TO PROTECT AND DEFEND: ASSIGNING PARENTAL RIGHTS WHEN PARENTS ARE LIVING IN POVERTY

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INTRODUCTION

Professor Dwyer asked participants in this symposium to imagine a new way to identify parents at the birth of a child. His particular request to me was to imagine a system that puts the interests of the child first in the context of the many children who are born into poverty. As embarrassing as it must be to this very wealthy country, millions of children live in poverty,[1] so Professor Dwyer's question is a serious one. My effort here is to give it a serious answer.

My proposal centers on the birth mother because, in my view, doing what is good for young children usually means doing what seems best to the child's key caretaker. In the case of infants, the key caretaker is almost always the birth mother. Under my proposal, she is empowered to decide whether she will be the child's sole legal parent or whether she will designate another as her parental partner. If she decides to designate a partner, she can designate whomever she wants; she is not constrained by presumptions in favor of her spouse or the child's biological father. If she decides not to designate a partner, or if someone not designated wants to be designated, a court can overrule her decision only in narrow circumstances designed to protect her capacity to act in the child's best interests.

Over the next few pages, I attempt to explain how my proposal would affect current rules in regard to child support, illegitimacy, adoption, co-parenting grandparents, stepparents, and same-sex couples. I argue that the changes work to the benefit of most of the children who are born to low-income mothers. The solution I propose may seem reasonable to some and absurd to others; fortunately, the conventions of academic discourse allow that to happen. What is important is that we use our imaginations to make new solutions possible and that we all keep talking until we come to a solution upon which we can begin to agree.

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[1] For more information on children living in poverty, see KIDS COUNT, State-Level Data Online, http://www.aecf.org/kidscount/sld/databook.jsp (last visited Mar. 23, 2006).

I. PROPOSED STATUTORY LANGUAGE

1. Definitions

a. "Parent" includes the woman who gives birth to the child and the designated parental partner.

i. If the child is adopted, the child's adoptive parent or parents are the child's sole parent or parents.

ii. Each parent is the natural guardian of the child and bears all the responsibilities of a parent.

b. "Eligible person" includes:

i. the mother's partner through marriage or civil union;

ii. the child's biological father [except in the case of a sperm provider who has no claim to parenthood under applicable state law]; or,

iii. any other natural person who has provided the mother with significant material and non-material support during the pregnancy and after the birth of the child.

2. A child is the child of:

a. the woman who gives birth to the child; and

b. the person designated by the woman as her parental partner, if any.

c. The designation may occur before or after the birth of the child.

d. To make a designation, the woman must:

i. identify the partner on the form created for that purpose by the bureau of vital statistics of the state in which the child's birth is recorded and file the form with the bureau; and

ii. inform the designated partner of the designation by mailing a copy of the form to the last known address of the designated partner.

e. A woman may not be required to designate a parental partner.

f. A designation may be revoked if the woman

i. revokes the designation within thirty days after the birth of the child; and

ii. informs the designated partner and the bureau of vital statistics of her decision to revoke the designation within thirty-five days after the birth of the child.

iii. Notice of the decision to revoke must be mailed to the designated partner by mail to the last known address of the designated partner.

3. Person Not Designated as Parental Partner

a. After the child is born, but no more than sixty days after the birth of the child, eligible persons not designated as the parental partner by the child's mother may petition to be named parental partner.
b. After the petition is filed, the mother must be provided with an opportunity to consult with petitioner, with legal counsel, and with such other professionals whose advice she desires.
c. The mother may agree to designate petitioner as her parental partner unconditionally, may agree to designate petitioner as her parental partner with conditions, or may decline to designate petitioner.
d. If the mother declines to designate petitioner as her parental partner, the court may designate petitioner as her parental partner if, and only if:

i. petitioner provided the mother with substantial material or non-material support during the mother's pregnancy and after the birth of the child;

ii. petitioner has demonstrated a capacity to co-parent the child with the mother;

iii. petitioner has no history of using force or engaging in other unduly coercive conduct with respect to the mother; and,

iv. petitioner agrees to such conditions as the court deems necessary for the child's best interests.

e. If more than one person qualifies to be designated as parental partner of the mother, the court must decide which one to designate based on the best interests of the child.
f. Conditions that may be required by the mother and the court include, but are not limited to:

i. parental education and training;

ii. payment of child support;

iii. provision of information concerning petitioner's health, location, and identity; and

iv. custody and access, including, but not limited to, arrangements at the time the designation decision is made and whether petitioner will be permitted to seek changes in custody or access in the future.

4. Declining Designation as Parental Partner

a. A person designated as parental partner may decline the designation by notifying the mother and the bureau of vital statistics of his or her decision to do so.
b. Notification of the decision to decline must be mailed to the mother and the bureau of vital statistics no later than ten days after the person was notified of the mother's decision to designate the person.
c. If the person is the partner of the mother through marriage or civil union, or if the person is the biological parent of the child, the person remains liable for child support.

II. DESCRIPTION OF PROPOSAL

Under my proposal, the birth mother is the only person initially assigned as parent to the child.[2] The birth mother may decide to add a second person as a legal parent by filing a declaration to that effect with the state and notifying the designated person. Any person may be designated: the mother's husband, the biological father, the mother's partner, the mother's parent, or a friend of the mother are all eligible. Once designated as a parental partner, the person has all the rights and responsibilities of a parent. A designated parental partner may decline the designation if he or she does so promptly. A declining designated partner who is also the biological father, or the marital or civil union partner of the mother, remains liable for child support. Only in that situation is the mother required to establish marriage, civil union, or paternity; otherwise, the burden of proving marriage, civil union, or paternity is placed on the putative partner or father. If a mother declines to name a parental partner, she cannot be required to do so. This provision bars state governments from requiring the mother who receives public benefits on behalf of the child to establish the paternity of the child.[3]

If the birth mother designates a parental partner early in the child's life and changes her mind within the first month of the child's life, she may revoke the designation. After that time, she may not revoke her designation. The rationale is that, immediately after the birth of a child, a woman may experience ambivalence about her role and the role of others in the child's future. In addition, she may be subject to undue influence or even coercion about naming a parental partner. Just as in the case of adoption, therefore, she is given an opportunity to change her mind. Giving the birth mother an extended period within which to revoke, however, would not be good for the infant because of the need for the infant to be placed expeditiously with people who want to commit to raising the child. Further, if the mother designates a parental partner when the child is older, the child may develop a relationship with that person. Allowing the mother to revoke the designation, therefore, could prove harmful not only to the designated partner who relies on the designation but also to the child.

Under the proposal, certain people wanting to fill the role of parental partner may petition to be designated over the mother's objection. The category includes only the mother's marital or civil union partner, the child's biological father, and people who provided the mother with substantial material and nonmaterial support during the mother's pregnancy and after the birth of the child.

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[2] I am omitting, solely for the purpose of avoiding being side-tracked, the difficult issue of assigning parenthood when the genetic mother, gestational mother, and intended mother are not the same person.

[3] States may continue to assert the right to collect child support from already established legal parents where there is an assignment by one parent or a statutory claim against one or both parents.

The petition for designation must be filed quickly — within sixty days after the birth of the child. If a petition is filed, the proposal calls for giving the mother access to advice from a lawyer and members of other professions. She then has three options: agree to the designation of the petitioner, object to the designation, or agree with conditions. Permitted conditions include, but are not limited to, parental education and training, child support, and restrictions on access and custody, including contests of custody.

If the mother objects to designating the petitioner as a parent, the court may designate the petitioner if and only if the petitioner demonstrates that he or she has provided the mother with substantial material and non-material support, has no history of violence involving the mother, and has the capacity to co-parent with the mother. The court may impose conditions on the petitioner of the same sort as the mother can demand.

The proposal does not specify what evidence would be sufficient to demonstrate that a petitioner has the capacity to co-parent the child with the mother. It is anticipated that the showing would be similar to that made in cases where parents disagree about whether joint custody is appropriate.[4] At a minimum, as the proposal provides, a petitioner cannot succeed when he or she has a history of using force against, or engaging in other unduly coercive conduct with regard to, the mother. Beyond that minimum, the petitioner should be required to show that he or she has acted respectfully toward the mother, is capable of resolving conflicts in a cooperative manner, and is willing to consult fully about important parenting tasks and decisions.

III. RATIONALE

A. Interdependency Theory

Key to the proposal is the claim, articulated in several of my earlier articles, that doing well by children, at least when they are young, requires us to do well by their caretakers, usually their mothers. I call the idea "interdependency theory."[5] The theory is grounded in the reality that society does not raise children; parents or other caretakers raise children. Children are dependent on at least one adult for their care. If that person does a good job, all of society stands to benefit when the child matures

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[4] *See, e.g.*, W. VA. CODE ANN. § 48-9-209 (West 2005); Taylor v. Taylor, 508 A.2d 964, 970–75 (Md. 1986); Hughes v. Hughes, 560 A.2d 1145, 1153 (Md. Ct. Spec. App. 1989); AM. L. INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 2.11, 2.12 (2000).

[5] Karen Czapanskiy, *Grandparents, Parents and Grandchildren: Actualizing Interdependency in Law*, 26 CONN. L. REV. 1315 (1994); Karen Czapanskiy, *Interdependencies, Families, and Children*, 39 SANTA CLARA L. REV. 957, 957–58 (1999); Karen Syma Czapanskiy, *Parents, Children, and Work-First Welfare Reform: Where Is the C in TANF?*, 61 MD. L. REV. 308 (2002).

and enters adult society. If the person does poorly, the child is more likely to suffer the experiences that make successful transition into adulthood less likely.

Adults who are responsible for children live different lives from adults who do not have such responsibilities. Just as the child is dependent on the adult, the adult is dependent on others in society for material, emotional, social, and symbolic support. Society should not begrudge the resources because society is also dependent on the parent or caretaker to do the best job he or she can for the child. Interdependency theory predicts that the best outcomes for children occur when the parent or caretaker on whom they depend receives adequate support and respect for caretaking from the people and institutions on which the parent or caretaker depends in turn.

My proposal satisfies interdependency theory. It focuses on the person most likely to be the child's caretaker, the birth mother. It accords that person the autonomy to decide whether, with whom, and on what terms to partner as a parent. That autonomy translates into an opportunity to demand respect and resources for the caretaker for the benefit of the child.[6]

I agree with Professor Dwyer that we should be skeptical of the claims of some parents.[7] He and I disagree on which ones and how they should be handled. Under my proposal, the mother is the only person accorded the presumption of parenthood. Professor Dwyer denies that presumption to some birth mothers and permits the courts to determine if the mothers in some categories should be awarded legal parenthood.[8] Under my proposal, it is the right of the birth mother to designate a second parent. As in Professor Dwyer's proposal, she is not required to designate her husband.[9] She is permitted, however, much more latitude than Professor Dwyer proposes, since she can designate anyone and is not required to designate anyone.[10] Professor Dwyer would deny legal parenthood to some people who could be designated by the mother unless they satisfy a court of their suitability.[11] Further, Professor Dwyer would allow the court to designate a second legal parent over the birth mother's objection in many more cases than I would allow.[12]

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[6] Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415 (1991) (exploring how mothers and fathers differ under the law in their authority to demand autonomy, respect, and resources for themselves as parents); *see also* Marcia Carlson & Sara McLanahan, *Strengthening Unmarried Families: Could Enhancing Couple Relationships Also Improve Parenting?* (Ctr. for Res. on Child Wellbeing, Working Paper No. 2005-26-FF, 2005), *available at* http://crcw.princeton.edu/workingpapers/WP05-26-FF.pdf.

The notion that parents should have the right to enter into contracts about their joint parenthood and the many ways in which such contractual relationships already exist to define parents are explored by Professor Katharine K. Baker in *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1 (2004).

[7] *See* JAMES G. DWYER, THE RELATIONSHIP RIGHTS OF CHILDREN 254–57 (2006).

[8] *See id.* at 257–62, 266–67.

[9] *See id.* at 259, 265–66.

[10] *See* Part II, *supra*.

[11] *See* DWYER, *supra* note 7, at 259–62.

[12] *Id.*

My differences with Professor Dwyer flow from interdependency theory. Part and parcel of supporting the parent/caretaker of a child is respecting his or her autonomy and assuming, as a result, that he or she has more capacity than anyone else in the world to make decisions for the child that are beneficial to the child. In any individual case, that assumption may be false. Disproving it is the work of the neglect and abuse system, however. Since the assumption of capacity is right on vastly more occasions than it is wrong, I am willing to put it into play when deciding who the child's first legal parent should be.

Professor Dwyer argues that, in a limited set of situations, we can predict that the assumption of capacity will be false in a large percentage of the cases.[13] Rather than wait for a faulty abuse and neglect system to catch up with these parents later on, he would empower courts to deny parental status to many of them at the outset.[14] He is not proposing to disqualify automatically these men and women from parenthood because of his concern that depriving a woman of the hope of gaining legal parenthood of the child is an incentive for her to hide the pregnancy, avoid prenatal care, and otherwise engage in negative behavior during her pregnancy.[15] He sees the judicial proceeding through which she can gain legal parenthood as an adequate response to the disincentive.[16]

I could not disagree more. It seems essential to me that we respect the autonomy of parents; requiring them to justify themselves in court is as much a disincentive for women to respect themselves as parents as automatically depriving them of that right. This seems to me particularly true in poor communities where courts are viewed with the greatest distrust and fear, especially in light of a long history in most communities of using the neglect and abuse system to remove children largely because their families are poor.

B. Single Parenthood

Under my proposal, a mother is permitted to parent alone. The state cannot require her to change her mind. A court's authority to designate a parental partner is severely limited.

The principal benefit to the child of allowing a woman to be a single parent is security. After *Troxel v. Granville*,[17] it is clear that a parent who has no co-parent is insulated from a variety of threats to her custody and other aspects of parental authority. This autonomy is particularly important for women who live at or near poverty,

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[13] *See id.* at 256–57.

[14] *See id.* at 254–67.

[15] *See id.* at 271.

[16] *See id.*

[17] 530 U.S. 57 (2000) (holding that parenting decisions made by fit parents are due deference).

as most single mothers do.[18] They cannot afford legal help to defend themselves against custodial challenges or even objectionable claims to visitation; restricting the number of people who can mount such challenges protects not just the mother but also the child who is dependent on the mother for care and for financial support.[19] Sole parenthood relieves the mother from worry that a violent or abusive father can challenge her for custody. Even when protecting the child is not at issue, the child may suffer when a mother's custody is threatened because litigation itself is a distraction from parenthood, and children usually need the best their parents can give. Finally, some parents use custody threats as part of a system of control over the mother, not as a way to foster a parent-child relationship or otherwise help the child.[20]

I am assuming that few mothers would act irrationally when it comes to the emotional and financial interests of their infants. Therefore, few would decline to designate as their parental partner a husband, a civil union partner, or a sexual partner who is a likely source of material or non-material support.[21] Further, few will choose to parent alone because raising a child alone is no picnic. If a woman, knowing the negative consequences, decides not to designate a parental partner, it is probable that she has persuasive reasons for her choice. Perhaps her husband has subjected her to threats or violence or otherwise given her reason to believe he would detract from

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[18] David T. Ellwood & Christopher Jencks, *The Spread of Single-Parent Families in the United States Since 1960*, *in* THE FUTURE OF THE FAMILY 25, 26–27 (Daniel P. Moynihan et al. eds., 2004).

[19] *See* Elizabeth S. Scott, *Parental Autonomy and Children's Welfare*, 11 WM. & MARY BILL RTS. J. 1071, 1095 (2003). In recognition of the burdens of litigation on the children's household, the Court in *Troxel* did not remand the case for further proceedings at the trial level, although that would otherwise be customary.

[20] *See* Garska v. McCoy, 278 S.E.2d 357, 360–62 (W. Va. 1981).

[21] Indeed, the principal researchers in the fragile families study group report:

> One of the most striking findings . . . is the high level of motivation among new unmarried parents. At the time of their child's birth, half of unmarried mothers are living with the fathers of their children and another third are romantically involved with the fathers but living apart . . . .
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> . . . [T]he majority of unwed parents are optimistic about their future together. . . . Most fathers say they want to help raise their child and the overwhelming majority of mothers say they want the fathers to be involved.

Sara McLanahan & Irwin Garfinkel, *Strengthening Fragile Families* (Ctr. for Res. on Child Wellbeing, Working Paper No. 02-14-FF, 2002), *available at* http://crcw.princeton.edu/workingpapers/WP02-14-FF-McLanahan.pdf. In one of the study's locations, every mother "planned to put the father's name on the child's birth certificate and to formally establish paternity," and all the fathers wanted both that recognition and to establish formal paternity. Sara McLanahan et al., *Unwed Fathers and Fragile Families* 12 (Ctr. for Res. on Child Wellbeing, Working Paper No. 98-12, 1998), *available at* http://crcw.princeton.edu/workingpapers/WP98-12-FF-McLanahan.pdf; *see also* Kathryn Edin & Joanna M. Reed, *Why Don't They Just Get Married? Barriers to Marriage Among the Disadvantaged*, 15 FUTURE OF CHILD. 117 (2005).

her capacity to raise the child.[22] If she is right, her decision to keep her husband away from the child is, more likely than not, a decision that will benefit the child emotionally.[23] If she is wrong, she can designate him as her parental partner at a later time, either unconditionally or with conditions that give her a sense of security about his continued supportive conduct.[24]

My proposal stands in contrast to the marriage initiatives that have become integral to welfare reform and other public policy proposals whose advocates argue that marriage is an antidote to child poverty.[25] It may be true that children who are raised by their own biological parents tend to have somewhat better outcomes than children

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[22] *See* P. Lindsay Chase-Lansdale, *The Developmentalist Perspective: A Missing Voice*, *in* THE FUTURE OF THE FAMILY, *supra* note 18, at 166, 168 (finding high levels of domestic abuse in empirical and ethnographic studies of extremely low income families); Irwin Garfinkel et al., *Fragile Families and Welfare Reform: An Introduction*, 23 CHILD. & YOUTH SERVS. REV. 277, 283–84 (2001) (finding that fathers in fragile families study who were no longer romantically involved with the mothers were much more likely than the cohabiting fathers to abuse substances and report high depressive symptoms; fathers who were not available for interview were reported to have more physical and mental health problems than the fathers who were interviewed and, for example, were reported by mothers to be twice as likely to have been violent toward the mother).

[23] *See* Jane C. Murphy & Margaret J. Potthast, *Domestic Violence, Substance Abuse, and Child Welfare: The Legal System's Response*, 3 J. HEALTH CARE L. & POL'Y 88, 91 (1999); Maureen Waller & Raymond R. Swisher, *Fathers' Risk Behaviors in Fragile Families: Implications for "Healthy Marriages"* 23, 34, 35 (Ctr. for Res. on Child Wellbeing Working Paper No. 02-18-FF, 2005), *available at* http://crcw.princeton.edu/workingpapers/WP02-18-FF-Waller.pdf (finding that based on fragile families data, mothers of children whose fathers exhibited risk factors such as domestic violence, substance abuse, and incarceration more frequently terminated their own relationships with the fathers and monitored the fathers' relationships with children). "[T]here is evidence that in high-conflict families, children whose parents divorce experience better adult outcomes than those whose parents remain together . . . ." Wendy Sigle-Rushton & Sara McLanahan, *Father Absence and Child Well-Being: A Critical Review*, *in* THE FUTURE OF THE FAMILY, *supra* note 18, at 116, 127.

[24] For further exploration of the relationship between power struggles and the decisions made by single mothers in poverty to marry, see Ellwood & Jencks, *supra* note 18, at 50–52.

[25] *See generally* Wade F. Horn, *Marriage, Family, and the Welfare of Children: A Call for Action*, *in* THE FUTURE OF THE FAMILY, *supra* note 18, at 181; *cf.* Nancy Folbre, *Disincentives to Care: A Critique of U.S. Family Policy*, *in* THE FUTURE OF THE FAMILY, *supra* note 18, at 231; Frank F. Furstenberg, *Values, Policy, and the Family*, *in* THE FUTURE OF THE FAMILY, *supra* note 18, at 267, 268; Adam Thomas & Isabel Sawhill, *For Love and Money? The Impact of Family Structure on Family Income*, 15 FUTURE CHILD. 57 (2005); Wendy Sigle-Rushton & Sara McLanahan, *For Richer or Poorer?: Marriage as Poverty Alleviation in the United States* (Ctr. for Res. on Child Wellbeing Working Paper No. 2001-17-FF, 2003), *available at* http://crcw.princeton.edu/workingpapers/WP01-17-FF-pub.pdf.

who are raised by single parents or one parent and a stepparent.[26] However, even if it were undisputed, that claim is not an adequate argument for a legal requirement that a second parent be established for every child or for a rule that the establishment of fatherhood occur through a marital presumption.[27]

More will be said on the first claim later, especially as it affects the lives of mothers and children who live in poverty. The marital presumption is supportable as a child welfare measure only if it can be demonstrated that it somehow supports the continuation of relationships between adults in ways that assist children. While marriage itself appears to have such a beneficial impact, why should it be assumed that the marital presumption adds to the benefit? In other words, would a man or a woman decide to marry in modern America solely because the child being carried by the woman would thereby become her partner's legal child? Possibly, in a few cases, but establishment of paternity by simple affidavit seems to do the same thing. It seems much more likely, particularly among poorer parents, that the decision to marry has little to do with legal parenthood.[28] On the other hand, according a marital presumption of fatherhood to the mother's husband can be detrimental to the child, as discussed below.

My proposal does not require that every mother in poverty parent alone. Instead, it gives her a choice. She can parent alone or she can choose a partner. If she chooses a partner, it can be anyone she wants, regardless of her marital status and any biological tie between the man and the child. That is, my proposal largely de-privileges marriage and biology as routes to fatherhood. The route to fatherhood lies not in status but in a simple, function-based test. A mother may decide to designate a man as her parental partner. If she does, the status attaches; marriage or biology alone are inadequate to establish or compel the establishment of the status. If she does not, the person seeking parental status must satisfy the mother or the court that he can function as a parent.

The function-based test should benefit poor children. Single parenthood has increased most in recent decades among women with relatively low income-earning capacity.[29] For example, in the mid-1990s, over forty percent of children whose

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[26] *See* Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, 15 FUTURE OF CHILDREN 75 (2005); Furstenberg, *supra* note 25, at 269–70; Wendy Sigle-Rushton & Sara McLanahan, *Father Absence and Child Well-Being: A Critical Review*, *in* THE FUTURE OF THE FAMILY, *supra* note 18, at 116.

[27] For a description of the working of the marital presumption, see Baker, *supra* note 6, at 12–13.

[28] Indeed, among poorer couples, the decision to marry is increasingly postponed until after a child has been born.

[29] Ellwood & Jencks, *supra* note 18, at 38 ("Single motherhood has spread faster among women with lower potential earnings.").

mothers had not finished high school were living with single parents.[30] For these mothers to establish legal fatherhood requires, at minimum, that the man sign the affidavit of paternity offered to him in the hospital.[31] The affidavit is then used to support a presumption of paternity in the paternity proceeding which follows in which the mother bears the burden of proof.[32] If he does not sign, the mother must initiate a paternity proceeding under which she must demonstrate the man's biological paternity.[33] Under my proposal, all the mother need do to create a legal father for her child is to designate him; unless he declines the designation, no further proceeding is needed.

If the mother is married at the time the child is born, she is likely to designate her husband as her parental partner.[34] If she does not, there is likely a reason for her decision that is important to her and that is likely to be important to the child. If the husband believes otherwise, he can petition for designation and the mother may be forced to accept him as a co-parent. In that situation, however, the father will have to meet the functional tests of the statute. If he may fall short as a parent, both the mother and the court can impose conditions that should increase the chances of his becoming a good father to the child, in financial and other ways.

The mother may be married to another man at the time she conceives a child with a boyfriend. This is more likely to be true when the woman lives at or near poverty because she may not have adequate resources to get a divorce when she is ready for one. Her estranged husband, enjoying a presumption of paternity over any child conceived or born during the marriage, can cause difficulties and delays in establishing legal fatherhood in the child's biological father. Under my proposal, the mother can designate her boyfriend as the child's father. While her husband can petition for a designation, the designation is not his as a matter of right.

Finally, after the child's birth, a mother may marry or become a partner with someone other than the child's biological father, again something that happens not infrequently in lower-income communities.[35] To empower the mother's husband to act as the child's father or guardian, the mother and her husband must seek a stepparent adoption. If the biological father objects, the adoption cannot be granted unless

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[30] *See id.* at 36–38.

[31] 42 U.S.C. § 666 (a)(5)(C)(ii) (2000) (requiring hospitals to provide putative fathers with ability to file paternity papers at hospital); *see also* IOWA CODE ANN. § 252A.3A (West 2000); MD. CODE ANN. [HEALTH-GEN.] § 4-208 (West 2005); VA. CODE ANN. § 63.2-1914 (West 2002).

[32] *See* DISPUTED PATERNITY PROCEEDINGS § 2.02 (5th ed. 2005).

[33] *Id.*

[34] *See* Furstenberg, *supra* note 25, at 273–74 (finding the desire of mothers to marry and to have the support of the father strong, but noting they want to "feel more confident about the prospects of marriage").

[35] Nancy Folbre, *supra* note 25, at 242; Bendheim-Thoman Ctr. for Res. on Child Well-being, Multiple Partner Fertility (Fragile Families Research Brief No. 8, June 2002).

the biological father's rights are terminated. Standards for termination vary from state to state, but, generally speaking, proof of abandonment, serious neglect, or abuse is required. The process can be time-consuming and expensive.

Under my proposal, stepparent adoption is unnecessary if the mother had not previously designated the biological father or anyone else as her parental partner. She can simply designate her spouse as her parental partner. If the biological father objects, it is up to him to petition for designation over the mother's objections. He might succeed, but, unlike the present situation, his parental status could be conditional to ensure that the child benefits from his designation.

Stepparent adoptions are generally granted by courts with little investigation into the suitability of the mother's choice of partner because it is assumed that the mother, who remains a legal parent after the stepparent adoption, will act in the child's best interests. My proposal takes that same presumption and expands it to the benefit of low-income women who are doing their best to parent but cannot easily afford the time and expense of a legal proceeding.

The importance of simplifying stepparent adoption became clear to me when many parents became fatally ill with HIV/AIDS in the 1980s and 1990s. As I saw in my practice, their attempts to plan for their children's security were often stymied by the legal rights of biological parents whose shared guardianship became sole guardianship once the caretaking parent died. This was not a problem when the surviving biological parent was involved in the child's life and was prepared to continue caring for the child after the principal caretaking parent became disabled by illness or died. When that was not the case, however, stepparent adoption would have been a route for keeping the child in the care of a familiar person after the death of a caretaking parent. Because stepparent adoption cannot occur without the consent or termination of parental rights of the child's other biological parent, many caretaking parents did not attempt it. In some cases, they were concerned that notifying the other parent of the child's situation would cause more legal and personal problems for everyone. In other cases, the mere thought of a judicial proceeding was just too intimidating. And others were unwilling to engage in litigation that would require them to say derogatory things about their former partner, either because of fear of retaliation or because they were not convinced that the person's poor parenting record was proof of poor personhood.

C. Child Support, Welfare, and the State

Under my proposal, a child's right to child support would change. Mothers would be permitted to parent alone, which would give the child only one parent from whom to seek support. It would also eliminate the opportunity for the state to force a mother to designate a person against whom a child support proceeding is undertaken by the state. Further, certain people who are currently liable for support would not be liable, while others who are not currently liable would become liable.

My proposal does not change the duty of the mother who, as legal parent, would owe the same duty to support as she does now. A parental partner designated by the mother or the court would also bear the duty of support. Some of these people do not bear the duty now because, as non-adoptive stepparents, they generally do not have an ongoing parental duty to the child. The mother's husband, civil union partner, or the biological father would bear no presumptive duty of support because they would have no presumptive parental rights. A duty of support would arise only if he or she is designated as a parental partner by the mother or the court, regardless of whether he or she accepts the designation. On its face, the concept of relieving certain people of the duty of child support seems contrary to the child's financial well-being because it may result in some children not being entitled to financial support to which they currently have a right. Nonetheless, I think it is a fair and justifiable proposal.

First, a mother may decide not to designate a person as a parental partner because she fears him. Child support enforcement proceedings may add to her vulnerability because such proceedings increase the probability that he will use violence against her.[36] Her self-protective decision is beneficial to the child because the child is better off not being a witness to family violence or being in a high-conflict family.[37] Under current law, a mother who receives certain public benefits can be required to cooperate in the child support proceeding despite the mother's concerns.[38] My proposal empowers some mothers to just say no.

Second, a mother's decision not to designate her husband or partner or the child's biological father as her parental partner may or may not make a difference to the child economically. If the mother designates someone else as her parental partner and that person accepts, the child is entitled to support from that person as well as the mother. Under current law, the mother cannot create such a duty in a third party except though adoption, a judicial process that requires the consent of the presumed or biological

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[36] Angela R. Fertig et al., *Child Support Enforcement and Domestic Violence Among Non-Cohabiting Couples* (Ctr. for Res. on Child Wellbeing, Working Paper No. 02-17-FF, 2004), *available at* http://crcw.princeton.edu/workingpapers/WP02-17-FF_Revised.pdf (concluding that stricter child support enforcement increases risk of domestic violence among non-cohabiting mothers receiving TANF who have not obtained a legal entitlement to child support); *see also* Angela R. Fertig et al., *The Effect of Child Support Enforcement on Bargaining Power Among Married and Cohabiting Couples* (Ctr. for Res. on Child Wellbeing, Working Paper No. 05-08-FF, 2005), *available at* http://crcw.princeton.edu/workingpapers/WP05-08-FF-Fertig.pdf; Naomi Stern, *Battered by the System: How Advocates Against Domestic Violence Have Improved Victims' Access to Child Support and TANF*, 14 HASTINGS WOMEN'S L.J. 47, 48–49 (2003).

[37] *See* Garfinkel et al., *supra* note 22, at 12.

[38] *See* Stacy L. Brustin, *The Intersection Between Welfare Reform and Child Support Enforcement: D.C.'s Weak Link*, 52 CATH. U. L. REV. 621 (2003); Bridget Remington, Comment, *It Takes a Father? Conforming with Traditional Family Values as a Condition of Receiving Welfare: Morals Reform and the Price of Privacy*, 32 STETSON L. REV. 205, 208 (2002).

father or a finding that he has abandoned the child. Judicial proceedings can be beyond the means of low-income or middle-income families and can disrupt a child's life, so they should be required only when absolutely necessary. A court's involvement is not likely to change the circumstances of a child's daily life, since the mother is free to live with the third party regardless of whether an adoption has been decreed. Further, unless and until the adoption is final, no duty of support arises in the third party selected by the mother to be her parenting partner. In the meantime, the child's financial welfare can be impaired.

Third, the proposal may not make a difference to the child's economic well-being because the mother's decision not to designate her spouse, civil union partner, or sexual partner as her parental partner is not final. If the person wants to be designated despite the mother's doubts about him or objections to him, he can offer her assurances of his intention to be a good parent to the child and partner to her. She and a court can condition his designation on an enforceable child support promise. This short-circuits the paternity and child support establishment proceedings and should make the mother's collection of child support more secure. Keeping a family out of court is almost always a benefit to the child.

Fourth, my proposal puts the mother in a strong bargaining position to gain financial support for a child. Today, a father's easiest route to legal parenthood is through the courts; he can sue or wait to be sued for paternity. If he wants to be a father and he is the mother's husband or sexual partner, his claim to paternal status is nearly impossible to deny.[39] If he does not want the status, he has no burden to disprove his presumptive fatherhood; the burden to prove his status is on the mother.[40] In neither situation does the mother have as much power as she would under my proposal to confer the status of fatherhood and ensure that it is awarded to a person willing to provide support to the child.[41]

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[39] The principal exception to that statement is where the child of a married mother was fathered by a different sexual partner. States are permitted to make the husband's presumptive claim for fatherhood irrebuttable. Michael H. v. Gerald D., 491 U.S. 110, 129–30 (1989). Under the Uniform Parentage Act, the competing claims to fatherhood are adjudicated using the child's best interests, similar to what I am proposing here. Uniform Parentage Act § 608, 9 U.L.A. 45 (2000). For a full description of the procedures for achieving legal fatherhood, see Baker, *supra* note 6.

[40] In many states, the burden is to demonstrate paternity by clear and convincing evidence, not merely by the preponderance of the evidence standard — a reminder that paternity proceedings have a history in the criminal law and that the testimony of mothers about their sexual partners was often considered untrustworthy. *See supra* note 32 and accompanying text.

[41] The interplay of child support enforcement, welfare, and the decision to marry is difficult to sort out, but it appears that strong child support enforcement may in fact discourage cohabiting low-income couples from deciding to marry. *See* Marcia Carlson et al., *The Effects of Welfare and Child Support Policies on Union Formation*, 23 POPULATION RES. & POL'Y REV. 513, 534 (2004).

Fifth, many fathers theoretically subject to a child support duty do not pay.[42] Despite many improvements, enforcement remains a difficult and time-consuming task. Further, exaggerated claims about the availability of child support helped to support the claims made for welfare reform that child support would provide an adequate substitute for public benefits in many cases.[43] Eliminating the right of the state to force a woman to establish paternity in someone she does not want as a parental partner would introduce more honesty into the system and help demonstrate that many low-income families with children need governmental support because the private support available to them is insufficient, even when coupled with their mothers engaging fully in paid employment.[44] It also seems likely that informal economic and social support offered by many low-income fathers and their families is more important to their children than the small amounts of child support the fathers can pay, especially when the child support often goes to reimbursing the state for public benefits rather than to the child's household.[45]

Sixth, there is a small but apparently growing group of cases in which men are relieved of paternal duties when they later find that the putative biological connection between them and the child does not exist.[46] The child support duty of course ends when the father-child relationship is found not to exist.[47] My proposal avoids this issue because the status of parental partner is not dependent on the existence of a biological tie between the parental partner and the child. Therefore, termination of the status cannot occur when a father learns of the absence of the biological tie or when a mother tries to eliminate an existing parent-child relationship because of the absence of a biological tie. Under my proposal, parental status turns more on function than on biology. Where a mother is prepared to share her parental rights and responsibilities

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[42] *See* Will Marshall & Isabel V. Sawhill, *Progressive Family Policy in the Twenty-First Century*, *in* THE FUTURE OF THE FAMILY, *supra* note 18, at 198, 212 (noting that although child support contributes over twenty-five percent of family income for poor children who get it, two-thirds of nonresident fathers of children in poverty do not pay formal child support).

[43] *See* Karen Syma Czapanskiy, *ALI Child Support Principles: A Lesson in Public Policy and Truth-Telling*, 8 DUKE J. GENDER L. & POL'Y 259, 259 (2001).

[44] *See id.* at 262, 266–67; Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 24 FAM. L.Q. 1, 24–28 (1990).

[45] *See* Garfinkel et al., *supra* note 22, at 282–83 (finding that the average unwed father in study earned about $17,000 a year and theoretically could contribute nearly $3,000 a year in child support; however, enforcing an order of that amount might drive fathers into underground economy).

[46] *See* Melanie B. Jacobs, *When Daddy Doesn't Want to Be Daddy Anymore: An Argument Against Paternity Fraud Claims*, 16 YALE J.L. & FEMINISM 193, 193–95 (2004); Paula Roberts, *Truth and Consequences: Part I. Disestablishing the Paternity of Non-Married Children*, 37 FAM. L.Q. 35, 51 (2003).

[47] In at least one case, repayment was ordered of child support paid before a paternity judgment was vacated. Mathison v. Clearwater County Welfare Dep't, 412 N.W.2d 812 (Minn. Ct. App. 1987).

with another, and that person agrees to enter into the partnership, neither partner should be able to use biology as an excuse to sever the resulting parent-child relationship on which the child depends.

D. Illegitimacy

My proposal eliminates the category of illegitimacy. That is, children of married parents and children of unmarried parents are treated exactly the same with regard to identifying a legal parent or parents. My proposal is intended to put to rest finally the issue of illegitimacy and the last vestiges of all claims that a child is entitled to different treatment, whether better or worse, because of the marital status of his or her parents.

One could regard this part of the proposal as trivial or, at best, symbolic, since the negative consequences of illegitimacy have declined over at least the last three decades. Symbolic claims can still persuade judges, however. For example, in Maryland, an unmarried father has the right to adopt his children over the mother's objections in order to legitimate them, even though doing so terminates the mother's rights.[48] However, a formerly married mother cannot adopt, even with the father's consent, because her adoption would render her children illegitimate.[49]

To me, the story is more than symbolic because the status of illegitimacy continues to have an impact on the lives of many children. The greatest impact is imposed on the non-marital children of American fathers by non-American mothers. Impoverished children of immigrant parents are the hardest hit by illegitimacy, as the parent's opportunity to confer citizenship on the child depends on the marital status of the parents.[50]

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[48] Bridges v. Nicely, 497 A.2d 142, 148 (Md. 1985) (discussing adoption of illegitimate child over mother's objection); Dawson v. Eversberg, 262 A.2d 729 (Md. 1970) (same proposition).

[49] Green v. Sollenberger, 656 A.2d 773, 778 (Md. 1995) (denying mother's petition even though father had given his approval because mother's husband at the time of the petition did not join in the petition and the adoption would have left the children "fatherless").

[50] *See* Nguyen v. INS, 533 U.S. 53, 57–60 (2001) (holding that illegitimate son of an American father and a Vietnamese mother was not a citizen and could be deported where the father had not legitimated son, even though the son lived with the father and had been a lawful permanent resident since age of six); *see also* Miller v. Christopher, 96 F.3d 1467, 1468, 1472 (D.C. Cir. 1996) (denying citizenship to an illegitimate daughter of an American father and a Filipino mother; holding that the statute imposing additional requirements for illegitimate children of American fathers was not unconstitutional); David A. Isaacson, *Correcting Anomalies in the United States Law of Citizenship by Descent*, 47 ARIZ. L. REV. 313 (2005); Manisha Lalwani, Comment, *The "Intelligent Wickedness" of U.S. Immigration Law Conferring Citizenship to Children Born Abroad and Out-of-Wedlock: A Feminist Perspective*, 47 VILL. L. REV. 707 (2002); Ashley Moore, Note, *The Child Citizenship Act: Too Little, Too Late For Tuan Nguyen*, 9 WM. & MARY J. WOMEN & L. 279 (2003); Melanie L. Shender, Note, Nguyen v. INS*: No, Your Honor, Men Are Not from Mars*, 36 U.C. DAVIS L. REV. 1023 (2003).

Some states continue to use the parents' marital status as a determinant of intestacy rights, with children of unmarried parents facing greater burdens in establishing their entitlement than children of married parents.[51] In addition, entitlement under intestacy laws often is connected to entitlement to public benefits needed by a child, such as worker's compensation[52] or social security benefits.[53]

E. Maternal Equality

Under the law as it stands today, there is no requirement that a father be recognized for a child of an unmarried mother, so long as the mother has sufficient financial resources to keep her off welfare and so long as she is careful about initiating her pregnancy without authorizing a paternity claim by the sperm provider. A woman who is married, who is poor, or who is not in a position to use an anonymous sperm bank is in the opposite situation. The woman's husband has a presumptive claim to paternity. If the woman is on welfare, the state can force her to sue her sexual partner for paternity and child support. And non-anonymous sperm providers can sue for paternity.

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[51] Estate of Griswold, 24 P.3d 1191, 1194, 1200 (Cal. 2001) (allowing inheritance by the father's family from estate of an illegitimate child where the father had acknowledged the child, even if the father did not have relationship with the child); Estate of Carter, 4 Cal. Rptr. 3d 490 (Cal. Ct. App. 2003) (holding that illegitimate children must be notified of probate proceedings where their identities are known; here, illegitimate children were dependent on decedent and known to administrator; finding that notice is not required where illegitimate children are not acknowledged or known); *In re* Estate of Ginochio, 117 Cal. Rptr. 565 (Cal. Ct. App. 1974) (upholding statute that distinguished between legitimate and illegitimate children for inheritance purposes when the putative father is decedent; finding the establishment of paternity for child support insufficient to establish inheritance rights); *In re* Estate of Miller, 524 N.W.2d 246 (Mich. Ct. App. 1994) (allowing illegitimate child to inherit from father's estate despite statute barring inheritance, as father had acknowledged her and paid child support); Miller v. Watson, 467 So. 2d 672, 675 (Miss. 1985) (allowing illegitimate child to inherit from grandmother's estate despite statute and the parties' stipulation that the child was the illegitimate child of decedent's son). *But see* Rainey v. Chever, 527 U.S. 1044 (1999) (Thomas, J., dissenting) (arguing that the father of an illegitimate child should not be allowed to inherit from the illegitimate child where the father had failed or refused to support the child and had not legitimated the child); Susan N. Gary, *The Parent-Child Relationship Under Intestacy Statutes*, 32 U. MEM. L. REV. 643 (2002).

[52] Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 165 (1972) (striking down Louisiana's workmen's compensation statute that denied benefits to illegitimate children when parents could not be married).

[53] Abkes v. Apfel, 30 F. Supp. 2d 1149 (N.D. Iowa 1998) (denying Social Security survivor benefits to an illegitimate child where the putative father was not listed on birth certificate, had not been adjudicated as the father, and had not been involved in the prenatal care of the child, even though the father spent time with the child in the three months between the child's birth and the father's death).

The difference among mothers who can legally parent alone and those whose sexual partners are recognized as fathers sounds like an issue of equity that affects adults, not children. Since this paper is about the best interests of children, therefore, it can be argued that the issue is irrelevant. I disagree. The heart of interdependency theory is the recognition that what affects a child's parent or caretaker affects the child. Little falls into the category better than the issue of whether the mother is permitted to parent alone or must accept a parental partner by operation of law.

The case of *Green v. Sollenberger*[54] illustrates my concern. A husband and wife divorced after she gave birth to three children.[55] After a number of years of struggle, during which the father rarely paid support[56] but during which he could challenge the mother for custody and visitation if he wished, the parents decided to stabilize the situation in the best way they thought available to them. With the father's consent, the mother petitioned for a decree of adoption, which was granted.[57] At some point prior to the adoption, the mother had become so poor that she qualified for welfare.[58] The state required reimbursement from the father for the benefits it paid to the mother.[59] The state's claim against the father was grounded in the mother's mandatory assignment of her child support rights to the state.[60] When the father asserted the adoption — and corresponding severance of his parental relationship with the child — as the basis for his refusal to satisfy the state's claims for reimbursement, the state successfully sued to set aside the adoption decree.[61] The appellate court's rationale included the claim that the children were deprived of legitimacy by the adoption and that the mother's husband should have joined in her adoption petition.[62] The result of the decision was the return to the status quo. The father was not going to pay child support voluntarily; the mother was not going to have the assurance that the father could not, in a moment of anger about the child support, sue her for custody and, regardless of whether he succeeded, use the litigation to disrupt the life she was building for the children.

By arguing that all mothers, regardless of economic or marital status, should have the right to parent alone, I am not arguing that all fathers are bad. What I am arguing is that the initial decision about whether a woman will be a better parent to her children if she is their sole parent is not a decision that the state should make for her. She is in the better position to decide whether her children will get more of

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[54] 656 A.2d 773 (Md. 1995).

[55] *Id.* at 775.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.* ("To receive public assistance, [the mother] was required to assign her right to obtain child support payments from [the father] to the State.").

[61] *Id.*

[62] *Id.* at 778.

what they need in terms of security and stability from her alone or from her working together with a parental partner. In few cases will she decide against sharing the work and struggle and joys of parenthood with a parental partner. In those few cases, some women will make the wrong decision. But the tradeoff is that, in the much larger group of cases, children will be well-served by their mother's decision.

I am also advocating that a woman's right to parent alone should not be unlimited. If she allows a parent-child relationship to develop between the child and the child's father or some other parental partner, then she should be made to stand by her decision and not permitted later to exclude that partner on the basis of her parental autonomy. When the child is an infant or about to be born, the mother is in the greatest need of financial, physical, and emotional support. When a person steps forward to provide such support, whether a husband, civil union partner, grandmother, or friend, and the mother accepts the support, the mother should be made to stand by her decision and not permitted later to exclude that partner on the basis of her parental autonomy. But where a spouse, civil union partner, or sexual partner has the opportunity to provide support to a pregnant woman or new mother and fails to do so, and the mother decides not to give him or her a second chance, my proposal would permit her the authority to exercise autonomy. Today, only wealthy, unmarried women can make that choice. They alone can be assured that their custody cannot be challenged by an uninvolved second parent, and they alone can share that sense of security with their children. Under my proposal, all mothers will have the same opportunity.

F. Same-Sex Parents

Because the birth mother can designate a parental partner, my proposal simplifies the process for recognition of the parental status of a woman's partner in a same-sex relationship. Under current law, in states that recognize co-adoption by same-sex partners, the non-biological partner gains parental status through an adoption petition.[63] In states that recognize parental status arising from civil union or marriage of same-sex partners, parental status is achieved through entry into such a relationship.[64] Neither is required under my proposal. In the even more difficult situation of people living in states that do not recognize co-adoptions, my proposal eliminates the conundrum of choosing between one partner having no legally-recognized parental relationship or seeking an adoption that terminates the rights of the birth mother.[65]

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[63] *See, e.g.*, Sharon S. v. Superior Court, 73 P.3d 554 (Cal. 2003).

[64] *See, e.g.*, VT. STAT. ANN. 15, § 1204 (2005).

[65] The problems of establishing parenthood in two same-sex partners are legion and well documented. *See* David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447 (1996); David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Issues in the Twentieth Century*, 33 FAM. L.Q. 523 (1999); Nancy D. Polikoff, *Lesbian and Gay Parenting: The Last Thirty Years*, 66 MONT. L. REV. 51 (2005); Nancy D. Polikoff, *The Impact of* Troxel v. Granville

The birth mother's designation of her partner does not mean that challenges are impossible: if the birth mother is married or in a civil union, or if the sperm was not provided through an anonymous process, a petition for designation can be filed, and the court will have to decide which of the proposed parental partners should be recognized. Lesbian mothers may be subject to bias by the court as a result of homophobia.[66] By limiting the opportunities for petitions to a small category of people and by making it difficult for any of them to qualify, however, I am trying to reduce the opportunities for a court to make a biased decision. Simplifying the process leading to legal recognition of two mothers is beneficial for their children because it ensures the security over the long haul of their relationship to each parent, provides for guardianship and support rights in two adults, and diminishes the need for litigation over the adoption early in a child's life.

While my proposal provides benefits to the children of lesbian partners, it is not quite as helpful to gay male parents — although it is better than current law. I am assuming that a common route for gay men to become parents together is for them to co-adopt a baby born to a woman who is inseminated with the sperm of one of the partners. Alternatively, the child may have been born to a woman who became pregnant by another man. Depending on the scenario, the outcomes may differ under my proposal.

In both scenarios, the birth mother can designate one of the gay men as her parental partner and thereby give him legal recognition as one of the child's parents. In the first scenario, where one of the gay men is biologically related to the child, his parental status is subject to challenge only if the woman is married or in a civil union at the time the child is conceived or born. The marital or civil union partner can sue for recognition, and it will be up to the court to determine whether recognition of the petitioner is better for the child. The problem can be avoided if the gay men and

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on Lesbian and Gay Parents, 32 RUTGERS L.J. 825 (2001); Mark Strasser, *Adoption and the Best Interests of the Child: On the Use and Abuse of Studies*, 38 NEW ENG. L. REV. 629 (2004); Leah C. Battaglioli, Comment, *Modified Best Interest Standard: How States Against Same-Sex Unions Should Adjudicate Child Custody and Visitation Disputes Between Same-Sex Couples*, 54 CATH. U. L. REV. 1235 (2005).

Important changes are happening in this area. In three cases decided by the California Supreme Court in 2005, children raised by same-sex partners were found to be the children of both partners for all purposes, including custody, visitation, and child support, even though none of the children had been adopted by the non-biologically-related partner and none of the adults had registered as domestic partners. *See* Kristine H. v. Lisa R., 117 P.3d 690 (Cal. 2005); K.M. v. E.G., 117 P.3d 673 (Cal. 2005); Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005).

In Washington State, the woman who helped raise the biological child of her former lesbian partner was accorded full parental rights as a "*de facto*" parent over a strong dissent. *In re* Parentage of L.B., 122 P.3d 161 (Wash. 2005). My proposal appears to yield the same result in each case. The process, however, would be simpler and the outcome settled earlier in the life of the child.

[66] *See* Chambers & Polikoff, *supra* note 65, at 536–37.

the birth mother understand the consequences of her marriage or civil union and avoid the issue. In the second scenario, the birth mother's designation of one of the gay men as her parental partner can be challenged if the child's biological father petitions for recognition. Again, the court must decide whether the child's best interests are served by recognizing one man rather than the other.

In either of the petitioning scenarios, the gay men may be subject to bias on the basis of their homosexuality. This very troubling issue cannot be resolved fully by my proposal without undermining the authority of birth mothers in general. As with the situation of lesbian mothers, I am hopeful that the opportunities for a court to act out of bias are reduced by the boundaries within which it must work when it is tempted to override the mother's designation. Assuming that the birth mother designates one of the gay men as her parental partner, and no other candidate for designation petitions or prevails, the intended parents must still take another step to complete the process. The second father must petition to co-adopt the child. Presumably, the birth mother will consent to the adoption. As with lesbian parents under current law, where co-adoptions are not recognized by the state where the couple resides, the non-designated partner will be faced with the Hobson's choice of acting as a parent to a child with whom he has no legal relationship or seeking to adopt under a law that will terminate the parental rights of all preexisting parents, including the designated parental partner. This is a poor outcome; I think its resolution lies in the arena of the reform of adoption law rather than in the arena of reform of the law of parental recognition.

G. Correcting the Overreaction to Lehr, *etc.*

Beginning with *Stanley v. Illinois*,[67] the Supreme Court decided a number of cases concerning the rights of fathers of non-marital children. In several cases, the Court expanded the rights of non-marital fathers to participate in the decision of whether their biological child should be adopted. In each of these cases, the man's rights turned on the degree to which the man had participated in the rearing of the child in ways analogous to what the Court saw as the role of the marital father.[68] In no case to date has the Court decided what the rights of non-marital fathers should be in regard to infants whose mothers seek to have them adopted at birth. Most states have reformed their adoption laws to give biological fathers a role in that decision.[69]

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[67] 405 U.S. 645 (1972).

[68] Lehr v. Robertson, 463 U.S. 248 (1983); Caban v. Mohammed, 441 U.S. 380 (1979); Quilloin v. Walcott, 434 U.S. 246 (1978).

[69] *See* Laurence C. Nolan, *Preventing Fatherlessness Through Adoption While Protecting the Parental Rights of Unwed Fathers: How Effective Are Paternity Registries?*, 4 WHITTIER J. CHILD & FAM. ADVOC. 289, 300–01 (2005) (discussing state adoption law reforms requiring that unwed fathers be given notice before their children are adopted).

As the result of these reforms, critics have asserted, fathers are permitted to participate even when they have not been supportive of the mothers during birth and have no plans to take the child into their care should the adoption fail due to the absence of their consent.[70]

I think allowing more rights to non-marital fathers is, in general, a good thing for children. Expanding the rights of fathers — whether marital or non-marital — in the adoption of newborns is not in that category, however. My proposal would reverse that trend by giving the birth mother the right to designate her parental partner. If she declines to designate a partner or decides to designate as her partner only someone she intends to become the parent of her newborn along with a different partner (i.e., a proposed adoptive parent), then her decision can be overridden only if the person seeking designation has provided her with support and care before the child's birth. In other words, a biological father must earn his way into the decisionmaking moment with respect to the adoption of a newborn, just as the existing Supreme Court cases teach in respect to older children.

My proposal eliminates claims to decisionmaking authority by fathers — whether biological or marital — who have created a child with a woman whose needs they then ignore. When the woman has decided to undertake the risks of pregnancy alone, she needs the assurance that she will be empowered to make the decisions she thinks best for the child.[71]

My concerns are illustrated by the story of a botched adoption in which I represented the proposed adoptive parent. The child was born as the result of a rape for which the man was convicted. The mother was in poor health, both physically and mentally. She placed her child in the care of her mother, the child's grandmother. When the child was young, the mother consented to the adoption of the child by the child's grandmother. We argued that notice to the father and his consent to the adoption was not required by law because the pregnancy was the result of a rape. The court disagreed, under a fair interpretation of the state's law, which goes far beyond the protections for fathers' rights required by the Supreme Court.[72] The grandmother, fearful about the mother's mental stability, refused for a time to pursue the adoption because she feared what the father would do after being notified of the proposed adoption. In the meantime, the mother's steadfastness about her consent to the adoption varied depending on how she was feeling that week. In the end, the adoption never occurred. The child remained with the grandmother, but the grandmother's

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[70] *See* Nancy E. Dowd, *Rethinking Fatherhood*, 48 FLA. L. REV. 523 (1996); *see also* Elizabeth Bartholet, *Beyond Biology: The Politics of Adoption & Reproduction*, 2 DUKE J. GENDER L. & POL'Y 5 (1995); Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN'S L.J. 323 (2004); Nancy E. Dowd, Essay, *From Genes, Marriage and Money to Nurture: Redefining Fatherhood*, 10 CARDOZO WOMEN'S L.J. 132 (2003).

[71] *See* Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1161 (2003).

[72] *See Lehr*, 463 U.S. 248; *Caban*, 441 U.S. 380; *Quilloin*, 434 U.S. 246.

legal status as the child's only parent was left unresolved. As a result, whenever the mother's situation changes or her health deteriorates, she threatens to remove the child from the grandmother's care. While the grandmother tries to shield the child from the tumult, so far as I can tell, the child's sense of security is less than ideal — and for good reason. The child needs a caretaker who can protect her from harm; the law, by empowering the biological father to have a role in the adoption regardless of his history with the biological mother, has undermined the child's best interests.

H. Grandparents, Parents, and Kids

Among families in poverty, multi-generational support systems are not uncommon, particularly when a new child is born.[73] A classic example is described in the case of *Garska v. McCoy*.[74] Although the case is better known for its primary caretaker presumption, the facts illustrate a parenting strategy familiar to many young women who are in poverty when their first child is born: seeking help from members of the extended family.[75] In *Garska*, the mother was living with her grandparents when the baby was born.[76] The baby's ill health led the mother and her grandparents to conclude that adoption by the grandparents was in the child's best interests because the child could then benefit from health insurance available to the grandparents.[77] When the father was notified of the adoption action, he objected, despite having had insignificant involvement with the child prior to that time.[78] The adoption action was dropped.[79] The father's claim for custody was granted by the trial court[80] and overturned by the West Virginia Supreme Court in a decision establishing the primary caretaker presumption.[81]

Under my proposal, the mother could designate her grandfather as her parental partner. His standing as parent begins upon the designation. The biological father is entitled to petition for designation. Under the facts as described in *Garska*, it is unlikely that the court would have replaced the grandfather and designated the biological father as the parental partner over the mother's objection. First, it appears that

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[73] *See* Czapanskiy, *supra* note 5, at 1315–16.

[74] 278 S.E.2d 357 (W. Va. 1981).

[75] *See* U.S. Census Bureau, U.S. Dep't of Commerce, Examining American Household Composition: 1990 and 2000, at 27 (2005), *available at* http://www.census.gov/prod/2005pubs/censr-24.pdf (finding that multi-generational households grew from 3 million in 1990 to 4.2 million in 2000, a change of thirty-eight percent, and as a proportion of all households, households with three or more generations grew from 3.3 percent to 3.9 percent from 1990 to 2000).

[76] *Garska*, 278 S.E.2d at 359.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.* at 361, 364.

the father did not provide the mother with material or nonmaterial support during the pregnancy, and his support of the mother and child after the child's birth was minimal, not substantial. Second, since he did not make himself available to help the mother with the child, he cannot establish a capacity to co-parent with her through a history of conduct. He might be able to establish a capacity to co-parent to the satisfaction of many courts because he is a good person who is able to get along with others. However, he will have a hard time meeting the third criterion concerning coercive conduct toward the mother because he impregnated her when she was a teenager temporarily staying with her mother. Given her age and his "roommate" relationship with her mother, it is hard to describe their sexual relationship as the voluntary act of two adults.

Even if the father were to overcome the barriers to eligibility for designation, he cannot replace the grandfather as the designated parental partner unless the court makes a further decision that it is in the child's best interests for that to occur. Under the *Garska* facts, that outcome would be unlikely. The grandfather assisted the mother after the birth of the child, provided her with a home and support, and offered to adopt the child to make health insurance available. By contrast, the father showed little regard for the well-being of either the mother or the child. Only a court committed to an ideology of fathers' rights would come to the conclusion that giving the father parental rights and excluding the grandfather from that role is in the child's best interests. It will be much more difficult under my proposal than under current law for a court to exercise its bias in that direction.

CONCLUSION

Far too many children in the United States are born into poverty or experience poverty during their minority. Compounding the misery they may experience because of the indigency of their families, these children face hardships because the law recognizes the wrong people as their initial legal parents. In this article, I have argued that the initial assignment of parenthood should be limited to the birth mother. In most cases, she will decide to add the child's father as a parental partner. Giving her the autonomy to decline to do so, I argue, gives her opportunities to bargain for better conditions for the child and avoids creating legal rights in a person who is not, in her estimation, going to behave well as a parent.

The proposal is a radical one even though it is likely to affect the reality of few children. It is radical because it empowers single mothers. In my view, this empowerment is essential for the well-being of all children, but especially for children who are born into poverty. They are most in need of protection from unwarranted interventions by the state as well as by claimants for parenthood who may not have the children's best interests at heart. Under my proposal, birth mothers would have greater autonomy to decide whether to parent alone or with a partner or a grandparent, whether

a child should be adopted, and whether to seek child support. The child is provided with security that the relationship with the mother cannot be easily disrupted by someone who has no functional relationship with the child. The child is also protected from negative consequences associated with being labeled illegitimate.

If given the opportunity to protect their children and to advance their interests, most mothers, like most fathers and other caretakers, will do as well as they can. That is all we can ask, and, most of the time, it will be as close as we can come to what the child will need. Under my proposal, mothers and their parenting partners would be granted more opportunities to protect and defend their children; they need nothing less.