2007 PA Super. ¶¶ 20-24, 932 A.2d at 480-82. As the opinion in *Jacob v. Shultz-Jacob* notes, the state supreme court granted review in *Ferguson*. *Jacob*, 2007 PA Super. ¶ 22 n.8, 923 A.2d at 481 n.8. Subsequently, the supreme court reversed *Ferguson*,

remanded, reasoning that equitable estoppel could justify Shultz-Jacob's support obligation while biology and active rearing activities could justify Frampton's.[35] In the meantime, the court's unquestioned assumption of Jacob's parental status[36] elided the genetic, gestational, adoptive, and rearing connections that might have been invoked in favor of her recognition.

Just a few months before, in *A.A. v. B.B.*, a court in Ontario relied on its *parens partriae* authority to recognize three parents for a five-year-old boy, filling an inadvertent legislative gap.[37] In this case, the biological mother's partner sought a declaration of maternity while their relationship remained intact. The couple had not pursued recognition via adoption because doing so, they reasoned, would sever the parental ties between the child and the male friend who assisted them in conceiving and whose involvement in the child's life (as "father") all three adults regarded as beneficial.[38] Notably, in this case, the ruling applied to an ongoing family relationship, while in the Pennsylvania case the court was dividing rights and obligations at dissolution.

These cases, although unusual in their recognition of more than two parents, rely on concepts similar to those detailed in the American Law Institute's ("ALI's") *Principles of the Law of Family Dissolution: Analysis and Recommendations*,[39] a project designed to explain family law decisions and to guide decisionmakers, including courts, legislators,

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holding enforceable a contract to relieve the donor of financial responsibilities. Ferguson v. McKiernan, 940 A.2d 1236 (Pa. 2007). The *Ferguson* majority reasoned that a rule of unenforceability

> would mean that a woman who wishes to have a baby but is unable to conceive through intercourse could not seek sperm from a man she knows and admires, while assuring him that he will never be subject to a support order and being herself assured that he will never be able to seek custody of the child[]

—and thus she would have no choice but to resort to anonymously donated semen. *Id.* at 1247.

35. *Jacob*, 2007 PA Super. ¶¶ 23-25, 923 A.2d at 481-82. Frampton died while the case was pending. Reggie Sheffield, *Sperm Donor Was Liable for Support, Court Rules*, HOUS. CHRON., May 27, 2007, at A10.

36. Throughout, the court refers, without analysis, to Jacob as the "biological mother." *See, e.g.*, *Jacob*, 2007 PA Super. ¶ 16, 923 A.2d at 479.

37. [2007] 278 D.L.R. (4th) 519, 522-23 (Can.), *leave to appeal denied sub nom.* Alliance for Marriage & Family v. A.A., [2007] 3 S.C.R. 124.

38. *Id.* at 525. The court does not explicitly identify the type of conception, stating only that the friend provided "assistance" to the lesbian couple. *See id.* at 522.

39. *See generally* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002) (recognizing and implementing various criteria for recognizing parental rights and obligations, in addition to biology, marriage, and adoption).

administrators, and affected individuals[40]—and an oft-cited *bête noire* of those criticizing family law's evolving departure from a marriage-centered regime.[41] In recognizing different parental categories based on specified formalities and behaviors, namely legal parents, parents by estoppel, and de facto parents,[42] the *Principles* establish the architecture for allocating custody and child support following family dissolution. Although most of the illustrations used in the *Principles* reveal a scheme that contemplates no more than two parents for a given child, the definitions and criteria leave open the possibility of a larger number.[43]

As all these authorities suggest, parental status is important for several reasons. Under familiar doctrines of family law, parental status confers parental rights, specifically presumptive constitutional and common-law protection for childrearing decisions (parental autonomy)[44] and for time to spend with the child (even over the objection of another parent).[45] Generally, fit parents may control others' access to the child,[46]

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40. *Id.* at xvii-xviii. The *Principles* explicitly seek not only to shape the choices made by legislators, courts, and administrative bodies, but also to encourage private ordering by making predictable the outcomes that would obtain in the absence of settlement. *See id.* at 1-6.

41. *See, e.g.*, COUNCIL ON FAMILY LAW, INST. FOR AM. VALUES, THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA (2005) [hereinafter THE FUTURE OF FAMILY LAW] (report sponsored by Institute for American Values; Institute for Marriage and Public Policy; and Institute for the Study of Marriage, Law and Culture); RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (Robin Fretwell Wilson ed., 2006). *The Future of Family Law* lists as sponsors most of the organizations that also sponsored *The Revolution in Parenthood*. *See* THE FUTURE OF FAMILY LAW, *supra*; THE REVOLUTION IN PARENTHOOD, *supra* note 7, at 4. In addition, one of these organizations, the Institute for American Values, also sponsored the workshop that produced *Reconceiving the Family*. RECONCEIVING THE FAMILY, *supra*, at xi.

42. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.03(1).

43. *See id.* § 2.03 illus. 1-27. Illustrations 5 and 10 leave open the possibility that, under state law, a child might have two parents along with the parent by estoppel recognized by the *Principles*. *Id.* § 2.03 illus. 5, 10. Illustrations 13 and 14 involve three parental candidates but recognition of one depends on the agreement or the "dropp[ing] out" of another. *Id.* § 2.03 illus. 13-14. In other illustrations, the facts identify two parties while avoiding references to other individuals who might be considered parents. *E.g.*, *id.* § 2.03 illus. 16-17. Illustration 27, however, depicts a situation in which a child has two parents and a de facto parent—without saying so explicitly. *Id.* § 2.03 illus. 27; *see also id.* § 3.03 (making the question whether a child already has two parents a factor in determining whether to recognize a parent by estoppel); Katharine K. Baker, *Asymmetric Parenthood*, *in* RECONCEIVING THE FAMILY, *supra* note 41, at 121, 128 (showing how the *Principles* adhere to a two-parent model for support, but a more expansive model for custody).

44. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 65-66 (2000) (plurality opinion).

45. Courts have recognized visitation with a child as a constitutionally protected liberty interest. *See, e.g.*, Swipies v. Kofka, 419 F.3d 709, 714 (8th Cir. 2005); Franz v. United States, 712 F.2d 1428, 1431-33 (D.C. Cir. 1983). Courts will restrict visitation, including requiring supervision, or deny visitation if necessary to protect the child from harm, however. *See* D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 777-89 (3d ed. 2006)

and parents enjoy a "parental preference" for custody[47] and guardianship.[48] Often, those who are not parents (usually called "third parties"[49] or "legal strangers"[50]) lack standing even to seek continued contact with a child with whom they have shared a relationship.[51]

Likewise, parental status also imposes parental obligations, including responsibilities for care and support of the child.[52] Indeed, to the extent that family law expresses a strong preference for private support of children,[53] increasing the number of recognized parents offers more resources and a more effective buffer against dependence on the state. Although it stopped short of recognizing more than two parents, the California Supreme Court in *Elisa B. v. Superior Court* clearly signaled that such financial objectives justify departing from traditional rules of parentage to recognize that a child can have two mothers, even without an adoption.[54] It is not much of a stretch to conclude that, if private money were the only issue, the more parents per child, the

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(reprinting and discussing cases and other materials on the standards for denying or restricting visitation).

46. *See, e.g.*, *Troxel*, 530 U.S. at 68-69 (plurality opinion).

47. The presumption is often stated in terms of a preference for a "biological" or "natural" parent. *See, e.g.*, Jones v. Jones, 2005 PA Super 337, ¶¶ 10-12, 884 A.2d 915, 917-18 (Pa. Super. Ct. 2005); Brian Bix, *Philosophy, Morality, and Parental Priority*, 40 FAM. L.Q. 7 (2006); *see also, e.g.*, LAURENCE D. HOULGATE, CHILDREN'S RIGHTS, STATE INTERVENTION, CUSTODY AND DIVORCE: CONTRADICTIONS IN ETHICS AND FAMILY LAW 162-71 (2005) (discussing the "biological preference principle" under which biological parents always have priority).

48. *See, e.g.*, Fischer v. Fischer, 157 P.3d 682, 685-86 (Mont. 2007); *see also* Freeman v. Rushton, 202 S.W.3d 485, 488 (Ark. 2005) (noting that the preference gives way to the child's best interests).

49. *See, e.g.*, Joanna L. Grossman, *Family Boundaries: Third-Party Rights and Obligations with Respect to Children*, 40 FAM. L.Q. 1, 1 (2006).

50. *See, e.g.*, Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 350 (2002).

51. *See, e.g.*, Alison D. v. Virginia M., 572 N.E.2d 27, 29 (N.Y. 1991). Some states give some third parties standing in certain circumstances, however. *See, e.g.*, MO. ANN. STAT. § 452.375(5)(5) (West 2003); *In re* C.R.C., 148 P.3d 458, 463 (Colo. Ct. App. 2006). Regarding applicable constitutional limitations, see *Troxel*, 530 U.S. at 66.

52. *See, e.g.*, Scott Altman, *A Theory of Child Support*, 17 INT'L J. L. POL'Y & FAM. 173 (2003); Baker, *Bargaining or Biology?*, *supra* note 18, at 7-8.

53. *See, e.g.*, Baker, *Bargaining or Biology?*, *supra* note 18, at 20.

54. 117 P.3d 660, 665-66 (Cal. 2005). In this action by the county to collect child support, the court held that

> a woman who agreed to raise children with her lesbian partner, supported her partner's artificial insemination using an anonymous donor, and received the resulting twin children into her home and held them out as her own, is the children's parent under the Uniform Parentage Act and has an obligation to support them.

Id. at 662. In a footnote, the court remarked, "We have not decided 'whether there exists an overriding legislative policy limiting a child to two parents.'" *Id.* at 666 n.4 (quoting Sharon S. v. Superior Ct., 73 P.3d 554, 561 n.6 (Cal. 2003)).

better.[55] *Shultz-Jacob*'s recognition of a third parent with some child support obligations[56] may be seen in this light.

The opponents of multi-parentage invoke many of the same developments cited by the supporters while reflecting very different underlying assumptions. *The Revolution in Parenthood* warns about the dangers of "[r]edefining [p]arenthood" and the "[i]ncreasing [s]lippage in the [m]eaning of [f]atherhood and [m]otherhood,"[57] implying that these terms have fixed understandings, rather than content based on evolving legal and social constructions.[58] Decrying the active role of the state in shaping the contours of parenthood,[59] the report's analysis sounds the alarm about both divorce and the rise of assisted reproduction. In so doing, it reveals that the allure of a bi-parentage rule lies in its ability to naturalize a normative family in which only enduringly monogamous heterosexual couples reproduce.[60] This position embodies a strong version of what Baker calls "bionormativity."[61]

For example, *The Revolution in Parenthood* condemns specifically Canada's recent replacement in federal law of the term "natural parent" with the term "legal parent."[62] Yet, the notion of legal parents is far from revolutionary. Justice Scalia, expressing his commitment to narrow traditional understandings of the family, has invoked the notion of legal parenthood to side with the arguments of a mother's husband, over the asserted claims of a biological father, in a dispute about the constitutionality of the presumption of legitimacy.[63] Moreover, the term "natural parent" has no inherent magic or invariable meaning. California law permits an unmarried man who has reared a child to be a "natural father," despite evidence showing that they share no biological

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55. Baker and Kessler so suggest. *See* Baker, *supra* note 11, at 673-76; Kessler, *supra* note 10, at 72.

56. Jacob v. Shultz-Jacob, 2007 PA Super. 118, ¶¶ 21, 24, 923 A.2d 473, 481-82 (Pa. Super. Ct. 2007).

57. THE REVOLUTION IN PARENTHOOD, *supra* note 7, at 22.

58. *See generally, e.g.*, Barbara Stark, *Review Essay: Pomo Parenting*, 80 OR. L. REV. 1035 (2001) (reviewing JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW (2000) and NANCY E. DOWD, REDEFINING FATHERHOOD (2000)) (both examining the expanding understanding of "parenting").

59. *See* THE REVOLUTION IN PARENTHOOD, *supra* note 7, at 6; *cf.* DWYER, *supra* note 7, at 26 (explaining that the state is always involved in identifying parents, even when it chooses to rely on biological criteria).

60. One finds a similar approach in an earlier report sponsored by the same organizations. *See* THE FUTURE OF FAMILY LAW, *supra* note 41; *see also supra* note 16. Baker thoroughly examines the reasons why "bionormativity" might prove attractive. Baker, *supra* note 11.

61. Baker, *supra* note 11, at 653.

62. THE REVOLUTION IN PARENTHOOD, *supra* note 7, at 10-11.

63. Michael H. v. Gerald D., 491 U.S. 110, 118-30 (1989) (Scalia, J., plurality opinion).

connection.[64] The absence of parental status historically for unmarried fathers[65] and, today, for most sperm donors[66] illustrates a larger principle that undermines any simplistic attempt to equate parentage with biology or genetics. Indeed, even without functional tests, family law would face the possibility of multi-parentage, thanks to reproductive techniques that promise to permit three biological[67] or even genetic parents.[68]

B. Family Law's "Deconstruction" of Parenthood

Just as the opponents of multi-parentage inaccurately depict traditional family law principles, the supporters rely on assumptions that contemporary family law has now left behind. Claiming that family law has considerably more work to do before operationalizing a multi-parent regime, the supporters envision parenthood, however it might be determined, as a bundle of rights and responsibilities that for legal purposes is treated as a comprehensive, exclusive, and indivisible unit.[69] For example, Jacobs and the other supporters call for reforms that would disaggregate the bundle that flows from parentage in order to expand the number of parents who can participate.[70] In my view, these supporters overstate the need for reforms because they understate the extent to which such disaggregation has already occurred.[71]

Today, almost every state has well-established rules for a division of the "parenthood pie" after dissolution of marriage, with courts routinely making separate decisions about the child's legal custody (also

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64. *In re* Nicholas H., 46 P.3d 932, 933, 941 (Cal. 2002).

65. *See generally* HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY (1971) (exploring the historical treatment of the nonmarital child as "*filius nullius*").

66. *See, e.g.*, *In re* K.M.H., 169 P.3d 1025 (Kan. 2007), *cert. denied sub nom.* Hendrix v. Harrington, 129 S. Ct. 36 (2008); Ferguson v. McKiernan, 940 A.2d 1236 (Pa. 2007).

67. *See, e.g.*, K.M. v. E.G., 117 P.3d 673, 676 (Cal. 2005).

68. *See, e.g.*, THE REVOLUTION IN PARENTHOOD, *supra* note 7, at 27.

69. In 1984, Professor Katharine Bartlett used this description in inviting readers to think outside the familiar legal box of unified parenthood. *See* Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 883, 944-45 (1984).

70. Jacobs urges that "[b]y disaggregating the strands of parentage, it becomes possible to recognize the many individuals who play a role in the child's life." Jacobs, *supra* note 7, at 325. In addition, Kessler, in advocating community parenting, asserts that to achieve this goal, "we [first] may need to further disaggregate the bundle of parental rights." Kessler, *supra* note 10, at 74. And Baker considers the possibility of "separat[ing] out obligations for children from rights to children." Baker, *supra* note 11, at 696. For additional discussion of this possibility, see *infra* notes 157-67 and accompanying text.

71. Analogously, one can discern an "unbundling" of the rights and responsibilities that traditionally have constituted marriage. *See* James Herbie DiFonzo, *Unbundling Marriage*, 32 HOFSTRA L. REV. 31 (2003).

called decisionmaking authority) and the child's physical custody (also called residential time).[72] Likewise, child support is no longer an indivisible obligation but rather a duty to be apportioned between the parents (and occasionally the state).[73]

Sometimes, a court will order an even more finely tuned division. For example, in attempting to resolve custody disputes between parents who practice different religions, some courts have carved out special awards of "spiritual custody," as distinguished from the prerogative of making other decisions or inculcating secular values—though not without raising questions under the First Amendment.[74]

The recent advent of parenting plans shows just how detailed such post-dissolution allocations of time with, responsibilities for, and duties to children have become.[75] States commonly require each divorcing parent to submit to the court a blueprint that will inform, but not bind, the court in adjudicating custody.[76] Such parenting plans, which also occupy an important position in the ALI's *Principles*,[77] typically cover three primary incidents of parentage—physical custody, legal custody (or decisionmaking), and financial obligations. For example, Missouri's statutory framework for a parenting plan, which each party must file when seeking dissolution of marriage, subdivides each of these primary incidents as follows, requiring:

> (1) A specific written schedule detailing the custody, visitation and residential time for each child with each party including: (a) Major holidays stating which holidays a party has each year; (b) School holidays for school age children; (c) The child's birthday, Mother's Day and Father's Day; (d) Weekday and weekend schedules and for school age children how the winter, spring, summer and other

72. *E.g.*, Bell v. Bell, 794 P.2d 97, 99 (Alaska 1990); *see* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.01 cmt. a (2002).

73. The Federal Advisory Panel on Child Support Guidelines listed as one objective the principle that both parents should share responsibility for child support. *See* LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 1.02(d) (Supp. 2003).

74. *See* Jordan C. Paul, Comment, *"You Get the House. I Get the Car. You Get the Kids. I Get Their Souls." The Impact of Spiritual Custody Awards on the Free Exercise Rights of Custodial Parents*, 138 U. PA. L. REV. 583 (1989); *see also* Jeffrey Shulman, *Spiritual Custody: Relational Rights and Constitutional Commitments*, 7 J.L. & FAM. STUD. 317 (2005).

75. The *Principles* make parenting plans central to child custody decisions following family dissolution. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 6-7.

76. Still, parents cannot bargain away the rights of their children, whose best interests control, notwithstanding possible unfairness to the parents. *See, e.g.*, Wallis v. Smith, 22 P.3d 682, 684-85 (N.M. Ct. App. 2001); D'Amico v. Ellinwood, 149 P.3d 277, 283 (Or. Ct. App. 2006). *But see* Ferguson v. McKiernan, 940 A.2d 1236, 1246-47 (Pa. 2007) (upholding sperm donor's agreement with the child's mother that he would have no parental responsibilities).

77. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 6.

> vacations from school will be spent; (e) The times and places for transfer of the child between the parties in connection with the residential schedule; (f) A plan for sharing transportation duties associated with the residential schedule; (g) Appropriate times for telephone access; (h) Suggested procedures for notifying the other party when a party requests a temporary variation from the residential schedule; (i) Any suggested restrictions or limitations on access to a party and the reasons such restrictions are requested;
> (2) A specific written plan regarding legal custody which details how the decision-making rights and responsibilities will be shared between the parties including the following: (a) Educational decisions and methods of communicating information from the school to both parties; (b) Medical, dental and health care decisions including how health care providers will be selected and a method of communicating medical conditions of the child and how emergency care will be handled; (c) Extracurricular activities, including a method for determining which activities the child will participate in when those activities involve time during which each party is the custodian; (d) Child care providers, including how such providers will be selected; (e) Communication procedures including access to telephone numbers as appropriate; (f) A dispute resolution procedure for those matters on which the parties disagree or in interpreting the parenting plan; (g) If a party suggests no shared decision-making, a statement of the reasons for such a request;
> (3) How the expenses of the child, including child care, educational and extraordinary expenses as defined in the child support guidelines established by the supreme court, will be paid including: (a) The suggested amount of child support to be paid by each party; (b) The party who will maintain or provide health insurance for the child and how the medical, dental, vision, psychological and other health care expenses of the child not paid by insurance will be paid by the parties; (c) The payment of educational expenses, if any; (d) The payment of extraordinary expenses of the child, if any; (e) Child care expenses, if any; (f) Transportation expenses, if any.[78]

Such outlines for parenting plans, now mainstays of contemporary custody adjudication, reveal that the law does not presently conceptualize parenthood as a comprehensive and indivisible monolith, but rather as a mosaic capable of division and subdivision even in the ordinary case. And with so many discrete elements of "parenting" listed, a plan could easily accommodate two, three, or more parents.

78. MO. ANN. STAT. § 452.310 (7) (West 2003).

Further, recent scholarship has begun to recognize the legal significance of parental "outsourcing" of some childrearing functions[79]—whether in intact or post-dissolution families. Certainly, nannies and day careworkers have become ubiquitous today.[80] Indeed, particularly now that home schooling is no longer an uncommon practice,[81] we might think of even public and private schools as places where specific activities that *could* be performed by parents are delegated to others. But even if education is in a class by itself, still many childrearing activities are performed "between home and school"[82] by those whom the law does not regard as parents.[83] The point of citing these phenomena here is not to contend that the adults performing these activities should be considered "parents,"[84] but rather to reinforce the idea that parenthood, as practiced and understood, consists of many parts that can be disaggregated and delegated. Childrearing takes place in bits and pieces.

Finally, family law has developed a rich vocabulary communicating multiple layers of the parenting enterprise, with roles to be played by or at least recognized for different individuals. Case law, statutes, and the literature now comfortably discuss a variety of types of parents—foster parents, birth parents, biological parents, intended parents, adoptive parents, legal parents, genetic parents, gestational parents (or mothers), surrogate parents (or mothers), de facto parents, parents by estoppel, and psychological parents—to name the most prominent examples.[85]

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79. *See* Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 390-91 (2008); Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 834-35 (2007).

80. *But see* Jodi Kantor, *Nanny Hunt Can Be a "Slap in the Face" for Blacks*, N.Y. TIMES, Dec. 26, 2006, at A1.

81. *See* Kimberly A. Yuracko, *Education Off the Grid: Constitutional Constraints on Homeschooling*, 96 CAL. L. REV. 123, 124-25 (2008).

82. Rosenbury, *supra* note 79, at 834.

83. Murray, *supra* note 79, at 390; Rosenbury, *supra* note 79, at 846.

84. *See* Murray, *supra* note 79, at 393-94.

85. *See, e.g.*, Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 826 (1977) (noting New York's division of parental functions among the child welfare agency, foster parents, and natural parents); Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (resolving a parentage dispute in favor of the genetic, intended parents and against the gestational surrogate); UNIF. PARENTAGE ACT § 204 (a)(5) (amended 2002), 9B U.L.A. 17 (Supp. 2008) (presumed parentage based on "holding out" child as one's own); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1) (2002) (formulating criteria for "parent[s] by estoppel" and "de facto parent[s]"); JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 19 (new ed. 1979) (developing the concept of a "psychological parent"); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 322-23 (proposing theory of parentage based on intent); *cf.* THE FUTURE OF FAMILY

These developments, with family law's increasing acknowledgment of the *sharing* of parental tasks and roles, lowers any conceptual hurdle of parenthood's supposed indivisibility.[86] Further, on an operational level, family law already routinely practices disaggregation of parental rights and responsibilities. Put differently, although some supporters of multi-parentage correctly observe that political discourse makes invisible some of a child's affiliations with more than two adults and case law often exhibits hostility to recognizing more than two legal parents for a given child,[87] one could just as easily see the glass as half full, instead of half empty. Today, an analysis of multi-parentage can unfold against a legal background that might be deployed quite supportively of the project.

III. SOME UNFINISHED BUSINESS IN FAMILY LAW'S TREATMENT OF PARENTAGE

Despite the evolution of important conceptual and operational tools permitting recognition of more than two legal parents, several aspects of family law's treatment of parentage remain underdeveloped and inadequate, given the contemporary emphasis on behavior and function. Although these gaps exist even within the more familiar regime of bi-parentage, the possibility of multi-parentage remains sufficiently unfamiliar and disorienting that it makes these gaps more visible. This Part considers the need for family law to do more work on four specific issues.

A. What Functions Count? Caregivers, Breadwinners, and Nannies

Family law currently relies on functional as well as formal and biological criteria in deciding what relationships to recognize, as shown by *Jacob v. Shultz-Jacob*[88] and *A.A. v. B.B.*,[89] and this is so in many bi-parentage cases as well.[90] This contemporary reliance on function

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LAW, *supra* note 41, at 37-38 (criticizing the recognition of different forms of parenting as "fragmentation of parenthood").

86. *See* Bartlett, *supra* note 69, at 883.

87. *See* Kessler, *supra* note 10, at 59-62, 65-72.

88. 2007 PA Super. 118, 923 A.2d 473 (Pa. Super. Ct. 2007).

89. [2007] 278 D.L.R. (4th) 519 (Can.), *leave to appeal denied sub nom.* Alliance for Marriage & Family v. A.A., [2007] 3 S.C.R. 124.

90. *See, e.g.*, V.C. v. M.J.B., 748 A.2d 539, 550-52 (N.J. 2000); Rubano v. DiCenzo, 759 A.2d 959, 967-68, 971 (R.I. 2000); *In re* Parentage of L.B., 122 P.3d 161, 169, 176-77 (Wash. 2005). *But see, e.g.*, Janice M. v. Margaret K., 948 A.2d 73, 87 (Md. 2008); Stadter v. Siperko, 661 S.E.2d 494, 498-99 (Va. Ct. App. 2008).

requires, as a threshold matter, identifying what behaviors trigger parental status and when performing acts that parents stereotypically perform does not entail such legal consequences. The exercise requires line-drawing, as illustrated by the Pennsylvania court's careful analysis of the roles in the children's lives played by both Shultz-Jacob and Frampton.[91] The court's emphasis on the semen donor's particular relationship with the child signals that not all semen donors—and not even all known semen donors—would merit parental status.[92] Supporters of multi-parentage appreciate the need for such line-drawing in order to avoid undesired consequences; for example, Kessler cautions that she has no intention of routinely "elevating sperm donors, mere ex-lovers, and babysitters to the status of parent."[93] Others also envision recognition of an expansive group providing parent-like care for children but assume that enlarging the legal understanding of "parent" need not follow.[94] The more debatable the governing criteria and their application, however, the more necessary state intervention becomes, with a corresponding diminution of family autonomy that alarms some scholars.[95]

Despite the importance of clarifying the standards for functional parentage, existing authorities reflect no consensus. Further, examination of many of the prevailing approaches reveals difficulties and inconsistencies that must be confronted even in bi-parentage cases.

One version of a functional test is illustrated by recent cases from Massachusetts[96] and Kentucky.[97] These cases, in which the courts considered whether or not to recognize a second parent for a child, impose significant outer limits by holding that only caretaking functions, that is, activities in which an adult engages in parent-like activities involving direct interaction with the child, can trigger de facto parent status. These courts reject the argument that other functions that parents are expected to perform, specifically providing financial and material support, can alone confer parental status. As a result, both courts

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91. *Jacob*, 2007 PA Super. ¶¶ 10-11, 21, 923 A.2d at 477-78, 481.

92. The Supreme Court of Pennsylvania subsequently confirmed that not all known semen donors have the legal status of parent. Ferguson v. McKiernan, 940 A.2d 1236, 1248 (Pa. 2007); *see also In re* K.M.H., 169 P.3d 1025, 1040-41 (Kan. 2007), *cert. denied sub nom.* Hendrix v. Harrington, 129 S. Ct. 36 (2008).

93. Kessler, *supra* note 10, at 76.

94. *See* Murray, *supra* note 79, at 410-15; Rosenbury, *supra* note 79, at 878-80.

95. *See* Baker, *supra* note 11, at 681, 699. As others note, however, the state is *always* involved because, even under rules basing parentage exclusively on biology, the rules come from the state. *See* DWYER, *supra* note 7, at 26, 135.

96. A.H. v. M.P., 857 N.E.2d 1061, 1071 (Mass. 2006).

97. B.F. v. T.D., 194 S.W.3d 310, 311-12 (Ky. 2006).

declined to recognize as a parent a mother's former partner who had primarily performed the role of breadwinner, rather than caretaker, while the family remained intact.[98]

This approach no doubt reflects the powerful legacy of the concept of "psychological parent," as formulated by psychoanalysts-child advocates Goldstein, Freud, and Solnit, who focused on the harm that the child would experience if an ongoing relationship with an adult whom he or she regarded as a parent were disrupted, regardless of that adult's official status with respect to the child.[99] Because of the influence of this idea,[100] frequently the recognition of functional parents has sought to emphasize the view from the child's perspective and the child's emotional need for continuing the relationship.[101] This emphasis should come as no surprise, given the iconic status of the child's best interests in child custody adjudication.[102] Thus, it follows, as in the Massachusetts and Kentucky courts, that only day-to-day interactions and the child's resulting emotional attachments and perceptions provide the pivotal criteria.

A contrasting, and much more complex, approach appears in the ALI's *Principles*, which spell out distinct criteria for legal parents, parents by estoppel, and de facto parents.[103] According to the *Principles*, legal parents are defined by state law.[104] Parents by estoppel may derive

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98. In the Massachusetts case, the court declined to recognize a breadwinner as a de facto parent and rejected the doctrine of parent by estoppel. *A.H.*, 857 N.E.2d at 1072-75. In the Kentucky case, the court held that the adoptive mother's former partner failed to show she was the child's primary caregiver and thus did not satisfy the test for "de facto custodian" and lacked standing to raise other claims, based on *in loco parentis*. *B.F.*, 194 S.W.3d at 311-12; *see also, e.g.*, Heatzig v. MacLean, 664 S.E.2d 347, 352 (N.C. Ct. App. 2008) (declining to adopt doctrine of parent by estoppel), *appeal dismissed by* No. 418P08, 2008 WL 5484382 (N.C. Dec. 11, 2008).

99. GOLDSTEIN ET AL., *supra* note 85, at 18-20.

100. *See, e.g.*, Peggy C. Davis, *"There Is a Book Out . . .": An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539 (1987).

101. *See, e.g.*, V.C. v. M.J.B., 748 A.2d 539, 551-52 (N.J. 2000) (adopting four-part test for recognition of "psychological parenthood" and identifying as the "most important" criterion the "forg[ing]" of a "parent-child bond").

102. *See, e.g.*, MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 121-60 (1994) (exploring the history and development of the best interest standard). A classic illustration is *Painter v. Bannister*, 140 N.W.2d 152, 157 (Iowa 1966), in which the court relied on an expert's testimony that child's best interests dictated the continued custody of the maternal grandparents, whom he regarded as "his parental figures in his psychological makeup," despite his father's suit for his son's return. *But see* DWYER, *supra* note 7, at 24 (contending that many of our rules show that family law does not make children and their welfare paramount); *cf. infra* notes 321-60.

103. *See supra* note 42 and accompanying text.

104. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(a) (2002).

their status solely because of an obligation to pay child support or a reasonable good faith belief, while living with the child for at least two years, of biological parentage. Alternatively, parenthood by estoppel can arise from living with the child and "holding out and accepting full and permanent responsibilities as a parent," either since the child's birth, pursuant to a co-parenting agreement, or for two years, pursuant to an agreement with the child's parent or parents, and in the child's best interests.[105] In contrast, to be a de facto parent, the adult must have lived with the child and

> for reasons primarily other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship, or as a result of a complete failure or inability of any legal parent to perform *caretaking* functions, (A) regularly performed the majority of the *caretaking* functions for the child, or (B) regularly performed a share of *caretaking* functions at least as great as that of the parent with whom the child primarily lived.[106]

In implementing this taxonomy, the *Principles* follow a hierarchal approach, with parents by estoppel accorded the same prerogatives as legal parents[107] and both of these granted priority over de facto parents for primary custody and presumptive joint decisionmaking responsibility after dissolution.[108] Thus, to the extent that these definitions are gendered, with the criteria for parents by estoppel deriving primarily from paternity cases[109] and those for de facto parents evoking women's traditionally disproportionate share of domestic carework,[110] the *Principles*' hierarchy ranks men above women.

Against this background, two specific features of the *Principles*' scheme merit a closer look, and both turn on money. First, the *Principles* establish outer limits by delineating circumstances that disqualify one

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105. *Id.* § 2.03(1)(b).

106. *Id.* § 2.03(1)(c) (emphasis added).

107. *Id.* § 2.03 cmt. b.

108. Parents by estoppel have all the same privileges as legal parents, including "priority over a de facto parent and a nonparent in the allocation of primary custodial responsibility . . . ." *Id.* § 2.03 cmt. b. Further, "[t]he court should presume that an allocation of decisionmaking responsibility jointly to each legal parent or parent by estoppel who has been exercising a reasonable share of [the] parenting functions is in the child's best interests." *Id.* § 2.09(2); *see infra* note 195 and accompanying text.

109. Most of the cases cited by the Reporter's Notes to comment b, about parents by estoppel, are paternity cases, although more recent cases about lesbian co-parents have broadened the reach of the doctrine. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.03 rptr. notes cmt. b; *see also* Appleton, *supra* note 24, at 240-42.

110. Even the United States Supreme Court has noted the traditionally gendered nature of domestic carework. *See* Nev. Dep't. of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003).

from parental status. Thus, only when one acts "for reasons primarily other than financial compensation"[111] does the performance of caretaking functions count toward establishing de facto parenthood.[112] Although a child might well form deep emotional attachments to a paid caregiver (say, a nanny), according to the *Principles*, the assumptions about "motivations" of "love and loyalty" that justify the responsibility the law accords to parents do not apply to "adults who have provided caretaking functions primarily for financial reasons."[113] Whether or not reliance on the generalized and intuitive assumptions that underlie this "nanny rule" is consistent with an approach that promises to emphasize function,[114] emotional attachment, and the child's interests, this boundary illustrates one effort to distinguish what counts from what does not.

Second, in contrast to the approach followed in Massachusetts and Kentucky, the *Principles* permit parental status based on the performance of functions that do not entail caretaking. To be sure, the *Principles* recognize the differences among parental functions, defining caretaking functions as the subset of parenting activities that consist of "tasks that involve interaction with the child or that direct, arrange, and supervise the interaction and care provided by others[,]"[115] while excluding from this subset other parenting functions, such as providing economic support, participating in decisionmaking, maintaining or improving the family residence, purchasing food and clothing or undertaking financial planning for the family,[116] or "performing any other functions that are customarily performed by a parent or guardian and that are important to a child's welfare and development."[117] But, unlike in Massachusetts and Kentucky, one who performs caretaking is not necessarily privileged in the effort to secure recognition as a parent over one who performs other parenting activities.

Accordingly, the *Principles* recognize "parents by estoppel," based on the provision of child support, and they treat parents by estoppel as legal parents.[118] Similarly, the *Principles* impose a presumptive floor on time allocated after dissolution to all legal parents and parents by

111. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.03(1)(c)(ii) cmt. c.ii (discussing de facto parents).

112. *See supra* note 106 and accompanying text.

113. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.03 cmt. c.ii.

114. *See id.* § 2.03 cmt. c.

115. *Id.* § 2.03(5).

116. *Id.* § 2.03(6)(a)–(d).

117. *Id.* § 2.03(6)(e).

118. *See supra* note 105 and accompanying text.

estoppel who have performed a reasonable share of parenting functions, caretaking or otherwise.[119] Finally, arguably turning the Massachusetts and Kentucky approach on its head, under the *Principles*, de facto parents, who acquire their status on the basis of caretaking activities, take a back seat to legal parents and parents by estoppel when it comes to primary custody and presumptive joint decisionmaking responsibility.[120]

The *Principles*' treatment of functions that do not entail caretaking, which departs from the special emphasis that Goldstein and his co-authors placed on interactions and a child's resulting emotional attachments,[121] no doubt has several sources. In part, however, it reflects a response to arguments by fathers' rights advocates, who resisted any privilege to be accorded to caretaking functions. They had contended that, instead, the *Principles* should place on a par the role stereotypically played by men (that is, providing economic support, doing home repairs, etc.) and the role stereotypically played by women (that is, giving care directly or arranging therefor).[122] These advocates got some of the parity they sought, in the form of a floor on custodial time and presumptively joint decisionmaking responsibility for noncaretaking parents.[123] If one

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119. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.08(1)(a). *But see id.* § 2.08(1)(d).

120. *See supra* note 108. In addition, the *Principles* permit caretaking individuals who are not parents at all to receive some custody. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 3.02(7). Section 3.02 defines "caretaker" as "a person who is not a parent . . . but who nevertheless is allocated and exercises residential or custodial responsibility . . . ." *Id.* At the same time, however, the *Principles* caution in section 2.18 that the court "should limit or deny an allocation otherwise to be made if, in light of the *number* of other individuals to be allocated responsibility, the allocation would be impractical." *Id.* § 2.18(1)(b) (emphasis added).

121. *But see* Baker, *supra* note 43, at 133-34 (contending that the *Principles* value children's emotional needs over their material needs because de facto parents have no financial obligations).

122. In making this argument, fathers' rights advocates were seeking to enlarge stereotypical fathers' opportunities for custody after dissolution. Their claim that divisions of labor in the intact family should not dictate the consequences of dissolution resembles arguments made by feminists in favor of a partnership theory of marriage, which in turn allowed homemakers after dissolution to share in the property acquired by breadwinners during marriage. *See, e.g.*, Stephen D. Sugarman, *Dividing Financial Interests at Divorce*, *in* DIVORCE REFORM AT THE CROSSROADS 130, 139-41 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) (exploring partnership theory); Alicia Brokars Kelly, *Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life*, 19 WIS. WOMEN'S L.J. 141, 199-203 (2004).

123. According to Katharine Bartlett, the Reporter who drafted these sections of the ALI's *Principles*, fathers' rights advocates were not influential in the development of the concept of parents by estoppel, even if their arguments did strengthen the minimal allocation of custodial time under § 2.08(1)(a) and did help produce a presumption in favor of joint decisionmaking responsibility under § 2.09(2). E-mail from Katharine T. Bartlett, A. Kenneth Pye Professor of Law, Duke Law School, to Susan Frelich Appleton, Lemma Barkeloo & Phoebe Couzins Professor of

also considers in this context the *Principles*' treatment of parents by estoppel, however, then functions stereotypically performed by fathers arguably count for more than mothers' stereotypical conduct.[124]

Thus, the contrasting approaches of the Massachusetts and Kentucky courts, on the one hand, and the *Principles*, on the other, spotlight an issue that requires resolution even in a bi-parentage regime and becomes even more notable as the number of possible parents increases: When parental status comes from function and behavior, what counts? Moreover, neither approach proves entirely satisfactory. The approach used in Massachusetts and Kentucky is problematic because the failure to recognize parental status for one who provided financial support leaves a child in a precarious economic situation, given both the privatization of child support and the usual assumption that only those with parental rights should shoulder parental obligations.[125]

The *Principles*' approach overcomes this particular difficulty by recognizing parents by estoppel on the basis of financial support. Yet, the *Principles* raise a different difficulty because of their distinction between paid and unpaid caregivers.[126] To the extent that the "child's eyes" should provide the controlling perspective in recognizing those who acquire status on the basis of caretaking, distinctions based on payment should remain irrelevant. The *Principles*' skepticism about the "love and loyalty" of paid caregivers probably reflects longstanding efforts to maintain a divide between intimate relationships and economic exchanges.[127] This skepticism also no doubt masks unarticulated value judgments and adherence to a status quo in which parents with commitments outside the home can rely on nannies without risking

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Law, Washington University School of Law (Sept. 23, 2008, 9:20 CST) (on file with the Hofstra Law Review).

124. *See supra* notes 109-10 and accompanying text.

125. See *infra* notes 140-67 and accompanying text for additional exploration of this issue. No doubt, the assumed link between parental rights and obligations explains why some courts have conferred parental status based on the past provision of child support or the promise to do so. *See, e.g.*, Elisa B. v. Superior Ct., 117 P.3d 660, 669-70 (Cal. 2005) (noting that Elisa functioned as breadwinner while Emily served as primary caregiver); *supra* note 54; *see also, e.g.*, H.M. v. E.T., No. U-110-07, slip op. at 4-6 (N.Y. Fam. Ct. 2007) (using equitable estoppel and implied contract to impose support duties on mother's former partner). *But see* Alison D. v. Virginia M., 572 N.E.2d 27, 28-29 (N.Y. 1991) (declining to recognize mother's former partner as co-parent in dispute about visitation).

126. *See supra* notes 111-14 and accompanying text.

127. *See* Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491 (2005) (debunking any such strict divide).

diminution of their own privileged status vis-à-vis the child.[128] As other scholars have noted, the prevailing understanding of caregiving rests on a racialized and class-based hierarchy that values interactions with children depending on who performs them.[129] Thus, even when mothers working outside the home and nannies perform the same caregiving tasks at different times of the day, we tend to use terms like "quality time" for the former and regard the latter as more menial functions.[130] Thus, the "nanny rule" reflects and legitimizes this hierarchy—without questioning its foundations.[131] Similarly, drawing a boundary at paid caregiving allows the state to rely on subsidized foster parents without threatening the primacy of the family of origin.[132]

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128. Consider, for example, the language of the Supreme Court of Appeals of West Virginia in rejecting the arguments of a couple who had cared for the child and then asserted a shared parenting agreement and standing as psychological co-parents:

> Virtually any parent who must rely upon child care, whether to allow the parent to work, attend school, care for elderly parents, visit the doctor, or for any other reason, could potentially face a challenge from the child's care giver asserting the existence of a shared parenting arrangement despite the absence of any writing evincing such an intent by the parent. We simply cannot condone a ruling that would permit such pervasive interference with parents' custodial rights. . . .
>
> . . . [S]imply caring for a child is not enough to bestow upon a care giver psychological parent status. Were this the law of the State, any person, from day care providers and babysitters to school teachers and family friends, who cares for a child on a regular basis and with whom the child has developed a relationship of trust could claim to be the child's psychological parent and seek an award of the child's custody to the exclusion of the child's parent.

In re Custody and Visitation of Senturi N.S.V., 652 S.E.2d 490, 497-99 (W. Va. 2007); *see also* Jensen v. Bevard, 168 P.3d 1209, 1214 (Or. Ct. App. 2007) (explaining that care during many weekends, while a parent works, does not suffice to create a parent-child relationship under the statute). *See generally* Susan Frelich Appleton, *The Networked—Yet Still Hierarchical—Family*, 94 VA. L. REV. IN BRIEF 31 (2008), http://www.virginialawreview.org/inbrief/2008/09/01/appleton.pdf (2008) (exploring the implications of Murray's proposal for gender stereotypes and issues of race and class); Murray, *supra* note 79 (arguing for legal recognition of caregiving by nonparents); *see also* Hasday, *supra* note 127, at 516.

129. *E.g.*, Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J. L. & FEMINISM 51, 55-59 (1997); *see also* BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD 135-42 (Rutgers Univ. Press 2000) (1989).

130. *See* Roberts, *supra* note 129, at 57.

131. For a critique of this rule, see Pamela Laufer-Ukeles, *Money Caregiving, and Kinship: Should Paid Caregivers Be Allowed to Obtain De Facto Parental Status?*, 74 MO. L. REV. (forthcoming Mar. 2009) (manuscript cited with the author's permission, on file with author).

132. *See, e.g.*, Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 845-46 (1977). According to comments in the *Principles*, "Relationships with foster parents are . . . generally excluded, both because of the financial compensation involved and because inclusion of foster parents would undermine the integrity of a state-run system designed to provide temporary, rather than indefinite, care for children." PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 cmt. c.ii (2002); *see also id.* § 2.03 illus. 19-20.

The prospect of multi-parentage brings new urgency to confronting these largely unacknowledged departures from family law's professed commitment to child's interests, because—for example—expanded parental numbers could comfortably make room for a nanny or foster parent, in addition to a traditional couple. Even under a "rule of two," however, the embrace of functional tests raises questions that family law has not definitively answered.

B. Imposing Parental Obligations

Most of the supporters of multi-parentage write primarily as if the issue arises only from a possible surfeit of volunteers—adults seeking parental status and the concomitant opportunity to exercise parental rights.[133] And, in fact, in the Pennsylvania and Ontario cases recognizing three legal parents, all the adults were ready, willing, and able to perform at least the roles assigned by the courts.[134]

Yet, today's official preoccupation with paternity establishment, child support enforcement, and "personal responsibility"[135] indicates that family law, in privatizing dependency, makes duty and obligation significant—if not predominant—attributes of parental status. The effort

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133. For example, Kessler's analysis assumes multiple claimants vying for parental rights against a norm that limits such status to two. *See* Kessler, *supra* note 10, at 74 ("more potential claimants"). The only reference in text to the imposition of parental responsibilities on an unwilling adult appears in a sentence describing another scholar's work. *See id.* at 76 ("June Carbone has suggested that recognizing functional parents ex post through equitable doctrines unfairly imposes obligations on people who did not agree to them." (citing June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295 (2005))). Jacobs makes similar assumptions, referring frequently to parental "rights" and "claims of parenthood." *See, e.g.*, Jacobs, *supra* note 7, at 314. She considers, however, a possible obligation that might be imposed on those whom her expanded definition of "parents" would include, "perhaps donors [of genetic material for use in assisted reproduction] should be required to provide contact information, health histories, and perhaps even a picture." *Id.* at 337. To be sure, in interrogating "bionormativity" and the resulting preference for binary parentage, Baker devotes a considerable part of her analysis to state-imposed child support obligations and their rationale. *See* Baker, *supra* note 11, at 664-71. Yet, when she considers the possibility of more than two parents, her focus shifts to competing claimants, asserting parental rights. *See id.* at 680-81, 683, 697-98.

134. Jacob v. Shultz-Jacob, 2007 PA Super. 118, 923 A.2d 473 (Pa. Super. Ct. 2007); A.A. v. B.B., [2007] 278 D.L.R. (4th) 519, 522 (Can.), *leave to appeal denied sub. nom.* Alliance for Marriage & Family v. A.A., [2007] 3 S.C.R. 124. In fact, in the Pennsylvania case, appellant Shultz-Jacob sought more than she received. She sought sole legal and primary physical custody of all four children; the court below awarded and the appellate court affirmed shared legal custody for all four children and primary physical custody of one child to Shultz-Jacob, with primary custody of the other three going to Jacob. *Jacob*, 2007 PA Super. ¶¶ 3, 5, 25, 923 A.2d at 476, 482.

135. *See, e.g.*, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of 42 U.S.C.) (welfare-reform legislation with a stated purpose of encouraging "the formation and maintenance of two-parent families").

to determine which behaviors and functions should count under a functional test, therefore, must include criteria for identifying the circumstances in which family law will treat an unwilling adult as a parent for purposes of imposing parental obligations, particularly financial responsibility.

With regard to unwilling adults, of the three main legal incidents of parentage, financial responsibility has become a site where we often find arguments designed to disclaim a litigant's own parental status.[136] Of course, given children's dependency, parental obligations are not limited to financial duties but include direct caretaking or arranging therefor. Indeed, such responsibilities can be repetitive and exhausting and thus might be viewed as more onerous than "mere" financial obligations.[137] Thus, custody and decisionmaking might most accurately be conceptualized simultaneously as rights (to spend time with a child and to direct the child's upbringing) and as obligations (to provide care for the child during such time and to exercise one's judgment and supervision). When parents at dissolution make overlapping and competing claims for custody and decisionmaking, we envision rights at stake. Yet, when one or more parents disclaim interest in custody or decisionmaking, the issue evaporates—because family law compels neither custody nor decisionmaking by parents unwilling to exercise these incidents.[138] By contrast, family law routinely imposes financial obligations even on parents who seek to avoid such responsibilities and often on those seeking to extricate themselves from parental status altogether.[139] As a result, the case of the unwilling adult is invariably a case that concerns child support.

These observations suggest that a functional parentage test for unwilling adults presents financial responsibility as a distinct issue capable of analysis in isolation. Nonetheless, separate consideration of

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136. *See, e.g.*, Rivera v. Minnich, 483 U.S. 574, 576 (1987); Hubbard v. Hubbard, 44 P.3d 153, 154 (Alaska 2002); Elisa B. v. Superior Ct., 117 P.3d 660, 664 (Cal. 2005); People *ex rel.* J.A.U. v. R.L.C., 47 P.3d 327, 329 (Colo. 2002); T.F. v. B.L., 813 N.E.2d 1244, 1248 (Mass. 2004); Shondel J. v. Mark D., 853 N.E.2d 610, 612 (N.Y. 2006); Marriage/Children of Betty L.W. v. William E.W., 569 S.E.2d 77, 80-81 (W. Va. 2002).

137. *Cf.* Roberts, *supra* note 129, at 55-56 (noting tedium of "menial housework").

138. *See, e.g.*, James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationship*s, 11 WM. & MARY BILL OF RTS. J. 845, 858 (2003).

139. *See, e.g.*, Ill. Dep't of Healthcare & Family Servs. v. Warner, 882 N.E.2d 557, 560-62 (Ill. 2008) (divided court interprets statute to eliminate support duties after termination of parental rights only when the child is sought to be adopted); *In re* Carr, 938 A.2d 89, 96-97 (N.H. 2007) (imposing support duties notwithstanding agreement to relinquish all parental rights). *But see, e.g.*, *In re* T.K.Y., 205 S.W.3d 343, 353-54 (Tenn. 2006) (termination of parental rights ends future child support responsibilities).

the case of the volunteer or the claimant and that of the unwilling adult, in fact, proves difficult because the legal understanding of parentage reveals an assumption that couples rights[140] and obligations.[141] As sketched out below, by unsettling the framework in which the assumed linkage of parental rights and obligations ordinarily operates, the possibility of multi-parentage offers valuable insights even for the more common bi-parentage scenario.

The assumption coupling parental rights and obligations can be traced to a Blackstonian view of parentage as a reciprocal relationship with both social and financial components,[142] which once included the parent's right to the child's earnings and the child's duty, as an adult, to support the parent in old age.[143] In more modern incarnations, this "exchange view" treats parental obligations as the moral basis of parental rights.[144] Critics have raised several different objections to this conceptual framework, including its tendency to overemphasize parental entitlements[145] and its failure to fit a world populated by unmarried, divorced, and noncustodial parents, who might not get their money's worth.[146] Nonetheless, the linkage of parental rights and obligations largely persists[147] despite the disaggregation of the various components of parenthood now apparent from the provisions covering children in virtually any divorce decree and in any standard parenting plan, such as the one quoted earlier.[148]

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140. *See supra* notes 44-51 and accompanying text.

141. *See supra* notes 52-53 and accompanying text.

142. *See* Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, *in* DIVORCE REFORM AT THE CROSSROADS, *supra* note 122, at 166, 178-79; *see also* Baker, *supra* note 43, at 135 (quoting Locke and Hegel for similar principle).

143. *See* Krause, *supra* note 142, at 179-80.

144. *See* Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 297-98 (1988). This "exchange view" also imposes a duty of obedience on the child as the quid-pro-quo for the parent's duty to support the child. *See id.*

145. *See, e.g.*, *id.* at 298 (observing that "this view stress[es] entitlement over responsibility, autonomy over connectedness, self over others").

146. *See* Krause, *supra* note 142, at 180.

147. *E.g.*, Campbell v. Davison, 2008 WL 3582689 at *3 (Ala. Civ. App. 2008) (holding that termination of parental rights terminates obligation to pay future support); Smith v. Smith, 893 A.2d 934, 937 (Del. 2006) (rejecting a birth mother's objection to her former partner's standing as a de facto parent because of the birth mother's previous suit against her former partner for child support); *In re* Parentage of G.E.M., 890 N.E.2d 944, 956 (Ill. App. Ct. 2008) ("no court has authority to bifurcate parental responsibilities between affairs of the heart and financial affairs"); Dep't of Hum. Resources *ex rel.* Duckworth v. Kamp, 949 A.2d 43, 63-64 (Md. Ct. Spec. App. 2008) (holding that court erred in allowing a man to retain parental status while relieving him of child support); Mintz v. Zoernig, 2008 WL 5401327 at *2-*3 (N.M. Ct. App. 2008) (holding that sperm donor who assumes a parental role must pay child support, notwithstanding agreement to the contrary).

148. *See supra* note 78 and accompanying text.

Moreover, the assumption that parental rights necessarily entail parental obligations helps uncover an additional rationale for the "nanny rule,"[149] one problematic outer limit in a scheme that otherwise professes to make function and attachment determinative. If performing caretaking functions triggered parental status and parental status necessarily imposed parental obligations, then not only the families hiring nannies but also nannies themselves might find the employment unduly risky. So understood, the "nanny rule" emerges as a measure that protects nannies from unwanted financial consequences.[150]

The traditional coupling of rights and obligations thus limits the pool of candidates for legal recognition as parents to those adults who can *fairly* be required to assume parental duties, including financial support. On this issue of fairness, no clear consensus has developed even in bi-parentage cases, although various authorities have used estoppel, intent, agreements, and genetics, among other factors.[151] In some cases, child support emerges as a risk that a male assumes in exchange for the pleasure of engaging in sexual intercourse.[152] Arguably, a common thread connecting these different reference points is the idea of but-for causation, in the sense that bringing a child into the world (either coitally or through the intentional use of assisted reproduction) or creating a situation of dependency (by assuming responsibility to the exclusion of others[153]) justifies a legally imposed obligation, whether or not the individual so designated is willing to function as a parent. Both the *Principles*' definition of "parents by estoppel"[154] and California's *Elisa B.* case[155] reflect this idea. Moreover, this approach, far more often than not, produces two parents, not only because of the usual biology of

149. *See supra* notes 111-14, 126-32 and accompanying text.

150. *Cf.* Baker, *supra* note 43, at 135-36 (noting similar problems for stepparents); THE FUTURE OF FAMILY LAW, *supra* note 41, at 36 (noting similar problems for "a boyfriend or girlfriend" who lives with a parent).

151. *Cf.* Altman, *supra* note 52, at 176-80 (examining the problems with theories of causation, vulnerability, and consent as rationale for child support liability).

152. *See, e.g.*, Dubay v. Wells, 506 F.3d 422, 426, 430-31 (6th Cir. 2007) (rejecting a constitutional challenge to a support obligation for an unwilling father of a child conceived after the mother's misrepresentation about contraception); Straub v. B.M.T. *ex rel.* Todd, 645 N.E.2d 597, 598 (Ind. 1994); Wallis v. Smith, 22 P.3d 682, 682-84 (N.M. Ct. App. 2001); L. Pamela P. v. Frank S., 449 N.E.2d 713, 715-16 (N.Y. 1983).

153. *See, e.g.*, Shondel J. v. Mark D., 853 N.E.2d 610, 614 (N.Y. 2006).

154. *See supra* note 105 and accompanying text.

155. Elisa B. v. Super. Ct., 117 P.3d 660, 667, 669 (Cal. 2005); *see also* County of San Luis Obispo v. Nathaniel J., 57 Cal. Rptr. 2d 843, 844 (Ct. App. 1996) (holding mother's statutory rape of father does not relieve him from child support, when he was a willing participant in sexual intercourse). *But see* Baker, *supra* note 11, at 661, 664-71 (showing why causation does not provide satisfactory rationale for support obligations).

reproduction but also because of the limits on our imagination from habitually following a "rule of two."[156] In other words, we are so accustomed to stopping at two parents who have child support obligations that our concept of fairness does not readily include more.

Thinking through how to make room for more than two parents provides an impetus to reconsider the quid-pro-quo approach to parentage. Two alternative conceptualizations are worth considering, if only as thought experiments. First, we might decouple parental status from at least the financial obligations for children, perhaps continuing to impose such obligations on two (not necessarily willing) parents but allowing others to exercise parental prerogatives.[157] For example, consider the current legal treatment of grandparents, who in every state may seek court-ordered visitation under specified circumstances but without a reciprocal financial duty.[158] Although this regime distinguishes between parents and grandparents, grandparent visitation statutes illustrate how the law might allocate a discrete and disaggregated piece of the bundle of parental rights without any concomitant obligation to make child support payments. Similarly, in defining and recognizing "de facto parents," the ALI's *Principles* create a class eligible for some custodial opportunities, untethered to financial obligations.[159] Indeed, Baker has criticized the *Principles* because of their unexplained severance of parental rights and obligations and their resulting scheme of "[a]symmetric [p]arenthood," which enlarges the class of those eligible for custodial time with a child while retaining the traditional two-parent

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156. *See supra* note 17 and accompanying text.

157. *See supra* note 138. James Dwyer suggests that child support obligations could "be imposed on biological parents, even if they do not become legal parents." DWYER, *supra* note 7, at 267. He continues:

> In the United States, most people currently think of the financial support obligation as linked to parental status and rights, but this is morally and practically unsound, and most family law scholars today favor a revision of the law to disconnect the support obligation from parental rights. A financial obligation can be justified solely on the grounds of making people take responsibility for the consequences of their past actions. If this were not the case, the state would not currently foist parenthood on biological parents who do not want to be social parents and impose a support obligation on them whether they seek custody or visitation. There is therefore no need to compensate biological parents for their financial burden by giving them parental rights as well, and doing so unjustifiably sacrifices the welfare of the child.

Id. at 267-68. I am hypothesizing a similar approach, although I take issue with his empirical claim about the position of "most family law scholars today." *See id.* at 268.

158. *See* WEISBERG & APPLETON, *supra* note 45, at 795-98 (noting that all states have grandparent visitation statutes but that some have been reformed after *Troxel v. Granville*, 530 U.S. 57 (2000)).

159. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 3.02 & cmt. b (2002).

limit for purposes of child support.[160] As she points out, the *Principles* do not even use parallel definitions of "parent" for purposes of custody and child support, respectively.[161]

Alternatively, we might set aside the notion that support for dependents belongs in the private domain. Suppose the state provided financial support for children's material wellbeing, just as the state now provides for their schooling, as political candidates promise the state will provide for their healthcare,[162] or, as Professor Martha Fineman[163] and others[164] urge, the state should provide for caregiving. Dollars are fungible, regardless of their source, so we can imagine how the state could simply provide financial resources—no strings attached—without any risk to a child's day-to-day wellbeing, in contrast to the implications of envisioning a shift to the state of the other parental functions, namely physical custody and decisionmaking authority.[165]

Of course, to the extent that family law remains stuck in the traditional "exchange view" of parental rights and obligations, state-provided child support cannot occur in isolation.[166] Hence, Baker worries that public support for children could threaten a corresponding diminution of parental autonomy, with state conditions and supervision attached to the funds.[167] Although Baker might well be correct as a practical matter, as a thought experiment, a vision of public support,

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160. Baker, *supra* note 43, at 121, 128. Baker introduces this critique by observing the difficulty in pinpointing what makes someone financially responsible for a child. *Id.* at 121. Indeed, but for the *Principles*' exclusion of paid caregivers, this asymmetry might offer a way out of the problems revealed by the "nanny rule." *See supra* note 149 and accompanying text.

161. Baker, *supra* note 43, at 124-26 (comparing PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.03 with § 3.03).

162. *See, e.g.*, Michael Luo, *On Health Care, Affordability and Comprehensiveness*, N.Y. TIMES, Feb. 22, 2008, at A18.

163. *See generally* MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY (2004) (arguing that caretaking creates a collective social debt that the state should support through economic subsidies).

164. *See, e.g.*, ANNE L. ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS 75-78 (2004) (proposing caretaker resource accounts). Alstott goes further, exploring the possibility of an affirmative obligation by the state to provide equal material resources for children and for parents to provide "emotional and intellectual growth via continuity of care, and moral instruction, and cultural context." Anne L. Alstott, *Is the Family at Odds with Equality? The Legal Implications of Equality for Children*, 82 S. CAL. L. REV. 1, 29 (2008).

165. Obviously, one can argue that financial support cannot be isolated from other parental functions, because how much one spends on a child reflects one's choices about childrearing and hence implicates parental autonomy. *See, e.g.*, Downing v. Downing, 45 S.W.3d 449, 457 n.24 (Ky. Ct. App. 2001) (reciting this argument); *cf.* Davis v. Fed. Election Comm'n, 128 S. Ct. 2759, 2770-71 (2008) (explaining how campaign contribution limits implicate First Amendment).

166. *See supra* notes 140-48 and accompanying text.

167. *See* Baker, *supra* note 11, at 695-96; *see also* Alstott, *supra* note 164, at 20-25 (considering problems that ensuring material equality for children might entail).

with no restrictions attached, can liberate our understanding of who should be a parent from a quid-pro-quo assumption. Family law could then identify parents—in any number—based on other criteria altogether, including more serious consideration of the child's nonfinancial interests, needs, and attachments.

C. The Challenge of Shared Decisionmaking Authority

The portrait painted by some supporters of multi-parentage is that of the intact family—or the ongoing community.[168] As in the scenario in the Ontario case, *A.A. v. B.B.*,[169] when three (or more) parents are collaborating and the child is thriving, the case for multi-parentage becomes especially compelling. Further, the traditional doctrine of nonintervention generally protects functioning families from state intrusion.[170]

As shown by the opponents' position, illustrated by Marquardt's op-ed piece, however, the prospect of multi-parentage becomes much more controversial upon the community's dissolution.[171] Indeed, all signs indicate that the animosity, possessiveness, factual contests, and willingness to use children as pawns often seen upon the dissolution of traditional marriages arise with equal regularity upon the dissolution of same-sex and other nontraditional relationships. At dissolution, legal or biological parents often have attempted to dispute the non-biological parent's legal claim to a relationship with the child—notwithstanding earlier co-parenting agreements, second-parent adoptions, or freely chosen divisions of familial labor.[172] Departures from traditional norms do not obviate the sorts of controversies that often arise at divorce. As

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168. *See, e.g.*, Kessler, *supra* note 10, at 53-58.

169. [2007] 278 D.L.R. (4th) 519, 522 (Can.), *leave to appeal denied sub. nom.* Alliance for Marriage & Family v. A.A., [2007] 3 S.C.R. 124.

170. The classic example is *McGuire v. McGuire*, 59 N.W.2d 336, 342 (Neb. 1953), which held that public policy requires courts to refrain from determining "[t]he living standards of a family."

171. Marquardt, *When 3 Really Is a Crowd*, *supra* note 17, at A16; *see also* THE REVOLUTION IN PARENTHOOD, *supra* note 7, at 31.

172. *See, e.g.*, Adoption of Joshua S., 33 Cal. Rptr. 3d 776, 777 (Ct. App. 2005) (a later companion proceeding to *Sharon S. v. Superior Ct.*, 73 P.3d 554, 558 (Cal. 2003), in which the California Supreme Court first recognized second-parent adoption), *review granted, op. superseded & aff'd*, 174 P.3d 192, 194 (Cal. 2005); Wheeler v. Wheeler, 642 S.E.2d 103, 103 (Ga. 2007) (Carley, J., dissenting); A.H. v. M.P., 857 N.E.2d 1061, 1064 (Mass. 2006); T.B. v. L.R.M., 2005 PA Super. 114, ¶ 2, 874 A.2d 34, 36 (Pa. Super. Ct. 2005); Goodson v. Castellanos, 214 S.W.3d 741, 744-45 (Tex. App. 2007); Miller-Jenkins v. Miller-Jenkins, 2006 VT 78, ¶¶ 3-5, 912 A.2d 951, 956; Miller-Jenkins v. Miller-Jenkins, 661 S.E.2d 822, 824 (Va. 2008).

the parental community expands, moreover, the possibilities for such disputes increase,[173] a point that supporters explicitly acknowledge.[174]

As shown earlier, contemporary family law has created a structure that distinguishes among the three primary layers of the "parenthood pie"—physical custody, legal custody, and financial responsibility—to be divided and subdivided at family dissolution.[175] At a conceptual level, slices of physical custody and financial responsibility readily lend themselves to allocation among two or more parents because these incidents of parentage entail, respectively, time and money—both divisible commodities.[176] The routine accommodation in a divorce decree of, for example, grandparent visitation and college tuition from a nonparental source (the state or a scholarship), shows just how easily family law can look beyond the traditional bi-parentage model when time and money constitute the issues.

Although the statute spelling out the elements of a parenting plan, quoted earlier,[177] also shows how legal custody, or parental decisionmaking, can be divided (with, say, the child's medical care entrusted to one parent and education to another), allocating this particular incident presents greater challenges. First, the prospect of a group of adults, perhaps feeling post-dissolution antagonism, collectively trying to decide how to rear a child justifiably sets off alarms, among multi-parentage's supporters and detractors alike.[178] And group decisionmaking would logically follow from the current prominence in family law of *joint* legal custody,[179] which generally entails in the bi-parentage case jointly exercised or shared

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173. *See, e.g.*, Emily Buss, *"Parental" Rights*, 88 VA. L. REV. 635, 668-82 (2002).

174. For example, Professor Baker describes:

> The more people with claims to a child, the more courts have to make decisions with regard to what is in a child's best interest . . . . Whenever legal parents are separated, the court is responsible for resolving children-rearing disputes between them.
>
> . . . .
>
> . . . The more adults debate and clash over how to raise a child the less coherent the child's way of life.

Baker, *supra* note 11, at 675, 683; *see also id.* at 708 (noting that custody litigation is bad for children).

175. *See supra* note 77 and accompanying text.

176. *See* Marygold S. Melli & Patricia Brown, *Exploring a New Family Form—The Shared Time Family*, 22 INT'L J. L. POL'Y & FAM. 231, 232-33 (2008).

177. *See supra* note 78 and accompanying text.

178. *See* Marquardt, *When 3 Really Is a Crowd*, *supra* note 17, at A16; *see also supra* note 174 and quoted source.

179. *See* Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 985-90 (2005).

decisionmaking, not segmented or alternating decisionmaking.[180] Second, despite some limits,[181] decisionmaking authority emerges as a logically prior and more robust prerogative than either physical custody or financial responsibility because the United States Supreme Court has treated choices about visitation matters[182] and childrearing expenditures[183] as critical aspects of parental autonomy, which the Constitution presumptively protects.

Third, decisionmaking authority encompasses far more than, say, with whom the child visits or what type of school the child will attend. Even in many of its mundane components, childrearing constitutes an expressive activity, entailing choices that reflect one's values, style, and priorities and, in turn, creates a unique family culture.[184] The respect for pluralism that purports to undergird contemporary family law emphasizes such uniqueness.[185] Upon family dissolution, shared decisionmaking might offer the child the benefits of pluralism or

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180. *Cf., e.g.*, *In re* Marriage of McSoud, 131 P.3d 1208, 1214, 1218-19 (Colo. Ct. App. 2006) (finding no abuse of discretion in a court order giving the father authority over decisions regarding medical care and religion).

181. For example, except in rare circumstances presenting a risk of harm to the child, a parent granted sole legal custody cannot deprive another parent of all visitation, which courts have interpreted as a constitutionally protected liberty interest. *See* sources cited *supra* note 45.

182. *See* Troxel v. Granville, 530 U.S. 57, 66-67 (2000) (plurality opinion). The Court held unconstitutional, as applied, a state statute permitting courts at any time and under any circumstances to compel third-party visitation with a child, even over a fit parent's objection. In *Troxel*, which arose outside the divorce context, the mother would have permitted her daughters to visit with their deceased father's parents, but the grandparents sued, seeking an order for even more time with the children. *Id.* at 60-61.

183. For example, two of the leading cases recognizing a constitutional right to parental autonomy concerned educational expenditures. *See* Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923) (instruction in the German language); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) (private schooling).

184. Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1371 (1994) ("For parents and other guardians, civil freedom brings a right to choose and propagate *values*."); David A.J. Richards, *The Individual, the Family, and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1, 28 (1980) ("Child-rearing is one of the ways in which many people fulfill and express their deepest values about how life is to be lived. To this extent, one's children are the test of one's life and aspirations."); Merry Jean Chan, Note, *The Authorial Parent: An Intellectual Property Model of Parental Rights*, 78 N.Y.U. L. REV. 1186, 1187 (2003) (proposing "intellectual property model" that would "[anchor] parental rights in the First Amendment"). Laura Kessler pushes the point further, contending that caregiving can "be a form of political resistance or expression." Laura T. Kessler, *Transgressive Caregiving*, 33 FLA. ST. L. REV. 1, 2 (2005).

185. *See, e.g.*, Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 956 (1993); Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 617-18, 658 (1992).

"double exposure"[186] but also might pose risks of confusion and instability,[187] in addition to the conflict and impasse that hostile parents might create. As Marquardt quite vividly has contended in an analysis of the feelings of children after divorce, they often live "between two worlds,"[188] not just physically but also in terms of family culture. Thus, although classified as a distinct incident of parentage, decisionmaking (or "parental autonomy" in the constitutional vernacular) necessarily permeates the other incidents as well.

Consistent with such observations, psychoanalysts-child advocates Goldstein, Freud, and Solnit once famously argued that all authority should be vested in a single custodial parent after family dissolution, for the sake of the child, who needs to feel complete confidence and security in the adult in charge, free from second-guessing by a court or others; thus, they contended that one adult, the true psychological parent, should exercise *all* post-dissolution decisionmaking authority, with the power to exclude altogether even another parent from any visitation.[189] The rationale underlying the approach of Goldstein and his co-authors does not dispute that maintaining a relationship with another parent after family dissolution has value for the child; rather, the argument goes, court-ordered visitation or other external constraints on the custodial parent's childrearing discretion impose too great a cost on the child's wellbeing, which depends directly on the psychological parent's autonomy.[190]

Extremely controversial even when it first emerged during an era in which sole custody was the rule of the day,[191] the approach advanced by Goldstein and his co-authors has been all but buried as the fathers' rights movement gained momentum and joint legal custody became standard fare in most family courts.[192] Today, some states employ a presumption

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186. *See* Rosenbury, *supra* note 79, at 891 (advancing a theory that would promote "pluralism within the family as well as without").

187. *See, e.g.*, Eickbush v. Eickbush, 2007 WY 179, ¶ 11, 171 P.3d 509, 512 (Wyo. 2007).

188. *See generally* ELIZABETH MARQUARDT, BETWEEN TWO WORLDS: THE INNER LIVES OF CHILDREN OF DIVORCE (2005) (discussing the difficulty that children of divorce experience because of their parents' different styles, different views, and different residences).

189. GOLDSTEIN ET AL., *supra* note 85, at 38.

190. *Id.*; *see, e.g.*, Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 395, 401-03 (2000) (explaining theory developed by Goldstein, Freud, and Solnit).

191. For critiques, see, for example, Nanette Dembitz, *Beyond Any Discipline's Competence*, 83 YALE L.J. 1304, 1310-11 (1974) (reviewing JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973)) and Peter L. Strauss & Joanna B. Strauss, Book Review, 74 COLUM. L. REV. 996, 1001-03 (1974).

192. *See, e.g.*, DWYER, *supra* note 7, at 43; Marygold S. Melli, *The American Law Institute Principles of Family Dissolution, the Approximation Rule and Shared-Parenting*, 25 N. ILL. U. L.

of joint legal custody, others express a preference for it, and parental agreement no longer constitutes a prerequisite.[193] Some authorities favor joint legal custody over joint physical custody as the means of involving more than one parent in a child's post-dissolution life, perhaps because joint legal custody appears to pose fewer practical problems[194] or perhaps because this arrangement seems fairer to one who is paying child support. Consistent with this favored treatment of joint legal custody, the ALI's *Principles* direct a court to "presume that an allocation of decisionmaking responsibility jointly to each legal parent or parent by estoppel who has been exercising a reasonable share of parenting functions is in the child's best interests."[195] By contrast, the *Principles*' favored resolution of physical custody disputes, in the absence of parental agreement, is not joint custody but an "approximation" approach under which a parent's custodial responsibility for a child approximates the time the parent spent with the child while the family remained intact.[196]

Given the present state of the law, then, the advent of multi-parentage provides an opportunity to take a fresh look at the special challenges of shared decisionmaking. In the current environment, some courts have been willing to push joint legal custody ever farther by ordering decisionmaking to be shared among two parents and others such as grandparents.[197] Some authorities, however, exhibit hesitation about increasing the number of individuals sharing childrearing decisions. For example, just two of the three parents recognized in *Jacob v. Shultz-Jacob* received legal custody, with Frampton allocated only

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REV. 347, 352-53 (2005); *see also* Leslie Eaton, *Lawyer Who Fought Pledge Assails Courts on Custody*, N.Y. TIMES, Oct. 23, 2004, at B2. One authority states that a significant minority of states currently contain a preference for joint physical and/or legal custody. Dwyer, *supra* note 138, at 911.

193. *See, e.g.*, Schepard, *supra* note 190, at 406-07 (recounting history of "joint custody revolution"). *But see, e.g.*, Eickbush v. Eickbush, 207 WY 179, ¶ 11, 171 P.3d 509, 512 (Wyo. 2007) (noting that Wyoming disfavors joint custody absent good reason therefor).

194. *See* DWYER, *supra* note 7, at 228; Maldonado, *supra* note 179, at 985-88.

195. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.09(2) (2002); *see* Melli, *supra* note 192, at 349.

196. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.08(1). Approximating past allocations of authority promotes pluralism and private ordering by using, in the absence of present agreement, the way the family members themselves sought to structure their responsibilities at a time when they were able to collaborate. It also promotes a child's interests if we assume that adults involved in his or her life know more about what's best in the individual case than does the state. *See* Scott, *supra* note 185, at 617 (first formulating "an 'approximation' rule").

197. *See, e.g.*, *In re* R.A., 891 A.2d 564 (N.H. 2005) (upholding statute that would allow joint legal custody to parents and grandparent and remanding for consideration of additional facts in this case).

physical custody and child support duties.[198] Although the *Principles*' presumption in favor of joint decisionmaking responsibility for legal parents and parents by estoppel might be read to include more than two adults,[199] the black-letter language about the allocation that the court should make refers expressly to "one parent or to two parents jointly."[200] Further, the presumption for joint decisionmaking responsibility does not include de facto parents (thus again denigrating caretaking compared to providing financial support).[201] Finally, the *Principles* caution that the court "should limit or deny an allocation [of responsibility to a legal parent, a parent by estoppel, or a de facto parent] otherwise to be made if, in light of the *number* of other individuals to be allocated responsibility, the allocation would be impractical."[202]

I would venture that such hesitation about expansion signals the need for a deeper investigation of shared decisionmaking itself. True, the greater the number of parents the more the likelihood that one will disagree. But how many is too many? On what basis do we take for granted that two will work or that three will not? If the single, fully autonomous parent advocated by Goldstein, Freud, and Solnit represented too extreme a position, does the new norm of fully shared post-dissolution decisionmaking reveal a pendulum that has swung too far in the other direction?[203] The prospect of multi-parentage, by magnifying the problems of joint legal custody, calls attention to them even in the more traditional bi-parentage scenario, reinvigorating a conversation left unfinished in lawmakers' rush to embrace joint custody.[204] Although I predict that the attraction of shared physical custody is unlikely to lose its luster soon,[205] deeper exploration of a host

198. 2007 PA Super. 118, ¶¶ 21-24, 923 A.2d 473, 481-82 (Pa. Super. Ct. 2007).

199. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.09(2).

200. *Id.* § 2.09(1).

201. *See supra* note 108 and accompanying text. Although they do not benefit from the presumption, "[a] de facto parent may be allocated decisionmaking responsibility." PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.09 cmt. a.

202. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.18(1)(b) (emphasis added).

203. *Cf.* Baker, *supra* note 11, at 709-10 (discussing the difficulties of compelled involvement of a second parent and the shift from sole custody to equally shared parenting and now back to more limited rights for non-custodial parents).

204. *See* Dwyer, *supra* note 138, at 911 (reporting a "retreat" from joint custody presumptions in some states, without distinguishing legal and physical custody).

205. Indeed, today fathers' rights activists have been seeking to establish a constitutional right to a strictly equal division of the child's time, as well as shared decisionmaking authority. *See, e.g.*, Margaret F. Brinig, *Does Parental Autonomy Require Joint Custody at Divorce?*, 65 LA. L. REV. 1345 (2005); David D. Meyer, *The Constitutional Rights of Non-Custodial Parents*, 34 HOFSTRA L. REV. 1461, 1473-74 (2006); *see also* Melli & Brown, *supra* note 176, at 233 (examining the rise of "post divorce shared time custody arrangements"). *But see* Margaret F. Brinig, *Penalty Defaults in*

of issues remains overdue, including what shared decisionmaking entails in practice, how it plays out for children, and whether a child can maintain a meaningful relationship with more than one parent[206] even when only one controls childrearing decisions. The debate about multi-parentage underscores the importance of pursuing such issues.

D. Parentage Jurisdiction

Multi-parentage also poses challenges to current jurisdictional doctrines and calls attention to the need for additional development of the law even for cases involving only two parents. The preference for custody adjudications in the child's home state, first advanced in the Uniform Child Custody Jurisdiction Act ("UCCJA")[207] (and later included, with some changes, in the Federal Parental Kidnapping Prevention Act ("PKPA")[208]) reflects the understanding of such adjudications as intensely fact-specific assessments in which evidence about the child's day-to-day interactions and the availability of witnesses with knowledge of the child and his or her environment carry significant weight.[209] Hence, the drafters expressly incorporated a preference for a forum with "maximum rather than minimum contact"[210] with the child. Similarly, the prospect of custody modification, upon a showing of changed circumstances, sparked special rules in the UCCJA[211] and PKPA[212] designed to eliminate forum shopping and jurisdictional competition.

Although the UCCJA and PKPA were drafted with custody adjudications in mind, some courts relied on their approach in contested

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Family Law: The Case of Child Custody, 33 FLA. ST. U. L. REV. 779, 781-86 (2006) (tracking recent movement away from joint physical custody arrangements) [hereinafter Brinig, *Penalty Defaults*].

206. Advocates of shared parenting claim that it keeps a second parent, usually a father, involved in the child's life, in turn providing both financial and emotional benefits to the child. *See, e.g.*, Maldonado, *supra* note 179, at 984-85.

207. UNIF. CHILD CUSTODY JURISDICTION ACT § 3, 9 U.L.A. pt. 1a, at 307-08 (1999).

208. Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A(c)(2)(a) (2000).

209. *See* UNIF. CHILD CUSTODY JURISDICTION ACT § 1(a)(3), 9 U.L.A. pt.1a, at 271 (stating legislative purpose to "assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available").

210. *Id.* § 3 cmt., 9 U.L.A. pt.1a, at 309.

211. *Id.* prefatory note, 9 U.L.A. pt.1a, at 263; *id.* §§ 13-15, 9 U.L.A. pt.1a, at 559-625.

212. 28 U.S.C. § 1738A(d), (f), (h).

adoption proceedings.[213] The attention sparked by the "Baby Jessica case"[214] and some other high-profile controversies that similarly raised jurisdictional issues in the context of the relinquishment or other terminations of the birth parents' rights, prior to adoption of the child,[215] inspired the development of new rules. The UCCJA's successor, the Uniform Child Custody Jurisdiction and Enforcement Act, now makes clear that adoption is not governed by such custody jurisdiction statutes[216] with their special emphasis on the child's situation and on the prospect of modification.

Instead, the Uniform Adoption Act ("UAA") governs adoption matters.[217] The UAA situates adoption jurisdiction in several possible states: where the child has lived, where the prospective adopter has lived, or where the agency is located.[218] Once a proceeding has commenced, the forum's jurisdiction continues.[219] The jurisdictional principle at work in the UAA reflects that adoption is a once-and-for-all decree, not a ruling subject to modification upon a showing of changed circumstances, like child custody.[220] This approach also reflects the assumption that a ruling as to who *is* a child's parent (the result of an adoption decree) does not require the same fact-intensive evaluation necessary to decide between competing individuals conceded to be parents which one should have custody.[221] In other words, the different jurisdictional approaches are designed to reflect the distinctive questions posed in custody and adoption cases, respectively.

This two-track approach to jurisdiction fails to reflect the contemporary emphasis on functional parentage, however. A court

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213. *E.g.*, People *ex rel.* A.J.C., 88 P.3d 599, 605 (Colo. 2004); Adoption of D.N.T., 843 So. 2d 690, 704-05 (Miss. 2003); Adoption of H.L.C., 706 N.W.2d 90, 93 (S.D. 2005); *see also* Adoption of Asente, 734 N.E.2d 1224, 1231 (Ohio 2000) (stating that a majority of jurisdictions apply the UCCJA and PKPA to adoptions).

214. *In re* Clausen, 502 N.W.2d 649 (Mich. 1993).

215. *E.g.*, *In re* B.B.R., 566 A.2d 1032, 1034 (D.C. App. 1989).

216. UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 103, 9 U.L.A. pt.1a, at 660 (1997).

217. *See id.* § 103 cmt., 9 U.L.A. pt.1a, at 660-61; Herma Hill Kay, *Adoption in the Conflict of Laws: The UAA, Not the UCCJA, Is the Answer*, 84 CAL. L. REV. 703, 744-46 (1996).

218. UNIF. ADOPTION ACT § 3-101(a), 9 U.L.A. pt.1a, at 67 (1999).

219. *Id.* § 3-101(b), 9 U.L.A. pt.1a, at 67-68.

220. *But see* People *ex rel.* A.J.C., 88 P.3d 599, 603-04 (Colo. 2004) (deciding custody based on best interests after a failed adoption); UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 103 cmt., 9 U.L.A. pt.1a, at 661 (explaining that courts must address custody after denying an adoption).

221. Naomi Cahn has recognized how these issues often become intertwined on the merits. Naomi R. Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L.J. 1, 58 (1997).

having personal jurisdiction over the adults with interests at stake[222] can determine parentage once and for all based on adoption, a DNA test,[223] marital status, or even the act of giving birth,[224] regardless of the child's home state. By contrast, a parentage determination based on functional criteria would seem to require the same "maximum contact"[225] necessary to adjudicate custody between competing parents. Indeed, in several jurisdictions, application of a traditional formal rule, the presumption of legitimacy, now often depends on the best interests of the child.[226]

The well-publicized interstate dispute between Lisa Miller-Jenkins and Janet Miller-Jenkins after the breakup of their union highlights the distinction between—but frequent entanglement of—parentage and custody determinations.[227] The Vermont Supreme Court applied custody jurisdiction statutes, the UCCJA and the PKPA, treating the case as a custody and visitation dispute,[228] even though one fundamental point of contention concerned whether Janet was *a parent at all* to Isabella, who was conceived by donor insemination and born to Lisa during the women's civil union. Despite her petition conceding Janet's parentage,[229] in the later proceedings Lisa argued that she was Isabella's sole parent. In other words, Lisa contended that Janet was a mere third party or legal stranger.[230] And traditionally the law has regarded such

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222. Is in personam jurisdiction required for custody? The issue awaits definitive resolution. *See* May v. Anderson, 345 U.S. 528, 533-35 (1953); *id.* at 535-36 (Frankfurter, J., concurring); Russell M. Coombs, *Interstate Child Custody: Jurisdiction, Recognition, and Enforcement*, 66 MINN. L. REV. 711, 735-64 (1982). On the other hand, child support orders require in personam jurisdiction. Kulko v. Superior Court, 436 U.S. 84, 86 (1978). To the extent that an adjudication of parentage imposes financial obligations or deprives one claiming parentage of an asserted liberty interest, then a court deciding parentage must have in personam jurisdiction.

223. For example, in some jurisdictions, genetic criteria determine parentage in gestational surrogacy arrangements. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (using genetics and intent to resolve dispute); Culliton v. Beth Israel Deaconess Med. Ctr., 756 N.E.2d 1133 (Mass. 2001). Further, there is authority for distinguishing paternity cases from custody cases for jurisdictional purposes. *See, e.g.*, Harshberger v. Harshberger, 724 N.W.2d 148, 156 (N.D. 2006); *cf.* Huss v. Huss, 888 N.E.2d 1238, 1241-43 (Ind. 2008).

224. *E.g.*, UNIF. PARENTAGE ACT § 201(a)(1), 9B U.L.A. 15 (Supp. 2008).

225. *See supra* notes 207-10 and accompanying text.

226. *See* Appleton, *supra* note 24, at 234-35 n.35 (noting that twelve states make the presumption rebuttable in child's best interests).

227. Miller-Jenkins v. Miller-Jenkins, 2006 VT 78 ¶¶ 7-9, 912 A.2d 951, 957; Miller-Jenkins v. Miller-Jenkins, 661 S.E.2d 822, 824-25 (Va. 2008).

228. *Miller-Jenkins*, 2006 VT ¶ 9, 912 A.2d at 957 ("This case is, at base, an interstate jurisdictional dispute over visitation with a child.").

229. *Id.* ¶ 4, 912 A.2d at 956. For one possible explanation for this concession and its context, see April Witt, *About Isabella*, WASH. POST, Feb. 4, 2007, at W14 (reporting disagreement between attorney and client).

230. *Miller-Jenkins*, 2006 VT ¶¶ 41-42, 912 A.2d at 965-66; Miller-Jenkins v. Miller-Jenkins, 637 S.E.2d 330, 335-36 (Va. Ct. App. 2006).

third parties as unprotected outsiders whom parents can exclude from a child's life.[231]

In this case, Janet's claimed parentage might rest on an automatic rule of parentage, specifically Vermont's gender-neutral version of the traditional presumption of legitimacy, which makes the mother's partner the child's second parent[232]—one consequence of an approach that gives same-sex couples in civil unions all the same rights, responsibilities, and benefits accorded to married couples.[233] Alternatively, Janet's status might rest on functional criteria, including several factors mentioned by the court: the parties' expectations and intent, Janet's active participation in both prenatal care and Isabella's birth, and Janet's performance of a parental role as well as Lisa's explicit treatment of her as a parent.[234] Although the Vermont court considered these matters, it maintained its focus on the issue of custody jurisdiction.[235] Later, when a Virginia court of appeals decided to respect the Vermont decisions,[236] it described its action as a remand of the case "with instruction to grant full faith and credit to the *custody and visitation orders* of the Vermont court."[237]

To be sure, Lisa's petition, filed in Vermont, seeking to dissolve the civil union, listing Isabella as a child of the union, and requesting custody for herself and visitation for Janet,[238] conflated the issues of parentage, on the one hand, and custody and visitation, on the other. And certainly judicial economy provides a good reason for resolving related issues in the same court. Although related, however, the issues call for different jurisdictional analyses, and rules of "automatic parentage" versus functional tests for parentage only add to the existing disarray.

Thus, the prospect of multi-parentage highlights the need for a closer look at the different jurisdictional strands that govern parentage,

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231. Jacobs, *supra* note 7, at 311-12; *see supra* notes 49-51 and accompanying text.

232. VT. STAT. ANN. tit. 15, § 1204(f) (2007). *See Miller-Jenkins*, 2006 VT ¶ 43, 912 A.2d at 966.

233. *See* Baker v. State, 744 A.2d 864, 886 (Vt. 1999).

234. *Miller-Jenkins*, 2006 VT ¶ 56, 912 A.2d at 970.

235. *Id.* ¶ 9, 912 A.2d at 957.

236. Miller-Jenkins v. Miller-Jenkins, 637 S.E.2d 330, 332 (Va. Ct. App. 2006). Virginia law, however, explicitly rejects recognition of any unions other than male-female marriages under its Marriage Affirmation Law. *See id.* at 337; Miller-Jenkins v. Miller-Jenkins, 661 S.E.2d 822, 825-27 (Va. 2008) (applying the "law of the case" doctrine to Lisa's challenge to the Vermont decision in Virginia again).

237. *Miller-Jenkins*, 637 S.E.2d at 332 (emphasis added). I believe that the Virginia court correctly decided that the Vermont rulings should evoke full faith and credit. In fact, I believe that the Vermont court had proper jurisdiction over the parentage issues—but not necessarily because of the UCCJA or PKPA.

238. *Miller-Jenkins*, 2006 VT ¶¶ 3-5, 912 A.2d at 956.

on the one hand, and custody, on the other[239]—strands that now have become entangled even in bi-parentage cases like *Miller-Jenkins*.[240] Where might such efforts to disentangle these strands go? Family law long has used an approach that fragments jurisdiction depending on the precise issue to be decided, specifically the doctrine of divisible divorce.[241] Thus, perhaps parentage cases should be separated, with cases based on functional criteria subject to different jurisdictional rules than other cases. Alternatively, perhaps these jurisdictional problems invite a deeper exploration of family law's reliance on parental status as a construct—separate and apart from the incidents of physical custody, decisionmaking authority, and financial obligation. The following section includes the beginning of such exploration, raising questions in the larger context of the aspirations discernible in modern family law.

IV. ASPIRATIONAL FAMILY LAW, PARENTAL NUMBERS, AND PARENTAL STATUS

In recent years, family law has often confronted a clash between its aspirations, on the one hand, and on-the-ground realities and behavior

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239. *Cf.* Cahn, *supra* note 221, at 3 (clarifying that custody decisionmaking requires a two-step process: "the first step is defining and identifying the parent(s), and the second step is determining the child's best interests").

240. The excessively publicized litigation following Anna Nicole Smith's death provides a second illustration of my point. *See, e.g.*, Barry Wigmore, *Ex-Lover of Anna Nicole Is Her Little Girl's Father*, DAILY MAIL (London), Apr. 11, 2007, *available at* http://www.dailymail.co.uk/tvshowbiz/article-447792/Larry-Brikhead-revealed-father-Anna-Nicole-Smith-daughter.html. Both parentage and custody of baby Dannielynn were initially contested. Several men—Howard K. Stern, Larry Birkhead, and Prince Frederick Von Anhalt—all claimed to be the baby's father. *See id.* If the issue were to be determined exclusively on the basis of genetic evidence, then any court to which the interested adults might submit should have authority to resolve the issue, once and for all. On the other hand, if functional criteria were to play a role in determining which man is Dannielynn's father, as suggested by some of Stern's initial claims, then only a court in the Bahamas, where the child had been born and spent her young life—her home state—arguably should have authority to decide. Moreover, it remains an open question whether a court in the home state must have personal jurisdiction in order to divest a competing adult of parental rights. *See supra* note 222. For example, assuming U.S. principles apply, could the Bahamas recognize Stern at Birkhead's expense without personal jurisdiction over Birkhead? Finally, the public debate about the litigation assumed a two-parent regime so that, in addition to her deceased mother, Dannielynn could have only one father.

241. *See, e.g.*, Estin v. Estin, 334 U.S. 541, 549 (1948). This doctrine situates jurisdiction over dissolution of marriage and its consequences in different locations. Dissolution of marriage must take place at a spouse's domicile. Williams v. North Carolina, 325 U.S. 226, 239 (1945); Williams v. North Carolina, 317 U.S. 287, 302-04 (1942). Only a court with personal jurisdiction over both spouses can resolve the financial consequences of dissolution including child support. *E.g.*, Kulko v. Superior Court, 436 U.S. 84, 91 (1978); Vanderbilt v. Vanderbilt, 354 U.S. 416, 418-19 (1957). And, as noted, a court closely connected to the child—preferably in the child's "home state"—decides child custody. *See supra* notes 207-12 and accompanying text.

patterns, on the other.[242] The aspirations often prevail. For example, in the famous custody case of *Palmore v. Sidoti*,[243] the Fourteenth Amendment's anti-discrimination goals trumped "the reality of private biases and the possible injury they might inflict"[244] on a Caucasian child living with her mother, who began cohabiting with and later married an African-American man. Conceding that the "effects of racial prejudice" might well be "real,"[245] the Court ruled impermissible these otherwise plausible considerations under the best interests standard for child custody and overturned the decision below changing custody from the mother to the father. Additional examples of family law's embrace of its aspirations, even in the face of problematic evidence, appear in the judicial validation of prenuptial agreements treating prospective husbands and wives as if they have equal bargaining power,[246] the scholarly critique of divorce reforms addressing the different roles of men and women in marriage,[247] and Congress's decision in the Family and Medical Leave Act to adopt a gender-neutral leave law while conceding the gendered realities of family caregiving.[248]

Family law's aspirations not only depict a world that ought to exist. Such aspirations also animate a wide range of laws and policies unabashedly designed to shape choices and influence behavior—to help achieve this better world. The literature on family law's "channeling function"[249] discloses that the field has a teleology. Illustrations abound, including the benefits triggered by marriage (designed to encourage marriage),[250] abortion-funding restrictions (designed to discourage

242. Others have recognized this aspirational feature of family law. *See, e.g.*, Barbara Bennett Woodhouse, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525, 2526 (1994).

243. 466 U.S. 429 (1984).

244. *Id.* at 433.

245. *Id.* at 434.

246. *See, e.g.*, Simeone v. Simeone, 581 A.2d 162, 165 (Pa. 1990) (enforcing premarital agreements to demonstrate equal status of men and women).

247. *See, e.g.*, June Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1463, 1485 (1990) (criticizing approach to post-divorce support that reinforces gendered specialization in marriage).

248. 29 U.S.C. §§ 2601(a)(5), 2601(b)(4)-(5) (2000).

249. *See* Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992); *see also* Linda C. McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channelling Function of Family Law*, 28 CARDOZO L. REV. 2133 (2007).

250. *E.g.*, Hernandez v. Robles, 855 N.E.2d 1, 6-7 (N.Y. 2006) (describing benefits provided to married couples under New York law, designed to encourage heterosexual sex to take place within marriage).

abortion),[251] and family caps (designed to deter procreation by recipients of public assistance).[252] Meanwhile, scholars propose new state action to steer family conduct, such as the surnames spouses use.[253] Of course, sharp disagreements about the features of the world that ought to exist and the desired ends of this teleology help explain family law's place at the epicenter of the so-called culture wars. The following subparts consider some implications of multi-parentage for this "aspirational family law."

A. The Promise of Transgressing Gender

One argument supporting legally recognized multi-parentage claims that it will unsettle gender categories and the longstanding privilege enjoyed by heterosexuality. Specifically, Kessler writes that that collaborative childrearing practiced by some gays and lesbians[254] illustrate how "disconnecting family formation and reproduction from heterosexual relations[] . . . reveal[s] heterosexuality and biology to be mere symbols of a privileged relationship."[255] Kessler's notion builds on the vision of "transgressive caregiving" that she has explored elsewhere,[256] and she sees the opportunity for official recognition of multi-parentage as a "potentially transformative moment" that legal feminists should seize.[257]

At the risk of oversimplifying, I see this same challenge to gender norms at the root of the opposing view as well. In situating the disapproval of multi-parentage in a larger argument against same-sex marriage, against "[s]lippage in the [m]eaning of [f]atherhood and [m]otherhood[,]"[258] and against procreation other than by heterosexual marital intercourse, opponents make threats to traditional gender

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251. *E.g.*, Harris v. McRae, 448 U.S. 297, 325 (1980) (funding scheme "encouraging childbirth except in the most urgent circumstances[] is rationally related to the legitimate governmental objective of protecting potential life").

252. *See, e.g.*, Susan Frelich Appleton, *When Welfare Reforms Promote Abortion: "Personal Responsibility," "Family Values," and the Right to Choose*, 85 GEO. L.J. 155, 159 (1996).

253. *See generally* Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761 (2007) (arguing for reform of the law of marital names to encourage more egalitarian decisions).

254. For more details on such practices, see generally, for example, DIANE EHRENSAFT, MOMMIES, DADDIES, DONORS, SURROGATES: ANSWERING TOUGH QUESTIONS AND BUILDING STRONG FAMILIES (2005).

255. Kessler, *supra* note 10, at 73.

256. Kessler, *supra* note 184.

257. Kessler, *supra* note 10, at 77.

258. THE REVOLUTION IN PARENTHOOD, *supra* note 7, at 22.

classifications a recurring theme.[259] Thus, different views of the significance of gender reveal contrasting visions about the aspirations that family law should now pursue.

Given these two positions, I normatively side with Kessler; however, I find recent developments far more complicated and equivocal than her optimistic vision suggests. Specifically, in the illustrations of multi-parentage that Kessler describes from the gay and lesbian community, often the "additional" legal parent is one who brings a "missing gender" to the family.[260] I see as no coincidence the court's recognition of parental status for the sperm donor in *Jacob v. Shultz-Jacob*[261] because, without such recognition, the children would have two mothers but no father. *A.A. v. B.B.*,[262] although a bit different, reaches the same bottom line, because the court and the parties conceded that second-parent adoption would have given the second mother the desired legal status, albeit with termination of the genetic father's parental rights. So, here too, one can see the genetic father as the "additional" parent and the legal procedure necessary to include him as the innovative step. Indeed, such families themselves seem to share the assumptions that I attribute here to the courts.[263]

Of course, one familiar argument against same-sex marriage contends that children need a mother and a father.[264] But to what extent do we find such gendered notions at work even as parental numbers expand? Consider, for example, whether the court in *Shultz-Jacob* would have been equally willing to add a third mother to the official list of parents. Similar thought exercises help illuminate the ongoing resistance to the recognition of multiple fathers in cases in which the genetic father

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259. *See, e.g.*, *id.* at 14. *See generally* THE FUTURE OF FAMILY LAW, *supra* note 41 (condemning the movement of family law away from the view of marriage as a sexual union between husband and wife); *cf.* Tara Parker-Pope, *Gay Unions Shed Light on Gender in Marriage*, N.Y. TIMES, June 10, 2008, at F1 (reporting findings that, compared to heterosexual couples, same-sex couples have more egalitarian and satisfying relationships).

260. *See* Dowd, *Multiple Parents*, *supra* note 13, at 244 (discussing Fiona Kelly, who has made the same observation); *cf. In re* Sullivan, 157 S.W.3d 911, 919 (Tex. App. 2005) (concluding that a sperm donor has legal standing to seek adjudication of his paternity); Cynthia R. Mabry, *Who Is the Baby's Daddy (And Why Is It Important for the Child to Know)?*, 34 U. BALT. L. REV. 211 (2004) (addressing the importance to children's identity of their relationship with their father).

261. 2007 PA 118, ¶¶ 24-25, 923 A.2d 473, 482 (Pa. Super. Ct. 2007).

262. [2007] 278 D.L.R. (4th) 519, 525 (Can.), *leave to appeal denied sub nom.* Alliance for Marriage & Family v. A.A., [2007] 3 S.C.R. 124.

263. *See* John Bowe, *Gay Donor or Gay Dad?*, N.Y. TIMES MAG., Nov. 19, 2006, at 66.

264. *See, e.g.*, Maggie Gallagher, *What Marriage Is For*, *in* SAME-SEX MARRIAGE: PRO & CON: A READER 263, 269 (Andrew Sullivan ed., rev. ed. 2004) (condemning "unisex marriage," a concept suggesting that "law was neutral as to whether children had mothers and fathers").

of a married woman's child is someone other than her husband[265] and concerns expressed following the raid on the Texas polygamists' compound about the children's inability to identify their "own" mothers from among the several women they regarded as such.[266]

Indeed, even among the supporters of multi-parentage, some of the individuals who are candidates for inclusion in the parental community are genetic or biological parents who might or might not be fully contributing to childrearing.[267] Contrary to Kessler's expectations, then, might multi-parentage offer a new opportunity for family law to reinscribe the continuing importance of gender and bionormativity, even in this era of nontraditional families?

To the extent that supporters see in the recognition of multiple parents a means of unsettling the way we conventionally think about families and the significance of gender in families, then a critical question becomes the perceptions that multi-parentage creates. A story recounted by Diane Ehrensaft, a psychologist who works with families headed by gays and lesbians in California, offers one answer that highlights the complex and contextual nature of such possible perceptions.[268] Ehrensaft has reported the experience of a lesbian couple who along with their child and the man who provided the semen (and who, with the women, was participating in the child's upbringing) were anxiously traveling together through Utah, a state with a conservative reputation where they feared that their nontraditional family would encounter hostility or worse. To their surprise, they were treated as welcome visitors as they stopped at roadside restaurants along their route. They then realized that residents of Utah were accustomed to seeing families that looked like theirs—polygamous families.

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265. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 118 (1989) (plurality opinion) (rejecting dual fatherhood); Sinicropi v. Mazurek, 729 N.W.2d 256, 266 (Mich. Ct. App. 2006) (rejecting two fathers for child with a mother) *aff'd by* No. 281726, 2008 WL 2596217 (Mich. Ct. App. July 1, 2008). *But see* J.R. v. L.R., 902 A.2d 261, 266 (N.J. Super. Ct. App. Div. 2006) (dividing support obligation between mother's husband, who reared child, and biological father).

266. *See, e.g.*, Amy Joi O'Donoghue & Nancy Perkins, *FLDS Court Showdown Begins*, DESERET MORNING NEWS, Apr. 18, 2008, *available at* http://findarticles.com/p/articles/mi_qn4188/is_20080418/ai_n25352433 (noting that "FLDS children 'don't think that way' [and] describe having a father of the house and several mothers").

267. *See* EHRENSAFT, *supra* note 254, at 197-99; Bowe, *supra* note 263, at 68, 70; *see also* Baker, *supra* note 11, at 685-91; Jacobs, *supra* note 7, at 335-38. *But see, e.g.*, THE REVOLUTION IN PARENTHOOD, *supra* note 7, at 32.

268. Ehrensaft told this story during a lecture entitled "Psychological and Legal Aspects of Assisted Reproductive Technology (ART) and Adoption in GLBT Families," on May 19, 2007, in St. Louis, Mo. *See also* EHRENSAFT, *supra* note 254, at 10-11, 147-48.

What message should one take away from this story? Opponents of multi-parentage might find validation for their rhetorical habit of linking same-sex marriage, polygamy, and now multi-parentage.[269] Further, polygamy is often associated with heterosexuality and gender oppression,[270] values quite inconsistent with a fully realized version of Kessler's transgressive agenda.[271] On the other hand, the fact that some might see polygamy as a positive option for feminists, given the relationship that the "sister wives" share,[272] simply underscores the uncertainty and contingency of the inquiry.

Additional complexities and possible contradictions emerge from placing Kessler's agenda in a wider frame that includes our understandings and practices of caregiving, which remain saturated with gender and thus have become an object of law reform supported by many feminists. Consider, for example, the Family and Medical Leave Act,[273] adopted in part to facilitate family caregiving and to relieve some working parents from the necessity of choosing between their jobs and certain domestic obligations.[274] As the United States Supreme Court has emphasized in *Nevada Department of Human Resources v. Hibbs*,[275] the statute also has a significant aspirational component. It was designed both to combat gender stereotypes and to degender carework.[276]

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269. *E.g.*, THE REVOLUTION IN PARENTHOOD, *supra* note 7, at 28-31.

270. *See also* Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL'Y REV. 97, 129 (2005).

271. In *Transgressive Caregiving*, Kessler describes her thesis as "partial," and she notes that the caregiving practices she examines will not "always necessarily serve to disrupt oppressive majoritarian norms." Kessler, *supra* note 184, at 4, 9.

272. Some descriptions present modern polygamy as a feminist option that helps women "have it all" and frees them to spend time with other women ("sister wives") instead of having a domestic relationship exclusively with a husband. *See, e.g.*, Elizabeth Joseph, *My Husband's Nine Wives*, N.Y. TIMES, May 23, 1991, at A31; *see also* Emens, *supra* note 2, at 314-17; *cf.* Shayna M. Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, 16 CORNELL J.L. & PUB. POL'Y 101 (2006) (urging decriminalization); Maura I. Strassberg, *The Challenge of Post-Modern Polygamy: Polyamory*, 31 CAP. U. L. REV. 439, 440 (2003) (examining "postmodern polygamy").

273. 29 U.S.C. §§ 2601 *et seq.* (2000).

274. *Id.* § 2601(b) (enacted with a stated purpose of "balanc[ing] the demands of the workplace with the needs of families").

275. 538 U.S. 721 (2003).

276. The majority explained in this case:

> Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees.
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> . . . .

Such goals, even if they fail to go far enough,[277] should—like Kessler's vision—appeal to legal feminists.[278] Yet, whether multi-parentage will advance the degendering of carework remains unclear. Based on the probable gender of those who provide care for children when their parents work outside the home, one might plausibly worry that expanded rules of parentage could undermine this purpose by putting more pressure on mothers to find others (women) to join the parenting enterprise rather than inducing fathers to pitch in.[279]

From this vantage point, then, a practice that Kessler notes with approval, "othermothering" in African-American communities,[280] looks problematic and raises questions about whether caregiving by fathers would obviate the need for so much assistance from "othermothers." Alternatively, perhaps othermothering diminishes the importance of fathers. As these competing interpretations show, there are risks in oversimplifying how multi-parentage might challenge traditional gender norms and achieve some of family law's (contested) aspirations.

> By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men. By setting a minimum standard of family leave for *all* eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.

Id. at 736-37; *see also, e.g.*, Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in* Hibbs, 58 STAN. L. REV. 1871 (2006). One might conceptualize the goal here, to use David Cruz's terminology, as "disestablishing sex and gender." David B. Cruz, *Disestablishing Sex and Gender*, 90 CAL. L. REV. 997, 1009 (2002).

277. For example, one criticism is that such reforms do not reach gendered conduct within the family itself. *See, e.g.*, FINEMAN, *supra* note 163, at 164 ("The practice of gender equality exists only to the extent that individual married couples chose to embrace it, unsupervised by the state.").

278. Even when performances depart from traditional norms and expectations, Kessler does not necessarily find them "transgressive," despite suggestions in *Transgressive Caregiving*. Kessler, *supra* note 184. For example, she finds some cases recognizing two legal mothers "stuck" in a traditional allocation of gender roles—because one mother served as breadwinner and the other as homemaker. *See* Kessler, *supra* note 10, at 70-71 n.148 (commenting on *K.M. v. E.G.*, 117 P.3d 673, 677 (Cal. 2005)) ("[T]he *K.M.* decision . . . subtly protects the two-parent norm by treating a same-sex couple like a heterosexual couple *where the parties conform in significant part to heterosexual gender roles*." (emphasis added)). Arguably, any conjugal couple, regardless of gender, evokes the marital model and its patriarchal underpinnings. On the other hand, from a child's perspective, doesn't life with a mother-breadwinner drain traditional gender stereotypes and patterns of some of their power?

279. *See* Appleton, *supra* note 128, at 34.

280. "Othermothers are *women* who assist blood mothers by sharing mothering responsibilities." Kessler, *supra* note 10, at 57 (emphasis added). For one classic treatment of this practice, see generally CAROL STACK, ALL OUR KIN (Basic Books 1997).

B. Transforming the Understanding of Nonparents, Parents, and Parental Status Itself

The move toward expanded parental numbers comes on the coattails of recognition that individuals not traditionally classified as "parents" often perform parental functions, as noted earlier.[281] An important issue that follows, then, asks whether applying the label "parents" matters or whether the issues posed by multi-parentage remain the same as those explored in the more familiar cases and literature on so-called "third parties" who sometimes are accorded some parental prerogatives, such as visitation opportunities[282] or other "custodial fragments," as Professor Emily Buss calls them.[283] If the role that parents traditionally play can be disaggregated according to the list in a parenting plan, as shown by the illustrative statute above,[284] the value added by parental status itself becomes questionable.[285] Arguably, family law could achieve the same effect by considering past conduct, including conduct that results in genetic parentage, to assign narrow, specific rights and responsibilities regarding a child (along with the constitutional protection appropriate to the incident in question) to various individuals without denominating them "parents."

In my view, the name matters for several reasons even apart from the specific rights and duties that parental status typically entails. First, the label and the status it signifies have considerable expressive value. Even in a universe of expanded parental numbers, some adults in a child's life will *not* be his or her parents. In other words, even if parentage is no longer necessarily comprehensive and indivisible, it remains exclusive[286]—in the sense that it excludes.[287] We know from the controversy about same-sex marriage, even in states that accord all the benefits and responsibilities of marriage through civil unions and domestic partnerships, a so-called "mere label" can constitute valuable

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281. *See, e.g.*, Murray, *supra* note 79.

282. *See, e.g.*, Deborah L. Forman, *Same-Sex Partners: Strangers, Partners, or Parents? The Changing Legal Landscape and the Struggle for Parental Equality*, 23 FAM. L.Q. 23 (2006); John DeWitt Gregory, *The Detritus of* Troxel, 40 FAM. L.Q. 133 (2006); Grossman, *supra* note 49.

283. Emily Buss, *Children's Associational Rights?: Why Less Is More*, 11 WM. & MARY BILL RTS. J. 1101, 1102 (2003).

284. *See supra* note 78 and accompanying text.

285. *See generally* Katharine K. Baker, *Family, the Law, and the Constitution(s)* (Mar. 19, 2008), *available at* http://ssrn.com/abstract=1106423 (exploring constitutional implications of recognizing family rights without family status).

286. *See supra* notes 69-87 and accompanying text.

287. Michael Warner has made this argument about marriage. Michael Warner, *Beyond Gay Marriage*, *in* LEFT LEGALISM/LEFT CRITIQUE 259, 260 (Wendy Brown & Janet Halley eds., 2002).

currency and implicate constitutional protections.[288] Likewise, in the context of kinship care, relatives often choose to become a child's guardian, rather than to pursue adoption, because they see as important maintaining the official status of the child's "parent" regardless of who is performing day-to-day parental functions (although, admittedly, a multi-parentage regime could change such preferences by eliminating what appears to be an "either/or" decision).[289] Hence, a third parent differs in a meaningful way from a nonparent assigned similar rights and responsibilities.[290]

As a result, expanding the number of parents changes our understanding of some of those "third parties," whom the traditional regime has treated as nonparents, outsiders, or legal strangers[291]—without obliterating the nonparental status itself. More significantly, however, our understanding of parents necessarily changes as well.

Recognizing additional parents within the existing framework necessarily requires either more sharing (in the sense of jointly exercising) or more subdividing of parental rights and obligations. Accordingly, some supporters of multi-parentage suggest a hierarchy of legally recognized parents, with some having a more significant role than others. For example, Jacobs envisions a scheme of "relative rights for parents," according to adults who contribute more caretaking greater parental authority than that accorded to those who contribute less.[292] The ALI's *Principles* also reflect a hierarchal approach.[293] Yet, in examining such possibilities, Baker observes that "hierarchal parenthood" or "greater and lesser parenthood[]" stands at odds with family law's current preference for equality.[294]

Although it might run counter to equality values, however, a hierarchal approach to expanded parental numbers would help preserve an important aspect of our traditional understanding of parentage, which identifies those adults (usually two) who have a *preeminent* relationship with a given child.[295] "[G]reater . . . parenthood," to use Baker's

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288. *See In re* Marriage Cases, 183 P.3d 384, 401-02 (Cal. 2008).

289. *See, e.g.*, Sacha Coupet, *Swimming Upstream Against the Great Adoption Tide: Making the Case for "Impermanence,"* 34 CAP. U. L. REV. 405, 433 (2005).

290. *See* Baker, *supra* note 285.

291. *See supra* note 49-50 and accompanying text.

292. Jacobs, *supra* note 7, at 333.

293. *See supra* notes 107-08 and accompanying text.

294. Baker, *supra* note 11, at 708-09. *But see id.* at 714 (seeing hierarchal approach as way to accommodate more parents).

295. This preeminence is the gist of Clare Huntington's argument that expanded recognition of nonparental caregivers must respect important parental rights. Clare Huntington, *Parents as Hubs*,

phrase,[296] would convey at least comforting reminders of the now familiar construct, while "lesser parenthood" (parenthood lite?) would emerge as a new category applicable to those formerly known as "third parties."

By contrast, a more evenhanded treatment of multiple parents would, in fact, present a more significant departure from the status quo, disrupting this preeminence. The results of multi-parentage could include a diffusion of the current intensity of the legal parent-child relationship and increased opportunities for children to experience pluralism *within* the family.[297] But multiplicity by itself would not necessarily dilute the isolation and control of children that critics of the existing regime of parental "ownership" have lamented.[298] Consider the children growing up on the Yearning for Zion compound in Texas.[299] Despite their experience of being reared by several mothers,[300] their world remains closed and confining, at least from the perspective of an outside observer.

Such disruption and diffusion of parenthood might be steps along the way to more far-reaching reform that some scholars have contemplated, dismantling the status of parent.[301] Because the state is inextricably involved in deciding who is a parent and what parenthood entails,[302] dismantling the legal status would necessarily transform the practice and understanding of parenting, perhaps dismantling parental status altogether. What would that mean, given the dependency of children?[303]

To contemplate this question—to see whether we might even imagine such "dismantling"—we might first try to tease out the aspects of such dependency on parents that our laws produce and that seem to

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94 VA. L. REV. IN BRIEF 45 (2008), http://www.virginialawreview.org/inbrief/2008/09/01/huntington.pdf.

296. Baker, *supra* note 11, at 708.

297. *See* Rosenbury, *supra* note 79, at 891 (advancing a theory of childrearing that takes place between home and school to create "pluralism within the family as well as without").

298. *See, e.g.*, Laura A. Rosenbury, *Rights and Realities*, 94 VA. L. REV. IN BRIEF 39, 43 (2008), http://www.virginialawreview.org/inbrief/2008/09/01/rosenbury.pdf; Barbara Bennett Woodhouse, *"Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992).

299. *See* O'Donoghue & Perkins, *supra* note 266; *see also supra* note 266 and accompanying text.

300. *See* O'Donoghue & Perkins, *supra* note 266.

301. *See, e.g.*, Murray, *supra* note 79, at 453-54; Rosenbury, *supra* note 298, at 44.

302. *See* DWYER, *supra* note 7, at 26, 135.

303. *See* Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 851 n.46 (1985) ("In civilized society, young children remain dependent. That this dependency is on the child's parents is surely based on laws.").

make children more dependent than others.[304] Perhaps after stripping away the law-based ways that children depend on parents, we would be left with the particular dependency of gestation.[305] Even here, however, law plays a role, as we can see from situations in which a "gestational surrogate" is deemed not to be a parent;[306] hence, in these situations, whatever the dependency that gestation entails, it is not dependency on a parent.

Next, in pursuing this thought experiment, we could consider how children and their care could be entrusted, instead of to those whom the law recognizes as parents, to interested members of the community or a collective of friends,[307] as suggested by the Indian Child Welfare Act's deference to caregiving within a tribe[308] or by the slogan "It takes a village."[309] Or, parental status might be dismantled by making it all-encompassing and thus erasing any distinction between parents and others, as suggested by a recent advertisement for a new T-Mobile calling plan, which proclaims that "Now Family Includes Everyone."[310] Still, even with far more adults participating in a child's rearing, someone no doubt would need to orchestrate the participants, and the attributes that we currently associate with parental status might accrete

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304. *See id.* (noting that mothers and fathers too are dependent upon the community and theorizing that we could shorten the period of children's dependency "if, for example, property laws were not enforceable against children," who would be allowed to take whatever they needed).

305. *Cf., e.g.*, Appleton, *supra* note 24, at 282-84.

306. *See, e.g.*, *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Ct. App. 1998); *In re* Roberto D.B., 923 A.2d 115 (Md. 2007).

307. Consider Katherine Franke's thoughts about what it would mean to unseat "marriage [as] the measure of all things." Katherine M. Franke, *Longing for* Loving, 76 FORDHAM L. REV. 2685, 2689 (2008). She considers the possibility of substituting friendship for marriage:

> Breaking loose from the architecture of marriage and the hetero-normative domestic that it entails renders it more possible to imagine and then construct other forms of attachment that are not always already a betrayal or disappointment of marriage's demands and the expectations they engender. Interrupting marriage's preemptory normalization of the social field by substituting friendship in its place opens up a range of possible conceptions of the meaning of reproductive sex—between friends, between strangers, in fact, all reproductive sex. Escaping the social field of marriage enables new forms of commitment, responsibility, love, care, and relatedness other than those of idealized "mother" and "father."

Id. at 2704-05.

308. 25 U.S.C. §§ 1901-23 (2000); *see* Murray, *supra* note 79, at 419-22.

309. *See, e.g.*, HILLARY RODHAM CLINTON, IT TAKES A VILLAGE: AND OTHER LESSONS CHILDREN TEACH US (1996).

310. N.Y. TIMES, June 13, 2008, at A17 (full-page advertisement "introducing the T-Mobile unlimited family plan").

to that individual.[311] Alternatively, in envisioning what this dismantling could mean, we might imagine the not unpleasant experiences of the children as they grow up in a school-like setting—both parentless and knowing they will remain childless—in Kazuo Ishiguro's haunting dystopian novel, *Never Let Me Go*.[312]

Professor Melissa Murray raises the possibility of dismantling parental status in her examination of the legal consequences that might follow from parents' reliance on others for caregiving, but she pushes back because of practical difficulties, such as the predictable impact on tax and immigration law and, of course, family law.[313] I would hesitate for a different reason—because normatively I continue to believe that a system that prefers *parental* choices about how to respond to a child's dependency serves children better than the alternatives.[314] Put quite differently, although the children's environment depicted in the early scenes of *Never Let Me Go*[315] (before the reader understands the context) is pleasant enough, something important seems missing from their lives, and I suspect that the absence of parents inspires this sense of loss.[316] My position favoring the retention of parental status, however, concedes that this status is legally constructed; my position also leaves me considerable room to ask whom the law should recognize as a parent and to conceptualize this status in some modified size, shape, or form.[317]

Thus, although I see several features of the current construction of parental status that merit rethinking, I support the recognition of three parents in *Jacob v. Shultz-Jacob*[318] and *A.A. v. B.B.*[319] over the alternatives of recognizing just two or jettisoning parentage altogether. This bottom line, however, turns on my own value judgment about what

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311. Clare Huntington affirmatively advocates this role for "parents as hubs" even within a larger network of individuals whom the law might recognize for their contributions to caregiving. Huntington, *supra* note 295.

312. KAZUO ISHIGURO, NEVER LET ME GO (2005).

313. *See* Murray, *supra* note 79, at 453-54.

314. *See also* Buss, *supra* note 173, at 647; Buss, *supra* note 283, at 1104; Elizabeth S. Scott, *Parental Autonomy and Children's Welfare*, 11 WM. & MARY BILL RTS. J. 1071, 1077-79 (2003).

315. *See* ISHIGURO, *supra* note 312, at 6-12.

316. *See also* Alstott, *supra* note 164 (emphasizing family's role in fostering emotional and moral development, cultural identity, and values).

317. Professor James Dwyer, for example, has undertaken a lengthy exercise along these lines. *See* DWYER, *supra* note 7, at 253-90.

318. 2007 PA Super. 118, ¶¶ 24-25, 923 A.2d 473, 482 (Pa. Super. Ct. 2007).

319. [2007] 278 D.L.R. (4th) 519, 533-34 (Can.), *leave to appeal denied sub nom.* Alliance for Marriage & Family v. A.A., [2007] 3 S.C.R. 124.

best serves the interests of the children in these cases, a reference point repeatedly invoked as a guiding principle in family law.[320]

In concluding, the following Part considers the role of this best interests principle in shaping the recent discourse on multi-parentage as well as the role of this discourse in illuminating some particular difficulties in the best interests principle itself. In doing so, this Part explains my support for the outcomes in the three-parent cases.

V. CONCLUSION: MULTI-PARENTAGE AND THE PROFESSED CENTRALITY OF CHILDREN'S INTERESTS

Given the "best interests" mantra that every family law student learns,[321] it should come as no surprise that all the participants in the discourse about parental numbers invoke children's interests. As Baker concedes, however, children's interests are "incredibly difficult to ascertain . . . in the abstract."[322] *The Revolution in Parenthood* attempts to move beyond the abstract to make the case for "natural parents," specifically married biological parents who rear their children,[323] by quoting personal narratives and citing pro-marriage social science evidence.[324] Particularly poignant are the voices of children of assisted

320. *But see* DWYER, *supra* note 7, at 24, 67 (asserting that law does not prioritize children's interests).

321. *See, e.g.*, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.02(1) cmt. b (2002); *see also id.* § 202(1) rptr. notes cmt. b. Sometimes, the rationale for a legal rule affecting children will include a quite candid concession that values other than the child's immediate interests drive the result. The Supreme Court's pronouncement that the Constitution does not permit race-based custody decisions, regardless of the projected relevance to the child, makes this point. *E.g.*, Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (rejecting as a constitutionally permissible reason to change custody to child's father the predicted discriminatory peer pressure on a Caucasian child whose custodial mother married an African-American man); *see also supra* notes 243-45 and accompanying text.

322. Baker, *supra* note 11, at 682; *see also* JANET L. DOLGIN, DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE 239-43 (1997); Cahn, *supra* note 221, at 5-6, 9-14 (noting how the best interests test disguises assumptions and judgments about parental rights).

323. *See* THE REVOLUTION IN PARENTHOOD, *supra* note 7, at 15-19.

324. I call this evidence "pro-marriage" because, as in many current debates in the "culture wars," one can find studies claiming to provide support for both sides. *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 161-67 (2007) (noting disagreements within medical community about health risks posed by ban on "partial birth abortion"); Lofton v. Sec'y of Dep't of Family & Children's Servs., 358 F.3d 804, 824-26 (11th Cir. 2004) (acknowledging conflicting data in unsuccessful constitutional challenge to Florida's ban on adoption by noncelibate gays and lesbians); *cf. In re* Adoption of Doe, 2008 WL 5006172 (Fla. Cir. Ct. 2008) (relying on expert testimony to invalidate Florida's ban on adoptions by gays and lesbians). Some have found deliberate political manipulation in the production of scientific evidence. *See* Michael Specter, *Political Science: The Bush Administration's War on the Laboratory*, NEW YORKER, Mar. 13, 2006, at 58, 59.

reproduction seeking knowledge about and contact with genetic parents.[325] Yet, while this report invokes such personal statements to solidify "the rule of two,"[326] competing narratives prompt supporters of multi-parentage to look beyond two[327] so that children can have it all—recognized and protected relationships with the several adults who have played important roles in their lives, from those with whom they have developed affective ties to those whose genetic material they have inherited. Indeed, the courts in both *Jacob v. Shultz-Jacob*[328] and *A.A. v. B.B.*[329] base their recognition of three parents on the interests of the children in question.

Certainly, this would not be the first context in which authorities have taken different positions on what legal arrangement best serves children. Children's interests have been cited as a rationale for protecting parental autonomy;[330] they have also been cited as a foundation for children's rights to challenge parental authority.[331] For years, children's interests were cited to support sole custody and unified decisionmaking after divorce (the view of Goldstein, Freud, and Solnit);[332] more recently, children's interests have been cited to support a preference for joint custody.[333] And now some push-back from that position has started to emerge.[334]

Perhaps a more candid analysis would present the best interests standard as a prominent example of aspirational family law,[335] which at a very general level captures how this legal system ought to work while ignoring its shortcomings. A more cynical view might describe references to the standard as a meaningless ritual or as a cover for value

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325. *See* THE REVOLUTION IN PARENTHOOD, *supra* note 7, at 17-19.

326. *Id.* at 32-33.

327. Jacobs, *supra* note 7, 336-38; *see also* Baker, *supra* note 11, at 687-89.

328. 2007 PA Super. 118, ¶¶ 24-25, 923 A.2d 473, 482 (Pa. Super. Ct. 2007).

329. [2007] 278 D.L.R. (4th) 519, 533 (Can.), *leave to appeal denied sub nom.* Alliance for Marriage & Family v. A.A., [2007] 3 S.C.R. 124.

330. MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS (2005); Buss, *supra* note 173.

331. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 241-46 (1972) (Douglas, J., dissenting in part); *see also* Emily Buss, *What Does Frieda Yoder Believe?*, 2 U. PA. J. CONST. L. 53, 56-57 (1999).

332. GOLDSTEIN ET AL., *supra* note 85, at 38.

333. HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 136-143 (1988); Maldonado, *supra* note 179, at 983-84.

334. Brinig, *Penalty Defaults*, *supra* note 205, at 781-86.

335. *See, e.g.*, GOLDSTEIN ET AL., *supra* note 85, at 53-54 (advocating as a more accurate description of the goal the "least detrimental available alternative").

judgments or political agendas that usually remain undisclosed.[336] Certainly, however, family law's invariable practice of imposing on unwilling adults only financial obligations for children—never visitation or decisionmaking responsibilities—belies any full-throated claim that family law prioritizes children's interests over adults'.[337] Other than child support, children get only what parents are willing to provide. There is no indication that multi-parentage is likely to challenge this unspoken baseline of adults' autonomy when assessing children's best interests.

Although this is not the place to recite a full critique or defense of the best interests standard, a few observations pertinent to multi-parentage are worth noting. First, the call for family law to respect children's needs and to reflect their experiences often fails to consider fully how the law itself and related norms shape those needs and experiences, as others have noted.[338] For example, opponents of multi-parentage assert that children want and need to be reared by married biological parents, and legal limits to effectuate this objective thus should follow.[339] Under an alternative reading, however, children feel marginalized, different, lonely, and frustrated when their family lives do not conform to a socially and legally constructed norm—so that legitimizing variations from the norm becomes a child-centered remedy.[340] In fact, the Supreme Judicial Court of Massachusetts invoked precisely such child-focused reasoning in ruling that marriage must be

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336. One can find countless criticisms along this line. Bartlett, *supra* note 144, at 303; Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS., Summer 1975, at 226, 260-61; *see also, e.g.*, Jon Elster, *Solomonic Judgments: Against the Best Interests of the Child*, 54 U. CHI. L. REV. 1, 11-21 (1987).

337. *See supra* notes 136-39 and accompanying text. True, one can envision substantial practical difficulties (even for the child's wellbeing) that would follow an order of, say, compelled visitation in a case in which the adult seeks to disclaim all relationship with the child. Nonetheless, the issue reveals how limited and contingent our understanding of children's interests remains. *But cf.* Maldonado, *supra* note 179, at 989 (proposing "Refusal of Parental Responsibilities" hearing for a parent to avoid exercising joint legal custody).

338. *See* Rosenbury, *supra* note 298; *see also, e.g.*, DOLGIN, *supra* note 322, at 33-39; Maldonado, *supra* note 179, at 930-37. *See generally* Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901 (2000) (exploring how law can affect marital norms).

339. *See generally* THE REVOLUTION IN PARENTHOOD, *supra* note 7 (advocating the preservation of the "two-person mother-father model" of parenthood).

340. *See, e.g.*, Holning Lau, *Pluralism: A Principle for Children's Rights*, 42 HARV. C.R.-C.L. L. REV. 317, 327 (2007).

open to same-sex couples—expressly attempting to alter through law reform the experiences of children growing up in such families.[341]

The dynamic relationship between family law and lived experience runs deep. For example, family law accords very different treatment to, say, a parent, a grandmother (whom every state recognizes to some degree through visitation statutes), and a nanny (whom family law treats as invisible).[342] This different legal treatment necessarily affects the expectations and experiences of the parent, the grandmother, and the nanny[343] and thus, in turn, the emotions and needs of the children in their care.[344] The governing rules not only influence conduct, as economists and family law's "channeling theorists"[345] have told us; they also affect feelings and self-perceptions—particularly for children, whose conduct choices are more limited than those of adult actors.

The reports from the Yearning for Zion compound in Texas, stating that children regard several women as their mothers and cannot identify the two adults whom we outsiders would call their "parents," show how the governing rules and norms affect the way one lives a life and sees the world.[346] Thus, the ability of family law to look beyond bi-parentage would reshape "reality" as it is experienced. The expressive value of parental status plays an important role in this experience.[347] Officially recognized multi-parentage families create a new norm and a new baseline—they would no longer seem "unfamiliar and disorienting," terms I used at the outset.[348] The pluralism that officially recognized multi-parentage families reflect might help family law achieve equality, not by treating everyone alike, but by signaling that the state values and

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341. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 964 (Mass. 2003); *id*. at 972 (Greaney, J., concurring); *see In re* Marriage Cases, 183 P.3d 384, 401, 433, 452 (Cal. 2008) (using similar reasoning); *see also* Appleton, *supra* note 270, at 130 (noting how same-sex marriage legitimates gender performances departing from the norm).

342. *See generally* Murray, *supra* note 79 (exploring the differing legal treatment for parents, grandparents, and nonparental caregivers); Roberts, *supra* note 129 (exploring the devaluation of menial household tasks).

343. *Cf.* Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 845-46 (1977) (examining the legally constructed and limited nature of the foster family).

344. *Cf.* ROTHMAN, *supra* note 129, at 135-44 (examining the experiences of those rearing children as parents and those rearing children as caregivers and thus exploring what it means to rear children).

345. *See supra* note 249 and accompanying text.

346. *See, e.g.*, O'Donoghue & Perkins, *supra* note 266; *see also* Emens, *supra* note 2, at 317.

347. *See supra* notes 286-90 and accompanying text.

348. *See supra* notes 87-88 and accompanying text.

respects diversity and that not all families must conform to an ideal rooted in very different assumptions.[349]

Second, multi-parentage reveals some valuable insights connecting children's interests and family law's channeling function. Professor Carl Schneider's classic examination of family law's channeling function focused on marriage and parenthood, typically understood as adult activities.[350] Consistent with this focus, examinations of family law's channeling function usually consider efforts to steer sexual desires and activities toward marriage, which provides a structure for managing the dependency that results from heterosexual intercourse's procreative consequences, whether intended or not.[351]

Despite the literature's focus on adults and their choices, however, channeling affects and is necessarily designed to affect children, even very young children. For example, abstinence-only sex education expressly aims to channel children.[352] In addition, children no doubt absorb the performances by other members of the community, both adults and more mature children, in response to channeling. That young girls want to grow up to be brides is far from an accident![353]

Family law's aspirations and express efforts to influence preferences and behaviors necessarily play a role in law reform. For example, the implications—no doubt, intended—of the rejection of gender stereotypes, articulated by Congress in the Family and Medical Leave Act[354] and by the Supreme Court in interpreting this statute,[355] include not only altered behaviors of employers and employees in the workplace and even at home[356] but also altered perspectives of children growing up in the reformed culture. More than their immediate experiences are affected, but also their values, goals, and visions for

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349. *See* Kessler, *supra* note 10, at 50-52; *cf.* Lau, *supra* note 340, at 335 (advocating pluralism as "the antidote to assimilation demands" and as an element in "children's rights jurisprudence").

350. Schneider, *supra* note 249, at 500.

351. Hernandez v. Robles, 855 N.E.2d 1, 6-7 (N.Y. 2006); *see also* McClain, *supra* note 249, at 2163-68.

352. Currently, federal funds are available to support sex education programs, but only if the programs promote exclusively abstinence from all sexual activity prior to marriage. 42 U.S.C. § 710 (2000).

353. *Cf.* Ginia Bellafante, *Even in Gay Circles, the Women Want the Ring*, N.Y. TIMES, May 8, 2005 (reporting greater popularity of same-sex marriage for lesbian couples, compared to gay male couples).

354. 29 U.S.C. § 2601 (2000). *See supra* notes 273-74 and accompanying text.

355. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 737 (2003). *See supra* notes 275-76 and accompanying text.

356. *See* Schneider, *supra* note 249, at 523.

their own futures.[357] To the extent one embraces the repudiation of gender stereotypes, these are positive moves and intended consequences.

Thus, in evaluating the emergence of multi-parentage, one should look beyond children's immediate experiences in specific cases and keep in mind family law's channeling function. When Kessler claims legally recognized multi-parentage can liberate family law from confining hierarchies based on gender, sexuality, and biology and I venture that we might discern in the cases a reinforcement of these values,[358] we should both consider how children might view these developments. Further, the opponents of multi-parentage no doubt have their sights set on the interplay between family law's treatment of parentage and family law's channeling function.

Third, by acknowledging family law's aspirations and channeling function in the context of the field's familiar encomium to the best interests of the child, the discourse on multi-parentage can help highlight an important "disconnect"—an ambiguity in "best interests" that results in frequent conversations in which the participants talk past one another. Family law's aspirations and channeling function look to the future and thus to children's wellbeing in general, including future generations of children. Yet, particular applications of best interests claim to be highly individualized and exquisitely fact-sensitive.[359] Occasionally—for example, in the controversy about transracial adoption—one can find acknowledgment of these two different understandings of "best interests."[360]

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357. Acknowledging the importance of role models is commonplace. *See, e.g*., Chambers v. Omaha Girls Club, Inc., 834 F.2d 697 (8th Cir. 1987) (unsuccessful challenge to dismissal from employment at girls club of single, pregnant employee deemed to be a poor role model); John McCormick & Mike Dorning, *Obama, Clinton Duel to a Duet: Ex-Foes Unite to Sing Each Other's Praises*, CHI. TRIB., June 28, 2008, at C1 (quoting then-Senator Obama: "Because of the campaign that Hillary Clinton waged, my daughters and all of your daughters will forever know there is no barrier to who they are and what they can be in the United States of America.").

358. *See supra* Part IV.A.

359. *See, e.g.*, *supra* note 209 and accompanying text.

360. *See, e.g.*, *In re* R.M.G., 454 A.2d 776, 795 (D.C. App. 1982) (Mack, J., concurring) (Commenting on the role of race, the judge notes: "In a custody or adoption proceeding, we are not concerned with the best interest of children generally; we are concerned, rather, with the best interest of THE child."). Likewise, in strict applications of the "nexus test," courts purport to determine whether particular conduct by a gay or lesbian parent has had an adverse effect on a child, rather than relying on generalizations about whether gay and lesbian parents serve children's best interests. *E.g.*, McGriff v. McGriff, 99 P.3d 111, 117 (Idaho 2004); *see also* Michael S. Wald, *Adults' Sexual Orientation and State Determinations Regarding Placement of Children*, 40 FAM. L.Q. 381, 434 (2006) (using a child-focused analysis to conclude that consideration of an adult's sexual orientation is likely to be harmful to children and generally should be irrelevant in placement decisions).

In the individual cases, *Jacob v. Shultz-Jacob*[361] and *A.A. v. B.B.*,[362] I have no doubt that the courts reached the correct results in recognizing three parents. The label "parent" mattered, because the law makes such titles important. The courts honored and respected the particular families—in which no one voiced opposition to parental status for any of the three adults in each case—and also legitimated the lived experiences of the children in question. Indeed, despite the criticisms of the opponents of multi-parentage,[363] they should find much to like in these particular outcomes because in each case the genetic father was formally brought into the family fold, resulting in legal protection for this relationship.[364]

When moving to a more general level, however, normative analysis becomes more difficult and contentious. A one-size-fits-all rule (what Baker dubs "[b]inariness for binariness' sake"[365]) strikes me as too blunt to constitute a child-centered rule about how many legal parents a particular child may have. Thus, I would reject a doctrine that determines parents by the numbers in the sense of making a numerical limit dispositive in all cases.

I favor a more pluralistic and nuanced approach that respects diversity among families and is sufficiently capacious to honor a given child's experience. The ability of family law to recognize more than two legal parents is consistent with such goals, even though giving lawmakers more authority and judges more discretion to decide when to do so entails significant risks—as frequently detailed in critiques of the indeterminacy of the best interests standard itself.[366] Thus, family law should remain open to the possibility that a child might have parents by the numbers, in the sense of numerous parents. Put differently, allowing recognition of more than two parents offers benefits for some individual children and opens up family law's channeling efforts by increasing and diversifying the valid paths for others to follow.

Nonetheless, if I were to shift my focus entirely from the individual children in *Jacob v. Shultz-Jacob*[367] and *A.A. v. B.B.*[368] to a more

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361. 2007 PA Super. 118, ¶¶ 24-25, 923 A.2d 473, 482.

362. [2007] 278 D.L.R. (4th) 519, 533-34 (Can.), *leave to appeal denied sub nom.* Alliance for Marriage & Family v. A.A., [2007] 3 S.C.R. 124.

363. Marquardt, *When 3 Really Is a Crowd*, *supra* note 17, at A13.

364. *See supra* notes 323-26 and accompanying text. It is not clear whether the supporters of bi-parentage would regard including a *gay* genetic father in the family fold as a benefit to a child otherwise being reared by a single mother or a lesbian couple.

365. Baker, *supra* note 11, at 685.

366. *See supra* note 336 and accompanying text.

367. 2007 PA Super. 118, ¶¶ 24-25, 923 A.2d 473, 482.

aspirational level of family law, I would probably give other issues priority on a child-centered agenda, including making child support a public responsibility[369] and revisiting the preference for joint decisionmaking after dissolution.[370] Indeed, completing the unfinished business of recent reforms[371]—and thereby developing as a larger frame a more normatively coherent family law—might well make the particular question of parental numbers a much less difficult and contested topic.

368. [2007] 278 D.L.R. (4th) 519, 533-34 (Can.), *leave to appeal denied sub nom.* Alliance for Marriage & Family v. A.A., [2007] 3 S.C.R. 124.

369. *See supra* notes 162-65 and accompanying text.

370. *See supra* notes 189-206 and accompanying text.

371. *See supra* Part II.