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Community Parenting

Laura T. Kessler*

I. INTRODUCTION

How does the law, or should the law, define parenthood? Traditionally, the legal category *parent* has been reserved for biological or adoptive parents. Significant social, economic, and scientific developments have strained this definition, however. Today's families are characterized by increased fluidity, a loosening of the state's hold on family life, and the delegation of caregiving tasks to individuals and institutions outside the formal, legal family.¹ These changes have sparked a debate about whether the law's traditional definition of parenthood should be expanded.

Some scholars, motivated by conservative religious values,² the benefits of certainty in the law,³ or constitutional privacy,⁴ advocate retention of status-based definitions of parenthood. Others, driven by

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1. See MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 3–4 (1981).

2. See, e.g., William C. Duncan, "Don't Ever Take a Fence Down": *The "Functional" Definition of Family—Displacing Marriage in Family Law*, 3 J.L. & FAM. STUD. 57, 77 (2001); cf. Lynn D. Wardle, *Deconstructing Family: A Critique of the American Law Institute's "Domestic Partners" Proposal*, 2001 B.Y.U. L. REV. 1189, 1228–29, 1233 (citing morality and tradition).

3. See, e.g., June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1295 (2005).

4. See, e.g., John DeWitt Gregory, *Family Privacy and the Custody and Visitation Rights of Adult Outsiders*, 36 FAM. L.Q. 163, 184–87 (2002).

equality concerns,⁵ less robust notions of family privacy,⁶ contract,⁷ and other theories,⁸ support definitions of parenthood expansive enough to encompass adults who function as “psychological parents”⁹ to children.¹⁰ Despite this split over whether the law should narrowly define parenthood, many people across the political spectrum seem to accept the prevailing legal rule that a child shall not concurrently have more than two legal parents.¹¹ Whatever their

5. See, e.g., Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. REV. L. & SOC. CHANGE 347, 358–59 (1996) (arguing that cultural diversity and rejection of the “omnipotent” mother call for maintaining children’s relationships with multiple caregivers); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 486 (1990).

6. See, e.g., David D. Meyer, *Partners, Care Givers, and the Constitutional Substance of Parenthood*, in RECONCEIVING THE FAMILY 60–65 (Robin Fretwell Wilson ed., 2006).

7. See, e.g., Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL’Y 1, 38–43 (2004).

8. See Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN’S L.J. 323, 326–27, 338 (2004) (advocating a multi-factor test that accounts for gestation, genetics, intent, whether the child is born in the context of marriage, the existence of a parenting relationship, and potential permanence); Margaret F. Brinig, *Troxel and the Limits of Community*, 32 RUTGERS L.J. 733, 764 (2000) (suggesting that a functional parent should receive rights under the limited circumstances where she “has been performing the same role as biological parents usually do”); Emily Buss, “Parental” Rights, 88 VA. L. REV. 635, 674 (2002) (asserting that states “should be free to assign parental rights based on a genetic, gestational, or contractual relationship, or on any other grounds not otherwise constitutionally prohibited”); Karen Czapanskiy, *Interdependencies, Families, and Children*, 39 SANTA CLARA L. REV. 957, 963 (1999) (advocating the use of “interdependency theory” to determine child custody, which looks to “the fundamental connection of the child to the specific person or people who care for the child every day because they have a long term commitment to the child’s development and well being”); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents’ Rights*, 14 CARDOZO L. REV. 1747, 1749 (1993) (advocating a “generist” perspective on parenthood, which would recognize as legal parents those who commit to and nurture children).

9. See JOSEPH GOLDSTEIN, ANNA FREUD & ALFRED SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 17–20 (1973) (formulating “psychological parent” concept).

10. These definitions vary widely in their theoretical underpinnings and expansiveness, but they all would recognize functional parents to a greater or lesser extent under certain circumstances. See sources cited *supra* note 8.

11. See Baker, *supra* note 7, at 48–49; Bartholet, *supra* note 8, at 342–43; Brinig, *supra* note 8, at 774–79; Buss, *supra* note 8, at 665–66; Duncan, *supra* note 2, at 75; David M. Wagner, *Balancing “Parents Are” and “Parents Do” in the Supreme Court’s Constitutionalized Family Law: Some Implications for the ALI Proposals on De Facto Parenthood*, 2001 BYU L. REV. 1175, 1184. For a few notable exceptions, 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 *passim* (1984); Naomi R. Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L.J. 1, 44–47 (1997); Melanie B.

disagreements, the participants in this discourse about parenthood also have justified their positions primarily on what they see as the needs and interests of children.¹²

In this Article I do not directly engage this debate, opting instead to change its parameters and focus. I have two aims: First, I seek to understand why, at a time of increasing recognition of non-traditional families, the “more-than-two” parent family is so widely agreed to be undesirable, even while so many people practice alternatives to the two-parent nuclear family norm.¹³ Second, I seek to move away from derivative, child-focused justifications for expanding the existing legal definition of parent. Instead, I argue for an explicit examination of gender politics. Such an analysis can provide an enriched understanding of functional parenthood. Identity and ideology are already present in contemporary conversations about how best to define parenthood and parental rights. The current singular focus on children’s best interests merely serves to obscure these important subtexts.

Part II of this Article sets the stage for a discussion of the more-than-two-parent family—what I will call *community parenting*¹⁴—by reviewing social science research demonstrating the prevalence of community parenting. In reviewing this literature, Part II also reveals how political discourses over divorce, cohabitation, single-parenthood, and same-sex marriage systematically mask the extent of community parenting in our society. Part III examines the law’s response to community parenting. It analyzes the current treatment of community parenting in the context of three types of custody

Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. ST. L.J. 809 (2006); David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753 (1999); cf. Davis, *supra* note 5, at 370 (advocating the use of various legal arrangements short of parenthood that would facilitate cooperative caregiving networks).

12. See sources cited *supra* notes 2–8; see also Robin Fretwell Wilson, *Undeserved Trust: Reflections on the ALI’s Treatment of De Facto Parents*, in RECONCEIVING THE FAMILY 90, 90–120 (Robin Fretwell Wilson ed., 2006).

13. This question is a revised version of the one asked by Elizabeth Emens in her article critiquing the two-person numerosity requirement for marriage. See Elizabeth F. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277 (2004).

14. Other possible terms include multiple parenting, multi-party parenting, democratic parenting, plural parenting, non-exclusive parenting, or non-nuclear parenting.

disputes: those involving non-marital fathers, surrogacy, and the dissolution of same-sex relationships. This review of the law in a range of areas highlights the degree to which the numerosity requirement that a child shall have no more than two parents is assumed and enforced in our law. Part IV presents several arguments for lifting this limitation. Among other potential benefits, recognizing more than two legal parents holds significant potential to deconstruct traditional gender and sexuality norms. Finally, Part V briefly reviews a number of potential legal reforms that would follow were we to lift the numerosity requirement with regard to parenthood.

More broadly, this Article embraces difference and diversity in family life. This approach stands in contrast to the two approaches that have dominated legal and academic projects surrounding non-nuclear families. The first approach, demonizing difference, seeks to characterize as dysfunctional, disorganized, and deviant those families that do not conform with the nuclear, heterosexual, male-breadwinner, female-homemaker ideal. For example, the African-American family has historically been studied as a pathological form of social organization.¹⁵ According to this perspective, non-marital childbearing, female household headship, and welfare dependency among African-American families are seen as the causes of poverty, low educational attainment, unemployment, and crime.¹⁶ Today, we see a similar field of interest developing with regard to the supposed dysfunctionality of gay and lesbian families.¹⁷ More generally, the “demonizing difference” approach to non-nuclear families can be seen in discourses over cohabitation, divorce, welfare, and same-sex marriage.

The second approach, downplaying difference, is typically achieved through descriptive projects portraying non-nuclear families as just like nuclear families, or through prescriptive projects suggesting that the purported problems of the non-nuclear family

15. See, e.g., Daniel Patrick Moynihan, *The Negro Family: The Case for National Action*, in *THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY* 39–124 (Lee Rainwater & William L. Yancey eds., 1967).

16. *Id.* For a contemporary critique of this trend, see Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 *DUKE L.J.* 274.

17. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 998–1001 (Mass. 2003) (Cordy, J., dissenting) (reviewing studies).

would be solved by embracing traditional nuclear-family lifestyles or circumstances. For example, in the context of debates in the 1960s and 1970s about the Black Family, much research was dedicated to demonstrating that socioeconomic position was the cause of black families' troubles.¹⁸ Such explanations suggested that if African-American families were not disproportionately poor, their family values and structures would be similar to those of white Americans. Along the same lines, advocates of same-sex marriage and gay family rights more generally have sought to portray same-sex relationships as just like heterosexual ones,¹⁹ and legal victories in these areas have been purchased largely on this theory.²⁰ This reasoning is also prevalent in debates about the decline of the American family more generally. For example, opponents of conservative initiatives to restrict divorce²¹ and promote marriage²² have sought to diminish the effects of unmarried parenthood on children, suggesting that there are essentially no differences in the parenting practices or developmental outcomes for children in traditional nuclear and unmarried-parent families.²³ Downplaying difference is an understandable response to

18. See, e.g., JOHN H. SCANZONI, *BLACK FAMILIES IN AMERICA* (1977); Frank F. Furstenberg, Jr. et al., *The Origins of the Female-Headed Black Family: The Impact of the Urban Experience*, 6 J. INTERDISC. HIST. 211, 221–22 (1975).

19. See Judith Stacey & Timothy J. Biblarz, (*How*) *Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 162–64 (2001) (discussing this tendency among researchers of same-sex relationships).

20. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 569–70, 574 (2003) (constructing the liberty interest at stake as the protection of committed relationships); *Goodridge*, 798 N.E.2d at 949 (providing a lengthy description of the traditional lifestyle of the fourteen individual plaintiffs, focusing on details such as the length of their relationships, the presence of children, and church attendance).

21. See D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW* 538–39 (2006) (discussing efforts by states to limit divorce through devices such as covenant marriage, lengthy waiting periods, mandatory marital counseling, mediation, and arbitration).

22. See, e.g., *Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 42 U.S.C. § 601(a)(2) (2000) (stating that one the welfare law's purposes is to “end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage”). For discussions of the legal and political movement to promote marriage in the United States, including more recent developments, see Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129, 153–59 (2003); Brenda Cossman, *Contesting Conservatism, Family Feuds and the Privatization of Dependency*, 13 AM. U. J. GENDER SOC. POL'Y & L. 415 (2005); Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CAL. L. REV. 1647 (2005); Noah Zatz, *Welfare to What?*, 57 HASTINGS L.J. 1131 (2006).

23. See, e.g., E. MAVIS HETHERINGTON & JOHN KELLY, *FOR BETTER OR FOR WORSE:*

the othering effect of the demonizing difference approach to non-nuclear families, but its effect is to assimilate minority families into traditional norms.

While seemingly contradictory, both of these theoretical frameworks for understanding non-nuclear families constrain intellectual development on several fronts. They deny the legitimacy of minority cultural forms. They hide a range of potentially positive, functional practices that occur within non-nuclear families that scholars of the family and policymakers should be interested in knowing more about. The methodologies of demonizing and downplaying difference also obscure the diversity of arrangements and practices *among* non-nuclear families.

Departing from these approaches, this Article seeks to explore some of the qualitative differences in parenting practices among non-nuclear families. Such an approach has two advantages. First, attention to these differences is likely to suggest less oppressive legal rules with regard to individuals in non-nuclear families. This important project is briefly addressed in Part V. Second, and more broadly, placing non-normative families and parenting practices at the center of our analyses of the family may work to denaturalize the normative nuclear family. Instead of studying the supposed problems of the non-nuclear family by holding it up to the standards of married, two-parent, white, heterosexual families, what insights might emerge if we did the reverse?

There are many possible insights produced by this methodology, but the one I will focus on here is the potential of community parenting to undermine traditional gender roles and intensive mothering standards, which dominate the normative nuclear family. As a preliminary thought experiment that seeks to explore one small, potentially positive aspect of community parenting—gender non-normativity—this Article does not seek to work out in any detailed fashion a set of legal rules for defining or regulating community parenting. That project, which could surely build on the ideas explored here, is left for another day. With these theoretical

commitments in mind, the next section examines the prevalence of community parenting practices in American society.

II. THE PREVALENCE OF COMMUNITY PARENTING

A. Social Science Research

Children today often do not live in nuclear families,²⁴ even though the nuclear family²⁵ remains a normative ideal within family law and American culture more broadly.²⁶ In 2005 almost one-third of American children did not live with two natural or adoptive parents.²⁷ If we take a longitudinal view, the trend away from the traditional family is even more apparent: about half of American children will spend a least some time in an unmarried-parent family before the age of eighteen.²⁸ These statistics are driven by a number of by now well-known developments.

Although divorce rates have remained relatively constant for more than two decades, recent estimates suggest that almost half of all first marriages will end in divorce.²⁹ Yet marriage remains a robust institution in our society, particularly for white, middle-class individuals, resulting in the widespread existence of step-families.³⁰

24. See Laura T. Kessler, *Transgressive Caregiving*, 33 FLA. ST. U. L. REV. 1, 3–4 (2005).

25. George Murdock defined the nuclear family as “a social group characterised by common residence, economic cooperation and reproduction. It contains adults of both sexes, at least two of whom maintain a socially approved sexual relationship, and one or more children, own or adopted, of the sexually cohabiting adults.” GEORGE MURDOCK, SOCIAL STRUCTURE 1 (1949).

26. See STEPHANIE COONTZ, *THE WAY WE NEVER WERE* (1992).

27. See U.S. DEP’T OF COMMERCE, LIVING ARRANGEMENTS OF CHILDREN UNDER 18 YEARS OLD: 1960 TO PRESENT 1–2 (2006), available at <http://www.census.gov/population/socdemo/hh-fam/ch1.pdf>.

28. See Larry L. Bumpass & James A. Sweet, *Children’s Experience in Single-Parent Families: Implications of Cohabitation and Marital Transitions*, 21 FAM. PLAN. PERSP. 256, 256 (1989); Larry L. Bumpass & R. Kelly Raley, *Redefining Single-Parent Families: Cohabitation and Changing Family Reality*, 32 DEMOGRAPHY 97, 97 (1995).

29. Robert Schoen & Nicola Standish, *The Retrenchment of Marriage: Results from Marital Status Life Tables for the United States, 1995*, 27 POPULATION & DEV. REV. 553, 556 tbl.1 (2001) (reporting that 43% to 44% of marriages ended in divorce in 1995); Robert Schoen & Vladimir Canudas-Romo, *Timing Effects on Divorce: 20th Century Experience in the United States*, 68 J. MARRIAGE & FAM. 749, 755 tbl.2 (2006) (reporting a 45% chance that a marriage would end in divorce in 2000).

30. See Larry L. Bumpass et al., *The Changing Character of Stepfamilies: Implications of*

Opposite-sex cohabitation—whether as an alternative, prequel, or sequel to marriage—has grown from a criminalized, deviant behavior³¹ to a common experience of adults in our country.³² In 2003, more than four-and-a-half million couples cohabited outside of marriage.³³ Children were present in about forty percent of those households.³⁴ This percentage approximates the share of married-partner households with children.³⁵ Marriage and re-marriage rates have declined significantly, offset in large part by cohabitation.³⁶ Non-marital childbearing is common,³⁷ fueled by changing social norms and the elimination of legal distinctions based on legitimacy.³⁸ Along the same lines, the successes of the gay rights movement in the area of parental rights³⁹ and advances in alternative reproduction have led to a significant increase in the number of children raised in households with a gay or lesbian parent.⁴⁰ By definition, children of

Cohabitation and Nonmarital Childbearing, 32 DEMOGRAPHY 425, 426 (1995).

31. See Martha L. Fineman, *Law and Changing Patterns of Behavior: Sanctions on Non-Marital Cohabitation*, 1981 WIS. L. REV. 275, 276.

32. See Bumpass et al., *supra* note 30, at 426; Andrew J. Cherlin, *American Marriage in the Early Twenty-First Century*, 15 FUTURE CHILD. 33, 35 (2005).

33. See JASON FIELDS, U.S. DEP'T OF COMMERCE, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2003, CURRENT POPULATION REP. P20-553, at 16 (2004).

34. *Id.* at 17.

35. *Id.*

36. Bumpass et al., *supra* note 30, at 426.

37. Cherlin, *supra* note 32, at 35 (about one-third of all births are to unmarried women).

38. See *Pickett v. Brown*, 416 U.S. 1, 7–11 (1983) (discussing long line of Supreme Court cases striking down classifications based on legitimacy).

39. For example, the majority of states no longer take into account the sexual orientation of a parent in custody disputes. See Kessler, *supra* note 24, at 30 (reviewing cases). This approach, known as the “nexus test,” makes the sexual orientation of a parent irrelevant unless there is evidence that it will negatively impact the best interests of the child. *Id.* at 30–31. Along the same lines, more than ten states and the District of Columbia now recognize “second-parent” adoption, which is the right of the partner of a biological parent to adopt without terminating the parental rights of the biological parent, thereby ensuring legal ties between children and both their lesbian or gay parents where the parents seek to formalize the relationship. *Id.* at 31. And in 2000, the National Conference of Commissioners on Uniform State Laws revised the Uniform Parentage Act of 1973, governing in part the status of children born through donor insemination, to remove bias in favor of married couples. See UNIF. PARENTAGE ACT § 702, 9B U.L.A. 45, cmt. (Supp. 2002). Although not revised explicitly with lesbians in mind, the change was made “in light of . . . the constitutional protections of the procreative rights of unmarried as well as married women.” *Id.*

40. Somewhere between one million and nine million children in the United States have at least one gay or lesbian parent. See Stacey & Biblarz, *supra* note 19, at 164 (discussing the different definitions of “gay” that affect this estimate). See generally LAURA BENKOV,

same-sex partners live in unmarried-parent families, except in one state,⁴¹ and are related biologically to only one parent in their household. Finally, worsening economic inequality in the United States and the consequent disruption of familial ties has expanded the number of children being raised by foster parents or other temporary caretakers.⁴² By definition or circumstance, children in these situations often develop significant relationships with adults outside the traditional nuclear family. This is now widely recognized both by those who advocate a more expansive definition of parenthood and those who oppose it,⁴³ and the law is slowly but surely moving toward a functional definition of parenthood.

What has been less apparent in the discourses surrounding divorce, cohabitation, “single-parenthood,” and gay family rights, however, is the extent to which children today may have significant family ties to *more than two* adults concurrently. Most obviously, the formal addition of step-parents to a family through remarriage often results in three or four adults across households who may have significant financial and emotional ties to a child, at least in part. However, looking only to divorce and remarriage may seriously underestimate the prevalence of these arrangements, because a significant portion of divorced parents forgo remarriage in favor of cohabitation.⁴⁴ Like married parents, unmarried cohabitant parents may break up and form new cohabiting relationships. When we include these informal “step-families,” the step-family experience is far more widespread than most discussions of blended families

REINVENTING THE FAMILY: THE EMERGING STORY OF LESBIAN AND GAY PARENTS 34–81 (1994) (documenting the increase in childbearing and childrearing among lesbians and gay men).

41. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969–70 (Mass. 2003).

42. See Sandra Bass et al., *Children, Families, and Foster Care: Analysis and Recommendations*, 14 *FUTURE CHILD*. 5, 8 (2004) (finding that the number of children in foster care nearly doubled from 1980 to 1998). For the racial dimensions of this problem, see DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002).

43. Compare BEYOND SAME-SEX MARRIAGE: A NEW STRATEGIC VISION FOR ALL OUR FAMILIES & RELATIONSHIPS (2006), available at <http://www.beyondmarriage.org/BeyondMarriage.pdf>, with DAN CERE, COUNCIL ON FAMILY LAW, *THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA* 33–40 (2005), available at http://www.marriage Debate.com/pdf/future_of_family_law.pdf.

44. See Bumpass et al., *supra* note 30, at 426.

suggest.⁴⁵ Using this more accurate definition of step-families, nearly one-third of all children are likely to spend some time in a step-family before the age of eighteen.⁴⁶ Like children in formal step-families formed through marriage, children in cohabitant stepfamilies often develop significant parent-child relationships with more than two adults across households.

Community parenting occurs in other contexts as well. For example, more Americans than ever have grandparents who are alive,⁴⁷ and there is evidence that ties between grandparents and grandchildren have become stronger over the past half-century.⁴⁸ Moreover, research shows that grandparents are more involved with their grandchildren when parents are divorced, especially maternal grandparents, given the norm of maternal custody.⁴⁹ As two leading sociologists of the family note, “intergenerational ties are often latent in the kinship system” until a crisis occurs.⁵⁰ Thus, “[f]ar from uniformly destroying the bonds of kinship, divorce appears to strengthen intergenerational ties along the maternal line. As a result, children of divorced parents may have stronger ties to some of their grandparents than children from nondisrupted marriages have to any of their grandparents.”⁵¹ Remarriage of a parent does not appear to

45. *Id.*

46. *Id.* at 425.

47. Merrill Silverstein & Jeffrey D. Long, *Trajectories of Grandparents' Perceived Solidarity with Adult Grandchildren: A Growth Curve Analysis over 23 Years*, 60 J. MARRIAGE & FAM. 912, 912 (1998).

48. See COONTZ, *supra* note 26, at 15; Chrystal C. Ramirez Barranti, *The Grandparent/Grandchild Relationship: Family Resource in an Era of Voluntary Bonds*, 34 FAM. REL. 343, 343-44, 346-48 (1985).

49. Thomas E. Denham & Craig W. Smith, *The Influence of Grandparents on Grandchildren: A Review of the Literature and Resources*, 38 FAM. REL. 345, 347-48 (1989).

50. ANDREW J. CHERLIN & FRANK F. FURSTENBERG, JR., *THE NEW AMERICAN GRANDPARENT* 163-64 (1986).

51. *Id.* at 164. For example, according Cherlin & Furstenberg:

Among all maternal grandparents, those in disrupted families were more likely to be living with the study child or to be seeing that child almost every day, were more likely to be exchanging services, were more likely to be providing financial support to the child's parents, and were much more likely to be engaging in parentlike behavior.

Id. at 151-52. Indeed, approximately one-third of maternal grandparents on the side of the parent with physical custody were seeing their grandchild or grandchildren at least two to three times a week, and approximately two-thirds were exchanging services and engaging in regular parentlike behavior. These figures represent approximately double the contact and parental

affect the increased frequency of contact between children and their maternal grandparents after divorce,⁵² potentially resulting in three or more adults across households and generations who are substantially involved in a child's life.

But even this expansive accounting of the complex variety of parenting arrangements that arise in the wake of family dissolution and re-formation does not fully account for the prevalence of community parenting. For example, in certain minority communities, care relationships extend well beyond the sexual family as a matter of course, often involving numerous social kin in care work. For example, for a set of complex reasons, including the history of American slavery and its aftermath,⁵³ the influence of African cultural traditions,⁵⁴ and economic necessity,⁵⁵ the practice of "othermothering" is common in the African-American community.⁵⁶ Othermothers are women who assist blood mothers by sharing mothering responsibilities.⁵⁷ They can be but are not confined to such blood relatives as grandmothers, sisters, aunts, cousins, or supportive fictive kin.⁵⁸ More broadly, African Americans are more likely than white Americans to rely on relatives and fictive kin for practical support, such help with transportation, housework, and child care.⁵⁹

involvement of all other grandparents. *Id.* at 250 tbl.A-7.

52. *Id.* at 148–49.

53. EDWARD FRANKLIN FRAZIER, *THE NEGRO FAMILY IN THE UNITED STATES* (1939); Angela Davis, *Reflections on the Black Woman's Role in the Community of Slaves*, 3 *BLACK SCHOLAR* 2, 7–8 (1971).

54. W.E.B. DU BOIS, *THE NEGRO AMERICAN FAMILY* (1909); Antonio McDaniel, *Historical Racial Differences in Living Arrangements of Children*, 19 *J. FAM. HIST.* 57, 69 (1994); Wade Nobles, *Africinity: Its Role in Black Families*, 5 *BLACK SCHOLAR* 10, 11 (1974); Niara Sudarkasa, *African and Afro-American Family Structure: A Comparison*, 11 *BLACK SCHOLAR* 37, 57 (1980).

55. See FRAZIER, *supra* note 53; Walter Allen, *African American Family Life in Societal Context: Crisis and Hope*, 10 *SOC. FORUM* 569 (1995); Frank F. Furstenberg et al., *supra* note 18, at 221; Twila L. Perry, *Race Matters: Change, Choice, and Family Law at the Millennium*, 33 *FAM. L.Q.* 461, 464–65 (1999) (identifying the shortage of black men at every age group and the precarious economic situation of many black men as critical factors affecting black women's low marriage rates).

56. See Patricia Hill Collins, *The Meaning of Motherhood in Black Culture and Black Mother/Daughter Relationships*, 4 *SAGE* 3, 4–5 (1987).

57. *Id.*

58. *Id.*

59. Natalia Sarkisian & Naomi Gerstel, *Kin Support Among Blacks and Whites: Race and Family Organization*, 69 *AM. SOC. REV.* 812, 812 (2004). Whites are more likely to be involved

Moreover, the persistence of the male-breadwinner ideal, which historically has been realized for only a small percentage of families (that is, mostly white, privileged families),⁶⁰ obscures the ways in which non-marital fathers continue to be involved in the lives of their children in minority and low-income communities, along with other biological and fictive kin. For example, although many low-income men do not provide regular, formal child support payments, research has found that they contribute to the support of their children through substantial, if irregular, cash payments,⁶¹ as well as by spending time with their children⁶² and by providing them with gifts and necessities.⁶³ Conceptions of fatherhood that are centered primarily on a man's ability to financially support his family in the form of earned wages consistent with the "good provider role"⁶⁴ miss the extent to which nonresidential fathers remain in children's lives in minority and low income communities, along with other biological and fictive kin.

Along the same lines, lesbians and gay men often engage in care practices involving social kin.⁶⁵ For example, a gay family of choice may include lovers, ex-lovers, friends, co-parents, gamete-donors, and children brought into the family through adoption, foster care, prior heterosexual relationships, and alternative reproduction.⁶⁶ Like the tradition of othermothering within the African-American community, gay families of choice are made up of fluid networks that have different purposes—including emotional support, economic

in exchanges of financial and emotional support. *Id.*

60. See JUDITH STACEY, *IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE* 30, 40, 42–43 (1996) (discussing the failure of the male breadwinner ideal for working class men and men of color, because these men could not typically support their families on a single wage).

61. See KATHRYN EDIN & LAURA LEIN, *MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK* 158–64 (1997); Sanford L. Braver et al., *Noncustodial Parent's Report of Child Support Payments*, 40 *FAM. REL.* 180, 182–84 (1991).

62. See Jennifer F. Hamer, *The Fathers of "Fatherless" Black Children*, 78 *FAM. SOC'Y* 564, 569–70 (1997).

63. EDIN & LEIN, *supra* note 61, at 164–65. Nonresidential boyfriends also provide cash and in-kind assistance to low-income unmarried mothers. *Id.* at 154–58.

64. Jessie Bernard, *The Good Provider Role: Its Rise and Fall*, 36 *AM. PSYCHOLOGIST* 1 (1981).

65. See KATH WESTON, *FAMILIES WE CHOOSE* 2 (Richard D. Mohr et al. eds., 1991).

66. *Id.* at 3, 31, 111–12.

cooperation, socialization, reproduction, consumption, and sexuality—which overlap but are not coterminous.⁶⁷ And like the community parenting practices in communities of color, biological fathers are increasingly playing an active role in the parenting of children of lesbian mothers, becoming a “junior partner in the parenting team.”⁶⁸

B. How Political Discourses Hide Community Parenting

As the trends reviewed here demonstrate, the modern family is increasingly characterized by a complex network of kinship ties that link individuals across households and from generation to generation. Within this context, community parenting is widely practiced. Yet its prevalence is hidden by legal and political discourses that conceive contemporary families only in relation to an idealized, two-parent norm. In these discourses, unmarried parents are referred to as “single.”⁶⁹ Modern families are described as “broken,”⁷⁰ “fragmented,”⁷¹ “divided,”⁷² and “divorced.”⁷³ Even when “blended,”

67. *Id.* at 108.

68. Gillian A. Dunne, *Opting into Motherhood: Lesbians Blurring the Boundaries and Transforming the Meaning of Parenthood and Kinship*, 14 *GENDER & SOC'Y* 11, 25 (2000); see also John Bowe, *Gay Donor or Gay Dad?*, *N.Y. TIMES*, Nov. 19, 2006, § 6 (Magazine).

69. *E.g.*, EDIN & LEIN, *supra* note 61; LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE* (1994); JANE MATTES, *SINGLE MOTHERS BY CHOICE* (1994); GEOFFREY L. GREIF, *SINGLE FATHERS* (1985); JEAN RENVOIZE, *GOING SOLO: SINGLE MOTHERS BY CHOICE* (1985); Andrea Engber, *Not Just for Single Moms . . .*, *SINGLE MOTHER*, Feb. 28, 2001, at 3; Benjamin Schlesinger, *Single Parent Families: A Bookshelf*, 20 *MARRIAGE & FAM. REV.* 463, 463 (1995).

70. *See, e.g.*, INST. FOR AM. VALUES, *MARRIAGE AND THE LAW: A STATEMENT OF PRINCIPLES* 21 (2006) [hereinafter *MARRIAGE AND THE LAW*]; Rick Lyman, *Trying to Strengthen an 'I Do' with a More Binding Legal Tie*, *N.Y. TIMES*, Feb. 15, 2005, at A1 (covering Arkansas governor Rick Huckabee's covenant marriage). According to Huckabee:

Personally, I don't think of this as tied to any political agenda . . . I think it has much more to do with recognizing that we as a society are paying a huge human price because of broken families. With the votes on same-sex marriage last year, many states have said what they are against. This is an opportunity to speak out on that which we are for.

Id.

71. *See, e.g.*, *MARRIAGE AND THE LAW*, *supra* note 70, at 22.

72. *See, e.g.*, FRANK F. FURSTENBERG & ANDREW J. CHERLIN, *DIVIDED FAMILIES* (1991).

73. *E.g.*, HETHERINGTON & KELLY, *supra* note 23; ELIZABETH MARQUARDT, *BETWEEN TWO WORLDS: THE INNER LIVES OF CHILDREN OF DIVORCE* (2005); JUDITH S. WALLERSTEIN

families are typically conceived of as nuclear, two-parent families different only in their presence of non-biologically-related family members.⁷⁴

Depictions of fractured, isolated parents and families are especially prominent in the current political and legal discourses regarding welfare. For example, this is a dominant theme in the “responsible fatherhood” movement, a key component of the Clinton administration’s welfare reforms⁷⁵ which the Bush administration has since expanded and funded aggressively.⁷⁶ As Senator Santorum explained in his remarks in support of the Responsible Fatherhood Act of 2003,⁷⁷ a bill to provide state grants to encourage “responsible fatherhood through marriage promotion” and “responsible fatherhood through parenting promotion”⁷⁸:

Imagine the change in neighborhoods where 70 percent of kids, 80 percent of kids are born out of wedlock, and within a year 90 to 95 percent of those kids have no father involvement in their lives. Imagine the change in the neighborhood, which is permeated by single mothers and fathers who are attached to nothing except other irresponsible fathers—we call those gangs—or they are not attached to that neighborhood at all because they are in jail. Imagine the neighborhoods with

ET AL., THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY (2000).

74. See, e.g., Donna K. Ginther & Robert A. Pollak, *Family Structure and Children’s Educational Outcomes: Blended Families, Stylized Facts, and Descriptive Regressions*, 41 DEMOGRAPHY 671, 678 (2004) (defining a blended family as one “with a biological parent who is married to a stepparent or with both biological parents and at least one half-sibling”).

75. See Press Release, The White House, Office of the Press Secretary, The White House Unveils New Responsible Fatherhood Initiative to Promote Work and Boost Child Support Payments (Jan. 26, 2000), available at <http://clinton4.nara.gov/WH/New/html/20000204.html>; see also sources cited *supra* note 22.

76. See EXECUTIVE OFFICE OF THE PRESIDENT OF THE U.S., A BLUEPRINT FOR NEW BEGINNINGS 75–76 (2001) (describing President George W. Bush’s plan for “promoting a pro-fatherhood agenda,” including “\$60 million for competitive grants for initiatives that promote responsible fatherhood”), available at <http://www.whitehouse.gov/news/usbudget/blueprint/blueprint.pdf>.

77. S. 604, 108th Cong. (2003).

78. *Id.* § 3 (amending Part D of Title IV of the Social Security Act to add “Sec. 469C. Responsible Fatherhood Grants”).

fathers in the homes. Imagine the neighborhoods with role models of responsible manhood and fatherhood.⁷⁹

Other than the race-laden imagery of this passage and the conflation of unmarried parenthood with deviance and criminality,⁸⁰ what stands out is the degree to which unmarried parents are imagined as isolated individuals devoid of affective ties with friends, social kin, or other types of family.

Similar depictions of broken, fractured families are found in congressional debates surrounding efforts to enshrine opposite-sex marriage in the U.S. Constitution. For example, Senator Sam Brownback stated in support of a senate resolution proposing a federal marriage amendment:

[T]he best situation for our children to be raised is in a home with a mother and a father. Children need these two parents. It is not that you can't raise good children in a single-parent household; you can. Many struggle heroically to do so. . . . Children do best academically and socially, and they are more likely to be raised in financially stable homes when a mother and father are both present.

More importantly, they have the security of knowing there are two people in their lives who provide security and stability, two people who provide something, each differently, but that is very important.⁸¹

These are just two statements, but they illustrate the widely accepted notion that individuals who live outside the married, heterosexual, two-parent family somehow exist in a netherworld beyond the family, divorced from affective relational ties. This image of disconnection is deployed across the spectrum in political

79. 150 CONG. REC. 3346, 3355 (2004).

80. See Martha Albertson Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274; Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127 (1987) (discussing the association of blacks with guilt and criminality).

81. 152 CONG. REC. 5517, 5518–19 (daily ed. June 7, 2006) (statement of Sen. Brownback).

discourses surrounding welfare,⁸² cohabitation,⁸³ divorce,⁸⁴ unmarried parenthood,⁸⁵ same-sex marriage,⁸⁶ and gay and lesbian parenthood.⁸⁷

More generally, a prominent contemporary theme in public discourse is that Americans are living increasingly fragmented lives; we are “bowling alone.”⁸⁸ According to this story popularized by the work of political scientist Robert Putnam, individuals in American society belong to fewer civic organizations and attend church less frequently than in the past.⁸⁹ Family bonds have loosened.⁹⁰ Membership in traditional women’s groups, such as local parent-teacher associations, sports groups, professional societies, and literary societies, has declined steadily.⁹¹ Although Putnam cites geographic mobility and technology as possible causes of this diminished social connectedness,⁹² he also identifies transformations in the American family since the 1960s as a likely explanation: “[F]ewer marriages, more divorces, fewer children, lower real wages, and so on. Each of these changes might account for some of the slackening of civic engagement, since married, middle-class parents are generally more socially involved than other people.”⁹³ Putnam also cites the movement of women “out of the home into paid employment” as a plausible explanation for Americans’ reduced social capital.⁹⁴ Although less virulent than much of the neo-conservative rhetoric about the alleged crisis of the American family,⁹⁵ this softer civil society version also implicitly longs for a simpler time when nuclear

82. See *supra* notes 75–79 and accompanying text.

83. See, e.g., CERE, *supra* note 43, at 25.

84. See MARRIAGE AND THE LAW, *supra* note 70, at 21, 22.

85. *Id.*

86. See *supra* note 81 and accompanying text.

87. *Id.*

88. See Robert D. Putnam, *Bowling Alone: America’s Declining Social Capital*, J. DEMOCRACY, Jan. 1995, at 65.

89. *Id.* at 69–70.

90. *Id.* at 73.

91. *Id.* at 68, 69.

92. *Id.* at 73–74.

93. *Id.* at 75.

94. *Id.* at 74.

95. See, e.g., MARRIAGE AND THE LAW, *supra* note 70.

families organized around traditional gender roles fulfilled our needs for connection and care.

These political discourses contrast starkly with social scientific accounts of the rich and varied kinship arrangements and community parenting practices, particularly in minority communities.⁹⁶ In addition to naturalizing the nuclear family, these discourses hide the prevalence of extended kinship arrangements and community parenting practices in our society. As demonstrated in Part III, community parenting practices are also largely unrecognized in the law.

III. THE LAW'S RESPONSE TO COMMUNITY PARENTING

How has the law dealt with community parenting? There has been significant movement in the law toward recognizing functional parenthood, particularly in the more progressive states.⁹⁷ However, current law provides virtually no means of accommodating community parenting, which often co-exists with functional parenting.

A. The Trend Toward Functional Parenthood

Just as marriage is increasingly understood as a relationship based on sentiment rather than obligation, the law has moved toward a functional definition of parenthood. For example, in the 1970s and 1980s, most states enacted grandparent visitation statutes giving grandparents who are prevented from seeing their grandchildren by a custodial parent legal standing to request visitation privileges from a court.⁹⁸

96. See *supra* Part II.A.

97. See Kessler, *supra* note 24, at 31–32.

98. See Catherine Bostock, *Does the Expansion of Grandparent Visitation Rights Promote the Best Interests of the Child?: A Survey of Grandparent Visitation Laws in the Fifty States*, 27 COLUM. J.L. & SOC. PROBS. 319, 319 n.3 (1994). Even though the Supreme Court subsequently struck down one of the most permissive grandparent visitation statutes in the country in *Troxel v. Granville*, 530 U.S. 57 (2000), family law scholars have noted that *Troxel* provides very weak privacy protections for natural or legal custodial parents when faced by a visitation claim of a grandparent. See Buss, *supra* note 8, at 638–40.

Along the same lines, relatively early and widespread acceptance of “second-parent”⁹⁹ adoption for non-biological gay and lesbian parents is a hallmark of the American gay rights movement.¹⁰⁰ Indeed, in a recent California case, the court recognized a non-biological gay mother’s right to a second-parent adoption, even over the wishes of her former partner, where the adoption proceedings had been initiated before the couple’s separation.¹⁰¹

The American Law Institute’s (ALI) *Principles of the Law of Family Dissolution*,¹⁰² a major restatement and reform effort in family law, recognizes functional parenthood by augmenting traditional definitions of parenthood based on blood and marriage with the concepts of the parent by estoppel and the de facto parent.¹⁰³ Parents by estoppel and de facto parents are individuals who, though not legal parents under state law, lived with the child for a significant period of time and acted in the role of parent for reasons primarily other than financial compensation, pursuant to an agreement with the legal parent, when a court finds that recognition of the individual as a parent is in the child’s best interests.¹⁰⁴ Although no state has formally adopted these ALI proposals on parenthood, many states have proposed them, and several state courts have recognized functional parents as legal parents under these and other theories.¹⁰⁵

99. “Second-parent” adoption refers to the right of the partner of a biological parent to adopt without terminating the parental rights of the biological parent, thereby ensuring legal ties between children and both their lesbian or gay parents where the parents seek to formalize the relationship.

100. See Nancy D. Polikoff, *Recognizing Partners but not Parents/Recognizing Parents but not Partners: Gay and Lesbian Family Law in Europe and the United States*, 17 N.Y.L. SCH. J. HUM. RTS. 711, 730–38 (2000).

101. See *Sharon S. v. Superior Court*, 73 P.3d 554, 574 (Cal. 2003).

102. See AM. LAW INST., *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* (2002) [hereinafter ALI PRINCIPLES].

103. *Id.* § 2.03.

104. *Id.* Although not relevant here, some important differences exist between the two categories.

105. See, e.g., *Kristine H. v. Lisa R.*, 117 P.3d 690, 692 (Cal. 2005) (recognizing former lesbian partner of biological mother as a parent pursuant to an estoppel theory); *K.M. v. E.G.*, 117 P.3d 673, 675, 678 (Cal. 2005) (recognizing former lesbian partner of gestational mother—and the genetic mother of the child—as a natural mother under the Uniform Parentage Act); *Elisa B. v. Superior Court*, 117 P.3d 660, 670 (Cal. 2005) (recognizing former lesbian partner of biological mother as a “presumed parent” under the Uniform Parentage Act); *In re E.L.M.C.*, 100 P.3d 546, 562 (Colo. Ct. App. 2004) (recognizing former domestic partner of adoptive mother as a “psychological parent”); *In re the Parentage of A.B.*, 818 N.E.2d 126, 130–33 (Ind.

And a couple of states have recognized functional parents by statute where certain conditions are met—for example, consent, holding out as a parent, living in the home with the child for a minimum statutory period, assuming significant responsibility for the day-to-day care of the child.¹⁰⁶

The reasons for these developments are complex. A breakdown of traditional gender norms has led to the recognition of parenting practices that occur in matrilineal, extended families and same-sex, two-parent families. Moreover, the trend toward recognizing functional parenthood comes at a time when cost-conscious policymakers are searching for ways to substitute family support for government assistance.¹⁰⁷ In the latter regard, the recent expansion of parenthood may be understood, at least in part, as a retrograde development aimed at privatizing dependencies within families that historically were assigned to the state as part of the New Deal and civil and welfare rights movements.¹⁰⁸

Whatever the complex and contradictory reasons, in all of the examples discussed in this section, courts and legislatures have generally recognized the parental rights of a non-biological functional parent only where the end result sought is two legal parents—that is, where the second biological parent (typically a man) is not involved in the child’s life, or at least is not formally asserting any parental rights. In contrast, the law has reflected relatively uniform hostility toward claims of multiple parenthood.

B. The Legal Treatment of Community Parenting Practices

American courts and legislatures have consistently assumed and enforced the rule that a child shall not have more than two legal

Ct. App. 2004) (recognizing former domestic partner of biological mother as a parent by estoppel); *In re Parentage of L.B.*, 122 P.3d 161, 177 (Wash. 2005) (holding that former lesbian partner of biological mother may be a de facto parent); *In re Clifford K.*, 619 S.E.2d 138, 157 (W. Va. 2005) (holding that former lesbian partner of deceased biological mother had standing to intervene in custody proceeding under “exceptional cases” provision). For a comprehensive review of the various equitable theories recognized by courts and some state legislatures, see Polikoff, *supra* note 5, at 483–509, and ALI PRINCIPLES, *supra* note 102, § 2.03 cmts. b-c.

106. See, e.g., KY. REV. STAT. ANN. § 403.270(1) (West 1999).

107. See, e.g., sources cited *supra* note 22 (discussing marriage promotion).

108. See MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH* (2004).

parents. This can be seen in areas as diverse as child custody,¹⁰⁹ paternity,¹¹⁰ adoption,¹¹¹ surrogacy,¹¹² and child welfare law.¹¹³ In this part, I briefly summarize this phenomenon in one very small area: a subset of child custody cases involving non-marital fathers' rights, surrogacy, and the dissolution of two-parent same-sex relationships. My goal here is to illustrate the pervasive existence of the two-parent norm in a narrow class of cases with the hope that the brief descriptions provided here can inform the ongoing debate regarding the numerosity requirement for parenthood.

The first and most classic set of child custody cases involving the potential legal claims of more than two adults concern the rights of non-marital fathers. In a string of these cases, the Supreme Court considered the claims of non-marital, non-custodial biological fathers with varying degrees of prior involvement in their children's lives who sought to block their child's adoption by another man—in each case, the biological mother's husband.¹¹⁴ Ultimately, the Court worked out a basic if somewhat vague rule for determining competing paternal claims to custody of a child in these circumstances: non-marital fathers can best protect their rights if they establish a relationship with the child and take advantage of all legal opportunities to be recognized as the father.¹¹⁵ Most would agree that

109. See, e.g., *In re Jesusa V.*, 85 P.3d 2, 11 (Cal. 2004) (finding two presumed fathers and defining its task as choosing the one “which on the facts is founded on the weightier considerations of policy and logic”); *Temple v. Meyer*, 544 A.2d 629, 409–10 (Conn. 1988) (denying visitation, because it would be against the child's best interests to have two father figures); *Bodwell v. Brooks*, 686 A.2d 1179, 1182 (N.H. 1996) (declining to adopt a “form of dual paternity” in order to allow a stepfather to pursue custody).

110. See *N.A.H. v. S.L.S.*, 9 P.3d 354, 360 (Colo. 2000) (en banc) (“[A]lthough a child certainly can have emotional attachments to more than one father figure, she can have only one legal father.”).

111. See Pamela Gatos, *Third-Parent Adoption in Lesbian and Gay Families*, 26 VT. L. REV. 195, 196 (2001).

112. See discussion *infra* notes 132–36 and accompanying text.

113. Cf. Adoption and Safe Families Act of 1997, Pub. L. No. 105–89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.) (promoting the fast-track adoption of children in foster care, thereby limiting possibilities for shared parenting among foster parents, biological parents, and relatives).

114. See *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1978); *Quilloin v. Walcott*, 434 U.S. 246 (1978).

115. See *Michael H. v. Gerald D.*, 491 U.S. 110, 142–43 (1989) (Brennan, J., dissenting) (“Though different in factual and legal circumstances, these cases have produced a unifying theme: although an unwed father's biological link to his child does not, in and of itself,

this is a sensible rule in the abstract, but it was largely conditioned on the assumption that a child can have only two legal parents. In essence, the Court defined its task as deciding the relative strength of two competing paternal claims where a child already has a biological custodial mother, no matter how strong each man's relationship with the child. The cases are caged in terms of constitutional equal protection, due process, and liberty doctrines,¹¹⁶ but in the end they can be read as dressed up versions of the childhood game of rock, paper, scissors.

The most striking example is the classic family law case of *Michael H. v. Gerald D.*,¹¹⁷ in which the Court rejected the constitutional claims of a biological, non-marital father to have continuing contact with his daughter. The child and her mother had lived on an and off with Michael H. for the first three years of the child's life;¹¹⁸ the child referred to him as "Daddy;"¹¹⁹ he contributed to her support;¹²⁰ and the child's guardian ad litem and a court-appointed psychologist had determined it would be in the child's best interest to maintain a relationship with both her natural father and stepfather¹²¹ Yet, in a plurality opinion invoking the "sanctity" of the two-parent "unitary family,"¹²² as well as the importance of traditional gender roles ("California law, like nature itself, makes no provision for dual fatherhood"¹²³), Justice Scalia rejected Michael H's claims.¹²⁴ The child's independent constitutional claim to have continuing contact with Michael H. failed "for the same reasons."¹²⁵ Leaving little doubt that a key issue driving the plurality was the specter of the more-than-two parent family, Justice Scalia limited the Court's holding to the situation where the biological mother and her

guarantee him a constitutional stake in his relationship with that child, such a link combined with a substantial parent-child relationship will do so." (citations omitted)).

116. See *Michael H.*, 491 U.S. at 119, 121, 130–32 (majority opinion); *Lehr*, 463 U.S. at 256, 265; *Caban*, 441 U.S. at 391; *Quilloin*, 434 U.S. at 255–56.

117. *Michael H.*, 491 U.S. 110.

118. *Id.* at 113–14.

119. *Id.* at 144 (Brennan, J., dissenting).

120. *Id.*

121. *Id.* at 115 (majority opinion).

122. *Id.* at 123.

123. *Id.* at 118.

124. *Id.* at 112, 132.

125. *Id.* at 131.

husband “both . . . wish to raise the child as the offspring of their union.”¹²⁶ This language suggests that if the child’s biological mother or stepfather wished to raise her *alone*, that is, if the end result would be only two legal parents, Michael H. might have had a constitutionally protected interest in his relationship with his daughter.

Justice Stevens, who cast the deciding vote, thought that Michael H. had a procedural due process right to assert his claims, but he found that the law in question had adequately provided that opportunity to him.¹²⁷ In dicta, he acknowledged that “enduring ‘family’ relationships may develop in unconventional settings.”¹²⁸ Therefore, he “would not foreclose the possibility that a constitutionally protected relationship between a natural father and his child might exist in a case like this.”¹²⁹ This dicta can be read to suggest a constitutional requirement to recognize more than two legal parents in some circumstances.¹³⁰ However, it has not carried any force in subsequent Supreme Court decisions addressing similar issues.

A second set of custody cases involve disputes that arise in the context of alternative reproduction such as artificial insemination, in vitro fertilization, and surrogacy.¹³¹ In each of these situations, there are at least three potential parents: two biological parents who donate gametes and a gestational mother, as well as one or more “psychological” or “intended” parents. When custody disputes arise in these cases, courts have generally adjudicated the competing claims with the assumption that the final result can produce, at most, two legal parents.

126. *Id.* at 129.

127. *Id.* at 133 (Stevens, J., concurring).

128. *Id.*

129. *Id.*

130. Justice Stevens may also have simply meant that the constitutional rights of a non-marital father in Michael H.’s position might trump the privacy rights of an intact marital family, thereby fully defeating a stepfather’s parental claims. His intended meaning is ambiguous.

131. See David Adamson, *Regulation of Assisted Reproductive Technologies in the United States*, 39 FAM. L.Q. 727, 727 (2005).

For example, in the 1993 surrogacy case of *Johnson v. Calvert*,¹³² the California Supreme Court was faced with competing parental claims of two women, the married biological mother of the child and a gestational surrogate. The *Johnson* court found that there were two ways to prove maternity under California's version of the Uniform Parentage Act: proof of giving birth to the child or through proof of genetic consanguinity.¹³³ Thus, both women could prove they were the mother of the child under California law. This could have resulted in three legal parents—the commissioning married couple who were biologically related to the child and the gestational surrogate. But the court found it necessary to add another step: when two women can prove they are the mother, “intention” will break the tie.¹³⁴ According to the court, “she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.”¹³⁵ Rejecting out of hand the option of enforcing the plain meaning of the statute, the court declared with little support or analysis that “California law recognizes only one natural mother.”¹³⁶

More recently, the California Supreme Court reiterated its commitment to the two-parent family norm, even as it expanded parental rights for gay and lesbian individuals. *K.M. v. E.G.*¹³⁷ concerned a custody dispute between former lesbian partners. Before their break-up, the couple utilized in vitro fertilization to conceive a child.¹³⁸ This involved harvesting eggs from one partner, fertilizing them with anonymous donor sperm, and implanting them into the uterus of the other.¹³⁹ The resulting twin children lived with the couple for five years.¹⁴⁰ When their relationship dissolved, the gestational mother claimed that she was the sole legal parent on the

132. 851 P.2d 776 (Cal. 1993). Subsequent surrogacy cases in California have had similar outcomes, resulting in two legal parents at most. See *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 282 (Cal. Ct. App. 1998); *Marriage of Moschetta*, 30 Cal. Rptr. 2d 893, 895 (Cal. Ct. App. 1994).

133. *Johnson*, 851 P.2d at 781.

134. *Id.* at 782.

135. *Id.*

136. *Id.* at 781.

137. 117 P.3d 673 (Cal. 2005).

138. *Id.* at 676.

139. *Id.* at 683.

140. *Id.*

theory that she had always intended to be a “single mother” and had used her partner’s eggs only because she was unable to produce sufficient eggs of her own.¹⁴¹ She claimed that her former partner was a mere egg donor who had signed her parental rights away in the fertility center’s boilerplate gamete donation agreement.¹⁴² The biological mother asserted that she would not have donated her eggs had she known that her partner intended to be a sole parent.¹⁴³

In an opinion heralded as a victory by many in the gay and lesbian rights community, the California Supreme Court declined to apply the intent test established in *Johnson v. Calvert*, noting that “our decisions in *Johnson* does not preclude a child from having two legal parents both of whom are women” so long as the end result would not “leav[e] the child with three parents.”¹⁴⁴ To be sure, this limitation can be read as protecting the institution of surrogacy, particularly where a heterosexual, married commissioning couple hires a surrogate as in *Calvert*. Especially in this context, it seems, the court was likely concerned with upholding the two-parent, nuclear family norm. At the same time, the *K.M.* decision also 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. Consider these additional facts from *K.M.*: the gestational mother was hesitant to make a long-term commitment to her partner and swore her partner to secrecy about the origin of the eggs.¹⁴⁵ The biological mother asserted that she learned of the boilerplate consent form waiving her parental rights ten minutes before she signed it.¹⁴⁶ Only after the twins were born did the gestational mother decide to “marry” her partner.¹⁴⁷ Significantly, there was no involvement of a known sperm donor who might disrupt the two-parent model. Given these facts, perhaps it should not be surprising that the court analyzed the women’s claims in status-based

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 681 (quoting *Elisa B. v. Superior Court*, 117 P.3d 660, 666–67 (Cal. 2005)).

145. *Id.* at 676.

146. *Id.*

147. *Id.*

terms, rather than relying on the more functional intent standard articulated in *Calvert*.¹⁴⁸

These are only a few examples from custody law of the prevailing legal rule that a child shall not concurrently have more than two legal parents. There are many others: For example, while adoption is the clearer and thus preferred legal avenue for recognizing non-biological parents, and second-parent adoption is recognized by many states,¹⁴⁹ “third-parent” adoption is not legally possible in our country.¹⁵⁰ Open adoption comes somewhat closer to facilitating community parenting,¹⁵¹ but open adoption contracts are largely unenforceable when disputes arise.¹⁵² A dramatic shift in federal child welfare policy in the late 1990s transformed the foster care system from one in which children could be placed with relatives on a long-term basis without terminating their biological parents’ rights, to a system in which relatives are coerced into adopting minor relatives in their care.¹⁵³ These policies often work to damage familial relationships and provide insufficient respect for the inherent strength of family caregiving networks, particularly in minority communities.¹⁵⁴ There are exceptions to the pervasive existence of the two-parent, nuclear

148. A companion case decided the same day recognizing the existence of two legal mothers presented a similarly gendered fact pattern. In *Elisa B.*, 117 P.3d 660, one partner was the “stay-at-home” mother and the other was the “primary breadwinner,” earning more than twice as much money as her partner. *Id.* at 663. When the couple split up, the primary breadwinner left the household and the stay-at-home mother retained custody of the twins. *Id.* The primary breadwinner partner supported the children for a short period, but then ceased support, asserting that she had no legal relationship with her former partner’s biological children. *Id.* at 670.

149. For a description of second-parent adoption, see *supra* note 99.

150. See Gatos, *supra* note 111, at 211–12.

151. “An open adoption is one in which the birth parents meet the adoptive parents . . . [and] relinquish all legal, moral, and nurturing rights to the child, but retain the right to continuing contact and to knowledge of the child’s whereabouts and welfare.” Annette Baran et al., *Open Adoption*, 21 SOC. WORK 97, 97 (1976).

152. See Annette Ruth Appell, *The Move Toward Legally Sanctioned Cooperative Adoption: Can It Survive the Uniform Adoption Act?*, 30 FAM. L.Q. 483, 484–85 (1996) (“[T]he Uniform Adoption Act of 1994 . . . provides no mechanism for the enforcement of post-adoption contact agreements, except in stepparent adoptions.”).

153. See ROBERTS, *supra* note 42, at 104–33; Sacha Coupet, *Swimming Upstream Against the Great Adoption Tide: Making the Case for “Impermanence”*, 34 CAP. U. L. REV. 405, 413–16 (2005).

154. See Coupet, *supra* note 153, at 413–16.

family norm in the law,¹⁵⁵ but they are rare, at least in the United States.

IV. THE TRANSFORMATIVE POTENTIAL OF COMMUNITY PARENTING

In light of the widespread acceptance of the two-parent, nuclear family norm, why should the law recognize community parenting? There are many arguments, including the fact that community parenting is already widely practiced in American society.¹⁵⁶ Failure to recognize it will not extinguish the practice; rather, it simply drives it underground. A second argument might be that establishing parental rights is crucial for children's economic welfare. For example, the parent/child tie entitles children to health insurance, inheritance rights, wrongful death and other tort damages, Social Security benefits, and child support, among other significant economic rights.¹⁵⁷ As stated previously, this may explain the movement within the law toward functional parenthood.

However, the justification I want to focus on here concerns gender politics and the intensive mothering norms that construct the normative nuclear family. Specifically, I assert that community parenting holds great potential to break down these traditional gender and sexuality norms. Feminists should be deeply invested in this project.

155. See *Jacob v. Shultz-Jacob*, 923 A.2d 473, 482 (Pa. 2007) (rejecting the argument that only two adults could be accorded parental status in a custody dispute involving three adults and four children); Carbone, *supra* note 3, at 1341–43 (discussing provision for dual paternity in Louisiana law). For an insightful and compelling discussion of how family law, while not quite there yet, is primed for the recognition of community parenting, see Susan Frelich Appleton, *Two Kinds of Parents* (June 17, 2007) (unpublished manuscript, on file with author).

156. See *supra* Part II.A.

157. See American Bar Association Section of Family Law, *White Paper: An Analysis of The Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 FAM. L.Q. 339, 361–62 (2004) (reviewing the economic benefits bestowed on children through legal parenthood). Of course, legal feminists and left legal scholars concerned with class should be cautious about making this argument, for it is likely to reinforce the designation of the family as the institution primarily responsible for economic dependency in the first place. A more radical agenda would be to de-link economic benefits from the family itself, for example, through a more robust social welfare state, universal health insurance, and child-support assurance. Such policies would relieve pressure to recognize family status, whether it be a same-sex marriage, functional parenthood involving two-parents, or community parenting.

Returning to the examples of community parenting discussed in Part II, othermothering is credited with contributing to black survival,¹⁵⁸ but its significance for women's liberation is just as great. As a practice, othermothering threatens both patriarchal and capitalist norms. Most obviously, to the extent that othermothering is defined by women-centered, fluid, family-like networks that have different purposes, othermothering undermines the patriarchal family, the male-breadwinner ideal, and the notion of biological motherhood. Perhaps less obviously, it also threatens capitalist norms, for it moves away from the concept of children as the private property of individual parents.¹⁵⁹

Along the same lines, gay and lesbian multiple-parent families in which community parenting is occurring “represent[] a radical and radicalizing challenge to heterosexual norms that govern parenting roles and identities.”¹⁶⁰ By disconnecting family formation and reproduction from heterosexual relations, extended gay kin networks and gay parenthood reveal heterosexuality and biology to be mere symbols of a privileged relationship. As such, community parenting can be deeply transgressive and possess significant political potential. This account of community parenting as a positive politics contrasts with dominant accounts of the care practices of lower-income people, people of color, sexual minorities, and divorced and unmarried

158. See Kessler, *supra* note 24, at 19.

159. See PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT* 182 (2d ed. 2000). Collins explains this point as follows:

[S]topping to help others to whom one is not related and doing it for free can be seen as rejecting the basic values of the capitalist market economy.

. . . The traditional family ideal assigns mothers full responsibility for children and evaluates their performance based on their ability to procure the benefits of a nuclear family household. Within this capitalist marketplace model, those women who “catch” legal husbands, who live in single-family homes, who can afford private school and music lessons for their children, are deemed better mothers than those who do not. In this context, those African-American women who continue community-based child care challenge one fundamental assumption underlying the capitalist system itself: that children are “private property”

Id. at 182.

160. See Gillian A. Dunne, *Opting into Motherhood: Lesbians Blurring the Boundaries and Transforming the Meaning of Parenthood and Kinship*, 14 *GENDER & SOC'Y* 11, 11 (2000).

parents more generally.¹⁶¹ In a time when the intensive mothering norm is making a strong resurgence,¹⁶² these models of community parenting provide great potential for theorizing parenting as a collective project.

V. THE LEGAL RECOGNITION OF COMMUNITY PARENTING

How can the law better recognize community parenting? First, we may need to further disaggregate the bundle of parental rights. Currently, it is all or nothing. You are in or out—a legal parent or a stranger. There are advantages and disadvantages to this framework. The existing debate on that question is likely to change, or at least certainly to become more intense, once we add more potential claimants to the mix.¹⁶³ Putting that important debate aside for the moment, what follows is a very brief exploration of a few concrete legal reforms that might follow if we were to recognize community parenting in the law.

Most obviously, were community parenting recognized as a legitimate practice, more than two adults could establish legal ties to a child. There are a number of ways this could be achieved, including third-parent adoption, co-guardianships, contracts, and post hoc judicial determinations. While the United States has yet to enter this territory in any serious way, other countries are moving in that direction.

For example, the Court of Appeal for Ontario recently granted legal parental status to a child's biological mother and her lesbian partner without extinguishing the parental rights of the child's biological father.¹⁶⁴ In that case, the three adults agreed that the women partners would be the child's primary parents, but that the father would play an active role in the child's life.¹⁶⁵ The non-

161. See *supra* Part II.B.

162. See Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES, Oct. 26, 2003, § 6 (Magazine), at 42. According to this article, "Why don't women run the world? . . . [B]ecause they don't want to." *Id.* at 45.

163. For a strong statement in support of the "all or nothing" model of parental rights, see Buss, *supra* note 8.

164. See *A.A. v. B.B.*, [2007] 83 O.R.3d 561 (Can.)

165. *Id.* at para. 1.

biological mother sought a judicial declaration that she, along with child's biological parents, was one of the child's legal parents.¹⁶⁶ Using its *parens patriae* power the court held it would not be in the child's best interest to lose the parentage of any of the parties.¹⁶⁷ Ultimately, the court declared the non-biological mother a legal parent without diminishing the status of either biological parent.¹⁶⁸

Even before this case, Canadian courts could order more than one non-custodial parent to pay child support concurrently (for example, a biological father and a stepfather) if the non-biological parent stood in the place of a parent to the child,¹⁶⁹ apportioning support according to the role each adult played in the child's life or even applying the full guideline amount to each adult independently.¹⁷⁰ This rule seems justified in light of the fact that a whole range of individuals often have economic and affective ties to a child that are worth preserving.¹⁷¹ Recognizing such care practices, which can be highly functional, would represent long-deserved recognition of the value of that care.

Or perhaps a more robust welfare state, in which both the state and a set of individuals would be jointly responsible for a child, would be the logical consequence of a society in which community parenting were recognized. A deeper commitment to community parenting might also involve a recognition that much parenting in our society occurs outside the family itself, "between home and school."¹⁷² Other law reforms that might follow, in one form or another, from a commitment to community parenting include open adoption and a foster care system where parental rights are not

166. *Id.* at para. 2.

167. *Id.* at para. 37.

168. *Id.* at para. 41.

169. See *Chartier v. Chartier*, [1999] S.C.R. 242, 246 (Can.) (holding that a stepparent who stands in the place of a parent to a child cannot unilaterally give up that status and escape the obligation to provide support for that child after the breakdown of the marriage).

170. See DEP'T OF JUSTICE CANADA, CHILDREN COME FIRST: A REPORT TO PARLIAMENT REVIEWING THE PROVISIONS AND OPERATION OF THE FEDERAL CHILD SUPPORT GUIDELINES 49–50 (2002), http://canada.justice.gc.ca/en/ps/sup/pub/rp/volume_2.pdf. In many provinces, this rule has been extended to individuals in cohabiting relationships, making the act of parenting (not marital status or the existence of other obligors) the determining factor in child support determinations. *Id.* at 17.

171. See *supra* Part II.A.

172. Laura Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833 (2007).

terminated on a fast track, but are shared with foster parents consistent with a child's welfare.

Obviously these reforms would implicate serious issues regarding family privacy, gender politics, and the best interests of children. Indeed, such reforms may involve reworking certain constitutional principles concerning the family.¹⁷³ Two points are worth making in that regard. First, the constitutional background rules that would allegedly constrain a greater recognition of community parenting are themselves a product of a set of power relations. Reconstructing such constitutional doctrines to more fully recognize, value, and protect community parenting practices could result in a less partial and distorted legal regime. Second, there remains ample room for revision of existing constitutional doctrines regulating family and intimate life without elevating sperm donors, mere ex-lovers, and babysitters to the status of parent. Because such a law reform project would require careful line drawing, it would be a delicate and difficult one, but it should be achievable nevertheless.¹⁷⁴

Needless to say, this is a long-term project. The movement toward recognizing functional parents—even in its two-parent iteration—has garnered a negative response by family law scholars from the religious right to the liberal center. For example, Emily Buss and others have argued that recognizing functional parents harms children by undermining legal parents' authority.¹⁷⁵ June Carbone has suggested that recognizing functional parents *ex post* through equitable doctrines unfairly imposes obligations on people who did not agree to them.¹⁷⁶ Lynne Wardle says that functional parenthood—and the ALI Principles more generally—will weaken and undermine the institution of marriage.¹⁷⁷ Robyn Wilson raises the problem of sexual abuse of children, arguing that functional parenthood provides

173. *But cf.* Meyer, *supra* note 6 (arguing that there is no contradiction between functional parenthood and constitutional privacy, at least when only two legal parents are the final outcome in a particular case).

174. *See, e.g., In re E.L.M.C.*, 100 P.3d 546, 562 (Colo. 2004) (finding that even though legal mother had a constitutionally protected parental right and her ex-domestic partner did not, the state had a compelling interest in protecting the child from the harm that would result from termination of her relationship with her psychological parent).

175. *See* Buss, *supra* note 8, at 647–48.

176. *See* Carbone, *supra* note 3, at 1304–06.

177. *See* Wardle, *supra* note 2, at 1233.

more potentially predatory adults with access to children.¹⁷⁸ Given this uphill battle on the threshold question of functional parenthood, one can see why proponents of functional parenthood may succumb to the impulse to construct community parenting as the deviant, dysfunctional “other”—much in the same way that proponents of same-sex marriage have worked so hard to distinguish polygamy.¹⁷⁹ Notably missing in these discussions is any consideration of gender politics, despite the fact that court decisions enforcing the two-parent numerosity requirement in law scream with traditional gender ideology.¹⁸⁰

It is incumbent upon legal feminists to take advantage of this potentially transformative moment. Slowly but surely, the law is moving in the direction of recognizing functional parents. Explicitly injecting the possibility of community parenting into the current discourse on functional parenthood carries great potential to undermine traditional gender and sexuality norms of the family. Of course, community parenting will not necessarily always serve to disrupt oppressive gender and sexuality norms. Indeed, in certain contexts, the assertion of parental rights by a third or fourth person may be a product of gender oppression. At the same time, the circumstances of community parenting can make gender transformation possible, at least to a greater extent than has been recognized in political, legal, and academic discourses. This is a feminist project worth pursuing.

178. See generally Wilson, *supra* note 12.

179. See Elise Soukup, *Polygamists, Unite!*, NEWSWEEK, May 20, 2006, at 52; see also Sarah Elizabeth Richards, *Polygamy Loves Company*, SALON.COM, Mar. 21, 2006, http://www.salon.com/mwt/broadsheet/2006/03/21/polygamy_activists/print.html?source=newsletter.

180. This observation is inspired in part by Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL’Y REV. 97 (2005).