Annette Ruth Appell*

Professor Appell supports the use of the traditional parental rights doctrine, which accords biological parents, particularly mothers, parental status alienable only voluntarily or upon proof of unfitness. She defends the doctrine against the criticisms that it is regressive and does not protect the interests of children or de facto parents. She contends that the attacks on traditional parental rights doctrine are misguided because they work to the disadvantage of families who do not easily fit the dominant norm—minority, single-mother, lower income, or politically and legally under-represented families. After examining the constitutional underpinnings and application of the parental rights doctrine as well as proposals to change it, she concludes that the doctrine provides more concrete standards than any alternative and serves to protect those families most vulnerable to intervention or dissolution.

“What she called the nastiness of life was the shock she received upon learning that nobody stopped playing checkers just because the pieces included her children.”

INTRODUCTION

This Article is a cautionary tale. It presents a progressive response to a series of progressive and not so progressive critiques of the constitutional doctrine that supports parental rights. The critiques range across a broad and complex spectrum. They include critical theories that identify as socially constructed what once seemed natural, recognition that family structures are variable and changeable, increasingly sophisticated reproductive technologies, unsatisfied demand for adoption, greater rights for women, and reaction to the constitutionalization of parental rights doctrine. The critiques denigrate the three core, interrelated aspects of parental rights—that biological relationships are

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privileged, that parents determine their children’s interests, and that families are private. Many child advocates, feminists and alternative family proponents, however, criticize those protections as harmful to adults and children, regressively patriarchal, heterosexist, and unduly dismissive of alternative methods of forming families.

These diverse and critical views about the current legal construction of families are not surprising, given the wide array of family forms. Dominant societal norms perceive and value a nuclear family model in which an adult married heterosexual couple bears, raises and supports their children without governmental cash assistance. Yet these families constitute a minority of households. Adults and children live together through diverse arrangements, such as adoption, kinship care, foster care, reproductive technology, parental separation, and formation of new intimate relationships. These families may have multiple kinds of parents. One kind is birth parents, those who conceived and gave birth to the child. The other is virtual parents, persons who are not necessarily biologically related to the child, but whom the child and the “parent” may view as a parent. This group of “parents” includes step-parents, co-parents, second parents, foster parents, grandparents, and prospective adoptive parents. Many virtual parents and their proponents view traditional parental rights law as a barrier to the protection of affectional relationships and have advocated new definitions of the families and corresponding state protections for them.

In addition, continued struggles to afford financial and legal protections for women who rear children and who battle domestic violence and subordination seem to demand public attention and accountability, not deference to families. Commentators, activists, and policy-makers challenge the value of family privacy that helps immunize families from public scrutiny and intervention, shields private acts of violence, and fails to mediate power imbalances among family members. These critics contend that family privacy reinforces oppressive gender norms that place women in the home and in the role of mother. Family privacy also limits a woman’s

2. See infra notes 287 and 416.
4. Now that a majority of all married women are in the workforce, the demographic dominance of nuclear families with stay-at-home mothers has declined. Michael Grossberg, Balancing Acts: Crisis, Change, and Continuity in American Family Law, 1890-1990, 28 IND. L. REV. 273, 296–97 (1995). Moreover, a child born in 1990 reportedly has a fifty percent chance at having a court determine where and with whom she or he will live. Id. at 297.
Virtual Mothers and the Meaning of Parenthood

attempts to define her own life and obtain adequate support for her child rearing and other roles. This privacy allegedly harms everyone because it confines familial values of connection and care-giving to women and the home, rather than expanding the operation of these values to the public sphere where they are most needed to temper individualism. Commentators argue that families and feminine values should be more public and the public should be more responsible for supporting families.

These perspectives raise important concerns, but in their haste to dismantle parental rights doctrine, critics ignore the virtues. The doctrine provides fairly determinate rules for establishing and maintaining families. It presents a model for parenthood that privileges and protects biological mother-work and those associated with this work. The current model holds that mothers earn parental status by gestating and birthing while fathers earn parental status by caring for the born child or marrying the mother. Persons who earn this status retain it, until they voluntarily relinquish the status or prove to be unfit. Parental status entitles its holders, rather than any other adult or entity, to make decisions for and about their children. Parental rights doctrine prohibits other persons and the state from usurping the parental decisionmaking role because they are, or claim to be, superior parents.

Regardless of how cogent the family critiques may be, many ultimately devolve into adult disputes about what is best for children and how families should function. The critiques proffer more subjective, less determinate rules for intervening in, or defining, the family. These rules would disadvantage poor and minority families who receive greater public surveillance and less respect as competent, functioning families. Critics ignore the self-referential nature of assigning value to families who resemble one's own family, but not families who are different. Moreover, persons who possess the power to assign family value typically have financial, political, or legal power. These same people generally have, or come from, families who satisfy dominant norms (White, marital and economically privileged), so their families both

5. E.g., Defense of Marriage Act, 1 U.S.C.S. § 7, 28 U.S.C.S. § 1738C (Lexis Supp. 2001) (refusing to recognize non-heterosexual marriage); Annette R. Appell, Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System [An Essay], 48 S.C. L. Rev. 577, 585 (1997) (explaining how social workers, lawyers and judges assess families). The author includes herself, as well as many of the commentators she cites herein, within this class of persons with some measure of financial, political and legal power.

6. See infra Section III.B.
produce value and are valued. From this position of dominance, commentators and decisionmakers can easily take privacy for granted and advocate interference into "other" families. These tendencies to devalue what is different make the critiques particularly troubling because the legally-protected biological nexus may be the only shield available to families who do not meet dominant norms.

The biologically-based legal construction of parenthood is actually a progressive tool for protecting the integrity of those families who do not easily fit dominant norms of family. This doctrine can facilitate the interests of children and the adults who care for them. Current constitutional protections of biologically-based families are important safeguards for women and children who are at risk of losing their status as family. Parental rights doctrine privileges and privatizes the parent-child relationship, thus offering relatively determinate and objective standards for creation and dissolution of families. The doctrine protects families who are most vulnerable to intervention or dissolution.

This deference is integral to the private production of values that constitutes a philosophical lynchpin of our constitutional scheme. The system, however, also values private property and promotes individualized self-interest in a way that often correlates the degree of privacy one enjoys directly with the amount of property one has and how well one conforms to dominant parental norms. Thus, dismantling family privacy while leaving in place the larger political scheme that permits autonomy-limiting income and power disparities will effectively target poor and non-dominant families who already must struggle to maintain their integrity.

For all of these reasons, parental rights doctrine and its critiques warrant analysis. This Article undertakes that effort. Part I first analyzes the constitutional doctrine that defines and protects families, locating its theoretical base and assessing theories about the efficacy of parental rights doctrine. That doctrine, premised on basic

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7. This Article does not rely on sociobiological theories that hold biological parents, particularly mothers, are genetically programmed to provide the best care for their offspring. See, e.g., GARY S. BECKER, A TREATISE ON THE FAMILY 37–38 (1991); JOHN H. BECKSTROM, SOCIOBIOLOGY AND THE LAW 81–102, 130–34 (1985). Nor does the Article rely on other theories and studies concluding that biological parents serve children best. ELIZABETH S. SCOTT & ROBERT E. SCOTT, PARENTS AS FIDUCIARIES, 81 VA. L. REV. 2401, 2433–36 (1995) (describing studies). Biological relationships are extremely important to children and adults, but the author does not base her argument on that opinion and does not believe that protecting these biological connections necessarily dictates the particular contours of parental rights doctrine. See ANNETTE R. APPEL, BLENDING FAMILIES THROUGH ADOPTION: IMPLICATIONS FOR COLLABORATIVE ADOPTION LAW AND PRACTICE, 75 B.U. L. REV. 997, 1013–20 (1995) (arguing that the importance of biological relationships to adults and children supports open adoption).
principles of our constitutional system of government, defines parent with reference to biological maternity. It grants parental status to persons who have earned that status through child-bearing or a nurturing relationship to the child-bearer or one's biological child. The doctrine concomitantly protects that status by deferring to parental governance of children.

Part II assesses major proposals to revise, directly and indirectly, the current biologically-based definition and protection of families. These family revision perspectives find that parental rights doctrine confines and harms women and children while presuming that parental rights doctrine is overrated and anachronistic. The revisionist accounts would wholly or partly replace the doctrine with a construction of parenthood based on affectional or state-sponsored, rather than biological, norms. The accounts would also reduce the privacy afforded family life, so that outsiders could more easily enter to reform or support families and so maternal values could transfer to larger society.

Part III examines the assumptions and repercussions of those critiques. It finds that the proposed alternative family standards frequently devolve into differences of opinion about what is best for particular children. These disputes do not provide principled reasons to depart from current law privileging parental assessment of what is best for children, absent parental unfitness or consent. This section shows that the critics may not fully appreciate how little privacy many families now enjoy and that the proposed alternative standards would further reduce, or disproportionately affect, the privacy of these more public families. Although parental rights doctrine is not perfect, it does protect people who otherwise enjoy little privacy. Many of the critiques do not afford such protection.

I. LEGAL CONSTRUCTION OF FAMILIES

Defining and regulating families is principally, though not exclusively, a state, rather than federal, prerogative. State laws

govern family issues, but the U.S. Constitution provides parameters that limit the states' ability to define and regulate family rights and obligations. The U.S. Constitution does not expressly refer to families. The United States Supreme Court, however, has interpreted the document to protect the integrity of certain families—mostly those related through biology or marriage. The Court has protected families on a number of doctrinal grounds, including substantive and procedural due process, equal protection, and freedom of religion. Regardless of the precise constitutional source, the Court's decisions hold that the family relationship is so fundamental that government intervention must be circumscribed. This limited intervention into family relationships (generally parent-child relationships) can be characterized as "family privacy." "Parental rights doctrine" refers...
to the fuller doctrine that defines parents and limits intervention into the family.

The historical context, doctrinal development or even doctrinal coherence of this constitutional protection are not of concern here. Instead, the analytic coherence of privileging family relationships within both the context of liberal philosophy and the repercussions for mothers and children of abandoning this privilege is assessed. Moreover, the present examination of the


15. This Article presumes that liberal philosophy is the predominant theoretical basis for the United States form of government, or at least that it provides the predominant theme explaining personal liberties doctrine. See Anita Allen, Social Contract Theory in American Case Law, 51 FLA. L. REV. 1, 1-10 (1999) (rehearsings the role of liberal social contract theory in early American political thought and subsequent legal doctrine); Robin West, Taking Freedom Seriously, 104 HARV. L. REV. 43, 61 (1990) (claiming that the Constitutional drafters largely rejected republicanism); see also Frank I. Michelman, Possession vs. Distribution in the Constitutional Idea of Property, 72 IOWA L. REV. 1319, 1325 (1987) (claiming "[a]ll right-thinking Americans of the founding era were professing republicans[,]" but noting republicanism then was a broad term unified by a theme of public governance); Daniel T. Rodgers, Republicanism: the Career of a Concept, 79 J. AM. HIST. 11, 38 (1992) (claiming that in early national history, it appears that there was no clear understanding of the meaning of republican, and quoting John Adams' declaration that the term is "unintelligible"). See generally THOMAS L. PANGLE, THE SPIRIT OF MODERN REPUBLICANISM 28-127 (1988) (showing that Lockean philosophy dominated early Constitutional theory). Cf. JVL. J. JOSEPHSON, GENDER, FAMILIES, AND STATE: CHILD SUPPORT POLICY IN THE UNITED STATES 3 (1997) (noting that multiple political theories produced the United States political system, though two themes predominate—protection of individual rights and democratic rule); MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT 6 (1996) (claiming that while republicanism dominated in early national history and while liberalism dominates now, both have always been present); James T. Kloppenberg, The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse, 74 J. AM. HIST. 9 (1987) (noting that Christianity, republicanism and Lockean liberalism informed revolutionary and early national ideology); David A. J. Richards, Constitutional Legitimacy and Constitutional Privacy, 61 N.Y.U. L. REV. 800, 817-18, 842-47 (1986) (describing early constitutional theory as liberal republican).
privileged family concerns the parent-child relationship, rather than intimate unions between adults. These adult unions are addressed insofar as they relate to, or contrast with, parent-child relationships.

To explore parenthood's meaning and privileges, this part of the Article addresses four issues. First, it reviews what a parent is—how the parent-child relationship is defined. Second, it considers the privileges that flow from this definition and attach to that relationship, and who exercises those privileges. Third, it examines the limits of these privileges and when the state can interfere with or reform the parent-child relationship. Fourth, it explores why this relationship receives special constitutional protection. These four aspects of parenthood specifically reveal that parental rights doctrine presents a unique form of privacy, that motherhood is the dominant theme of parenthood, and that the definition and protection of the parent-child relationship is deeply rooted in constitutional theory.

A. Defining Parents

The notion of families during the formative periods of the United States Constitution, the Bill of Rights and the Thirteenth and Fourteenth Amendments, contemplated a patriarchal household in which the father presided over and controlled his wife and their children. The Supreme Court, in a series of cases defining parental rights to custody and control of children, continues to define families along these traditional lines, primarily recognizing families created through birth and marriage. This doctrine's development, however, in the context of parent-child relationships, has defined the family in matrifocal terms. That is, parenthood, as protected by the Constitution, is understood in relation to the

16. Michael Grossberg, Governing the Hearth 4–9 (1985); Mary Ann Mason, From Father's Property to Children's Rights 1–83 (1994). See also Law, supra note 13, at 589–93; Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 Yale L.J. 2117, 2122–24 (1996). The household may also have included child apprentices or indentured servants. Mason, supra, at 30–39. In the antebellum South, the (white) patriarch's household power and control extended to slaves as well. Hasday, supra note 8, at nn. 119, 120 & 147. Nevertheless, the actual experiences of many women and families did not entirely fit this patriarchal model. See Hendrik Hartog, Man and Wife in America (2000) (describing marital separations in the 19th and early 20th centuries); Mason, supra, at 50–83 (describing rise in maternal rights in the 19th century); Law, supra note 13, at 594–605 (describing 18th and 19th century family life).
Virtual Mothers and the Meaning of Parenthood

The Court's jurisprudence presents childbearing as the parental paradigm and the mother as the anchor. It does so in three ways. First, the Supreme Court presumes that the woman who gave birth ("biological" mother)\(^\text{17}\) is a parent, regardless of marriage or any proof that she has cared for her child after birth or made legal declarations of parenthood. A woman establishes parenthood by carrying the fetus to term.\(^\text{18}\) Although the Court has yet to review competing claims of women to the same child, it has not placed even long-term foster mothers on par with biological mothers.\(^\text{19}\) Yet the Court took the extraordinary step of extending procedural due process protections to a mother whom a trial court judged to be unfit.\(^\text{20}\) The Court held that the mother's legal relationship to her children was so fundamental that the state must waive costs of her appeal even when the action was brought by a private party, her ex-husband.\(^\text{21}\)

Second, constitutional family privacy doctrine defines the non-maternal parent, the "father," in relation to the mother. A father is someone who has either (a) acted like a mother by contributing a gamete and nurturing the child ("biological" or "birth" father)\(^\text{22}\) or

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\(^{17}\) When gestational and genetic relations are split, the biological mother is referred to as the "gestational mother" and the "genetic mother." The Court has not yet faced the question of a gestational mother who is not genetically related to the child. This Article does not address issue here, although it will surely arise eventually. R. Alta Charo, And Baby Makes Three—or Four, or Five, or Six: Redefining the Family After the Reprotech Revolution, 15 Wis. WOMEN'S L.J. 231, 243 (2000); Marjorie Maguire Shultz, Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality, 1990 Wis. L. REV. 297, 316-18.

\(^{18}\) Lehr v. Robertson, 463 U.S. 248, 260 n.16 (1983) ("The mother carries and bears the child, and in this sense her parental relationship is clear.") (quoting Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)); see also Tuan Anh Nguyen v. INS, 533 U.S. 53, (2001); Miller v. Albright, 523 U.S. 420 (1998) (both denying equal gender protection challenges to citizenship rules that treat as United States citizens children born to female United States citizens, but require non-marital biological fathers to take additional steps to establish paternity).


\(^{20}\) M.L.B. v. S.L.J., 519 U.S. 102 (1996) (ruling that indigent mother was entitled to free transcripts in a civil appeal from an adoption court order terminating her parental rights).

\(^{21}\) Id. at 124. M.L.B. involved a private dispute between divorced parents regarding stepmother adoption of the noncustodial mother's children. The state's role was purely judicial. Id. Fifteen years earlier, though, the Court refused to recognize a per se right to legal representation for indigent parents when the state itself petitions to terminate their parental status. Lassiter v. Dept. of Soc. Serv., 455 U.S. 18 (1981).

\(^{22}\) Caban, 441 U.S. at 389 (ruling that the father was "fully comparable to . . . mother"); Stanley v. Illinois 405 U.S. 645 (1972); see also Smith v. Org. of Foster Families for Quality & Reform, 431 U.S. 816 (1977) (holding the fact that foster parents nurtured the
been married to the mother at the time of conception ("legal" father). For example, the Court held that the man in *Stanley v. Illinois* who was not married to the children's mother but who had cared for, and lived with, the children for most of eighteen years, was a father and, therefore, entitled to a hearing before the state could remove the children from his care. Similarly, in *Caban v. Mohammed*, the biological father lived with the mother during conception, after conception and during the birth of his children and then continued to visit them after their mother remarried. The Court held that the biological father had a relationship with his children "fully comparable to that of the mother" and could not be deprived of that relationship without a hearing or his consent.

In contrast, the Court refused to grant parental status to biological fathers who have merely contributed a gamete, but have not provided significant care for the child or wed the mother. In *Quilloin v. Walcott*, the Court held that an unwed biological father, who never lived with the mother or the child, and provided only sporadic support, and never legally claimed the child as his had no parental rights. He was, therefore, powerless to stop his eleven-year-old child's adoption by the mother's husband. Similarly, in *Lehr v. Robertson*, the Court held that a biological father who lived with the mother prior to the child's birth, visited her in the hospital when the child was born, but who did not live with or support the mother or child after birth, had no parental right to bar the mother's new husband from adopting the child.

Instead, the biological relationship merely "offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. . . . If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of
where the child's best interests lie. Nevertheless, it is possible that this unique, inchoate opportunity will not override the rights of the man married to the mother. In Michael H. v. Gerald D., a plurality of the Court held that the man who was married to the mother at the time of conception and birth has a superior paternal claim to that of the biological father despite the fact that he had maintained a relationship with the child, that included living with her and her mother for short periods of time. A majority of the Court, however, would have recognized at least a right of the biological father to visit the child.

Third, parent-child-like relationships that are based only on nurture, not biology and nurture (including a nurturing relationship to the biological mother), are insufficient to establish legal parenthood over the claims of fit, legal parents who have not agreed, i.e., legally consented, to the formation of the relationship. For example, the Court has recognized that deep and enduring parent-child-like relationships may arise with no biological connections, but it has not given those relationships the same status as birth relations. Indeed, the Court held in Santosky v. Kramer, that the state has no interest in reforming families, until or unless the biological parents have been proven unfit. The Court's reluctance to grant certiorari to adoptive parents whose adoptions

28. Id. at 262.
30. Id.
31. Id. at 132–136 (concurring opinion by Justice Stevens for reasons that the biological father's right to visit his daughter was properly denied based on the best interests of the child); id. at 142–145 (dissenting opinion by Justices Brennan, Marshall, and Blackmun, arguing that the biological father here established a parent-child relationship worthy of protection); id. at 159–163 (dissenting opinion by Justice White, arguing that the biological father should have the opportunity to prove paternity, despite the mother's marriage to another man).
33. See Org. of Foster Families, 431 U.S. at 844–847 (recognizing importance of relationships between foster parents and children, but declining to give them equal status to birth relations). Although Org. of Foster Families distinguishes relationships that "have their origins in an arrangement in which the State has been partner from the outset," the Court did suggest that adoption might deserve equal legal status to biological parenthood. Id. at 844–45.
34. Santosky, 455 U.S. at 766–67. This prohibition applies to parents who wish to retain their parental rights. Parents are free, however, to transfer their parental rights to others for the purposes of adoption. This Article does not address the status of adoptive families except to the extent of their legitimacy when formed as a result of such voluntary transfers or after appropriate hearings that determine parents are unfit to have any parental status.
judges have overturned or denied, while ordering the children returned to their biological parents, strongly suggests that the Court does not recognize as parents persons who have no biological relationship to the child, unless the would-be parent has a relationship to the biological parent, like the non-biological father in *Michael H.*

Thus, the constitutional definition of parent differentiates between women as mothers and men as fathers. So far, the Court treats the mother's biological connection (gestational and genetic) differently than the father's biological (genetic) connection; the latter is not sufficient or even necessary to create a legal parent. Parenthood, as a constitutional matter, can be lost for failure to earn it by caring for the child or legally claiming the child or it can be usurped by a person who shows affection for the mother by marrying her. Parenthood to date requires a biological connection between the mother and child; a nurturing connection between the prospective other parent and the mother; or a nurturing and genetic connection to the child.

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35. *See Baby Richard,* 513 U.S. at PC; *DeBoer,* 509 U.S. at 1301–02 (1993) (Justice Stevens, as Circuit Justice for the Sixth Circuit, denying stay pending certiorari determination because the Supreme Court was unlikely to grant certiorari or, if it did, to declare decision unconstitutional: federal law does not authorize "unrelated persons to retain custody of a child whose natural parents have not been found unfit simply because they may be better able to provide for her future and her education"); *see also* O’Connell v. Kirchner, 513 U.S. 1303, 1304 (1995) (Justice Stevens, as Circuit Justice for the Seventh Circuit, denying stay of state court order to return Baby Richard to his birth father because there was no federal question). But *see* O’Connell v. Kirchner, 513 U.S. 1138 (1995) (Justices O’Conner and Breyer dissenting from denial of stay because state court’s order may have been based on an interpretation of the Federal Constitution that conflicts with decisions of other courts).


37. *Even the Court’s cramped abortion jurisprudence reflects this distinction between male and female biological connections by refusing to permit the pregnant woman’s husband (the potential legal father) to be notified of the woman’s decision to abort.* Planned Parenthood v. Casey, 505 U.S. 835, 895–96 (1992).


40. *Michael H.*, 491 U.S. at 110. One could also read *Michael H.* and the step-parent adoption cases, *Quilloin* and *Lehr,* as further reflecting a matrifocal definition of parent, for in those cases, it was the mother’s chosen (marital) partner that the Court considered as, or paved the way to become, the father. That is, those cases in effect allowed the mothers to choose the father. But *see* Caban v. Mohammed, 441 U.S. 380, 394 (1979) (holding that the mother was not permitted to choose her new husband to be the father).

41. *An in-depth examination of fathers is beyond the scope of this Article, however, under current definitions, the category of “father” is more variable than “mother.” Because it includes both genetic and non-genetic paternal relationships to the child, the category could logically encompass a larger group of fathers than previously sanctioned. The fathers who have shown a commitment to the mother, symbolized by marriage, are paradigms for other domestic partners, whether marital or not, who have shown a commitment to the mother. It is not evident why marriage in itself should be the only way of establishing non-biological legal fatherhood, or why “fathers” must be men.* Accord Ruthann Robson, *Making
The Supreme Court's line of cases that resolves whether the law should treat non-marital parent-child relationships the same as parent-child relationships arising out of marriage also reflects this matrifocal definition of parent. The Court has implicitly defined parent and child when determining whether these non-marital families can receive benefits available to marital families. Like the paternal rights cases discussed above, the non-marital child cases rarely raise questions about mother-child relationships. Indeed, the only cases addressing the benefits which flow from the mother-child relationship held that these benefits should not depend upon whether the mother was married. Her status as mother (i.e., genetic and gestational) is presumably sufficient to create a legally recognizable parent-child relationship so that she could sue for the wrongful death of her children and her children could sue for hers. A father, however, must be more than the genetic parent, unless he dies before the child is born. If he has not married the mother, the state may deny a father parental status if he does not establish legal paternity or the children are not actually

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42. The traditional alignment of marriage with parenthood held that non-marital fathers were not fathers. Grossberg, supra note 16, at 196-233. The nonmarital family cases address whether legal benefits could flow between non-marital parents and their biological offspring.

43. See Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73, (1968); Levy v. Louisiana, 391 U.S. 68 (1968). The only case in which the Supreme Court upheld a distinction regarding benefits to non-married versus married mothers involved Social Security survivor benefits that permitted both children and married mothers to receive benefits through the father, but denied them to non-married mothers, although the non-marital children could still receive children's benefits. Califano v. Boles, 443 U.S. 282 (1979). The court based its decision there on the presumptions that non-marital children would not be unduly disadvantaged because they still received benefits and unmarried women are less likely to be economically dependent on the father of their children. Id.

44. See Glona, 391 U.S. at 73; Levy, 391 U.S. at 72; accord Tuan Anh Nguyen v. INS, 533 U.S. 53 at 64 (2001) (“Given the proof of motherhood that is inherent in birth itself, it is unremarkable that Congress did not require” mothers to take further affirmative steps to prove parenthood).


dependent on him.\textsuperscript{47} Fathers in the non-marital children cases, as in the parental rights cases, are men who either were married to the mother or were genetic contributors and proved their parenthood by a court order or by supporting the mother or children. A mother is a mother by virtue of giving birth.

The Court’s view of parenthood shows that parenthood is biologically-based, although it must be earned. Mothers earn it through the nurturing biological acts of gestation and birth. “Fathers” earn it in one of two ways. Men who are biologically (genetically) related to the child earn the status by caring for the child after birth. Both non-genetic and genetic fathers may earn parental status by making a commitment to the child’s mother, generally by marrying her. Although a person may become a father through marriage, marriage is not essential to maternity or to biological paternity. The acts of gestation and birth instead form the anchor and paradigm for parenthood. Persons must relate to the child like a mother, through biological connection and nurturing, or must relate to the mother through commitment and caring.

\section*{B. Nature of Parental Rights}

A significant, if obvious, aspect of the matrifocal definition of parent relationships is that care-giving (rather than solely genetic connection) is a necessary component to each of these relationships: mother-child, father-child, or father-mother-child. The relationship to a child is an integral aspect of the creation of the status (parent) and the contour of the right (parental). Parental rights\textsuperscript{48} involve decisionmaking by parents that necessarily include

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\item The label “parental rights” is used rather than “family rights” because the former is more accurate. These rights are exercised by parents, not children and not, necessarily, a combination of the two. Certainly, parents may determine how much deference they would give to their children’s choices. Children, however, do not have rights equal or superior to their parents. For example, children cannot veto parental relinquishment for adoption and similarly cannot, absent parental unfitness, seek termination of parental rights. Indeed, because of the legal disability and developmental limitations of children, parents frequently
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or affect children.\textsuperscript{49} That is, categorizing someone as a parent presumptively ties his or her interests to the child's.\textsuperscript{50} This means that parents' decisions about, or affecting, their child are both presumptively cognizant of the child's needs and in the child's "best" interests. Once parenthood is established, it is by definition earned and cannot be terminated without substantial process.\textsuperscript{51} This right belongs to the parent and applies only to decisions regarding, affecting, or relating to the child.

In this way, these parental rights are not individual rights, but rights that arise out of these relationships and apply to decisions for or about others.\textsuperscript{52} They are distinct from other decisional rights made the family decisions. Parham v. J.R., 442 U.S. 584, 602 (1979) (stating that "parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions"). See generally Kenneth Karst, \textit{The Freedom of Intimate Association}, 89 YALE L.J. 624, 642–43 (1980). Moreover, calling these "family" rights masks the legal and factual difference between adult relationships and parent-child relationships. \textit{See infra} text accompanying notes 70–74.

\textsuperscript{49} Once these decisions become sufficiently non-relational, the parent ceases to have parental right. Annette R. Appell & Bruce A. Boyer, \textit{Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption}, 2 DUKE J. GENDER L. & POL'Y 63, 75 (1995); \textit{see also} Carolyn Wilkes Kaas, \textit{Breaking up a Family or Putting It Back Together Again: Refining the Preference in Favor of the Parent in Third-Party Custody Cases}, 37 WM. & MARY L. REV. 1045, 1076–78 (1996) (noting that the Supreme Court protects parental rights only when parents have undertaken the corollary parental responsibilities); Scott & Scott, \textit{supra} note 7 at 2440 (linking parental performance to parental authority).

\textsuperscript{50} \textit{E.g.}, Santosky v. Kramer, 455 U.S. 745, 759–60 (1982) (children do not have an interest in terminating their relationship with their parents); Parham, 442 U.S. at 600 (holding that a child's interest in not being committed to a psychiatric institution "is inextricably linked with the parents' interest in and obligation for the welfare and health of the child"); \textit{see also} Scott & Scott, \textit{supra} note 7, at 2437–38 (explaining this presumption and the interrelationship of parent-child interests).

\textsuperscript{51} \textit{See M.L.B. v. S.L.J.}, 519 U.S. 102 (1996) (holding that even after a mother has been proven unfit by clear and convincing evidence she has a right, reserved theretofore only for criminal defendants, to a free copy of the records for appeal); Santosky, 455 U.S. 745 (even parents who abused or neglected their children have a right to substantial process before termination of parental rights); Stanley v. Illinois 405 U.S. 645 (1972) (holding that putative father has a right to hearing before a state can remove his children).

\textsuperscript{52} Naomi R. Cahn, \textit{Models of Family Privacy}, 67 GEO. WASH. L. REV. 1225, 1241 (1999); Martha Albertson Fineman, \textit{What Place for Family Privacy?}, 67 GEO. WASH. L. REV. 1207, 1213–14 (1999); \textit{see also} \textit{JOHN LOCKE, TWO TREATISES OF GOVERNMENT} 348 (SECOND TREATISE § 58) (Peter Laslett ed., Cambridge Univ. Press 1960) ("The Power, then, that Parents have over their children, arises from that Duty which is incumbent on them, to take care of their Offspring during the imperfect state of Childhood."); Kaas, \textit{supra} note 49 at 1072 (stating that, the "analysis of parental rights is actually a consideration of the scope of the protection afforded to the parent-child relationship"); David A. J. Richards, \textit{The Individual, the Family, and the Constitution: A Jurisprudential Perspective}, 55 N.Y.U. L. REV. 1, 28 (1980) (stating that the scope of parental rights is defined by responsibilities to the child); Mary L. Shanley, \textit{Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy}, 95 COLUM. L. REV. 60, 88 (1995) ("A 'parental right' should not be viewed as pertaining to an individual per se, but only to an individual-in-relationship with a dependent child."). Others promote a relational conception of the parent-child relationship but
privacy rights that involve decisionmaking for oneself. Nevertheless, commentators often view parental rights as individual rights, thereby either equating parental rights with property rights or associating parental rights with other personal rights arising out of individual autonomy. In fact, early constitutional family jurisprudence applied decisional privacy to the married-parent child-rearing entity, and not to individuals outside the marital context. Relying on this early jurisprudence, the Court has subsequently extended the private realm to include heterosexual individuals' decisions about birth control, pregnancy and marriage, regardless of whether they occur in the context of individual, coupled or marital decision-making. Thus, although such privacy rights began in traditional family contexts, the Court has extended them to protect individual decisions about certain intimate heterosexual matters. Their common origin, however, does not mean all decisional privacy is the same.

53. Decisional privacy refers to the doctrine protecting intimate decision-making, including marriage, birth control, and parental decision-making for their children, from coercive intervention by the state.


60. Dolgin, supra note 56, at 1553–58.
Instead, parental rights and other rights involving intimate adult decisions, like procreation, or adult relationships, such as marriage, address two different sides of privacy. Despite their common origin, parental rights are by definition relational while adult decisions and relationships are individual. This distinction is important because of the developmental differences between adults and children that distinguish parent-child relationships from adult-adult relationships. The former involve dependent relationships while the latter may be interdependent, but generally involve relationships between competent adults. Adults in these latter relationships may make certain decisions that will financially or legally bind their partners, but such power does not extend to

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61. See Cahn, supra note 52, at 1230–40 (describing and distinguishing three types of constitutional privacy: marital, parent-child, and sexual decision-making); Anne C. Dailey, Constitutional Privacy and the Just Family, 67 Tul. L. Rev. 955, 981 (1993) (characterizing individual and family privacy as “subdoctrines” of constitutional privacy); Rubenfeld, supra note 56, at 749 (distinguishing Fourth Amendment privacy from substantive limits on state power to intrude on certain decisions).

62. See Dailey, supra note 61, at 981 (“Family privacy, far from being instrumental to or even compatible with individual privacy, is deeply antithetical to it.”). But see Karst, supra note 48, at 642–43 (characterizing all of these intimate or family rights as associational but recognizing a difference between parent-child and adult-adult association); Minow & Shanley, supra note 52 (advocating that law regarding intimate associations be viewed as relational); Radhika Rao, Reconceiving Privacy: Relationships and Reproductive Technology, 45 UCLA L. Rev. 1077, 1102–07 (1998) (distinguishing between relational rights (right to connect with others, including adults) and individual rights (“right to be left alone”)).

63. See Martin Guggenheim, A Paradigm for Determining the Role of Counsel for Children, 64 Fordham L. Rev. 1399, 1407 (1996) (“Children are by definition persons in need of adult caretakers . . . .”) (quoting JOSEPH GOLDSTEIN, ET AL., BEFORE THE BEST INTERESTS OF THE CHILD 122 (1979)). Of course, the category of “child” itself is problematic because of the wide range of development and dependency persons experience between birth and the age of eighteen. “Child” also masks the wide variety of material and social conditions children experience relating to gender, class, race, culture and national origin. In addition, “child” is a problematic category over time and place. See, e.g., Janet E. Ainsworth, Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court, 69 N.C.L. Rev. 1083, 1091–1104 (1991) (describing changing social constructions of child in Western culture, and noting that “who is classified as a child, and what emotional, intellectual, and moral properties children are assumed to possess—has changed over time in response to changes in other facets of society.”); Dolgin, supra note 55 (describing changing legal constructions of childhood); Jamil S. Zainaldin, The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796–1851, 73 Nw. U. L. Rev. 1038, 1047–52 (1979) (describing the source and development of western construction of childhood as a distinct and special stage); see also Elizabeth S. Scott, The Legal Construction of Adolescence, 29 Hofstra L. Rev. 547 (2000) (describing the different treatment of adolescents in various areas, such as medical care, voting, drinking, and criminal activities). This Article does not undertake the daunting and much needed task of particularizing children as a category. Instead, the Article treats children as a category defined by their relationship to parent, occasionally making crude distinctions between children at various ends of the developmental spectrum.

64. The balance of power between the two may be unequal, and one person may in fact be dependant on the other. But that does not make the dependent person a child.
intimate decisions like divorce or whether to bear a child. Similarly, although certain decisions made about or within adult relationships are protected from governmental intervention, these relationships do not consider individual autonomy. Treating all decisional rights as relational would encumber adult decision-making, particularly in childbearing and marriage. Indeed, failure to distinguish between adults (i.e., women) and children supported some of the most outrageous and negative aspects of family privacy doctrine. The decisions held that wives’ identity merged into their husbands’ identity and had no legal status of their own. The parallels between a husband’s complete power over both his wife and his children are striking. However, the difference between combining a husband and a wife’s interests (marital unity) and parents and children’s interests (parental rights) is that adult women can generally identify, articulate, and frequently affect their own interests, whereas children cannot through much of their childhood.

65. See Casey, 505 U.S. at 898 (holding that a woman’s autonomy regarding her own pregnancy precludes a husband from gaining an interest in the pregnancy).

66. Id. at 887–98; see also Christyne L. Neff, Woman, Womb, and Bodily Integrity, 3 Yale J.L. & Feminism 327, 352–53 (1991) (discussing pregnancy as a matter of bodily integrity over which others should not have decision-making authority); Rao, supra note 62, at 1105–11 (distinguishing between relational rights and bodily integrity rights, such as abortion and contraception, but including adult-adult relationships as relational rights).

67. See, e.g., Siegel, supra note 16 (describing the historical doctrine of marital unity that included the right of husbands to beat their wives, and explaining the persistence of this power differential even as domestic violence prohibitions have outlawed such status-based conduct); Reva Siegel, Home as Work: The First Women’s Rights Claims Concerning Wives’ Household Labor, 1850–1880, 103 Yale L.J. 1073, 1211–17 (1994) [hereinafter Siegel, Home] (describing husbands’ control of family assets and wives’ continuing economic dependence due, in part, to devaluation of household work); Reva Siegel, Reasoning from the Body: A Historical Perspective on Abortion and Questions of Equal Protection, 44 Stan. L. Rev. 261, 319–23 (1992) [hereinafter Siegel, Reasoning] (describing the role that the wifely duty to her husband to bear and raise children played in limiting women’s access to abortion); see also discussion of feminist critique of privacy infra text accompanying notes 305–24.


69. Helpful here is Professor Yochai Benkler’s distinction between capacity for autonomy (competence and ability to “evaluate options and consequences of actions”) and conditions for autonomy (the factual circumstances that limit or enable self-direction). Yochai Benkler, Siren Songs and Amish Children: Autonomy, Information, and Law, 76 N.Y.U. L. Rev. 23, 33 n.32 (2001). Adults generally have the capacity and the conditions to be autonomous, though each may vary from adult to adult. Young children lack the capacity and conditions for self-direction, although they should develop both as they mature. Teenagers may fall someplace in between child and adult in the areas of capacity and conditions for autonomy. See Scott, supra note 63, at 591–92 (describing limitations in a teenager’s ability to appreciate consequences). Professor Benkler, however, may not agree with my simplistic formulation, for he seems to assume that teenagers are autonomous. See, e.g., Benkler, supra, at 46 (allowing parents to keep their children out of high school “violates the autonomy of children”).
Conversely, treating parents and children as holders of individual rights within the family obscures the different capacities of adults and children. That is, most adults have the cognitive and experiential ability to make informed, forward-looking decisions. Children, however, depending on their chronological age and developmental stage, have limited cognitive abilities. Most children remain unable to appreciate the full and future meaning of their choices and actions, even as their cognitive abilities approach those of adults. Moreover, most adults can implement their own decisions—to go somewhere or do something else—although many are constrained by poverty, emotional ties, dependence, or obligation. In contrast, young, but even unemancipated older, children are often financially, physically, and legally dependent on adults. Treating all children, rather than mature children, as independent rights holders vis-à-vis their parents, presumes a level of autonomy, independence and competence that simply does not apply to all children. Assigning such autonomy-based rights to children who are unable to make their own decisions merely empowers an adult to make decisions for the child. Parental rights

70. Michelle Oberman, Minor Rights And Wrongs, 24 J.L. MED. & ETHICS 127, 132 (1996); Scott, supra note 63, at 555-56, 591-92. These well-accepted limitations have not, however, persuaded lawmakers who have in many states established laws permitting or mandating children ten years old and younger to be tried as adults. Id. at 557.


72. See Martha Minow, Rights for the Next Generation: A Feminist Approach to Children’s Rights, 9 HARV. WOMEN’S L.J. 1, 18 (1986) (“Conceptually and practically, children in our society are not autonomous persons but instead dependants who are linked legally and daily to adults entrusted with their care.”).

73. Guggenheim, supra note 63, at 1405-08. This does not mean that children are not rights holders in other contexts. E.g. Suter v. Artist M., 503 U.S. 347 (1992) (assuming without deciding that children may bring suit pursuant to 42 U.S.C.S. § 1983); Bellotti v. Baird, 443 U.S. 622, 643-644 (1979) (holding that pregnant girls have a limited right to obtain an abortion without parental consent); Tinker v. Des Moines Indep. Cmty. Sch. Dist. 393 U.S. 503 (1969) (holding that children have a limited right to free speech in school setting); In re Gault, 387 U.S. 1 (1967) (holding that children have a right to certain procedural protections in juvenile delinquency proceedings); Brown v. Bd. of Ed., 347 U.S. 483 (1954) (holding that children have a right to equal protection); see also Minow, supra note 72, at 18-21 (advocating that children’s rights be framed in the context of children’s dependency, relationships, and connections); Lee E. Teitelbaum, Children’s Rights and the Problem of Equal Respect, 27 Hofstra L. Rev. 799 (1999) (discussing difference between children’s needs-based and autonomy-based rights); Woodhouse, supra note 54, at 327-30 (advocating recognition of children’s needs-based rights).

74. Appell & Boyer, supra note 49, at 75-76. Even children’s rights rhetorician Barbara Woodhouse recognizes that children’s rights are not autonomy-based, but are defined by
doctrine bestows the right to make these decisions on adults who have shown a prescribed level of commitment to the child (or to the child's mother). In this way parental rights are earned, unlike other decisional privacy rights, that inure automatically to (adult) persons.

Although parental rights are relational—in the sense that they protect decisions made by parents for their children—they are not mutual. Children do not share corresponding decisionmaking rights. That is, children's decisions about their own parents or family status do not clearly have constitutional protection, but children do have some individual constitutional rights that could interfere with parental control over them. Children have certain procedural protections against punitive state intervention. For example, in juvenile delinquency proceedings, children have a right to their own attorney, who is ethically bound to represent the child's interests, not those of the parents. Children also have limited rights to reproductive freedom. For example, when a teenage girl becomes pregnant and seeks an abortion, her rights may override her parent's parental rights, should they disagree about the outcome of the pregnancy. Yet, she may have no right to make

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75. Arguably the children benefit from parental decision-making and autonomy absent abuse or neglect, but the children are not positive rights-holders in this context.


78. See Gault, 387 U.S. at 41 (holding that due process requires child and parents to be notified of the child's right to counsel in certain juvenile delinquency proceedings); MODEL RULES OF PROF'L CONDUCT R. 1.2, 1.8(f), 1.14 (2001) (establishing that an attorney must follow to the extent possible a minor client's direction regardless of who pays the attorney's bill).

79. Planned Parenthood v. Casey, 505 U.S. 835, 899–900 (1992); see also Carey v. Population Servs. Int'l, 431 U.S. 678 (1977). These limited rights are constitutional in nature and follow adult constitutional rights. They are, however, distinct from statutory rights or limitations on parental rights arising out of the state's parens patriae role. For an argument that the teenage abortion decisions do not grant children rights, but instead merely replace parental control over children's medical treatment with state control, see Martin Guggenheim, Minor Rights: The Adolescent Abortion Cases, Hofstra L. REV. (forthcoming 2002).

80. E.g., Casey, 505 U.S. at 899–900 (upholding a minor's right to seek judicial bypass of parental consent to abortion). Interestingly, girls who have not reached majority are legally competent in most states to consent to the adoption of their children. Jennifer Durham & Annette Appell, Minor Mothers and Consent to Adoption: An Anomaly in Youth Law, 5(1) ADOPTION Q. (forthcoming 2001). The philosophical and jurisprudential tensions that arise when parental decisions conflict with children's procreational and procedural rights are beyond the scope of this Article. For some discussions about these conflicts, see generally Robert A. Burt, The Constitution of the Family, 1979 SUP. CT. REV. 329; Dailey, supra note 61;
other medical decisions or decide whether she would rather have other parents. It is sufficient for purposes of this Article that children may attain rights independent from, and in conflict with, their parents' parental rights at some point, as children become more like adults (i.e., more mature). These rights may limit parental rights, though in a different way than third party or state intervention limits parental rights.

C. Extent of Parental Rights

A parent has a constitutional right to direct his/her child's care and upbringing, absent proof that the parent is abusing or neglecting the child or has failed to establish legal parenthood. Parental rights doctrine protects parental decisions by presuming that parental choices regarding or affecting children are sound. The government may adopt general laws and policy relating to child-rearing, such as education of children, child labor prohibitions, and

Robert B. Keiter, Privacy, Children, and Their Parents: Reflections On and Beyond the Supreme Court's Approach, 66 MINN. L. REV. 459 (1982); Richards, supra note 52.

81. Minow, supra note 72, at 8-14, 18-21 (describing history, current treatment, and mixed rationales behind children's rights); Scott, supra note 63, at 566-68 (same).


83. See Rhonda Gay Hartman, Adolescent Autonomy: Clarifying An Ageless Conundrum, 51 HASTINGS L.J. 1265 (2000) (arguing that adolescents are and should be treated legally as autonomous); LOCKE, supra note 52, at 346 (SECOND TREATISE § 55 (noting that parental control over children diminishes as children grow up)).

84. The references throughout this Article to "parent" and "biological parent" may refer to persons who have attained parental status through legally valid and completed adoptions. For purposes of this paper adoptive parents are presumed to would stand on the same footing as other de jure (biological and marital) parents.


87. See Stephen Gilles, On Educating Children: A Parentalist Manifesto, 63 U. CHI. L. REV. 997, 954 (1996) ("Rather than prescribing the best diet or the best style of parenting, we police the extremes."); see also Naomi R. Cahn, Reframing Child Custody Decisionmaking, 58 OHIO ST. L.J. 1, 6 (1997) (noting that meeting the designation as parent determines the deference to the relationship); Kay P. Kindred, God Bless the Child: Poor Children, Parens Patriae, and a State Obligation to Provide Assistance, 57 OHIO ST. L.J. 519, 525-27 (1996) (providing a succinct rehearsal of parental rights and parens patriae doctrines).
establishment of minimum parenting standards. The constitutional liberty interest, however, in the parent-child relationship cabins the state's ability to legislate regarding child welfare and child rearing. Thus, the state can coercively intervene in, or interfere with, family governance in order to protect the child, i.e., if the parents have fallen below minimum parenting standards. The state, however, cannot intervene merely because it has a difference of opinion with the parent about what is best for the child. This means that the state may not take children away from parents or diminish parental autonomy without adequate cause and process or, of course, parental consent. Moreover, the state cannot sanction another parent-child relationship through adoption, without proper proof and process. In these ways, families are private: parents have primary control over child-rearing, and the state may not usurp that control, unless there is sufficient cause and process or the parents consent to ceding control.

The Court has been divided and cautious about extending its decisional privacy doctrine. It, however, has been relatively united in upholding the sanctity of the parent-child relationship, as illustrated most recently in Troxel, a case that raised the question of whether a court could substitute its judgment for the mother's regarding whether third party visitation was in the best interests of the children and if so how much. Two things are particularly noteworthy about the decision. First, at least eight justices affirmed that

88. See Prince v. Massachusetts, 321 U.S. 158, 167 (1944) (holding that, "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare").


90. "State" and "government" are used interchangeably to refer to federal and state (geopolitical organizations) legislative, judicial or administration action.

91. See Meyer, supra note 11, at 545-48 (discussing balancing between parental rights and governmental protection of child welfare).

92. Troxel v. Granville, 530 U.S. 57, 68-69 (2000) (O'Connor, J., plurality) (discussing that "there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of [a fit] parent to make the best decisions concerning the rearing of that parent's children"); see Reno v. Flores, 507 U.S. 292, 304 (1993) (noting that the best interests of the child is not grounds for intervening in the parent-child relationship).


96. 530 U.S. 57.
the Constitution protects the parent-child relationship from undue governmental interference, although a majority of the justices could not agree on a rationale for the decision. Second, these eight justices affirmed the line of privacy doctrine cases that originated in the oft-denigrated *Lochner* era as establishing the primacy of parent-child relationships, even though the justices and constitutional law scholars have long questioned the validity and modernity of these early cases. Thus, the *Troxel* Court did not definitively identify what a family is or when the state can intervene. It did affirm that state action relating to the parent-child relationship has constitutional limitations, in an era of decisions which have diminished the rights of the federal government to curtail state authority.

D. Philosophical Underpinning of Parental Rights Doctrine

The Court’s family doctrine seems to have developed as an extension of political and personal autonomy principles on which the United States government was founded as well as from common law family doctrine that treated families as entities into which the state could not intrude. The origin and basis for these decisional privacy rights, derived from, but not enumerated in, the

97. All Supreme Court Justices but Justice Scalia agreed that the Constitution protects parental rights. *Troxel*, 530 U.S. at 65 (Justice O'Connor, Chief Justice Rehnquist, Justice Ginsburg, and Justice Breyer, plurality); id. at 77 (Souter, J., concurring); id. at 80 (Thomas, J., concurring); id. at 86-88 (Stevens, J., dissenting); id. at 95 (Kennedy, J., dissenting).


99. *Troxel*, 530 U.S. at 65-67 (O'Connor, J., plurality); id. at 77 (Souter, J., concurring); id. at 80 (Thomas, J., concurring, although holding open the possibility that the Court might overrule that line of cases); id. at 86-87 (Stevens, J., dissenting); id. at 95 (Kennedy, J., dissenting).


Constitution, have been the subject of much legal theorizing. The focus here is on decisional privacy doctrine’s foundation in a political and moral philosophy that values individual autonomy and informs the theoretical basis for the United States’ structure of government. The purpose of government is to maintain the political (if not material) conditions for people to determine the course of their own lives, through elected representative rule guided by reason and limited by respect for individual liberty to determine one’s own morality or sources of meaning. The state,

104. Commentators have also searched for a unifying theme for privacy. E.g., Dolgin, supra note 55; Meyer, supra note 11, at 535–36; Rubenfeld, supra note 56.

105. This refers primarily to the liberal influence on early American political theory that valued freedom, tolerance, and justice, espoused most influentially perhaps by Locke and his adherents. STEVEN M. DWORETZ, THE UNVARNISHED DOCTRINE: LOCKE, LIBERALISM, AND THE AMERICAN REVOLUTION 65–96 (1990); Brandon, supra note 102, at 1227; Kloppenberg, supra note 15. Cf. Richards, supra note 15, at 842–43 (characterizing this philosophy as a republican conception of self government). This value of individual autonomy might be traced to the notion of inalienable—natural—rights that precede positive law. Brandon, supra note 102, at 1227–30; see also Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (noting that decisional privacy is a right “older than the Bill of Rights”); 5 FREDERICK COPESTON, A HISTORY OF PHILOSOPHY 128–30 (Image Books 1985) (1959) (stating that Locke’s theoretical construct of the state of nature established individual liberty as pre-political); SANDEL, supra note 15, at 30–39 (describing the development of concepts of natural law, encompassing notions of individual freedom justifying the colonial rebellion and the framing of the constitution); accord Scott & Scott, supra note 7, at 2407 (“Parental rights were understood to be grounded in natural law”). Others suggest autonomy-based rights are political, not prepolitical. See BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 5–6 (1980) (arguing that rights are political and liberalism is better understood as a political account of power distribution, not as a social contract or a method of preserving natural rights); Rubenfeld, supra note 56, at 804–05 (arguing that privacy is a political, not natural, right necessary to democracy). Whatever autonomy’s philosophical home, the pursuit and protection of it are part of our constitutional theory. For more complex and complete accounts of early American political theory, see DWORETZ, supra; SANDEL, supra note 15; Brandon, supra note 102 (describing the role of family in early American political theory); Finkelman, supra note 13; Paul Finkelman, AFFIRMATIVE ACTION FOR THE MASTER CLASS: THE CREATION OF THE PROSLAVERY CONSTITUTION, 32 AKRON L. REV. 423 (1999); Kloppenberg, supra note 15; Richards, supra note 52, at 8, 14–19 (describing themes of autonomy undergirding the Constitution).

106. Brandon, supra note 102, at 1227–31; David A. J. Richards, Liberal Political Culture and the Marginalized Voice: Interpretive Responsibility and the American Law School, 45 STAN. L. REV. 1955, 1957–62 (1993); West, supra note 15, at 52–53. Historically, and even currently, other governmental roles include protection of a way of life for some people. See SANDEL, supra note 15, at 94–96 (tracing earlier notions of privacy that were based on the state’s interest in a certain morality); Finkelman, supra note 105 at 423 (noting that the Constitution was written in large part to protect a very valuable form of property in the late 18th Century, slavery, which, of course, came at the expense of the freedom of enslaved persons). Although notions of liberalism and individual autonomy seem to have driven much of the decisional privacy doctrine in the latter part of the 20th Century, notions of the state or the majority as arbiters of moral values (the good life) appear to be on the rise. See Planned Parenthood v. Casey, 505 U.S. 835, 882–87 (1992); Bowers v. Hardwick, 478 U.S. 186, 196 (1986); see also West, supra note 15, at 54–60 (describing the Supreme Court’s move away from liberal protection of individual non-majoritarian rights and toward a more republican notion of positive, majoritarian rights).
as a result, has a limited ability to interfere with individual autonomy.\textsuperscript{107} This autonomy is important in itself, but it is also significant because it promotes a dynamic democracy that relies on autonomous citizens to govern.\textsuperscript{106}

How families fit into this model of individual liberty\textsuperscript{109} is a matter of interpretation based on different theories of the role of families vis-à-vis individuals and the state. One set of theories derives family autonomy from the family’s public functions (“public family”), while the other set derives from individual autonomy (“autonomous family”). These theories explain or justify the family’s protection from coercive state intervention based on competing views of the good life. Both sets of theories also support parental rights doctrine.\textsuperscript{110}

The public family theories hold that families are protected from undue governmental intervention because the family fulfills two important, related public functions: caring and nurturing the young and preparing them for autonomous adulthood and citizenship in a pluralistic democracy.\textsuperscript{111} Families are uniquely suited to

\begin{itemize}
\item \textsuperscript{107} E.g., Rubenfeld, supra note 56, at 784 (arguing that privacy is the “fundamental freedom not to have one’s life . . . determined by a . . . normalizing state”); West, supra note 15, at 46 (stating that “individual freedom is the primary, if not the only, moral end of political organization”). Cf. Sandel, supra note 15, at 103 (“The image of the person as a freely choosing, unencumbered self has only recently come to inform our constitutional practice.”).
\item \textsuperscript{108} See Brandon, supra note 102, at 1227–28; Rubenfeld, supra note 56, at 805; see also Galston, supra note 103, at 901 (discussing liberalism’s limitations on the state’s power to mold individuals).
\item \textsuperscript{109} This assertion presumes, of course, that there is an inherent constitutional liberty interest in family integrity. See Brandon, supra note 102, at 1227–34 (arguing that although the Constitution does not explicitly provide for family protection, it is an institution, like other explicitly protected institutions (press, religion, private property) that enable political autonomy or independence from the state); Rubenfeld, supra note 56, at 804 (noting that privacy, including family integrity, is a constitutional right because the Constitution creates democracy). \textit{But see}, Ely, supra note 100 (arguing that the Constitution does not support general privacy rights).
\item \textsuperscript{110} Although both sets of theories offer a positive and empowering picture of families, family privacy has also served historically to disempower women and children. \textit{See infra}, Part II.D. In addition, decisional privacy doctrine has not served women well in preserving their families against custodial and economic challenges. Martha Albertson Fineman, The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies 180–81 (1995); \textit{see} West, supra note 11, at 1385–86; \textit{see also} Catharine A. MacKinnon, Reflections on Sex Equality Under Law, 100 Yale L.J. 1281, 1310–11 (1991) (discussing privacy in protecting women’s freedom to choose).
perform these functions by caring for children in a communal context of self-sacrifice and duty, and raising them in diverse settings. Children then mature into adults who possess pluralistic values and the ability to think critically because of their allegiance to family and community. This rearing function enriches the government by creating citizens separate enough from the state to be capable of exercising the power to govern. In contrast, institutionalized or uniform child rearing values would presumably create citizens who would not question the state and who would not provide the diversity of opinions and values that can serve as a check on government.

The autonomous family theories also relate family autonomy to individual adult autonomy, but these theories are based on individual autonomy as an end in itself, as opposed to a means to democratic governance. These autonomy theories hold that decisions regarding family relationships and issues are protected because families are intimate associations created and controlled by autonomous adults. The family is fundamentally important because it is "an aspect of human self-definition and moral

strand of republicanism, the family's public role may authorize state intervention to insure inculcation of specific, publicly-defined values in children. Id. at 18–19.

112. See, e.g., Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (noting that parents' "primary function and freedom include preparation for obligations the state can neither supply nor hinder"); Maxine Eichner, Square Peg in a Round Hole: Parenting Policies and Liberal Theory, 59 Ohio St. L.J. 133, 170–74 (1998) (arguing that families teach children to subordinate personal preferences for the greater good).


114. Brandon, supra note 102, at 1227; Dailey, supra note 61, at 1021–23.

115. Dailey, supra note 61, at 1022–23; see also Brandon, supra note 102, at 1227 (“This capacity in turn presumes that people possess, at a minimum, intellectual and ethical resources independent from the ruler or state.”); William A. Galston, The Legal and Political Implications of Moral Pluralism, 57 Md. L. Rev. 236, 236–40 (1998) (suggesting that family autonomy protects value pluralism, a central idea in political liberalism).

116. See Richards, supra note 52, at 28.
choice." Families in turn support self-definition and moral autonomy by providing an environment free from state control of socialization and value production. Because these family associations are so intimate and fundamental to adult life, the state should have exceedingly good reasons to interfere. Once it does, the state must provide substantial process to protect choices about families. Whether this intimacy is an end in itself or a means through which people produce or exercise moral value, the essence of the family autonomy theory is that family relationships are the ultimate exercise of positive freedom to form and protect intimate associations.

Each set of theories supports, at least in part, the parental rights doctrine. Under the public family theory, it is the parent’s role to raise and nurture children to become mature adults who are able to exercise political choice. The *sine qua non* of the public family theory is that children are both dependent and malleable. Therefore, they are in need of protection and formation. Parents, rather than the state, have responsibility in the first instance to care for and socialize children, with the goal of producing independent adults who are able to care for themselves and be productive citizens. Although the family fulfills a public function, this role requires a measure of independence from the state. Thus, parental rights doctrine curbs the homogenizing effect of the state by insuring that the state does not unduly interfere with parental decisions and does not entirely usurp the family’s socializing role.

The public family theory does not, however, explain why families should be defined in the first instance around biological relationships.
Any nondiscretionary and nondiscriminatory general rule that assigns parenthood to private citizens and minimizes state discretion in placing individual children would presumably promote the goals behind public family theories. For example, a rule defining parents as those adults who were born on the same day as the child and live in the nearest proximity would limit state discrimination and discretion (although it may be difficult to administer). One can imagine a slightly more discretionary and potentially discriminatory rule that would require all persons interested in becoming parents to take a course or pass a test regarding child rearing or development. These potential parents would then place their names on a waiting list; children could be assigned based on a lottery or bestowed upon the next person on list. An even more discretionary and potentially discriminatory rule would be for the state to determine who would be the best providers of care for the child, perhaps through psychological and intelligence testing, financial means guidelines, any history of caring for the particular child, and then place children accordingly.

Defining parents based on their biological relationship to the child seems the most definitive rule because it is perhaps the clearest, simplest standard that also minimizes the state’s role in making individualized decisions about who constitutes a family. It also promotes diversity by minimizing discriminatory choice that could result in homogenization. When the state establishes less determinate rules, such as the best care-giver, it invites injection of contingent standards that exclude or include persons in the cate-

124. Discrimination refers to the use decision-making based on values regarding race, class, morality, religion, sexual orientation and the like. Discretion refers to decision-making without determinate rules that grants greater latitude to the decision-maker to assess different outcomes. If one of the main purposes of family privacy is to promote private value production, then rules that permit the state to choose parents based on its own values or to discriminate may well curb private values.

125. Contrast this to the rules for ruling class families in Plato’s Republic which would have the state determine where children are reared. FREDERICK COPLESTON, A HISTORY OF PHILOSOPHY 229–33 (Image Books 1985) (1946).


127. Our current standards are not natural but are based on judgments that the birth or biological connection makes parents particularly willing and suitable to raise children. It seems a more benign judgment than other tools used to define families. The government’s coercive removal of Native American children from their families and tribes to foster homes and government boarding schools reveals the personal and cultural destructiveness of discretionary decisionmaking regarding who should raise children. Jose Monsivais, A Glimmer of Hope: A Proposal to Keep the Indian Child Welfare Act of 1978 Intact, 22 AM. INDIAN L. REV. 1, 2–3 (1997); see also Twila L. Perry, Race and Child Placement: The Best Interests Test and the Cost of Discretion, 29 J. FAM. L. 51 (1990–91) (discussing the tendency of judges and social workers to make presumptive and biased decisions regarding placement and adoption of children).
category of "parent" based on value-laden judgments about what types of child rearing and parent are most important for children. The interpersonal aspect of the current definition of father (nurturing relationship to the child or mother) is more problematic than the maternal definition because competing claims to fatherhood may arise under the less determinate standard that will be more difficult to resolve. These claims require the state to exercise its own homogenizing values when making specific decisions about whether a parent is sufficiently nurturing or which person has a stronger relationship to the child. The existing rule, however, minimizes both state discrimination in defining parent and state discretion in applying the definition, while limiting the state’s role in administering the rule for distributing children.

The family autonomy theory also supports parental rights doctrine. Because the theory is based on protection of decisions about intimate matters, such as whether to bear children, the theory offers tighter analytic support for the deference to biologically-based definitions of parent. The principle that choosing to conceive and raise a child is an expression of individual autonomy supports defining and protecting parenthood by linking biological and chosen interpersonal connections. Insofar as family autonomy promotes individual autonomy by creating a private zone of value production, those who are able to exercise autonomy within that context—i.e., adults—should be free to do so, absent just cause for state interference. In this way, families are expressions of adult self-definition and associational choice so state intervention should be minimal.

The thornier problem for family autonomy theory is how to account for the parent as the rights-holder: adults are the decision-makers and children are not. Legally-sanctioned control over another individual seems at odds with notions of individual autonomy theories that support family autonomy theories. True


129. See infra, part III.C.

130. Autonomy suggests the right to make decisions without interference from the state. See Fineman, Intimacy Outside of the Natural Family: The Limits of Privacy, supra note 103, at 966; Teitelbaum, supra note 73, at 802.

131. See Benkler, supra note 69, at 46–47 (arguing that if children are not autonomous, then parental control must arise out of stewardship, not parental autonomy); Richards, supra note 52, at 36 (criticizing family privacy as promoting “absolute right of parents to control their children”); Teitelbaum, supra note 73, at 810 (noting that parental control over children “cannot be reconciled with liberal rights theory”); West, supra note 11, at 1385
autonomy would make each family member a parent—a decision-maker. It may not make sense to think of children as having individual autonomy, particularly in light of their developmental limitations. Indeed, to the extent that the autonomous family theorists view families as fora to inculcate values and create meaning, part of that freedom relates to the act of rearing—molding and socializing—children. Once children reach a level of maturity that enables them to engage in adult-like behavior and share in adult-like obligations and responsibilities, they may begin to share in some of the autonomy adults enjoy. The more like adults children become, they are less like children. As a result parents enjoy less control.

In any event, children who are incapable of acting autonomously require adult assistance in making or carrying out decisions. This is generally the parents' role, though frequently supplemented by actual and fictive kin networks. If the parents (discussing cramped or conservative notions of liberty that do not consider private oppression).

132. See, e.g., ACKERMAN, supra note 105, at 146–48 (suggesting desirability of greater limitations on parental control over children); Doig, supra note 56, at 1557–58 (stating that children as independent rights holders are at odds with parental authority); Woodhouse, supra note 14, at 1040–44 (analogizing parental rights to property rights). Contra Gilles, supra note 87, at 959–60 (arguing that just as adults are autonomous because they have incentives to act in their own best interests, parents should control children because parents have incentives to act in their children's best interests).

133. Some commentators view autonomy not as something children have, but instead as something they will have, and that potentiality should guide decision-makers to insure children will have tools to live autonomous lives. See e.g., Arneson & Shapiro, supra note 113, at 158–63.

134. Davis, supra note 9, at 248; Gilles, supra note 87, at 962 ("the proposition that general custody, control of, and responsibility for the child lies with the child's parents stands as a fixed point in the thinking not only of the Supreme Court, but also of most liberal political theorists.").


do not exercise the authority to make or assist the child in making the child's decisions, the question becomes who. If a judge or another adult substitutes for the parents, the child is not less restricted, just subject to someone else's decision-making about what is best for the child or what the child actually wants. There is, however, no clear or universal standard for deciding what is best for children. Moreover, the government has not proven adept at filling the parental role. Thus, autonomous family theories hold that families, not the state, are the primary source of value production. Therefore, parents or their designees should be the decision-makers for non-mature children.

Both theories lead to the same result: that raising children is a private matter. It is the parents' role to decide what the good life is—how and with whom the child should live. Unless the parents are unfit to make those decisions or have consented to have others make or share in making them, the state may not second-guess those decisions or sanction the decision-making power of others. Constitutional design and theory do not support the state's exercise of such power.

* * *

The preceding explanation of the doctrinal content and philosophical grounding of the parental rights doctrine frames the following rehearsal of parental rights critiques. This framework
should help assess whether the critiques fundamentally conflict with parental rights doctrine and whether alternate visions of family privacy honor the basic theory underlying our political structure. This introduction accepts this framework at face value, and does not explore the philosophical (moral, metaphysical and epistemological) underpinnings of the political philosophy that provides a foundation for our constitutional structure or provide support for parental rights doctrine in empirical, sociological, psychological, or biological research. The goal instead is to establish the basic principles of parental rights doctrine.

First, the doctrine defines parent matrifocally—where the mother is the paradigmatic parent. She embodies both biological and caregiving aspects of parenthood through the work of bearing and birthing. Second, neither genetic connection nor nurturing in themselves are sufficient to establish parenthood, but must exist in combination in relation to the child or to the “mother” (the parent who contains both biological and nurturing relationship to the child). Third, parents, not the state, make decisions about their children’s interests when the children themselves cannot physically, developmentally or economically, make their own decisions. Fourth, parents can lose their status if the parents choose or if they severely abuse or neglect their children. Finally, the privacy of the parent-child unit is valuable both because it serves the political function of rearing children to meet their basic needs and to be citizens, morally independent from the state which they will eventually govern and because child rearing is an exercise of individual autonomy.

II. RECONSTRUCTING FAMILIES AND REVISING BOUNDARIES

This model of family privacy that privileges biological relationships and parental assessments about what is in their children’s interests receives much criticism from a variety of perspectives. One or both of two phenomena seem to motivate those critiques that specifically address parental rights doctrine: (1) the subordinating rhetoric and practices attendant to notions of parents as supreme rights holders over their children; and (2) the apparent dissonance between the privilege afforded nuclear families and the structure of so many other families that are headed by different types of parents. These other families include single mothers, lesbian or gay co-parents, grandparents, extended kin networks, and substitute care-givers. To these critics, parental rights doctrine is out of touch with and a barrier to the protection of the interests
and affectional connections of the adults and children in these non-nuclear families. Prominent examples of this seeming dissonance are when persons without legal parental status, such as prospective adoptive parents, foster parents, or co-parents, develop parent-like relationships with children that the legal parents subsequently and lawfully terminate. Parental rights critics would revise family law to protect such significant, affectional relationships over the objection of the birth parents.

Other critics who do not specifically address parental rights doctrine focus more broadly on aspects of decisional privacy that relegate families to a private world apart from civil and market society. This division places women (whom dominant culture equates with mothers) and children in the private world of family. Such an assignment limits their options, shields abusive husbands and fathers from public sanction, excuses the public from financial accountability to children and other dependents and their caregivers, and relegates valuable care-giving norms to women and families. These critics would place families and motherhood in the public where they would be supported, valued, emulated, and, most importantly, de-gendered.

Three common themes characterize all of these critiques and the models they propose. First, they minimize biology in defining parent-child relationships and privilege actual or prospective affectional or care-giving relationships. Second, they essentially advocate reduced family privacy, by allowing third parties or the state to play a parental or supervisory role in determining what is in the child's interests. Third, like parental rights doctrine, the critiques implicitly or explicitly are adult-oriented, even those that purport to be child-centered. Indeed, the models frequently hold homogenized views of children and their needs, without regard to age, race, culture or gender.

The critiques vary in the depth of challenge to parental rights doctrine and in the alternatives they propose. These revisionist critiques can be placed into four categories based on the values they promote. First is the public children perspective that views children as belonging to the public and parents as fiduciaries whose role is to promote and protect the children's interests. Second is the psychological parenting perspective that values and protects psychological relationships between children and the adults who are not their legal or biological parents. Third are the adult choice critiques that seek to accommodate the changing roles of sex and gender in defining and creating families. Fourth are feminist perspectives that claim the connections between
women and motherhood and between families and privacy are harmful to women, men, mothers, fathers, children and society.

A. Public Children Perspective: The Fiduciary Model

To some legal commentators, parental rights doctrine is troubling because it leaves the important and potentially exploitive task of child-rearing to parents, who have wide discretion in raising their children. This discretion allows parents to elevate their interests above their children, particularly in the contexts of religious training and the dissolution of families. These commentators criticize the adult-orientation and individualism of parental rights rhetoric. They propose a fiduciary model for parent-child relationships that treats children's interests as the principal and casts the parents as fiduciaries who serve those interests. Under that model, the state fills the role of identifier and promoter of children's current and future interests, rather than the protector of children. The purpose of the fiduciary model is both rhetorical and directive. It seeks to humanize children by making them distinct from their parents and part of the larger political

141. See Arneson & Shapiro, supra note 113, at 138 (religious indoctrination); Dwyer, supra note 54, at 1435 (religious indoctrination); Scott & Scott, supra note 7, at 2446 (stating that divorce weakens the family structure and promotes individualized values); Barbara Bennett Woodhouse, Of Babies, Bonding, and Burning Buildings: Discerning Parenthood in Irrational Action, 81 Va. L. Rev. 2493 (1995) [hereinafter Woodhouse, Irrational Action] (failure to consent to children's adoption); Barbara Bennett Woodhouse, The Dark Side of Family Privacy, 67 Geo. Wash. L. Rev. 1247, 1256 (1999) [hereinafter Woodhouse, Family Privacy] (arguing that the state should establish "social and legal expectations" to educate parents in their responsibilities).

142. Scott & Scott, supra note 7, at 2412-13; Woodhouse, supra note 68, at 1809-12. At least two proponents of the model were motivated by the Supreme Court's promotion of the parents' religious values over the presumed secular interests of the children in Wisconsin v. Yoder, 406 U.S. 205 (1972). See Arneson & Shapiro, supra note 113, at 138-39; Dwyer, supra note 54, at 1383-90.

143. See, e.g., Arneson & Shapiro, supra note 113; Dwyer, supra note 54; Scott & Scott, supra note 7; Woodhouse, Irrational Action & Family Privacy, supra note 141; Woodhouse, supra note 68. These commentators vary in the content and specificity of proposals for change and in their views of what children's interests are, but they are united in their opposition to status-based parental rights. Compare Scott & Scott, supra note 7, at 2418 (advocating laws that promote child-centered parental decisions) with Arneson & Shapiro, supra note 113, at 156-57 (the state should limit parental decisions that threaten children's future autonomy), Dwyer, supra note 54, at 1429 (permitting state intervention that would be good for the child), and Woodhouse, Irrational Action, supra note 141, at 2505-06 (arguing that the law should protect children's affectional relationships).

144. See generally, Arneson & Shapiro, supra note 113; Dwyer, supra note 54; Scott & Scott, supra note 7; Woodhouse, Irrational Action & Family Privacy, supra note 141; Woodhouse, supra note 68.
**Virtual Mothers and the Meaning of Parenthood**

The model also seeks to provide a decisional standard for parents, judges and legislators to insure that they each act in ways that are cognizant and protective of children’s interests. Under the fiduciary model, parents would not have the right to direct their children’s upbringing, but would instead be stewards for their children, acting in their present and future interests or according to their presumed desires. Although proponents of the fiduciary model generally presume that children should remain with their families of origin (usually their birth parents), parents, under this model, would lose their status or authority by self-dealing—placing their own interests above their children’s. Rather than deferring to parental decisions about children, the fiduciary model frees judges to assess whether parental decisions reflect their children’s interests, presumably by reference to public standards defining and ranking children’s interests. The model would expand current legislative authority to protect children’s

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145. Arneson & Shapiro, supra note 113, at 156–71; Scott & Scott, supra note 7, at 2474; Woodhouse, Irrational Action, supra note 141, at 2507. Apparently, Professors Elizabeth and Robert Scott would not significantly modify current doctrine, but instead recharacterize the parent-state balance of power regarding children from state as protector of dependant children to state as definer and arbiter of interests. See Scott & Scott, supra note 7, at 2438–39 (casting child labor prohibitions, education mandates, and minor drinking, driving and marriage rules as analogous to conflict of interest rules applicable in fiduciary contexts). Professors Scott and Scott would, moreover, sanction greater state monitoring of children through physical and psychological evaluations. Id. at 2441. They do not, however, suggest standards for interpreting the results of those tests.

146. See Arneson & Shapiro, supra note 113, at 156–57; Dwyer, supra note 54, at 1432–35; Scott & Scott, supra note 7, at 2418; Woodhouse, Irrational Action, supra note 141, at 2504–05. Professors Scott and Scott claim their vision of parents as fiduciaries is largely descriptive of current law. Scott & Scott, supra note 7, at 2453.

147. Arneson & Shapiro, supra note 113, at 149–57; Dwyer, supra note 54, at 1429–30; Scott & Scott, supra note 7, at 2418–19; Woodhouse, Irrational Action, supra note 141, at 2500–01. The fiduciary model is particularly concerned with preserving children’s future interests in being autonomous, which may be synonymous with rejecting their parents’ values. Arneson & Shapiro, supra note 113, at 156; Dwyer, supra note 54, at 1430.

148. Dwyer, supra note 54, at 1432–33; Woodhouse, Irrational Action, supra note 141, at 2504–05.

149. Arneson & Shapiro, supra note 113, at 156–57; Scott & Scott, supra note 7, at 2431; Woodhouse, Irrational Action, supra note 141, at 2504.

150. Scott & Scott, supra note 7, at 2442; see Woodhouse, supra note 141, at 1256; see also Arneson & Shapiro, supra note 113, at 154–56 (arguing that the Amish parents in Wisconsin v. Yoder were serving their own and their community’s religious needs at the expense of their children’s religious freedom).

151. E.g., Arneson & Shapiro, supra note 113, at 158–62 (maximizing a child’s opportunities for an “open future,” generally by promoting secular education); Dwyer, supra note 54, at 1429, 1433 (continuing care, protection, guidance by a single set of parents, educational opportunity, and medical care); Scott & Scott, supra note 7, at 2437–39 (discussing broad social consensus about the best interests of the child); Woodhouse, Irrational Action, supra note 141, at 2501–08 (preserving affectional attachments).
physical health and development to preclude parents from interfering with children's present happiness and future interests.\footnote{152}{Arneson & Shapiro, supra note 113, at 158-71 (arguing that children must be free to develop critical thinking skills, but parents should be free to make choices that might limit children's future adult career options); Dwyer, supra note 54, at 1430 (noting that parents must justify decisions based on the child's desires and future interests); Woodhouse, supra note 14, at 1042 (criticizing parental right to refuse to send children to school or to consent to adoption when children are in the care of others).}

Although the model's proponents are more or less deferential to parental determinations of the child's interests,\footnote{153}{Compare Scott & Scott, supra note 7, at 2443-45 (state should be more deferential in intact families, but less when interests are more likely to conflict), with Dwyer, supra note 54, at 1376, 1429 (arguing parents have no legal grounds to resist state intervention except by asserting the child's interests to prohibit unhelpful state intervention).} the model diminishes parental authority and remains adult-oriented. It diminishes parental authority and family privacy, under the parental rights doctrine, by presuming there is some universal correct answer about children's interests and that the state does or should have the wisdom and authority to make those determinations.\footnote{154}{For example, Arneson and Shapiro favor religious freedom. Arneson & Shapiro, supra note 113, at 154 ("As a fiduciary, the parent is bound to preserve the child's own future religious freedom."). Professors Dwyer and Woodhouse expect the state to define and protect the child's presumed desires or best interests. Dwyer, supra note 54, at 1433-35; Woodhouse, Irrational Action, supra note 141, at 2504-05.} Parental rights doctrine holds that such wisdom and authority are within the parent's province, in part because the state should be relatively neutral about competing family values as long as they do not promote abuse or neglect. The fiduciary model remains adult-oriented, merely substituting the state as all-knowing super-parent able to discern what children's interests are and to discern when parents are acting contrary to their child's interests.\footnote{155}{As a case in point, Arneson and Shapiro define children's interests in reference to the "state's interests in the production of a citizenry able to participate in its operations." Arneson & Shapiro, supra note 113, at 157; see also Dwyer, supra note 54, at 1432-33 (noting that parents would substitute their judgment for what the child would rationally want). Professors Elizabeth and Robert Scott present a more nuanced approach that promotes laws which strengthen the parent-child relationship and defer to parental assessments of the child's interests. Scott & Scott, supra note 7, at 2415-18, 2430-31. This model does not empower, particularize or free children to decide any more than the parental rights doctrine.}

152. Arneson & Shapiro, supra note 113, at 158-71 (arguing that children must be free to develop critical thinking skills, but parents should be free to make choices that might limit children's future adult career options); Dwyer, supra note 54, at 1430 (noting that parents must justify decisions based on the child's desires and future interests); Woodhouse, supra note 14, at 1042 (criticizing parental right to refuse to send children to school or to consent to adoption when children are in the care of others).

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B. Psychological Parent Perspective

The psychological parent view favors relationships children form with their primary care-givers. This perspective holds that day-to-day care-giving, not biological connections, should define parenthood. Although in many, if not in most instances, the biological parents will be the psychological parents. The theory holds that (biological) parental rights should not prevail over psychological parental rights, as it is in every child’s best interests to remain with his or her psychological parent. Because psychological attachments predominate in assessing children’s interests, biological connections may be subordinated to psychological relationships. Psychological parent advocates fear that the parental rights doctrine does not protect children’s desires or interests in maintaining psychological relationships.

156. This theory is no doubt shaped by the influential series of books on the best interests of children, in which Joseph Goldstein, Anna Freud, and Albert J. Solnit articulated and popularized a psychological theory that children’s relationships with their care-givers should not be disturbed or disrupted. JOSEPH GOLDSTEIN, ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1973) [hereinafter BEYOND THE BEST INTERESTS] and BEFORE THE BEST INTERESTS OF THE CHILD (1979) [hereinafter BEFORE THE BEST INTERESTS]. According to the theory, the “psychological parent” is the real parent—the most important relationship the child has, and disturbing that relationship harms the child. A “psychological parent” is “one who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child’s psychological needs for a parent, as well as the child’s physical needs.” BEYOND THE BEST INTERESTS, supra, at 98. For critiques of the psychological parent theory, see Susan Brooks, Therapeutic Jurisprudence and Preventive Law in Child Welfare Proceedings, A Family Systems Approach, 5 PSYCH., PUBL. POL’Y, & L. 951, 957–58 (1999); see also Symposium, Helping Families in Crisis: the Intersection of Law & Psychology, 22 N.Y.U. REV. L. & SOC. CHANGE 295 (1996); Symposium, The Impact of Psychological Parenting Theory on Child Welfare Decision-Making, 12 N.Y.U. REV. L. & SOC. CHANGE 485 (1983–1984).


The psychological parent perspective comprises two models. The first, the de facto parent model, expands the idea of parent to include adults who become members of the child’s family and whom the child may view as a parent, though the person lacks a legal or biological relationship to the child. The second, the adoption promotion model, seeks to maximize children’s opportunities to develop or preserve non-biological parent-child relationships. Both models are concerned primarily with the promotion of psychological relationships children can form or have formed with care-giving adults. The models purport to be child-centered, however, they presume that these psychological attachments are important to all children, regardless of age or circumstances. These models would, for the most part, permit individualized inquiries into children’s needs, but they presume that adults other than the parents should determine, or have a role in determining, the children’s interests.

1. De Facto Parent Models—Persons who meet the definition of parent generally have the right to play a role in the child’s upbringing through custody, support and visitation. Parents enjoy a presumption that they will have custody of, or visitation with, the child and that the best interests of the child guides these decisions. Yet persons who do not satisfy legal definitions of parent often play significant roles in children’s lives. Such relationships commonly develop when children form attachments to stepparents, foster parents, other care-givers selected by the parents, and father figures when the mother and father were not married. These non-legal, de facto parents can lose their relationship and any contact with the child, should the legal parent so choose. De facto parent models give these persons legal status, so that they can seek custody or visitation with the child over the parent’s objection, but they cannot necessarily terminate parental rights. In this way, the de facto parent models expand the definition of parent to people who have in fact, not through the operation of law, stood in the role of parent to a child. There are two types of de facto parent model, one consensual and the other non-consensual. The consensual model grants legal status only to those persons who have become de facto parents through relationships to which fit parents

159. Exceptions include the Adoption and Safe Families Act of 1997 and Professor Elizabeth Bartholet, both promoting termination of parental rights whether or not the child has significant affective relationships with others. See infra, text accompanying notes 193–208.
160. Cahn, supra note 87, at 5.
161. Id.
162. Bartlett, supra note 52, at 244.
have consented. The non-consensual model grants such status to persons without regard to parental consent or fitness.¹⁶³

a. Consensual Model—The consensual de facto parent model finds support in the American Law Institute’s Draft Principles of the Law of Family Dissolution (A.L.I.).¹⁶⁴ This model also finds support in a growing body of statutory¹⁶⁵ and case law¹⁶⁶ that permit

¹⁶³ “Unfitness” is used throughout this Article to refer to parental failings regarding their children that rise to the level of abuse or neglect that has harmed or might harm the child. The Article contrasts parental fitness standards to the “best interests of the child” that is not based on harm or parental fitness, but instead on what is best for the child.


¹⁶⁵ E.g., MINN. STAT. ANN. § 257.022(2b) (West 1998 & Supp. 2001); NEV. REV. STAT. ANN. § 125C.050(2)-(3) (Michie Supp. 1999); WIS. STAT. ANN. § 767.245(1) (West 2001) (each granting persons who have established a de facto parent-child relationship standing to seek visitation); see also IND. CODE ANN. § 31-9-2-35.5 (Michie Supp. 2001) (defining de facto custodian as person who has been primary care-giver and financial supporter of child and excluding foster parents); IND. CODE ANN. §§ 31-14-13-2, 31-17-2-8 (Michie 1999 & Supp. 2001) (permitting consideration of awarding custody to de facto custodian in paternity and custody proceedings); OR. REV. STAT. § 109.119(3) (1999) (granting persons who have established a de facto parent-child relationship standing to seek visitation and custody). Many other states have statutes that permit third parties to seek custody (including visitation) based on prior custody of the child, e.g., COLO. REV. STAT. § 14-10-123(1) (2001); TEX. FAM. CODE ANN. § 102.003(a)(9) (Vernon 1996 & Supp. 2002), exceptional circumstances that could include substantial relationship to the child, e.g., ARIZ. REV. STAT. ANN. § 25-415(G)(1) (West 2000); WIS. STAT. ANN. § 767.24(3)(a) (West 2001), or harm to the child if the relationship were discontinued, e.g., CAL. FAM. CODE § 3041 (West 1994). New Jersey requires that de facto parents be given notice and an opportunity to object to an adoption. N.J. STAT. ANN. 9:3-46(b) (West 1993 & Supp. 2001).

a person, frequently the significant other or affectional partner of the legal parent, who has lived with, cared for, and supported the child to secure some measure of parental status, generally to assert visitation or custody claims. That status would allow the de facto parent, upon dissolution of the relationship, to have visitation or custody, and make decisions on behalf of the child. The presumption, however, is that the de facto parent will not have primary custodial or decisionmaking responsibility unless several conditions exist. Such conditions are that the legal parent agrees, has not performed a reasonable share of parenting, or that it would be harmful to the child not to be with the de facto parent.

The consensual de facto parent model creates a new category of parent. Nevertheless, it does not unduly diminish the legal parent’s role as parent, because it requires either parental consent to the relationship’s formation or a failure to parent. This model

to de facto parents. V.C., 748 A.2d at 547–48. Fewer states will award primary custody to the co-parent over the legal parent. David L. Chambers & Nancy D. Polikoff, Family Law and Gay and Lesbian Family Issues in the Twentieth Century, 33 Fam. L.Q. 525, 539 (1999); see also Gestl v. Frederick, 754 A.2d 1087 (Md. Ct. Spec. App. 2000) (holding that lesbian de facto parent has standing but must prove exceptional circumstances to obtain custody); LaChapelle, 607 N.W.2d at 151 (awarding sole physical custody to the birth mother and joint legal custody to her and her ex-partner, the lesbian co-parent). But see Custody of C.C.R.S., 892 P.2d 246 (Colo. 1995) (upholding denial of return of child to mother who initially consented to child’s placement before birth and did not request return of the child for over six months).

167. A.L.I., supra note 164, at §§ 2.03(1) (defining “parent” as legal and de facto parent), 2.04 (granting certain de facto parents party status), 2.09 (allocating custody to “parents”), 2.10 (allocating decisionmaking responsibility among “parents”), 2.13 (listing factors court should consider in allocating custody and decisionmaking among parents, such as violence, drug use or child abuse), 2.14 (listing factors court should not consider, such as race, gender, sexual orientation and earning capacity).

168. A.L.I., supra note 164, at § 2.21(1). This is consistent with current doctrine. Chambers & Polikoff, supra note 166, at 559; see also, Gestl, 754 A.2d 1087 (holding lesbian de facto parent has standing but must prove exceptional circumstances to obtain custody); LaChapelle, 607 N.W.2d at 151 (awarding sole physical custody to the birth mother and joint legal custody to her and her ex-partner, the lesbian co-parent). However, when de facto parents have had sole physical custody, courts may be willing to award full custody to the de facto parent rather than removing the child to the mother. See Ind. Code Ann. §§ 31-14-13-2.5(d) & 31-17-2-8.5(d) (Michie Supp. 2001) (stating that best interests of the child governs decision to grant de facto custodian custody); Or. Rev. Stat. § 109.119(3)(a) (1999) (applying best interests of the child test to custody, visitation and guardianship requests of persons whom court determines has established emotional ties creating a parent-child relationship); C.C.R.S., 892 P.2d 246 (affirming award of custody to persons with whom the mother placed the child immediately after birth and the following six months); In re A.D.C., 996 P.2d 708 (Colo. Ct. App. 1998) (awarding custody to grandparents who had cared for the child with the mother’s consent for four months and holding that the best interests of the child standard applies in custody disputes between legal parents and non-parents who can make the statutory showing that the that they have had the physical care of a child for six months or more).

169. The ALI defines a de facto parent as:
sanctions state interference with parental authority to determine the child's interests. It does so, however, only when the psychological parent relationship developed from a relationship to which the legal parent had previously consented, or when the parent has abdicated the parental role. The model thus limits parental authority (regarding with whom the child may have an ongoing relationship) only when the parents themselves have chosen to expand their own family unit or have abdicated their parental role. Moreover, the consensual de facto parent doctrine comports with the matrifocal definition of parent to the extent that de facto parent status extends largely to persons who were in a domestic partnership with the legal or biological parent and provided care for the child. That is, in the context of co-parenting, the de facto parent is analogous to the non-biological adult, not the child's legal parent, who for a period that is significant in light of the child's age, developmental level, and other circumstances, (i) has resided with the child, and (ii) for reasons primarily other than financial compensation, and with the consent of a legal parent to the formation of a de facto parent relationship or as a result of a complete failure or inability of any legal parent to perform caretaking functions, regularly has performed (i) a majority of the caretaking functions for the child, or (ii) a share of caretaking functions at least as great as that of the parent with whom the child primarily has lived.

A.L.I., supra note 164, § 2.03(1)(b) (emphasis added).

170. Id. Case law frequently articulates the consent of the parent to the formation of the relationship as a factor or standard when defining de facto parent. E.g., E.N.O., 711 N.E.2d at 891 (defining de facto parent as someone who shares parental responsibilities "with the consent and encouragement of the legal parent"); V.C., 748 A.2d at 552 (the intent of the legal parent to have the third party serve a parental role is critical to the analysis of whether some one is a de facto parent); J.A.L., 682 A.2d at 1321 (holding that a person has standing in loco parentis when he or she, inter alia, "developed a relationship with the child as a result of the participation and acquiescence of the natural parent...."); Rubano, 759 A.2d at 975 (citing parental consent to and fostering of the relationship as an element in determining whether the de facto parent may obtain visitation rights); H.S.H.K., 533 N.W.2d at 421 (listing as one element of de facto parent test "that the [legal] parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child").

171. A.L.I., supra note 164, § 2.03(1)(b).

172. Even then, de facto parents frequently hold a secondary parental status that does not necessarily place the de facto parent on the same footing as a legal father or mother who would be entitled to custody or visitation based on a best interests of the child analysis. Instead, de facto parents, having established de facto status, are more likely to have to prove detriment to the child should contact discontinue, and de facto parents are rarely entitled to or awarded custody over a legal parent. See generally, supra note 166.

173. 748 A.2d at 552 (stating that if the legal parent "wishes to maintain that zone of privacy she cannot invite a third party to function as a parent to her child and cannot cede over to that third party parental authority the exercise of which may create a profound bond with the child").
In this way, the model does not reduce the importance of biology or make the family public: it simply adds parents based on past parental conduct and consent.

b. Non-consensual Model—In contrast, the non-consensual de facto parent model does not consult parental conduct, but looks solely at non-parents' parent-like relationships with children, granting de facto parent status to persons who did not form a relationship to the child with the parents' consent or because of parental unfitness. Primarily reflected in legal commentary, but also in some doctrine, the non-consensual de facto parent model finds its motivation in protecting de facto psychological relationships children form with adults other than their parents. Commentary advocating this proposed model, purportedly driven by the child's needs or interests, apparently responds to failed adoption cases like "Baby Richard" and "Baby Jessica." In those situations, parental rights doctrine forced would-be adoptive couples to return young children, whom the couples had raised since birth. They returned the children because the prospective adopt-
tive parents failed to obtain parental consent or prove that a non-consenting parent was unfit. Moved both by the plight of the children and their psychological parents, the commentary promotes a model which places such de facto parents or judges on the same or better footing as biological parents in determining what the child’s interests are.

This model accords children or their psychological parents legal standing to question parental determinations about what is best for the child. The model would require the court to hear and consider the child’s perspective, particularly evidence of affectional ties, when determining custody as between parents and third parties. The model could also, in its most extreme version, create a liberty interest for the child and his or her psychological parents to family protection. By giving children or their psychological parents these rights, this model provides children with a right not to be raised by their birth parents. This right could inhere in the child and the psychological parents to protect established family relationships, or could be effected by granting power to a child’s psychological parents to seek custody or visitation on behalf of the child. The model would protect a child’s psychological relation-
ships, regardless of the legal parents' fitness or consent to that relationship. Thus, when foster parents, would-be adoptive parents, or presumably any other primary caretakers face a loss of custody of the child to the legal parents, the court should review the best interests of the child to award custody.

Implicit in this model are two significant presumptions about parental authority. The first is that parents do not want what is best for their children, particularly when the children have formed attachments to others. The second presumption is that the child or other adults can weigh and assess the child's interests more accurately than the parents, even without proof of unfitness. Both presumptions implicitly or explicitly challenge parental rights doctrine by disconnecting parental and child interests and permitting intervention into families based on some standard lower than parental unfitness or consent. This model, thus, fundamentally revises parental rights doctrine by taking decision-making authority from biological parents and giving it to the child, the child's de facto parents, the judge or the child's lawyer. Parental rights doctrine only permits this transfer if the parents consent or are failing in their parental responsibilities. The non-consensual de facto parent model essentially holds that the parental decisions no longer deserve deference once the child has been out of their care for an undefined length of time. Moreover, this model's diminution of the biological connection assumes that psychological attachments are more important than biological attachments. It also assumes that the parental work of bearing and giving birth to a child is less valuable than providing day-to-day care to a child after birth.

In contrast, the parental rights doctrine values this biological mothering and requires a failing on the part of the mother and the person who supports her or the child before others can earn the privilege of deciding what is best for children. The protection still requires clear and convincing proof that the child has been cared for by de facto custodian and consideration of parental intent in placing child with de facto custodian; In re Huber, 723 N.E.2d 973, 975 (Ind. Ct. App. 2000) (requiring proof of parental unfitness, long acquiescence in the child living in the care of others or voluntary relinquishment of the child before applying best interests of the child to custody disputes between parents and third parties); see also In re C.C.R.S., 892 P.2d 246 (Colo. 1995); In re A.D.C., 969 P.2d 708 (Colo. Ct. App. 1998) (both construing COLO. REV. STAT. § 14-10-123(1) (2000) to permit award of custody to physical custodians based on the best interests of the child).


185. In the thwarted adoption cases, the birth mothers consented to adoption just after birth. The biological fathers were not be married to the mother or did not have a chance to
tion of psychological relationships, to the formation of which the birth parents never consented, undermines this prohibition against intervention into biological families. Advocating that children should have a separate, even constitutionally protected, liberty interest in maintaining these relationships directly challenges the parental rights doctrine because the proposed interest rests on a presumption that fit parents do not protect their children's interests. Moreover, granting children such a liberty interest would effectively permit psychological parents to usurp the parents' constitutional liberty interest in a relationship with their children.

2. Adoption Promotion Model—This model limits parental authority by expanding decisionmakers for children and presuming that once a child or a sibling is in substitute care, the child need not be reunited with the biological family. The adoption promotion model manifests itself in standards, doctrine and the legal commentary that make adoption or prospective adoptive families equal to birth families. The Uniform Adoption Act of 1994 (UAA) and a handful of state adoption statutes provide an example of this approach. They permit hearings following thwarted adoptions that would allow nonparents to obtain custody instead of a non-consenting, fit birth parent. Accordingly, when nonparents seek

support the child. In these cases, one could argue that the biological father is not or should not be a legal father. Nevertheless, parental rights doctrine grants the biological father the first chance to fully earn parenthood, unless (arguably) the mother is married to another man.

186. See, e.g., Lowe, supra note 176, at 984–85 (describing the flaws of privileging biology over psychology).


189. UNIF. ADOPTION ACT (1994) §§ 2-408(e)-(f), 2-409(e)-(f), 9 U.L.A. 60–63 (1999); see also 750 ILL. COMP. STAT. ANN. 50/20 (West 1999 & Supp. 2001) (providing that after an adoption petition has been denied or vacated, "the court shall promptly conduct a hearing as to the temporary and permanent custody of the minor child who is the subject of the proceedings . . ."); VT. STAT. ANN. tit. 15A, § 2-408 (Michie 1989 & Supp. 2000). Nevada has a set of puzzling adoption and termination of parental rights statutes that could be construed to permit a custody hearing after a failed adoption. NEV. REV. STAT. ANN. §§ 127.165,
to adopt a child and the court fails to find that grounds for adoption exist (for example, the birth parent is unfit or has consented to the adoption), the parent is not necessarily entitled to resume custody. Instead, the court will determine with whom the child should live.

These provisions essentially permit courts to transfer custody from birth parents to other private individuals who have filed an adoption petition, even when the court has found that fit birth parents do not consent or have never consented to placement of the child with the adoption petitioners. These provisions amount to a limitation of parental authority because they transfer the right to determine custody and control of the child from the parents to the court. They also amount to a limitation of parental authority because the provisions permit this intervention regardless of whether parents have failed in their parental responsibilities by abusing or neglecting the child. These provisions allow the filing of an adoption petition to transform non-parents into parents. Like the non-consensual de facto parent model, the UAA subordinates biological relationships. The UAA, however, goes further by

128.160 (Michie 1998) (each stating, after describing methods to set aside an adoption or termination of parental rights, that "[a]fter a petition for adoption has been granted, there is a presumption ... that remaining in the home of the adopting parent is in the child's best interest"). Even without explicit statutory authority, some courts will conduct custody hearings after thwarted or failed adoptions. Guardianship of Zachary H., 86 Cal. Rptr. 2d 7, 15 (Cal. Ct. App. 1999); In re C.C.R.S., 892 P.2d 246 (Colo. 1995); cert. denied, 116 S. Ct. 118 (1995); Matter of Adoption of a Child, 705 A.2d 1233 (N.J. Super. Ct. App. 1998).

190. See UNIF. ADOPTION ACT (1994) § 2-408, 9 U.L.A. 62 (1999) (a finding that the parent is not unfit or does not consent to the child's adoption "is not tantamount to a determination that the child must be placed in that parent's custody" (emphasis omitted)).

191. UNIF. ADOPTION ACT (1994) §§ 2-406(f)(2), 408(e), 409(e), 9 U.L.A. 58–62 (1999) (providing for determination whether return to the mother would be detrimental to the child when the mother revokes her adoption consent after a failed attempt to have the father's rights terminated and an adoption decree entered). State law has long permitted courts to conduct best interests of the child hearings when a mother seeks to revoke her consent when there are no other barriers to the adoption. E.g., Haw. Rev. Stat. § 578-2(f) (Michie 1999) (stating that the best interests of the child determines whether the mother may revoke her consent); N.Y. Dom. Rel. Law § 115-b(3) & (4) (McKinney 1999) (same); UNIF. ADOPTION ACT (1994) §§ 2-408(f), 2-409(f), 3-506, 3-704, 9 U.L.A. 61, 63, 90, 96–96 (1999) (providing for determination of whether it is in the best interests of the child to be placed with the father who does not consent to the adoption or is not found to be unfit); Graves v. Graves, 288 So.2d 142 (Ala. 1973); Martin v. Ford, 277 S.W.2d 842 (Ark. 1955); Adoption of Duarte, 40 Cal. Rptr. 671 (Cal. Ct. App. 1964); Kathy O. v. Counseling & Family Services, 438 N.E.2d 695 (Ill. 1982); In re D., 408 S.W.2d 361 (Mo. 1966); In re Adoption of Baby C., 480 A.2d 101 (N.H. 1984). For a recent example of application of this doctrine after the vacation of a fraudulent adoption, see In re Adoption of E.L., 733 N.E.2d 946 (Ill. App. 2000).

192. See Cahn, supra note 87, at 22–23 (noting that in these situations, courts explicitly or implicitly redefine parent to include thwarted adoptive parents in order to avoid the parental preference doctrine and apply instead the best interests of the child standard).
subordinating biological relationships to nascent psychological relationships.

Federal child welfare policy applies a preference for the adoption of children whose parents have been unwilling or unable to provide adequate childcare. The Adoption and Safe Families Act of 1997 (ASFA) marks a departure in articulated federal child welfare policy from family preservation to adoption. ASFA promotes adoption of foster children at the expense of parental rights. It simultaneously limits funding for family preservation and time for family reunification while it increases funding for promotion and preservation of adoption. ASFA limits the provision of services to preserve families, instead "putting children on a fast track from foster care to safe and loving and permanent


194. See generally Dorothy Roberts, Is There Justice in Children's Rights?: The Critique of Federal Family Preservation Policy, 2 U. PA. J. CONST. L. 112 (1999). The term "articulated" is used because, although federal child protection policy has, since at least 1980, featured families of origin as the preferred resource for children, the federal government failed to provide leadership in the form of explanation or enforcement of rules designed to do so. See Naomi R. Cahn, Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption, 60 OHIO ST. L.J. 1189, 1192-97 (1999) (tracing policy back to the early 1900s). See also Suter v. Artist M., 503 U.S. 347, 360-61 (1992) (noting absence of federal rules or regulation giving content to the reasonable efforts requirement); David J. Herring, The Adoption and Safe Families Act—Hope and Its Subversion, 34 FAM. L.Q. 329, 334-36, 342 (2000) (describing failures of AACWA largely due to lack of local and federal enforcement). But see Cahn, supra, at 1196-97 (describing and citing testimony at Congressional Hearings regarding AACWA claiming the states had provided too much emphasis on family preservation and reunification); Herring, supra, at 334 (suggesting that front line decisionmakers resisted federal permanency planning mandates due to concerns about fairness to families). Nevertheless, due to failures in implementation of AACWA, child advocates resorted to private enforcement of federal law provisions. By 1996, nearly half of the states were or had been under court supervision for failure to provide basic services to children in the child protection system. Robert Pear, Many States Fail to Meet Mandates on Child Welfare, N.Y. TIMES, Mar. 17, 1996, at 1. See, e.g., Suter, 503 U.S. 347; Lynch v. Dukakis, 719 F.2d 504 (2d Cir. 1983); Norman v. Johnson, 739 F. Supp. 1182 (N.D. Ill. 1990); B. H. v. Johnson, 715 F. Supp. 1387 (N.D. Ill. 1989); see also Barbara L. Atwell, "A Lost Generation": The Battle for Private Enforcement of the Adoption Assistance and Child Welfare Act of 1980, 60 U. CIN. L. REV. 593, 618-37 (1992) (describing the litigation).
ASFA permits states not to provide family preservation services to families in certain instances. It, nevertheless, requires that the state seek to maintain most neglected and abused children in their homes and, if removed, to reunify them with their families. The AFSA also requires states to initiate or join petitions to terminate parental rights in these same circumstances or if a child has been in foster care for fifteen out of the most recent twenty-two months, with a few exceptions. ASFA does not increase funding or provide additional safeguards to insure that parents receive reunification services during that fifteen-month period. Instead, it limits the time period for reunification of children with their families, provides financial incentives for adoption, and requires states to make reasonable efforts to have a child adopted when that is the goal for the child.

ASFA presumes that certain children, those who have been in foster care for over one year and those with very violent parents, should be adopted. These presumptions, coupled with the shift of funding to adoption promotion and planning, even before parental rights have been terminated, illustrate a move away from deference to parental authority and deference to individualized inquiries as to parental fitness. ASFA also establishes generic

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196. Such instances are when a court has determined that the parent has abandoned, tortured, chronically abused or sexually abused the child, the parent has feloniously assaulted, killed or attempted to kill the child or another child of the parent, or the parent's parental rights to a sibling have been involuntarily terminated. 42 U.S.C.S. § 671(a)(15) (Lexis 1998).
197. 42 U.S.C.S. § 675(5)(E) (Lexis 1998). A state is not required to file a petition to terminate parental rights when the child is being cared for by a relative, the state agency has determined that filing such proceedings would not be in the best interests of the child, or if reasonable efforts were required but not provided by the state. Id.
198. Indeed, the fifteen years between passage of the AACWA and its ASFA amendments were marked by failures in the provision of meaningful preservation and reunification services for families. Cahn, supra note 194, at 1201–04; Herring, supra note 194, at 332–36.
200. This does not mean to suggest that adoption is not an excellent option for many children or that the state agencies did not need incentives to promote adoption. ASFA does reflect, for whatever reasons, a preference for substitute care for certain children, particularly those who come from poor and minority families. See Roberts, supra note 194, at 129 (noting that "it seems that this reverence of adoption over biology is reserved for poor and minority families that are most often clients of the child welfare system").
201. Although the Constitution countenances termination of parental rights—or non-assignment of parental rights—before a father has established more than a genetic connection to the child or the mother, see supra text accompanying notes 22–31, the Constitution does appear to require an individualized inquiry into parental conduct in relation to the child after parental rights are established, see supra text accompanying note 93. Although
mandates as to how long a child should belong to his or her family. Although it permits individualized consideration, ASFA presumes that children, whether they are infants or teenagers, should not return to their families of origin after being separated for fifteen months. ASFA further presumes that they should be placed in new adoptive homes, again without regard to the children's own circumstances, attachments, or age. Like the UAA, the ASFA constitutes at least a partial abandonment of the presumption that biological parents are the first choice for children. Indeed, as one commentator has observed, ASFA seems to view adoption as the goal of child welfare services and the legal relationship between children and their parents to be the barrier to that goal's attainment.

Professor Elizabeth Bartholet appears to be one of the few legal academicians to embrace both the UAA's and ASFA's adoption preference and diminution of biological parent-child relationships. She advocates that parenthood should be reconstructed to minimize biology so that adoption will be an easier and more desirable method for having children. In a more radical departure from family preservation than the ASFA, she recommends abandoning the state's federally-mandated role to assist the parents in the federal ASFA does permit individualized inquiry as to whether to file a termination of parental rights petition and as to parental fitness at the hearing, some states mandate such filings in every case, e.g., IND. CODE ANN. § 31-35-2-4.5(a)(2) (1998) (Michie 2000), and at least two states have defined parental unfitness solely in terms of the time the child has been in foster care, 750 ILL. COMP. STAT. ANN. 50/1(D)(m-1) (West 1999 & Supp. 2001); NEV. REV. STAT. ANN. 128.109(1)(a) & (2) (Michie 1998 & Supp. 1999). The Illinois Supreme Court, however, has ruled the Illinois statute unconstitutional. In re H.G., 757 N.E.2d 864 (Ill. 2001); see also, Jennifer Ayres Hand, Note, Preventing Undue Terminations: A Critical Evaluation of the Length-of-Time-Out-of-Custody Ground for Termination of Parental Rights, 71 N.Y.U. L. REV. 1251 (1996) (collecting statutes and discussing grounds).

Of course, the parents who are subject to these state ASFA laws have usually been proven to be abusive or neglectful and have justifiably had their parental rights limited. It is not the intention to equate these parents with the fit birth parents in thwarted adoptions, except to note that both types of laws illustrate valuation of substitute care over parental care.

In a growing body of work addressing infertility, transracial and transnational adoption, and most recently child welfare, Professor Bartholet has designed a theory that would make adoption an easier and more acceptable method of creating family, even at the expense of non-consenting biological parents. E.g., BARTHOLET, supra note 188; FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING (1993); Elizabeth Bartholet, Beyond Biology: The Politics of Adoption and Reproduction, 2 DUKE J. GENDER L. & POL. 5 (1995); see also Raymond C. O'Brien, An Analysis of Realistic Due Process Rights of Children Versus Parents, 26 CONN. L. REV. 1209 (1994); Russ, supra note 82 (both arguing for less family preservation and easier termination of parental rights for foster children).
remedying the problem. That is providing services to reunify the parents with the children. Professor Bartholet instead advocates placing the state into the role of child-broker, terminating parental rights and placing children with better parents. Indeed, Professor Bartholet even criticizes the child welfare system for providing services to intact families when abuse or neglect has been indicated rather than removing the children immediately. Her work also suggests the abandonment of traditional standards for state removal of children (harm or risk of harm based on parental abuse or neglect), while replacing these standards with something akin to a best interests of the child standard.

The adoption promotion model diminishes the biological aspect, and privacy of parenthood, by permitting third parties to decide when to dissolve and create a new family without first establishing parental failure or unfitness. This opens the family to outside intervention. This evaluation may be based on the needs or assessments of others outside the family, and not necessarily regarding parental conduct or the interests of the child. On the contrary, the adoption promotion model makes generalized presumptions about family reformation that are based entirely on third party adult actions (adoption petitioners) or assumptions (that children should be severed from their parents after fifteen months of separation).

C. Adult Choice Perspectives: Changing Roles of Sex and Gender in Defining Families

Changes in the role of sex (in its biological and reproductive senses) and gender in parenting have prompted re-examination of biology's role in the definition of parent. Lesbian and gay families confound the traditional gendered (mother and father) aspect of the parental rights doctrine because they frequently seek creation

206. Id. at 102.
207. Id. at 96–97.
208. Guggenheim, supra note 157, at 1734.

Although she never offers a substitute standard for removal, Bartholet clearly advocates that children be removed to protect their 'well-being' far more frequently than is current practice. Because only a relatively small number of children are hospitalized or killed in the United States each year as a result of abuse, Bartholet's call for a vast increase in removals must contemplate a significantly broader basis for removal—one focused on 'well-being' or 'best interest' rather than on serious harm.

Id.
or legal affirmation of family relationships that by definition are not heterosexual and not marital. That is, in a same-sex co-parenting arrangement, only one parent, at most, can be the biological parent. Because the parental rights doctrine generally presumes only two parents of different sexes or genders, lesbians and gays must often defeat the rights of one or both biological parents to obtain parental status for themselves.

Reproductive technology also permits parenthood without biological relation to the child and without coitus. It increases the number of potential biological and legal parents for any one child. Although reproductive technology need not disrupt parental rights doctrine when adoption law principles apply, some commentators advocate divorcing parenthood from biology and caregiving entirely, replacing them with the pre-conception intent of the potential parents. Moreover, reproductive technology now permits the separation of the maternal biological connection to the child: gestation and genetic relationships can be split between two women. In this situation the parental rights doctrine does not clearly identify who is considered the mother.

1. Protecting Lesbian and Gay Families—Lesbian and gay challenges to parental rights doctrine typically arise in several settings: the creation of families (through artificial insemination,
surrogacy and adoption), the legal extension of family benefits to existing custodial de facto parent-child relationships (adoption), and the protection of de facto parent-child relationships after dissolution of the adult relationship (third party visitation or custody.) Many of these issues are not unique, but are more endemic, to lesbian and gay families because of laws that limit the creation and protection of parental relationships of two persons of the same sex. These issues may also be increasingly concentrated in lesbian and gay families as more lesbian and gay couples become parents, rather than sharing parenting responsibilities of a child born in a previous affectional heterosexual relationship.

Childless lesbians and gays may create parent-child relationships through artificial insemination, surrogacy, or adoption. These arrangements normally depend on parental consent or judicial processes that terminate parental rights of one or both birth parents. This permits lesbians and gay men to have families without engaging in heterosexual sex or having any ongoing relationship with the other biological parent or parents. In some cases, however, non-custodial biological parents—usually fathers—may have standing to request and obtain visitation or custody.

212. See Polikoff, supra note 210, at 465–68 (describing the “new lesbian-mother families” who begin to parent in the context of a lesbian relationship, rather than lesbian parent-child relationships that formed in the context of a heterosexual marital relationship); see also Laura M. Padilla, Flesh of My Flesh But Not My Heir: Unintended Disinheritance, 36 J. Fam. L. 219, 219 (1997–98) (citing statistics that, as of the mid-1990s, around 10,000 lesbians and gays had or adopted children). William Rubenstein refers to these new families as “second generation queer parent cases,” distinguishing them from “first generation” custody contests arising after divorce of heterosexual and homosexual parent, and forecasting “third generation” queer parent cases when another adult is intended to have a non-parental but significant role in the child’s life. William B. Rubenstein, Divided We Propagate: An Introduction to Protecting Families: Standards for Child Custody in Same-Sex Relationships, 10 UCLA Women’s L.J. 143, 144 (1999).

213. In the case of anonymous sperm donation, the father does not normally have parental rights or status. UNIF. PARENTAGE ACT (1973) § 5, 9B U.L.A. 407 (2001). A known donor, on the contrary, generally has parental status or the potential of such status and cannot relinquish his parental rights or responsibilities by contract. See, e.g., Fred A. Bernstein, This Child Does Have Two Mothers . . . And A Sperm Donor with Visitation, 22 N.Y.U. Rev. L. & Soc. Change 1, 33 (1996) (distinguishing between involved and uninvolved sperm donors); Alexa E. King, Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction, 5 UCLA Women’s L.J. 329, 333 (1995) (advocating different levels of parenthood for adults involved in the reproduction and rearing of the child). Of course, the father can relinquish parental rights in the context of adoption, but such proceedings provide judicial oversight ostensibly to insure that another adult or two will become parents and that someone is attending to the child’s interests. Cf. Bernstein, supra, at 33 (recognizing the limitations of prenatal agreements for anticipating or governing what will be best for a child as s/he develops).

214. Lesbians may use a known donor even though they do not wish the donor to have legal rights to or responsibilities for the child. Reasons for using known donors include the fact that many sperm banks or insemination services refuse to provide sperm to non-
The mother and her partner both seek to bar the father’s access because he is not really a parent and should have access only at the mother’s and her partner’s discretion. This argument undermines the biological connection between father and child, but may comport with the matrifocal aspect of parental rights doctrine and the Supreme Court’s preference for two affectional parents in the same household.

Adoption is an important tool to create new, and validate existing, de facto, parent-child relationships. Lesbians and gay men in a relationship with a same-sex partner who is the birth or adoptive parent of a child may want to establish a legal parent-child relationship for multiple reasons. This relationship provides the child with second parent benefits, such as health insurance, governmental benefits, or a surviving parent, should the legal parent die or become incapacitated, while insuring that the second parent will married women. See Holly J. Harlow, Paternalism Without Paternity: Discrimination Against Single Women Seeking Artificial Insemination by Donor, 6 S. Cal. Rev. L. & Women’s Stud. 173, 174–75, 180 (1996) (noting that in the 1990s, unmarried women still faced barriers to insemination); Note, Reproductive Technology and the Procreation Rights of the Unmarried, 98 Harv. L. Rev. 669, 670 (1985) (stating that in 1979, roughly ninety percent of doctors would not provide insemination to unmarried women); see also Lisa C. Ikemoto, The In/Fertile, The Too Fertile, and the Dysfertile, 47 Hastings L.J. 1007, 1028–30 (1996) (noting that doctors and clinics often limit in vitro fertilization services to wealthy, heterosexual, married couples). Additionally, some lesbians may wish to provide their children with more information about the father, and even an actual person to whom the child could have access. See Rosemarie Tong, Feminist Approaches to Bioethics: Theoretical Reflections and Practical Applications 172–73 (1997); Elizabeth L. Gibson, Artificial Insemination by Donor: Information, Communication and Regulation, 30 J. Fam. L. 1, 27–28 (1991). Of course, gay men too may decide to have ongoing or open relationships with the biological parents of their children. See, e.g., In re M.M.D. & B.H.M., 662 A.2d 837 (D.C. 1995) (discussing the status of a gay adoptive father entered into open adoption with birth mother).


216. See supra notes 40, 41 and accompanying text.

have the rights and responsibilities of parenthood should the adult relationship end in another fashion. Lesbian and gay partners may seek simultaneously as a couple to adopt a child. Because most adoption statutes do not explicitly permit same sex adoption, same sex adoption litigants therefore must often argue for expansive interpretation or liberal construction of adoptions acts. The parties frequently rely on the ubiquitous best interests of the child provisions of the statutes or relaxation of statutory thresholds for filing adoption petitions. These arguments do not usually address, or advocate eroding, standards that protect birth parent rights. However, the arguments could foster approaches to adoption that privilege the best interests of the child, or justify outcomes, at the expense of process in ways that could erode parental rights protections. That is, adoption law is structured to consider adoption only after a parent has consented or been judged unfit to be a parent. Modifying this structure or these standards could undermine parental rights protections. Apart from

218. See In re Adoption of Tammy, 619 N.E.2d 315, 320 (Mass. 1993) (holding that adoption by the child’s second mother will entitle the child to inheritance, to support, health insurance benefits, and social security benefits in the event of second mother’s death).


220. It appears that only Connecticut explicitly permits an unmarried domestic partner to adopt his or her partner’s child. See CONN. GEN. STAT. ANN. §§ 45a-724, 45a-727, 45a-731 (West 1993 & Supp. 2001).


222. E.g., In re Adoption of T.K.J., 931 P.2d 488, 496 (Colo. Ct. App. 1996); In re Adoption of Baby Z., 724 A.2d 1035, 1048 (Conn. 1999); In re Angel Lace M., 516 N.W.2d 678, 681-62 (Wis. 1994); In re Adoptions of B.L.V.B. & E.L.V.B., 628 A.2d 1271, 1275-76 (Vt. 1993).


224. In one second parent adoption case, a dissenting judge articulated a way around this tension when he claimed that only statutory provisions “implicating the involuntary termination of parental rights” need be strictly construed, while other provisions should be liberally construed. R.B.F., 762 A.2d at 745 (Johnson, J. dissenting); see, Glennon, supra note 223, at 267-68 (urging a liberal construction of the Pennsylvania adoption act, but recognizing need to interpret statute to protect parental rights).
this potential threat, lesbian and gay adoption does not undermine parental rights doctrine.

The break-up of same-sex partners who co-parent a child legally related to only one of the parents raises custodial issues and remedies similar to the consensual de facto parent model. Indeed, same-sex couple dissolution is a paradigmatic example of the consensual de facto parent model and these cases constitute a substantial body of de facto parent doctrine. A model that recognizes de facto parental rights of a same-sex, non-legal, co-parent defers to the legal parent's autonomy because de facto parental rights would arise out of a parent-child relationship which the legal parent consented to and encouraged.

In sum, lesbian and gay parenting does not pose a fundamental challenge to parental rights doctrine, even though the parental rights doctrine generally presumes two and only two parents of different sexes. Lesbians and gays advocate enlarging the definition of parent to include the non-marital, non-related partner, and, occasionally, narrowing the definition to exclude one or both biological parents (in order to obtain parental status for themselves). Each argument devalues the male biological aspect of parental rights doctrine (genetic connection only) but is consistent with the aspect that establishes parenthood based on relationship to the "mother."
2. Accommodating Reproductive Technology—Reproductive technology itself can challenge biologically-based parenthood because it creates families who do not fit the traditional patterns produced by coital reproduction and facilitates extra-family private ordering among biological and non-biological kin. Reproductive technology, thus, dramatically increases the options for, and complexities of, creating children and invites multiple claims to parenthood of a single child, embryo or fetus. Reproductive technology permits separation of female gestation and genetic contribution, and increases the possibility of separation of male genetic donation and commitment to the mother or the child. A child, therefore, can have as many as three or more women and three or more men with legal claims to parenthood. Nevertheless, doctrine and commentary are largely consistent with parental rights doctrine, although some reproductive technology rhetoric imagines, or advocates for, new definitions of parenthood that privilege intent and exclude biology and, thus, undermine parental rights doctrine. However, competing claims of gestational surrogates and egg donors who agree to produce a child may pose the most difficult challenge for parental rights doctrine.

suggesting that parenthood be defined by virtue of the relationship between the adults). See generally Bernstein, supra note 213 (describing attempts to abrogate connection between semen donors and their offspring).


230. For example, Professor Dolgin views reproductive technology as the continuing transformation of family law from a relational doctrine governing the biologically defined family as an entity to a rights based doctrine in which families and family relationships are bundles of individual rights holders. Janet L. Dolgin, An Emerging Consensus: Reproductive Technology and the Law, 23 VT. L. REV. 225 (1998). Professor Marjorie Shultz believes increased options for creating children invite reconsideration of legal and normative definitions of a parent. Shultz, supra note 17, at 304–318. Professor Rao views reproductive technology as undermining family paradigms by replacing biological ordering with social choice and destroying the opposition between family and market. Radhika Rao, Assisted Reproductive Technology and the Threat to the Traditional Family, 47 HASTINGS L.J. 951, 959 (1996).

231. For example, egg donor(s) and her husband, sperm donor, gestational surrogate, husband of the surrogate, and man and woman who contracted for the donated gamete and womb.

232. A number of other issues arise in the literature as well that are outside the scope of this Article. For example, ethical and policy issues regarding participants in and products of these processes and the regulation of these processes, such as clinic regulation, storage of reproductive materials, resolution of disputes, and informed consent. By omitting them, the Article does not intended to minimize the importance of these issues or to suggest that assisted reproduction does not pose immediate and long-term problems, both politically and socially, for individual children and families that echo larger issues in family law and social justice.

233. "Gestational surrogate" refers to a woman who carries a genetically unrelated fetus.
Assisted reproduction doctrine generally does not challenge constitutional parental rights doctrine because it is consent-based. In most instances, the law will not force a traditional surrogate to relinquish her baby if she changes her mind, and persons who donate gametes so that others can use them to create and rear a child are not entitled to, or burdened with, parental rights and responsibilities. Many commentators apparently wish to normalize assisted reproduction by treating it like sexual reproduction. In fact, one of the major disputes is whether contract or family law should govern the delineation of parenthood in non-coital reproduction. Yet, even these doctrines are based on consent of the biological parent(s), while the choice of either legal paradigm relates to whether preconception intent of the parties should govern parental rights or whether family doctrines such as best interests of the child and safeguards around relinquishment of maternal rights should govern. Neither family nor contract law advocates would wrest children from biological parents who did not at one time or

234. “Traditional surrogate” refers to a woman who carries a fetus genetically related to the surrogate.

235. E.g., In re Baby M., 537 A.2d 1227 (N.J. 1988); see also, Cahn, supra note 87, at 23-27 (noting that when a preconception agreement breaks down, courts will treat it as a custody matter and conduct a best interest of the child inquiry); James Lindemann Nelson, Genetic Narratives: Biology, Stories, and the Definition of the Family, 2 Health Matrix 71, 72 (1992) (“Surrogateship contracts...are quite widely regarded as ‘unenforceable as contrary to public policy’ ” and are, in fact, banned in many states.). Indeed, adoption laws in all but a few states forbid or discourage pre-birth maternal relinquishment of the child and establish timing or other conditions for post-birth maternal relinquishment. Durcan & Appell, supra note 80.


another express a willingness to relinquish parental rights through anonymous gamete donation or contractual agreements.

Parental rights doctrine does not clearly mandate the use of contract or family law principles. On the contrary, parental rights doctrine permits states to govern conditions or methods for voluntarily relinquishing or transferring parental rights. Thus, surrogates and gamete donors may relinquish parental rights pursuant to state law. However, the question of whether a surrogate mother can validly relinquish parental rights pre-birth may have constitutional implications relating to whether a woman can deprive herself of future liberty interests. Donation of eggs or sperm for someone else's use is less problematic because genetic contribution is not a sufficient condition of parenthood. These donors relinquish the opportunity to establish a liberty interest, unlike the traditional surrogate who will have established a liberty interest by bearing the child.

The more thorny challenge reproductive technology poses for parental rights doctrine arises in the gestational surrogacy context when the woman who donates the egg and the woman who carries

239. Again, this is not to suggest that contract or family law does not make a difference, particularly in the traditional surrogacy context in which it matters a great deal whether a woman can and should be forced to relinquish custody or parental rights to her genetic and gestational child and whether the child's interests would be outcome determinative. See Lori B. Andrews, Beyond Doctrinal Boundaries: A Legal Framework For Surrogate Motherhood, 81 Va. L. Rev. 2343, 2343-45 (1995) (noting deficiencies with both doctrines). The Article does not intend to suggest that family law doctrines do not produce ugly processes and results. See, e.g., Ikemoto, supra note 214, at 1024-26 (describing racialized presumptions regarding fatherhood); Dorothy E. Roberts, The Genetic Tie, 62 U. Chi. L. Rev. 209, 244-52 (describing the use of genetic lineage to maintain white supremacy).

240. For example, the Uniform Parentage Act permits men to donate sperm anonymously and thereby relinquish any rights of responsibilities of subsequent parenthood. Unif. Parentage Act (1973) § 5, 9B U.L.A. 407 (2001). Adoption laws provide forms and conditions for relinquishing parental rights. Joan Hollinger, 1 Adoption Law & Practice § 2.11 (2000); see also Cruzan v. Mo. Dep't of Health, 497 U.S. 261 (1990) (permitting the state to establish forms/evidentiary standards for persons to forego life-sustaining medical treatment). Even Professor Dolgin’s proposal for laws permitting women who are not biologically related to a contractually produced child to be designated as the legal mother upon the child’s birth, without requirement of the birth mother’s post-birth consent and entry of an adoption decree, Dolgin, supra note 230, at 253-58, is not necessarily in conflict with parental rights. But see infra note 241 and Section III.A. & C.

241. See Barbara Stark, Constitutional Analysis of the Baby M Decision, 11 Harv. Women’s L.J. 19 (1988) (arguing that surrogates cannot alienate maternal or privacy rights prior to conception, but instead retain these rights throughout each stage of surrogacy: i.e., the decision to conceive, the decision to carry or abort, medical decisions, and eventually the decision to surrender the child to the prospective (contracting) parents); see also Anita L. Allen, Privacy, Surrogacy, and the Baby M Case, 76 Geo. L.J. 1759, 1786-91 (1988) (asserting that a surrogate cannot alienate parental rights until after birth).

242. This is not to suggest that such reproduction does not pose the same sort of challenges to children and families as adoption and other biological disconnections between children and families. E.g., Nelson, supra note 235, at 81-82.
the pregnancy each seek parental rights. The prevailing view seems to privilege the ovum provider when she produced her ovum for the express purpose of reproducing a child for herself. This view appears to rely on an intent-based definition of mother that looks to intent to parent at the time of conception. If a woman intends to “donate” her womb or ovum so another woman can be the mother, then the donee, not the donor, is the mother. If intent to parent is a tiebreaker between two competing biological mothers (gestational and genetic), as many commentators suggest, it is consistent with, but not mandated by, parental rights doctrine. That is, neither the genetic nor the nurturing relationship is sufficient to establish motherhood, so neither woman is the mother. Yet, each can forego her ability to be considered a legal parent through relinquishment of that right before, at, or after, the time of conception. However, such contracts, particularly for gestational surrogates, pose other problems.

243. E.g., Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); Belsito v. Clark, 67 Ohio Misc. 2d 54 (1994) (both granting the genetic mother (ovum donor) parental status); see also UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT (1988) §§ 5-6, 9B U.L.A. 266–67 (Supp. 2001) (providing a number of alternatives including the designation of the woman who gives birth as the mother or the specific enforcement of gestational surrogacy agreements). But see Charo, supra note 17, at 249–50 (arguing that gestation should define motherhood and noting that every country but Israel that has examined the issue of split genetic and gestational motherhood defines the birth mother as the mother).

244. Johnson, 851 P.2d at 782; see also UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT (1988) § 4(a), 9B U.L.A. 265 (Supp. 2001) (stating that “a donor is not a parent of a child conceived through assisted conception”); Ikemoto, supra note 214, at 1023–27 (explaining that surrogacy doctrine reinforces long standing family doctrine maintaining white male control over women’s sexuality and white conceptions of racial purity); NABER, supra note 236, at 299 (recommending adoption of laws that recognize the gamete recipient, and not the donor, as the legal parent).

245. See, e.g., Cynthia B. Cohen, Parents Anonymous, in NEW WAYS OF MAKING BABIES, supra note 236, at 88, 96; Dolgin, supra note 230, at 275–79; Shultz, supra note 17, at 366–67.

246. This relinquishment is analogous to an anonymous sperm donor, or a putative father who fails to register, file a paternity action, or hold himself out as a parent. Yet, it does seem that under the parental rights doctrine, gestation would trump genetics, despite pre-conception intent, because parental rights doctrine values nurture over genetic connections. By the time of birth, the gestational mother has provided more nurture than any other parent. The traditional surrogate, of course, would be the only mother at birth since she embodies both aspects of parenthood—the genetic and nurturing connections.

247. Like many feminists, the author is troubled by the gender, racial, and class implications of characterizing gestation as a fungible commodity. See, e.g., Anita L. Allen, The Black Surrogate Mother, 8 HARV. BLACKLETTER L.J. 17 (1991) (linking surrogacy to slave women’s relationship to their babies, and critiquing enforcement of such contracts due to likely economic and racial inequality between surrogates and contracting parents); Marie Ashe, Mind’s Opportunity: Birthing a Post-Structuralist Feminist Jurisprudence, 38 SYRACUSE L. REV. 1129, 1170 (1987) (describing the uniqueness of pregnancy and childbirth); Minow & Shanley, supra note 52, at 11 (noting that selling pregnancy and childbirth like any other labor diminishes the special relationship between a woman and her reproductive capacities); Margaret Jane Radin, Market-Inalienability, 100 HARV. L. REV. 1849, 1915–16, 1925–36 (1987) (discussing the harms to
consistency with parental rights doctrine, commentators do characterize gestational surrogacy and gamete donation as a new type of parenthood defined by pre-conception and pre-birth intent, manifested by a contract, to have a child.\textsuperscript{248}

A rather extreme manifestation of an intent-based parent conception is the theory that there is a constitutional right to procreate that requires that the state recognize as parents those persons who desire and plan to have children using reproductive technology.\textsuperscript{249} This constitutional right to procreate\textsuperscript{250} extends to persons who are unable or unwilling to reproduce coitally, regardless of whether they have a genetic tie to the creation.\textsuperscript{251} Although this liberty interest does not mandate that the state provide the means to procreate, the state must enforce pre-conception agreements, over the claims of donors and surrogates.

This establishment of a liberty interest in non-coital procreation that requires states to enforce pre-conception agreements would elevate to constitutional status the pre-conception intentions of persons who may have no biological or personal connection to the child or the biological parent(s). The enforcement of pre-women's and children's personhood that selling reproductive services causes, particularly in the context of class division and gender oppression); Roberts, \textit{supra} note 239, at 241-52 (noting how surrogacy echoes slavery's ownership of human beings and the use of slave women to bear children to be sold, tends to privilege paternal and devalue maternal genetic ties, and is used by wealthier women at the expense of poorer women); see also Stark, \textit{supra} note 241 (discussing constitutional limitations on contractual surrogacy).

\textsuperscript{248} Dolgin, \textit{supra} note 230 at 236-60; Nelson, \textit{supra} note 235 at 79; see also Andrews, \textit{supra} note 239, at 2367-68 (arguing for upholding surrogacy-contracts because child would not exist but for the intending parents); Cohen, \textit{supra} note 245, at 96 (same); Marjorie M. Shultz, \textit{Questioning Commdification}, 85 \textit{Cal. L. Rev.} 1841, 1852-54 (1997) (reviewing \textit{MARGARET JANE RADIN, CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS} (1996)) (same). Professor Shultz even argues that intentional parents may be "better" parents than the gestational parent because assisted reproduction involves the type of long-term and multi-faceted commitment required for parenting. Shultz, \textit{supra} note 17, at 332. Professor Shultz does not, however, elaborate on why a surrogate's gestation and child birth would not involve long-term, multi-faceted commitment.


\textsuperscript{250} This "right" is derived from the right not to procreate, Robertson, \textit{Procreative Liberty, supra} note 249, at 416-21, or the right not to be sterilized, Hill, \textit{supra} note 249, at 366-69 (citing \textit{Skinner v. Oklahoma}, 316 U.S. 535 (1942)).

\textsuperscript{251} \textit{See} Hill, \textit{supra} note 249, at 379-83. Robertson notes that infertile and fertile persons' interest in procreation is not different and so both should have a right to procreation.

\textsuperscript{252} Robertson, \textit{Procreative Liberty, supra} note 249, at 428-29.

\textsuperscript{252} \textit{Robertson, CHILDREN OF CHOICE, supra} note 249, at 126-27; Hill, \textit{supra} note 249, at 382-87.
Virtual Mothers and the Meaning of Parenthood

conception child-rearing agreements may not violate parental rights doctrine. However, according their enforcement constitutional protection confers parental status based upon volition, rather than any biological connection or demonstrated affectional conduct. This would mean that the pre-conception intentions of persons who are unrelated to the potential child and who have no more than a potential nurturing relationship to the child or, perhaps, supportive relationship to the biological mother would, as a constitutional matter, suffice to designate them as the parents. The traditional surrogate mother, who by definition intended initially to relinquish the child but who meets the current matrifocal definition of parent, would not be a parent because the constitutional definition of parent would no longer depend on genetic and nurturing relationships. This construction of parental rights deletes biological and affectional connection, leaving third parties to determine who are parents by virtue of adult preconception intentions.

Reproductive technology, thus, poses both actual and rhetorical challenges to parental rights doctrine by creating legal constructs that permit alienation of one’s gametic materials and allow the separation of the maternal roles of gamete donation and gestation. Because technology increases the options for people to plan for children’s reproduction before conception and without regard to biological connections, commentators are tempted to re-write parental rights doctrine to exclude such connections and the requirement of earning parenthood. Indeed, under procreational rights theory, all that is necessary is the intent to parent. Therefore, contract and procreational rights theory omits the child altogether. These theories are exclusively adult-oriented, unlike traditional family and adoption laws that recognize as parents persons who have a physical relationship to the child or mother and allow modification or transfer of that status according to the parents’ wishes and the best interests of the child.

253. See Robertson, Children of Choice, supra note 249, at 143 (“preconception rearing intentions should count as much as or more than biologic connection”); Hill, supra note 249, at 382-386 (arguing that procreative rights are more fundamental than privacy rights and procreation is inherently relational, as is parenthood, so parental rights are subsumed in procreational rights and not defined by biology).
Feminist perspectives challenge parental rights doctrine because they question the very meaning of biology, sex and gender, and the privacy of the family. Feminist theory and activism have been largely devoted to challenging the differential experiences, treatment, and conceptions of women and men. In doing so, feminists have identified and challenged the perceived connection between biological differences and gender norms. These challenges have placed biology, motherhood and families at issue because women’s unique role in gestating fetuses and nursing babies has supported constractive social norms that dictate what women can and cannot

254. *E.g.*, Zillah R. Eisenstein, *The Female Body and the Law* 2 (1988) ("Just as biology is never devoid of its cultural definition and interpretation, so sex itself, as a biological entity, is partly defined in and through culture."); Jane Flax, *Postmodernism and Gender Relations in Feminist Theory*, 12 Signs 621, 627 (1987) ("The single most important advance in feminist theory is that the existence of gender relations has been problematized. Gender can no longer be treated as a simple, natural fact."); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender*, 144 U. Pa. L. Rev. 1, 5 (1995) (stating that "most, if not all, differences between men and women are grounded not in biology, but in gender normativity"); Evelyn Nakano Glenn, *Social Constructions of Mothering: A Thematic Overview*, in *Mothering: Ideology, Experience, and Agency*, supra note 136, 1, 3 (feminist scholars have challenged notions of manhood or womanhood as inherent qualities derived from or related to sex); Tracy E. Higgins, "By Reason of Their Sex": Feminist Theory, Postmodernism, and Justice, 80 Cornell L. Rev. 1536, 1570 (1995) ("Sexual difference, however it may be measured, is irretrievably bound up with gender."); see also Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187 (1988) (showing how homosexuality challenges gender dichotomies); Robin L. West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 Wis. Women’s L.J. 81, 140–44 (1987) (describing how woman’s biological preganbility and social roles form women’s identities as care-givers and how societal constructs couple pain with childbirth though such a connection is neither natural or biological). *Cf.* Catharine A. MacKinnon, *Points Against Postmodernism*, 75 Chi.-Kent L. Rev. 687, 700–01 (2000) (claiming that subordination of women is universal in that it occurs across all cultures). The subject of gender and its relation (or lack of relation) to the increasingly outmoded categories of male and female has become its own intellectual specialty. See Franke, supra, at 3–5 (arguing that there is no such thing as biological sexual differences, only the meaning society assigns to them and so "there is no principled way to distinguish sex from gender"); Adria Schwartz, *Taking the Nature Out of Mother*, in *Representations of Motherhood*, 240, 250 (Donna Bassin et al. eds., 1994) (discussing postmodern feminist challenges to the binary categorization of men and women). The claim that there is no such thing as biological difference—just the meanings we ascribe to them—has great relevance to the major tenet of this Article, that biology matters because the legal parental paradigm encompasses the two types of biological contribution that mothers/women/females make: gametic and gestational. This Article does not take issue with the point that biology is meaningful only to the extent we assign social meaning to it. Indeed, it describes the legal construction of parenthood as privileging (ascribing special meaning to) the things that persons who have ovaries and wombs can do. It also defends that meaning because for some persons, that genetic and gestational connection is the only socially meaningful thing that affords them the privilege of being a parent. *See infra* text accompanying notes 287 and 416.
do both to their own bodies and in the social, political and economic spheres. These critical perspectives implicate, albeit indirectly, the parental rights doctrine because much of feminism’s work has involved the disassociation of women from child bearing and rearing and examination of the role family privacy ideology plays in the subordination of women. In these ways, feminist perspectives reject or minimize the biological content of parenthood and reduce family privacy. Although these feminist perspectives are not anti-child, they are primarily concerned with adult freedom and values.

1. Biology, Gender and Motherhood—The association of women with children—women as mothers—is a major focus of feminist scholarly debate. Torn between the power of motherhood and its limitations, feminists are both critical and celebratory of women’s biological and socially constructed role as life and caregivers. Early in the second wave of feminism, Adrienne Rich described these two meanings of motherhood as: (1) the potential relationship of women to their powers of reproduction and to children; and (2) an institution which works to keep that potential and women under control. More recently, Dorothy Roberts has explained the crux of this dilemma: “it is difficult to explain motherhood, as an institution and an experience, in a way that grasps both its affirming and oppressive aspects.”

Feminists have suggested that the unique, nurturing relationship of women to children implicates a particular feminine morality. Yet, feminists have also criticized the notion of family as

255. The same is true for men, but their gender norms are more likely to lead to physical, financial, or economic power and freedom than the norms of women. Of course, race, culture, class and religion create divisions among men regarding such norms.

256. See Patricia A. Cain, Feminist Jurisprudence: Grounding the Theories, 4 BERKELEY WOMEN'S L.J. 191, 198 n.36 (1989-90) (contrasting the “modern day women’s movement,” with the first wave of feminism starting in the 19th century).


258. Dorothy E. Roberts, The Unrealized Power of Mother, 5 COLUM. J. GENDER & L. 141, 143 (1995); see also Flax, supra note 254, at 638-39 (noting that feminist perspectives range from viewing the family as woman’s special realm to viewing it as the site of gender struggles); Carol Sanger, M Is For the Many Things, 1 S. CAL. REV. L. & WOMEN’S STUD. 15 (1992) (rehearsing feminist approaches to motherhood); Robin West, Jurisprudence and Gender, 55 U. CHI. L. REV. 1, 53 (1988) (discussing the potentiality of motherhood as both valuable and dreadful).

259. See, e.g., Mary Becker, Maternal Feelings: Myth, Taboo, and Child Custody, 1 S. CAL. REV. L. & WOMEN’S STUD. 133, 142-58 (1992) (discussing the special bonds mothers have with their children).

260. See infra Part II.D.1.b.
normative and socially constructed consisting of a White, middle class, heterosexual cohabitational unit,\textsuperscript{261} oppressive to both women and children,\textsuperscript{262} and a mechanism for reinforcing gender roles and patriarchal hegemony.\textsuperscript{263} The Article explores two basic responses to these gendered dichotomies, one that distances women from motherhood and the other that uses motherhood as the model for all women and men. Both of these responses turn motherhood into an abstract notion, making motherhood a virtual activity or concept, divorced from the acts of gestation and birth.

\textit{a. Separating Women from Motherhood}—Feminists have challenged the gendered connection between women and motherhood for several reasons. Dominant conceptions of woman entail motherhood.\textsuperscript{264} Thus, courts and legislatures have historically restricted women’s choices based on a unified conception of women and mothers.\textsuperscript{265} This social construction of womanhood views all women as potential mothers,\textsuperscript{266} both constricting more


264. Fineman, \textit{Intimacy Outside of the Natural Family: The Limits of Privacy}, \textit{supra} note 103, at 51 (women as a legal and cultural category encompasses motherhood in its definition); M.M. Slaughter, \textit{The Legal Construction of “Mother,” in Mothers in Law, supra} note 210, 73, 74 (“Women are socially constructed as Mothers or childrearers because of a system of power that keeps them from working to full capacity in the labor market.”) Carol Sanger calls this “maternal essentialism.” Sanger, \textit{supra} note 258, at 18; \textit{see also} Glenn, \textit{supra} note 254, at 13 (“Woman is conflated with mother, and together appears as an undifferentiated and unchanging monolith. (In contrast, men appear in all of their historical specificity in a variety of roles and contexts.)”). Professor West embraces this connection. West, \textit{supra} note 258, at 14–18.

265. \textit{See, e.g.}, Michael M. v. Superior Court, 450 U.S. 464 (1981) (upholding a state law criminalizing sexual intercourse for teenage girls and not boys because young girls can become pregnant); Muller v. Oregon, 208 U.S. 412, 422 (1908) (upholding state statute prohibiting women from working in factories more than ten hours per day based in part on women’s needs arising out of “discharge of her maternal functions”); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (Justice Bradley’s famous concurrence with the court’s ruling upholding denial of woman’s admittance to the legal bar because of her “paramount destiny” to be a wife and mother). \textit{But see} Int’l Union, United Auto. Workers v. Johnson Controls, 499 U.S. 187 (1991) (striking down a policy prohibiting women from working in jobs that could damage a fetus). For a discussion of the Supreme Court’s contradictory conceptualizations of gender and biology, see Higgins, \textit{supra} note 254, at 1542–60.

266. \textit{Eisenstein, supra} note 254, at 80 (“The woman’s body . . . is inevitably associated with the mother’s body . . . .”); Dorothy Roberts, \textit{Racism and Patriarchy in the Meaning of Motherhood, in Mothers in Law, supra} note 210 ("All women are socially defined as mothers . . . .")
expansive or different views of women and suggesting that women who do not become mothers are not women. The equation of womanhood with motherhood limits women's opportunities outside and inside the family and supports gender-based expectations regarding thought, action, dress, and behavior. If a woman is only either an actual or potential mother, her role is to be, or prepare for being, a mother, not an astronaut, attorney, or athlete. The equation of woman and mother relegates women to the private confines of the family, while men are free to engage in the outside, public world of paid work and politics. Moreover, because women are mothers, they have no interests apart from motherhood, so women's interests become indistinguishable from children's, depriving both mothers and children of individuality by denying that their interests can ever conflict.

Those feminists who seek to be free, like men, from these constraining norms, divorce parenting from women, disregarding motherhood and the family, except insofar as they impede equal

or potential mothers.

267. See Cain, supra note 256, at 205 n.96 (rejecting "dominant" feminist discourse "that privileges the experience of motherhood over other experiences of female connections."); Higgins, supra note 254, at 1566 ("[N]ot all women can or wish to be mothers and therefore some resist a definition of woman as mother as not reflecting their experience."). Other social norms, like race, also dictate who is and is not a woman. See Eileen Boris, The Power of Motherhood: Black and White Activist Women Redefine the "Political," 2 Yale J. L. & Feminism 25, 46 (1989); Roberts, supra note 261, at 15-16 (both noting that dominant norms exclude African American from the category of woman).

268. Susan Moller Okin, Justice, Gender, and the Family 45 (1989); see also Franke, supra note 254 (discussing role of ability to bear children in the definition of woman in the context of whether persons were born with male or female genitals); West, supra note 258, at 47 (noting that, because it is compulsory, motherhood can be "tremendously constraining, damaging, and oppressive"). Treatment of pregnancy and pregnant women illustrates motherhood's subversion of women. See MacKinnon, supra note 110, at 1315-28 (noting dominant ideology's inability to conceive of the uniqueness of pregnancy or a fetus, or to separate a woman from the fetus she carries); Michelle Oberman, Sex, Drug, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs, 43 Hastings L.J. 505, 537-38 (1992) (describing how the law equates pregnant women's use of drugs with child abuse or neglect).

269. Eisenstein, supra note 254, at 82-83; Okin, supra note 268, at 170-72; Fineman, Intimacy Outside of the Natural Family: The Limits of Privacy, supra note 103, at 967; see also Shultz, supra note 17, at 380 (noting different legal treatment of mothers and fathers who try to waive parental rights).

treatment in the male world. In attempting to maximize women’s autonomy, these feminists have highlighted women’s similarity to— not difference from— men, thus discounting sex-based differences. In the context of the family, these feminists have disavowed any connection between women and child rearing. Viewing child-rearing, at least in part, as a burden that inhibits women’s autonomy, they advocate social or legal reform that would equalize child rearing responsibilities among men and women. After all, if women and men are the same, they should share child-rearing responsibilities. Once care-giving is no longer the domain of mothers, anybody can do it, even men. This has been an important ideological step in freeing women from limitations based on their potential or actual role as mothers. But, by equating men and women as parents, feminists rhetorically nullify the very

271. This model, sometimes referred to as “legal equality,” “liberty feminism,” or “sameness feminism,” minimizes differences between men and women and seeks to establish rules that will apply to all persons, regardless of sex/gender. See Katherine Bartlett, Gender Law, 1 Duke J. Gender L. & Pol’y 1 (1994); West, supra note 258, at 14 (both describing such feminism).

272. E.g., Joan C. Williams, Deconstructing Gender, 87 Mich. L. Rev. 797 (1989) (describing how focusing on women’s difference from men reinforces oppressive gender stereotypes); Wendy W. Williams, The Equality Crisis: Some Reflections on Culture, Courts, and Feminism, 14 Women’s Rts. L. Rev. 151 (1982) (arguing for gender neutral treatment of pregnancy, rape, and the draft). Even though equality feminists discount dissimilarities, they do not necessarily ignore them. On the contrary, equality feminists are critical of socially constructed differences that subordinate women and advocate remedial action to place women on par with men in the family as well as the workplace. E.g., Wendy W. Williams, supra, at 173 (“[I]t seems entirely possible that the concept of exclusive mother-infant bonding—the latest variation on ‘maternal instinct’—is a social construct designed to serve ideological needs.”).

273. E.g., Shultz, supra note 17, at 379–90; Slaughter, supra note 264, at 73–74. Accord Williams, Deconstructing Gender, supra note 272, at 822–835 (advocating for gender neutral parenting coupled with restructuring wage labor to take into account of child rearing demands).


275. Czapanskiy, supra note 274; see also Martha Fineman, The Neutered Mother, 46 U. Miami L. Rev. 653, 660 (1992) (“As a result of the push to gender neutrality, Mother as an explicitly positive symbol with unique connotations and significance in regard to her relationship with her child has been moved out of the text and into the margins of family law discourse. Mother is neutered into Parent and is, at the same time, transformed into ‘Wife’— a role considered to be more appropriate as it connotes an equal or full partner in the family and extra-family contexts.”).

276. See Czapanskiy, supra note 274, at 1464 (defining parent in gender neutral terms); Slaughter, supra note 264, at 73 (noting in the context of child rearing, “there is nothing in nature that requires women to Mother, or prevents men from doing so”); see also Fineman, Our Sacred Institution: The Ideal of the Family in American Law and Society, 1993 Utah L. Rev. 387, 397 (noting change in law to reflect gender neutral parenting); Shanley, supra note 52, at 78 (contending that in the context of adoption, gender neutrality presumes that legal rules treat both parents the same by requiring each to consent before a child can be adopted).
distinct roles of women's and men's biological connection to children and the attendant maternal privileges. Equating maternal and paternal roles in the creation of parenthood either reduces the biological connection to genetics or neuters the roles by characterizing them as care-giving and, thus, discounts the matrifocal aspect of parenthood.

b. Separating Motherhood from Women—The converse approach that challenges confining normative associations of women and parenthood is to privilege mothering and its associated norms. This approach too presents a sex-neutral, though gendered, parenting model. The approach does so in the context of different definitions of family or civic values, each of which privileges and supports relations of dependency and caregiving. For some feminists, redefining families begins with the recognition that child rearing is factually, structurally, and ideologically gendered. In other words, family is currently configured as a self-contained triad defined or created by the relationship between adults wherein the children depend on the mother for care and the mother depends on the father for support. This configuration masks the dual-edged nature of dependency whereby the act of caring for dependents creates dependency for the caregiver (who is usually a woman). This caregiver dependency makes women particularly vulnerable because they must rely on private financial and child-care support from their partners (usually fathers). To

277. *Casey*, 505 U.S. at 896–98. Of course the minimal role of males in reproduction frees them from invasive intervention during gestation, unlike women who may be subject to criminal and civil sanction for behavior while pregnant. See *Ferguson v. City of Charleston*, 532 U.S. 67, 67 (2001) (describing a public hospital’s practice and policy of testing and arresting (poor, mostly African American) pregnant women for illicit drugs); *Whitner v. South Carolina*, 492 S.E.2d 777 (S.C. 1997), cert. denied, 523 U.S. 1145 (1998) (holding that a woman may be guilty of “child abuse” for using illegal drugs while pregnant with a viable fetus); *KATHA POLLIT, REASONABLE CREATURES* 181–82 (1995) (contrasting the “duty of care” women have to their fetuses with the lack of such a duty to the men who live with pregnant women).

278. Professor Martha Fineman has developed these themes in a number of works. E.g., *FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES*, supra note 110; *Fineman, The Neutered Mother*, supra note 275; *Fineman, Our Sacred Institution: The Ideal of the Family in American Law and Society*, supra note 276. Professor Karen Czapanskiy has developed a similar model of interdependency in a number of her works. E.g., *Karen Czapanskiy, Grandparents, Parents and Grandchildren: Actualizing Interdependency in Law*, 26 CONN. L. REV. 1315 (1994); *Czapanskiy, supra note 135.

279. See infra text accompanying notes 294–304.

280. E.g., *Fineman, supra note 275*, at 663–68.

281. See *Fineman, The Neutered Mother, supra note 275*, at 401–02.

282. Women are still, by and large, care-givers (of dependant adults as well as children), so this new model does not sufficiently compensate or protect women from the sacrifices they make in providing care for children (and elders) in a social context in which women
recognize and remedy this dependency, feminists argue for a redefinition of families based on the mother-child or care-giver-cared-for dyad. This model advocates ideological and financial support for vertical relationships of dependency rather than horizontal relationships based on sex. Under this model, the public would support the parent (mother)-child dyad, rather than tying support to the private means and volition of the other parent (father). Moreover, this dyad would no longer be tied to biology and child bearing, although it would be defined by dependency and care-giving. Instead, this dyad could be filled by men and children (or other dependents, such as elderly parents).

The argument that mothering is not tied to biology, that child-bearers need not be child-rearers, also resonates with feminists who address families that do not fit dominant (White, middle-class, heterosexual) family norms. Just as feminists have challenged gendered norms arising out of women's biological ability to bear children, feminists have also questioned biological and social constructions that affect parenting definitions. The dominant ideology of family is that it consists of mother, father, and child(ren), with the mother providing child care and the father supporting and heading the family. Yet that is a particularly White, heterosexual,
middle-class norm that does not apply to many families of color, to poor, lesbian, and gay families, and even to families of divorce. For example, families of color frequently live in extensive kin and fictive kin networks that transcend or even substitute for the nuclear family, through, for example, maternal-led families, informal adoption, and multi-generational households. Blood ties, although important, are only one ingredient in a rich construction of family love and obligation. Moreover, White working class families are often extended, rather than nuclear. Lesbian and gay parents are not both biologically related to their children, nor do they fit the heterosexual portion of the dominant family norm. This diversity and complexity of family relationships leads some feminists to question the primacy of biology in creating and defining families.

Another way that feminists value motherhood is to disconnect it from women, place it in the public realm, and universalize it. These feminists find cross-cultural similarities among women and differences from men that are based on women's capacity to be-

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288. See Fineman, The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies, supra note 110, at 190; Susan Chira, Struggling to Find Stability When Divorce Is a Pattern, N.Y. Times, March 19, 1995, at 1, 42.


290. See, e.g., Collins, supra note 261, at 219–23 (describing African American extended and fictive families); Stack & Burton supra note 136, at 35 (describing an African American man caring for his grandchildren because they are his daughter's children).


292. Though they may be legally related through formal adoption in several states. See supra text accompanying notes 217–24.

293. See Roberts, supra note 239, at 272–73.
come pregnant and their cultural role as child rearers. Because of the commonality of the potential for motherhood, some feminists suggest that women share an essential connection to other people and are, therefore, primarily relational, rather than, like men, autonomous. In contrast to the values relating to the dominant (male) norm of autonomy, e.g., individualism and rights, women's connectivity suggests different norms, such as nurturing, empathy, and inclusion. These feminists reject male-defined values of autonomy and rights and suggest instead that female values form an alternate jurisprudence and ethics for all people.

For these nurturing values to be universal, they must not be connected to gender or biology. Accordingly, some feminists have separated motherhood, whence these norms arise, from women. Mothering, thus, is divorced from nature and biology—child bearing—and becomes a practice, job or relationship in which one person "nurtures and cares for another." Mothering then starts after birth and can be done by anyone and in various

294. E.g., Fineman, The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies, supra note 110, at 47–54; West, supra note 258, at 14. Robin West asserts that this conflation arises from biology, socialization, and psychological forces. West, supra note 258, at 26.

295. West, supra note 258, at 1–5.

296. Id. at 16–17 (citing Nancy Chodorow and Carol Gilligan); Eichner, supra note 112, 154–56. Indeed, early feminists used women's special connection to children as part of their political agenda toward social reform. See, e.g., Boris, supra note 267 (describing women's use of motherhood as a political platform during the early 20th century women's movement).

297. Sara Ruddick, Maternal Thinking 229 (1989); Fineman, supra note 110, at 235; West, supra note 258, at 65–66; see also Frances Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 Harv. L. Rev. 1497, 1567–68 (1983) (arguing for bringing family values into the market in order to promote more communal forms of social life).

298. Disconnecting gender from biology is, of course, necessary to promote these currently gendered norms as universal, that is applying to men as well. See Sara Ruddick, Thinking about Fathers, in Rethinking the Family, supra note 136, 176, 186 (equating gender-inclusiveness and genderlessness).

299. See, e.g., Glenn, supra note 254, at 13 (noting need to deconstruct oppositions between male and female and subordinate position of mothering); Ruddick, supra note 298, at 186 (arguing for mothering as a "genderless activity").

300. Glenn, supra note 254, at 3. See also Fineman, The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies, supra note 110, at 235; Barbara Katz Rothman, Beyond Mothers and Fathers: Ideology in a Patriarchal Society, in Mothering: Ideology, Experience, and Agency, supra note 136, 139, 154–55; Ruddick, supra note 266, at 35–36. Ruddick also claims that neither childbearing or mothering "is a necessary condition for or consequence of performing the other activity well." Id. at 38.

301. Okin, supra note 268, at 171; Ruddick, supra note 298, at 187. Thus, childbearing no longer counts. But see Becker, supra note 259, at 140, 142 (noting the uniqueness of pregnancy, particularly in relation to caretaking post-birth); West, supra note 258, at 22–23 (discussing the special connections between mother and fetus). Other arguments for devaluing pregnancy include the repercussions of its meaning in the context of reproductive choice. Focusing on the importance of the maternal bonding that occurs during pregnancy
manners. That way, childbearing no longer counts. This degen-
dered universalization of mother allows non-mothers—especially men—to appropriate the values of nurture and connectedness. It also frees women from automatic relegation to the maternal role and holds others accountable for fulfilling that role.

Feminists, thus, separate biology and parenthood for several reasons. They do so to free women from confining maternal norms, to make society more responsive to relationships of dependency, and to reflect complex and diverse family structures in which the biological parent-child connection may not be primary or exclusive and promote maternal norms in larger society. Although the intent is not to minimize motherhood, this further abstraction of motherhood from the physical maternal role to the more universal notion of care-giving diminishes the role of maternal biology in parent-child definitions and suggests that mothering belongs to the public, diminishing the privacy of the parent-child relationship.

2. Gendered Harms in Family Privacy Ideology and Doctrine—In addition to separating women and family, feminists have attempted to remove women and family from the private realm, so that they can

can militate toward personifying the fetus. See Linda L. Lacey, "O Wind, Remind Him That I Have No Child": Infertility and Feminist Jurisprudence, 5 Mich. J. Gender & L. 163, 188 (1998) ("An emphasis on the strength of the bonds formed between unborn children and the gestational mother could be used to make the point that pro-life advocates have been making all along—that from the moment of conception, fetuses are equally capable of thought and emotion as born babies."). Of course devaluing the uniqueness of pregnancy can also limit a women's reproductive choices. See MacKinnon, supra note 110, at 1313-16 (noting that the failure to recognize that pregnancy is not like other actions or body parts has limited legal doctrine regarding abortion choice); Minow & Shanley, supra note 52, at 11 (arguing that treating pregnancy like any other service or commodity can limit economically disadvantaged women's reproductive freedom).

302. The historical and cultural variety of parenting in part drives Glenn to create such a broad definition of mothering. See Glenn, supra note 254, at 25 ("[W]omen's relationship to mothering seems both different from and (potentially) the same as men's, just as any particular woman's relationship to mothering is both the same and different from that of other women.").

303. See Joan Mahoney, Adoption as a Feminist Alternative, in Reproduction, Ethics, and the Law, Feminist Perspectives 35, 48-51 (Joan C. Callahan ed., 1995) (arguing for defining parenthood as a nurturing, rather than genetic, relationship); Rothman, supra note 300, at 134, 156; Ruddick, supra note 266, at 36 (such involvement with children "can inspire distinctly maternal conceptions of bodily life that are in no way limited to women."). Pre-birth conduct as well, apparently, should confer parental status. Shanley, supra note 52, at 85-90 (arguing that law should examine fathers' conception and prebirth conduct to determine whether he should be accorded parental status).

304. See Glenn, supra note 254, at 13; Ruddick, supra note 266, at 36. Ruddick also cau-
tions against associating mothering with birth-giving because not all birth-givers want to be, and should not be forced to be, mothers. Id. at 38-39.
partake of the benefits of the public world of polity and market. Feminist approaches to family have criticized the rhetoric that invokes the purportedly private nature of families—the political, ideological, and gendered construction of public and private realms that relegate women and mothering to the private family and place men, the market, politics, and law in the public realm. The legal and social equation of families with privacy works in three interrelated ways: 1) it associates families with the private sphere, not the market or polity; 2) it associates women (and children) with families and, therefore, the private sphere; and 3) because the families are private, it prohibits state intervention into family relations, instead leaving them to be ordered privately. This construction of family as a private and unitary entity has harmed women because of power imbalances and compulsory gender norms that contribute to subordination of women.

305. See Margaret Baldwin, Public Women and the Feminist State, 20 HARV. WOMEN'S L.J. 47 (1997); Sally F. Goldfarb, Violence Against Women and the Persistence of Privacy, 61 OHIO ST. L.J. 1 (2000); Olsen, supra note 297; Siegel, supra note 16; Laura W. Stein, Living with the Risk of Backfire: A Response to the Feminist Critiques of Privacy and Equality, 77 MINN. L. REV. 1153 (1993). Although the accuracy and relevance of the public private debate has been questioned, the Supreme Court's holding in United States v. Morrison, 529 U.S. 598 (2000), that the civil rights cause of action provisions under the Violence Against Women Act (VAWA) are unconstitutional, may reinforce arguments against privacy doctrine arising out of distinctions between public and private realms. The Article addresses feminist critiques of family and privacy, although they are often intermingled with and closely related to the equation of women and privacy. Accordingly, the Article does not address feminist critiques of privacy doctrine as a vehicle for individual choice. See MacKinnon, supra note 110, at 1311 (critiquing privacy doctrine as a tool for framing and protecting women's reproductive rights).

306. E.g., OKIN, supra note 268, at 110–111; Fineman, Intimacy Outside of the Natural Family: The Limits of Privacy, supra note 103, at 967–69; Glenn, supra note 254, at 13; Goldfarb, supra note 305, at 4–5; Olsen, The Family and the Market: A Study of Ideology and Legal Reform, supra note 297, at 1499–1500. Feminists have also challenged the myth of the private family. See, e.g., Baldwin, supra note 305; Fineman, Intimacy Outside of the Natural Family: The Limits of Privacy, supra note 103; Olsen, The Myth of State Intervention in the Family, supra note 123; see also Goldfarb, supra note 305, at 25–28 (rehearsing feminist challenges to the veracity of the market-family dichotomy).

307. Descriptions of the gendered aspect of the private/public distinction vary and do not always follow the Article's description, but most see at least a crude distinction between public and private realms, with women and the family belonging to the private and the market and politics belonging to the public. See Baldwin, supra note 305, at 62–63 (describing gendered public-private dichotomy as excluding women's issues from public discourse, limiting women's participation in the public sphere, and normalizing women's privatized status); Dailey, supra note 61, at 998 (describing the conventional view of family privacy—but not this description of it); Goldfarb, supra note 305, at 22 ("[I]n the market-family dichotomy supported a legal system that consigned women to a domestic sphere in which the law then refused to intervene.").

308. See Minow & Shanley, supra note 52, at 17–19 (citing examples of how notions of privacy militate against women obtaining domestic violence orders of protection and asserting other rights). Professor Reva Siegel has traced the historical and current role of privacy doctrine in limiting the rights of women. E.g., Siegel, supra note 16. Some feminists have
The ideological and legal relegation of women to the private family historically kept, and continues to keep, many women from public life. For example, women could not work for pay, sue or be sued, sign contracts or vote. These restrictions prevented women from having a public life. Relegating families to the private realm both devalues domestic work and enforces patriarchal hegemony over domestic assets and expenditures. Family privacy also justifies public (state and market) abdication of meaningful responsibility for the support of children or their caregivers. Thus, women are not adequately compensated for their domestic labor and support for children is often inadequate because this support depends upon the private resources of their parents, sometimes supplemented by inadequate public assistance.

The characterization of the family as private also justifies state reluctance to intervene to protect family members from violence, abuse, or neglect, so women (and children) have no protection from private harms/injury within the family. Marriage legally unifies the husband and wife, and in the past, subsumed the wife's claimed privacy as a vehicle to promote women's freedom. See Singer, supra note 238, at 1517–22 (rehearsing feminist arguments that private ordering of family relationships promotes women's freedom).

309. Glenn, supra note 254, at 13; Goldfarb, supra note 305, at 22; Siegel, Home, supra note 67. But see Martha Minow, "Forming Underneath Everything that Grows:" Toward a History of Family Law, 1985 Wis. L. Rev. 819, 846–84 (describing public lives of women in the past several hundred years). Enslaved women (and men and children), though privately "owned," were very much in the market as mere commodities and as producers of commodities, frequently working alongside men. Id. at 861. The feminization of family also accounts for why the federal courts eschew domestic relations cases. Naomi R. Cahn, Family Law, Federalism, and the Federal Courts, 79 Iowa L. Rev. 1073 (1994).

310. Siegel, Home, supra note 67 (describing how historical separation of spheres reinforced husband's control of family assets and undervalued household labor); Singer, supra note 238; at 1560–61.

311. Eichner, supra, note 112, at 156–68; Singer, supra note 238, at 1568–64. But see Kindred, supra note 87, at 537–38 (arguing that if the state is empowered to interfere in the private family to ensure that children are clothed, fed, and sheltered, the state itself must have a duty to provide benefits to insure parents can adequately clothe, feed, and shelter their children).

312. See Eichner, supra note 112; Fineman, supra note 52, at 7; Singer, supra note 238, at 1561.

313. See, e.g., MacKinnon, supra note 110, at 1311 (arguing privacy belongs to those with power and is a hell hole for those without); Frances Olsen, Constitutional Law: Feminist Critiques of the Public/Private Distinction, 10 Const. Comment. 319, 322–23 (1993) (noting that feminist rejection of public-private dichotomy has permitted the movement of rape out of the private realm, as a sexual act, and into the public realm, as a crime of violence); Elizabeth M. Schneider, The Violence of Privacy, 23 Conn. L. Rev. 973, 974, 984–86 (1991) (claiming that the legal notion of family privacy has encouraged and reinforced violence against women and children by shielding it, immunizing it, and characterizing it as an individual, not systemic, problem); Siegel, supra note 16 (historical, legal account of private spheres that tolerated wife abuse).
legal identity into the husband's, so the state could not intervene in interspousal contests because the wife had no legal standing.\textsuperscript{314} The historically protected marital unity and resulting privacy given to that relationship has been said to sanction or promote, violence against women.\textsuperscript{315} Liberal notions relegate families and, by association, women, to the private world. Similarly, differentiating between state (public) and non-state (private) action limits legal intervention to protect against non-governmental restriction of women's autonomy.\textsuperscript{316} This laissez faire structure leaves women more vulnerable to private physical, economic, and cultural violence and subordination.

The persistence and limitations of assigning women and families to the private realm have led some feminists to reject liberal and constitutional privacy doctrine as useless and even harmful, and as

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\begin{footnote}{314} Siegel, supra note 16, at 2122; Carl Tobias, \textit{Interspousal Tort Immunity in America}, 23 Ga. L. Rev. 359, 362-64 (1989).\end{footnote}
\begin{footnote}{315} See Goldfarb, \textit{supra} note 305, at 22-24 (describing how doctrines like interspousal tort immunity, the marital rape exemption, and laws of coverture, which permit a husband to discipline his wife, have historically shielded domestic violence and continue to shape ideology inhibiting protection of women from intimate violence inside and outside the marital relationship).\end{footnote}
\begin{footnote}{316} See \textit{id.} at 36-41 (describing how even violence against women by state actors is privatized and restating feminist critiques of state-civil society dichotomy). The Supreme Court's decision in \textit{United States v. Morrison}, 529 U.S. 598 (2000), holding that the pervasive violence against women and the subordination of women, as well as the inadequate local response, does not give rise to a civil rights remedy under the 14th amendment enforcement clause, may be an example of the deeply embedded exclusion of women from full citizenship. Although the Supreme Court did not base its ruling in \textit{Morrison} directly on any claim that violence against women is private, and therefore, off limits, the Court's refusal to extend a federal civil rights remedy to women victimized by gender-based violence may arise out of deeply held connections between family privacy ideology and doctrine. See, e.g., Cahn, \textit{supra} note 309, at 1105; Goldfarb, \textit{supra} note 305, at 33. Indeed, prior to the Violence Against Women Act's enactment (the federal statute at issue in \textit{Morrison}), Chief Justice Rehnquist warned that its private cause of action provision "'could involve the federal courts in a whole host of domestic relations disputes.'" Judith Resnik, \textit{The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act}, 74 S. Cal. L. Rev. 269, 271 (2000) (quoting William H. Rehnquist, \textit{Chief Justice's 1991 Year-End Report on the Federal Judiciary}, Third Branch, Jan. 1992, at 3). The \textit{Morrison} majority held that there was no basis for federal jurisdiction over gender-motivated violence, because violence against women does not implicate state action or the market (interstate commerce). 529 U.S. at 612-13, 619-27. This ruling echoes the traditional equation of women with the family, and not with the market or the polity, harkening back to the laws of coverture that kept domestic relations out of federal courts because a husband and wife were not considered diverse. See Goldfarb, \textit{supra} note 305, at 28-33 (discussing connection between the federal domestic relations exemption and family privacy doctrine and ideology); Resnik, "\textit{Naturally} Without Gender: Women, Jurisdiction, and the Federal Courts, \textit{supra} note 8, at 1698 (tying ideological constructions of women as private, domestic actors to the federal court's resistance to assume jurisdiction of "domestic" matters); see also Cahn, \textit{supra} note 309, at 1102-04 (describing domestic relations exception, but noting that federal courts do hear certain family law matters).\end{footnote}
\begin{footnote}{317} \textit{See generally} Baldwin, \textit{supra} note 305; West, \textit{supra} note 258.\end{footnote}
\end{footnotesize}
counterproductive tools for equality\textsuperscript{318} or for autonomy.\textsuperscript{319} Instead, some feminists have argued for more intervention into the family\textsuperscript{320} by dissolving the public-private split\textsuperscript{321} and restructuring the relationship between families and the state so that public, rather than private, resources are used to support mothers and children.\textsuperscript{322}

Feminists also argue that women should claim the autonomy aspect of privacy (freedom of choice)\textsuperscript{323} and reject the familial notions of privacy (state-family distinction).\textsuperscript{324} These responses to the harms of privacy hint at, and often explicitly call for, a revision or abolition of privacy doctrine.

Feminist theory has not been directly concerned with the legal definition of parent. It argues, however, that the equating of women and motherhood is limiting both for women and society, it constrains women and mothers, it brackets values of care from dominant societal norms, and it purports to be natural and, therefore, separate from the market and polity. Separating biology from parenthood spreads the burden and benefits of motherhood, making fathers better parents and counteracting the negative aspects of individualism. In this way, feminist critiques, like the other revisionist critiques reviewed in sections II.A. and II.B., would limit the privacy of the family and disassociate biology or gender from parenthood.

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Most of the revisionist critiques expose the underside of privacy and the significant limitations of parental rights doctrine. Some critiques are not explicitly or directly about the parent-child relationship, but the repercussions or careless extension of such critiques could undermine family autonomy. Each of these critiques challenges a definition of parent based on biology and seeks to limit the autonomy that the doctrine affords to families. Revisionists present these challenges because the fixed, patriarchal, nuclear family does not reflect the actual lives and structures of

\textsuperscript{318} E.g., MacKinnon, supra note 110, at 1311–13; Schneider, supra note 313.

\textsuperscript{319} See generally Fineman, supra note 103.

\textsuperscript{320} E.g., Linda Gordon, Family Violence, Feminism, and Social Control, in Rethinking the Family, supra note 136, 262, 281–82; Schneider, supra note 313, at 974–75.

\textsuperscript{321} See Olsen, supra note 297, at 1567–78 (arguing that unifying market and family will both bring communal values to the marketplace and help transcend the male-female dichotomy, although Olsen signifies the market as private).

\textsuperscript{322} Fineman, supra note 287, at 2205.

\textsuperscript{323} Schneider, supra note 313, at 994–97.

\textsuperscript{324} Id.; Stein, supra note 305, at 1155.
many families. The nuclear family model disregards the needs of children for care and nurture and the needs of adults to parent. The fiduciary model demotes parents from arbiters of their children’s interests to protectors of their state-defined interests. The psychological parent theories would define parents along adult-child affectional, not biological, lines. The adult choice theories would define parents according to adult-adult affectional relationships or intent to rear children, without regard to biological connection to the child. Feminist theories challenge family privacy and the connection of biology and parenthood, seeking to make families and family values more public and more universal. The unifying theme of these various views is a challenge to the notion that current constructions of families and motherhood should be private and exclusive. Instead, revisionists all, on some level, argue that families should be constructed, maintained, and publicly supported along actual caregiving relationships, rather than, or in addition to, biological status.

III. Problems with Revisionist Perspectives and Models of Parenthood

Many of the family critiques above are compelling. However, their suggestion that the parental rights doctrine or family privacy is anachronistic may not comport with the experiences of the thousands of families who are deprived of the recognition and protection the doctrine affords. Descriptions of families and children trapped in patriarchal, oppressive, and abusive homes, cordoned from public law and the marketplace, are at best incomplete and at their weakest, simply inapplicable to many families. The oppressiveness of the connections between woman and mother, and mother and child may not accurately describe the experiences of women who face social, legal and financial obstacles to the full embrace of these connections. Moreover, many parents face state intervention in intimate choices about child bearing and child rearing, which leave their families particularly vulnerable to disruption, contrary to the impression that the parental rights doctrine unduly insulates the family. For these families, the biological connection may be their best claim to family.

There are three major, related problems with these critiques. First, they do not propose standards or the standards proffered are less determinate, as well as more subjective and more interventionist, than the matrifocal standards currently supplied under the
parental rights doctrine. Critics who suggest the reconfiguration of families along caregiving or psychological, rather than biological, lines, ignore the earned aspect of biologically-based parenthood—that caregiving is an essential feature of existing definitions of parent and the scope of parental autonomy. These critics also fail to account for how the biological parents lose their parental status, including their right to make decisions about what is in their children’s interest. Second, these revised standards take privacy for granted, overlooking the fact that many families are already very public and struggle against state oversight and control that is often uninvited and unhelpful. These families are more public because they are poor or otherwise do not meet dominant norms—norms that frequently privilege White, middle class, married, and heterosexual persons. Third, these public families suffer when family privacy is reduced because they may not meet the discretionary standards proposed. The relatively determinate matrifocal standards privilege the status of women who have carried and fed the fetus through their own bodies and the “men” who are biologically related to, and have cared for, the child or who have cared for the mother. Without deference to these standards, the state would have license to decide who is a parent based on majoritarian or dominant norms regarding parents. Such norm-based decision-making is contrary to the liberal values of moral autonomy, equality, and tolerance that limit state action.

This Part of the Article explores the problems that the critiques raise in the remainder of this section. Section III.A. examines revisionist models and illustrates that they broaden intervention, substituting other adults for the parents in determining what is best for children, frequently without regard to the parents’ fitness or consent. Section III.B. explores how and why family privacy is inaccessible to many women and children who constitute non-dominant families or have limited financial means. In the context of this diminished privacy, section III.C. argues that defining families along care-giving lines will most broadly and deeply affect those families whose autonomy is already compromised and who do not meet majoritarian or governmental standards for caregiving.
The parental rights doctrine defines parents using relatively objective principles: biological relatedness and domestic partnership with the mother or child. The doctrine then permits parents to decide with whom their children will live and with whom they will visit, unless the parents are not fit to do so. Parents can lose or decrease their rights by consent or by neglecting or abusing their children. The deference to parental fitness or consent is a hallmark of parental rights doctrine. It permits parents, rather than judges or legislatures, to make fundamental, individualized decisions—that may reflect diverse notions of the good life—about their children’s upbringing. The deference also limits public scrutiny of family functioning to situations in which parents have fallen below minimum care taking standards.

As observed above, many of the revisionist perspectives minimize the role of biological caregiving and maximize post-birth caregiving or publicly-defined determinants of the good life as grounds to interfere with the parent-child relationship. Most of the critiques do not dispute the presumption that birth parents will rear children, unless there are specific reasons that the birth parents cannot, or should not, do so. Indeed, it is these reasons for interfering with this initial presumption that the revisionists address: when courts, legislatures, and other adults can substitute as decision makers about who constitutes or functions as a family and what is best for individual children. The revisionist models propose broader reasons for intervention than those permissible under the parental rights doctrine, because those models permit intervention based on non-parents’ disagreement about a child’s interests. These broader reasons undervalue the earned nature of parenthood by allowing intervention without first showing that parents are no longer competent to determine their children’s interests.

325. The Article does not intend to minimize intractable problems women and children face when multiple persons compete for the paternal role or non-supportive fathers interfere with mothers’ autonomy. Others have advocated models to resolve or minimize these problems. E.g., Baker, supra note 55; Czapanskiy, supra note 135; Fineman, supra note 110.

326. Some critics would define parents according to their prebirth intention to parent regardless of their physical or genetic relationship to the child. See supra text accompanying notes 230–53. Critics, such as some advocates for same sex parents, would base their definition of parents on adult affectional relationships. See supra text accompanying notes 211–28.

327. Most of the feminist critiques do not advocate new definitions of parents or intervention standards. Instead, reduction of family privacy is a by-product of much of the analysis that devalues or universalizes maternal biological connections and that criticize
In exploring these issues, it is helpful to define and distinguish the notion of intervention and its scope. Intervention means the point at which someone who is not a parent (for example, a third party, judge, guardian ad litem, or legislature) is authorized to determine and rank a child’s interests. Intervention occurs once a decisionmaker other than the parent has legal authority to review the parent’s determination of what the interests are and their relative priority. This definition of intervention is used because it captures the substitution of parental judgment, not just the moment when others have entered into, or become involved with, the family. For example, in a thwarted adoption case, the point of intervention may not be when the birth mother transfers the child to the prospective adoptive parents, but instead the point at which the prospective parents refuse to return the child to the non-consenting birth father. Scope means what the substitute decisionmaker reviews. For example, in a custody dispute between parents, the scope is whether the court may review custodial candidates in addition to the parents. The analysis is confined to intervention and scope.

The revisionist models appear to contemplate intervention at several different points and for diverse purposes, although the revisionists are not always clear about grounds for, and the scope of, intervention. The fiduciary parent model would intervene from the outset. The state, not the parents, would define and weigh children’s interests to promote the values the state has identified as most important (e.g., public education) or in the child’s best interests (what any rational child would want.) Although the state would not micro-manage the child-rearing endeavor, it might provide more monitoring for those families who are most likely to have conflicts with their children’s interests, such as families headed by parents who are extremely religious and families who divorce. The fiduciary parent model, thus, accords the state broader power than it has under current doctrine to determine what children’s interests are and
to monitor child rearing and assess which interests are paramount, particularly for non-marital families or families considered too far outside the mainstream. The scope of intervention is broad and ill-defined, apparently including an assessment of whether the parents are truly serving their child's short and long term interests and extends to children's moral education. That assessment substitutes the state as identifier, prognosticator, and balancer of the child's interests.

The de facto parent models would allow an adult who has developed a psychological parent relationship with the child to intervene when the legal parent denies access to the child. The consensual de facto parent model\(^\text{331}\) permits intervention only when the parent had abdicated the parental role or previously invited the adult to join the family as a parental figure. The de facto parent has the status to assert his or her desire to have a role in the child's life because the legal parent has effectively already consented to that person's parental or quasi-parental role and enlarged the family circle accordingly. That is, the de facto parent, like the marital "father," has, with the legal parent's assent, supported the parent directly or indirectly by caring for the child. The de facto parent, thus, gains parental status, and accordingly, a right to maintain a relationship with his or her de facto child. The scope of intervention would be confined to the existence of and the amount of access the de facto parent could have to the child.

The non-consensual de facto parent model\(^\text{332}\) is different because it does not require parental unfitness or consent to the relationship's formation and because it is premised on the child's needs and interests, not the de facto parent's status. The non-consensual model allows any psychological parent to assert that the child's interests include contact or custody with the psychological parents. This difference is significant because it permits intervention, regardless of the parent's consent to the formation of the relationship, and because it is premised on the child's interests in maintaining important relationships. Because the model bases intervention on the child's needs and not on parental consent, it effectively grants (certain) care-giving adults the (parental) right to decide, and then to con-

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331. This model grants parental status to persons whom the parent has allowed to live with and care for the child as a parent. See supra text accompanying notes 164–74. The de facto parent model includes lesbian and gay perspectives that promote co-parent adoption and visitation with the child post dissolution of the adult relationship. See supra text accompanying notes 211–28.

332. The non-consensual de facto parent model grants parental status on the sole basis of the psychological relationship between the child and de facto parent. It does not depend on consent or parental unfitness. See supra text accompanying notes 176–87.
 Vince a judge, what the children's interests are. Although the non-consensual de facto parent model is purportedly based on the child's interests, it does not advocate for a broad scope of intervention. Instead, it is generally confined to custodial decisions between the de facto and the legal parents.

The private adoption promotion, and the procreational rights, models permit intervention when a parent who contemplates relinquishing an existing or prospective child changes his or her mind. These models, unlike the non-consensual de facto parent model, do not intervene unless a parent has at least considered relinquishing parental rights. Unlike the de facto parent model, however, these adoption promotion and procreational rights models will allow intervention (substitution of judgment about the child's interests) based on the potential for caregiving, and in the case of adoption, even against a legal parent who never consented to relinquish the child. In effect, these models allow displacement of legal parents with potential parents who need not have established any sort of psychological or biological parent relationship. The models, like the de facto parent models, confine scope of intervention to custodial disputes between parents and prospective parents, and in some instances, complete termination of biological parental rights.

Both the fiduciary and the non-consensual de facto parent models, unlike the others, explicitly purport to serve children's interests. Yet even these two approaches retain a nuclear family-based model for child rearing, albeit with additional public involvement and financial supports, so that poor children do not face such harsh material conditions as they do under the current regime. Within this conventional framework, the children's interests models presume to know best what is in children's interests. For example, the non-consensual de facto parent model values psychological parent, but not other, attachments. Accordingly, they advocate sparing children the grief attendant to loss of a de facto parent but not other meaningful relationships, such as friends,

333. The private adoption promotion model permits third parties to attain parental status solely by filing an adoption petition. See supra text accompanying notes 188–92. A discussion of the ASFA (public adoption) is not included in this analysis because, for the most part, intervention results from child abuse and neglect. The adoption promotion occurs after that initial intervention.

334. The procreational rights model defines parent by pre-birth (even pre-conception) intent to parent. See supra text accompanying notes 249–53. This and the adoption promotion model may encompass other reproductive technology perspectives for purposes of this discussion.

335. For example, if one parent refuses to consent to the adoption or revokes a prior consent, then the court could determine who among the parties before it should rear the child.
teachers, relatives, or nannies. This model, thus, does not advocate intervention to prohibit parents from moving their children away from neighborhoods where they have established relationships, or that nannies be given parental rights and responsibilities, even though a child may not know the difference between a paid caretaker and a family member.336 Ironically, the children's interests models accord little attention to the harms of termination of parental rights and adoption, despite the deep, ongoing pain that estrangement from family causes some children.

This selectivity about what is good for children suggests that these models protect only the relationships that adults value. The psychological relationship most valued is that of psychological parent. Although it may seem uncontroversial that the most important consideration is for children to remain with their psychological parents (thanks in large part to the hegemony of the psychological parent theory), venerable competing theories exist.338 The Article is not arguing that one theory or the other is correct. On the contrary, the Article recognizes that there is disagreement about what children need. The parental rights doctrine assigns that determination to the birth mother and to the birth father or the birth mother's chosen affectional partner because they have earned the right to be arbiter of their children's interests.339 That right includes choosing who should care for the child.

Moreover, the fiduciary, non-consensual de facto parent, adoption promotion, and procreational rights approaches abandon the maternal paradigm by discounting, and even ignoring, the unique biological and relational work of child bearing and permit establishment of parenthood over the objections of, and without having supported, the "mother." Under the non-consensual de facto parent model, parents are those adults who act like parents. The standard, however, does not identify when or how the psychological parents become more like parents than the biological parents. The adoption promotion and procreational rights models would displace biologi-

336. As Professor Kate Nace Day described her feelings as a child for her nanny: "I could no more discern the difference between hands that held me as work, and hands that held me as love." Kate Nace Day, Judicial Voice: Judge Julia Cooper Mack and Images of the Child, 40 How. L.J. 331, 346 (1997).

337. See Appell, supra note 7, at 1014-16 (describing deep and persistent attachments adoptees have to their birth families).

338. See, e.g., Brooks, supra note 156, at 957-961 (describing family systems theory); Davis, supra note 157, at 354-64 (describing family network model).

339. Professor Guggenheim makes a similar point in the context of curbing the discretion of children's lawyers to make their own choices regarding what is good and bad for children, thereby usurping substantive legal standards. See Guggenheim, supra note 138, at 1507-08.
cal parents with adults who want to be parents but do not require that these new parents have earned parenthood or that the parents chose them. On the contrary, these two models merely contemplate that the prospective parents want to be parents. All of these models effectively grant parental status to persons who act like, or want to be, parents. Yet the models skip the critical step of finding first that the persons who have already earned that status—the parents—have relinquished, or failed to maintain, that status by abusing or neglecting their children.

This presumptive redefinition of parent invokes less determinate, more subjective standards regarding current or future care-giving and discounts the temporally and logically prior care-giving that establishes parenthood in the first instance under the matrifocal parental rights doctrine. By doing so, the revisionists discount the parenting work the initial parents have performed as a condition of obtaining parental status in the first place. Instead, the models require parents to re-earn parenthood. In these ways, revisionist standards simultaneously lower the bar to intervention and minimize the biological aspect of parent-child relationships, while reconstructing families along purely social lines. These standards would also make children more public because, as a developmental matter, children need caretakers and decisionmakers. If their parents no longer have that authority, persons outside the family—judges, lawyers, prospective parents—exercise that authority. Indeed, the purpose of many of the critiques is to make children more accessible outside their families of origin. Many parents, however, are already subject to external scrutiny, and their children accessible to others. These families are the subject of the discussion that follows.

B. Families Who Need More, Not Less, Privacy

Revisionist perspectives essentially view families as hidden, separate, and physically and psychologically oppressive to women and children, and largely immune from outside intervention or governance. From this vantage point, perhaps family walls should be more transparent and permeable. Many families who are more visible, less private and less autonomous, however, do not share this vision of family life or the related assumption that public intervention is fair, equalizing, and helpful. Just as family formations are not monolithic, neither are the experiences of privacy. Family privacy and autonomy range along a spectrum marked by lines of class, race, gender,
religion, and sexuality. Most simply stated, along this public-private spectrum, White, upper class and middle class, marriage-based families are the most private and protected from state intervention, while poor, non-marital families of color are most vulnerable to state surveillance and interference.\(^{340}\) In between, there are families headed by single parents, lesbian and gay parents, parents of color, and poor White parents who do not fit the dominant norm of marriage-based intact family.\(^{341}\) Because these non-normative families fall outside of the definition of family, they enjoy less privacy. They may not take privacy for granted or view motherhood as mandatory or isolating. Although some mothers might experience the maternal role as oppressive and limiting, for others motherhood is not oppressive and husbands or other domestic partners are not the primary oppressors.\(^{342}\) Instead, motherhood is a seat of power and value production “through which children are raised into a deep appreciation and respect for maternal authority and commitment to familial interdependence” rather than independence.\(^{343}\) Moreover, 

\(^{340}\) See Eva Rubin, *The Supreme Court and the American Family: Ideology & Issues* 47–49 (1986); Appell, supra note 5, at 584–87; Fineman, supra note 110, at 177–78. Judith Bradford and Crispin Sartwell capture the dimensions of nuclear family privacy: “The ‘family space’ that accompanies the model of the nuclear family is both a social and physical space. Polite neighbors avert their eyes from family matters, and house walls hide them.... Privilege preserves the nuclear family from both visibility and questionability. No one asks: ‘What the hell is wrong with your mother?’” Bradford & Sartwell, *Addiction and Knowledge: Epistemic Disease and the Hegemonic Family*, in *Feminism and Families* 116, 123 (Hilde Lindemann Nelson ed., 1997).

\(^{341}\) See Fineman, supra note 110, at 177–78 (explaining that the state intervenes into single mother families because these families have a void—they are lacking a father); Patricia Hill Collins, *Shifting the Center: Race, Class, and Feminist Theorizing About Motherhood*, in *Representations of Motherhood*, supra note 254, 56, 59 (noting that outside forces threaten the integrity of non-dominant families); Fineman, supra note 103, at 958–59.

\(^{342}\) See, e.g., Collins, supra note 341, at 56–57 (arguing that critiques of motherhood based on male domination are decontextualized vis-à-vis women in alternative family structures); Denise A. Segura, *Working at Motherhood: Chicana and Mexican Immigrant Mothers and Employment*, in *Mothering: Ideology, Experience, and Agency*, supra note 136, 210, 213 (noting presumption that motherhood is oppressive and that women do not work outside the home). Such views of families and motherhood may arise from privileged perspectives. Collins, supra note 341, at 59–60. Indeed, a primary result of middle class women’s foray out of the home and into the workplace has not been a less gendered division of labor within the home, but instead a shift in the responsibility for that labor to women of color. See Roberts, supra note 266, at 236 (noting that Black women have filled this role).

\(^{343}\) See Iglesias, supra note 136, at 903–05, 915–28, 989; see also Bell Hooks, Feminist Theory: From Margin to Center 133 (1984) (claiming that although White women in the early women’s movement viewed motherhood as an obstacle to women’s liberation, Black women historically have viewed it as humanizing woman-affirming work); Collins, supra note 341, at 67 (women of color view mothering as work on behalf of the family as a whole, not on behalf of a patriarch). Of course, any generalized discussion of experiences of motherhood and the family (including the discussion in this Article) risks oversimplification and the submersion of individual and cultural differences among women. See Segura, supra note 342, at 212 (noting that research on Mexican and Chicana mothers revealed differences between views of motherhood and employment, although “current research on Mexican-origin women
especially for women of color, dominant culture presents a substantial threat to reproductive freedom, to the ability to raise children, and to preservation of children's culture. For these women, "the possibility of nurturing, motherhood, and family maintenance" has been challenged, not imposed. Further, for many working poor and working class women of any race, "work and family have rarely functioned as dichotomous spheres." Women who must work out of economic necessity while their own children are unattended or cared for by others might well appreciate being cabined at home with their children. These women may find freedom in mothering their own children.

... treats them as a single analytic category ... as well as research on contemporary views of motherhood that fails to appreciate diversity among women").

344. See Collins, supra note 341, at 64–66; Glenn, supra note 254, at 17–19. Patricia Williams captures the devaluation of African American mothers and their children when she contrasts the common theme of welfare reform that "black women have no business having any more children" with the encouragement of "poor white women who have children out of wedlock ... to give up their children for adoption and redistribution in the great 'white baby shortage.'" PATRICIA J. WILLIAMS, THE ROOSTERS EGG 9 (1995); see also RICKIE SOLINGER, WAKE UP LITTLE SUZIE: SINGLE PREGNANCY AND RACE BEFORE Roe v. Wade 20–40 (1992) (describing the early 20th century policies and laws that prevented unwed African American mothers from relinquishing their children for adoption while mandating White unwed mothers to do so). The history of birth control and forced sterilization also reflects this denigration of Black women and children. See Roberts, supra note 261, at 31–32 (explaining the racism of the early feminist birth control movement that aimed at reducing the birth rate of African American children and detailing the disproportionate sterilization of Black women). Indeed, framing reproductive choice in the context of safe, unrestricted abortion, and not resources for healthy pregnancy and parenting illustrates too the privileging of White, middle class women. Id. at 32–33.

345. Boris, supra note 267, at 30; see also Kathleen Neal Cleaver, Racism, Civil Rights, and Feminism, in CRITICAL RACE FEMINISM 35, 37–39 (Adriene Katherine Wing ed., 1997) (contrasting White women's liberations movement fighting against their own oppression within dominant culture while African American women fought for liberation from dominant culture).

346. Collins, supra note 341, at 58; see also Glenn, supra note 254, at 15–16 ("An ideology that places mothering exclusively in the private, emotional realm creates conflicts for mothers who have to work outside the home.").

347. Boris, supra note 267, at 29; Collins, supra note 341, at 56–64; Marlee Kline, Race, Racism, and Feminist Legal Theory, 12 HARV. WOMEN'S L.J. 115, 130–31 (1989); Roberts, supra note 266, at 235. In June 1990, a majority of White mothers (54.9%) and nearly half of Black (46.9%) and Latina (44.4%) mothers were working for wages. Segura, supra note 342, at 228 n.3. Historically, African American women particularly have worked outside the home. By the early twentieth century, up to seventy percent of African American women were wage earners—nearly five times that of white women. Boris, supra, at 28. Most of these women were working as domestics, often caring for the children of more privileged women. Id. at 29; Collins, supra note 341, at 56–64; see also Kline, supra, at 130–31 (noting that West Indian women emigrate to Canada specifically to work as domestics); Roberts, supra note 266, at 235 ("Women of color continue to do most of the domestic service in America."); Mary Romero, Who Takes Care of the Maid's Children? Exploring the Costs of Domestic Service, in FEMINISM AND FAMILIES, supra note 340, 151.

348. See Roberts, supra note 266, at 236 ("Black women historically experienced work outside the home as an aspect of racial subordination and the family as a site of solace and resistance against white oppression.").
Many African-American women in particular share a history in which the very reproduction of children was public and commodified. Female slaves gave birth to babies whom slave owners then sold as labor power. Professor Dorothy Roberts has noted the continuity of this challenge to African American maternity: "Black mothers' bonds with their children have been marked by brutal disruption, beginning with the slave auction where family members were sold to different masters and continuing in the disproportionate state removal of Black children to foster care." This experience and image of mothers who had no power to control the often-permanent separation from their children after slave masters sold them starkly contrasts with the image of women seeking freedom from the oppression of motherhood. The former image resonates today, as African American women face tremendous threats to family integrity, particularly through the child protection system in which African American children are disproportionately represented.

In the divorce and custody context, families without fathers (or mothers) too are public, even if they are White and middle class. The best interests of the child standard, applicable in these proceedings, allows the state to assess family structure and functioning without regard to parental fitness. Once parents divorce, the parents may use courts to monitor parental behavior and direct child rearing, including custody, visitation and education. For example, courts have denied lesbian mothers and gay fathers custody of their children and even prohibited these parents from having their lovers be present or affectionate during visitation. This oversight affects mothers more than fathers, because mothers are usually primary caregivers and courts will generally enforce the

349. See Boris, supra note 267, at 34; Barbara Omolade, The Unbroken Circle: A Historical and Contemporary Study of Black Single Mothers and their Families, 3 Wis. Women's L.J. 239 (1987); Perry, supra note 289, at 52–53. Female slaves were not even relieved from their other work while producing children. NANCY FOLBRE, WHO PAYS FOR THE KIDS? 169 (1994) ("African-American women performed extraordinarily demanding physical labor, even while pregnant or nursing."); see also Roberts, supra note 266, at 233–34 (noting that slave women's strenuous labor challenged the dominant ideology associating mothers with frailty and domesticity).

350. Roberts, supra note 258, at 146. Other women of color too are at greater risk than white women of losing their children to the state or having diminished opportunities to parent due to the economic necessity of working. Kline, supra note 347, at 132.

351. See Boris, supra note 267, at 34; Roberts, supra note 239, at 250–51.

352. Appell, supra note 5, at 578; Peggy C. Davis & Richard G. Dudley, Jr., The Black Family in Modern Slavery, 1987 Harv. Blackletter L.J. 9. For a recent account of, and explanation for, the disproportionate number of African American children in the child welfare system, see generally DOROTHY ROBERTS, SHATTERED BONDS (2002).

353. See Fineman, supra note 103, at 958; Shapiro, supra note 211, at 19, 31.

354. Baker, supra note 55, at 1526; Fineman, supra note 103, at 961.

requests of fathers, regardless of their level of involvement or support of the child.  

Poor families of all races are public because they use, or must rely on, public resources and are more visible. The repercussions of this publicness are a special vulnerability to surveillance and external control, and, accordingly, a diminution of privacy and autonomy. The limitations on individual liberties of women receiving needs-based social security benefits include the inability to assert protection under the Fourth Amendment, to treat abortion as a medical procedure, and to plan their own


357. Appell, supra note 5, at 584; Marsha Garrison, Child Welfare Decisionmaking: In Search of the Least Detrimental Alternative, 75 GEO. L.J. 1745, 1810 (1987); Roberts, supra note 258, at 148; see also Rayna Rapp, Family and Class in Contemporary America: Notes Toward an Understanding of Ideology, in RETHINKING THE FAMILY, supra note 136, 49, 58–59, 65 (noting that sociologists have studied poor African American families more than poor white families, and that upper class families are not even subjected to studies). This is not to say that middle class families do not receive numerous and valuable government benefits through tax, inheritance, and marriage laws that, among other things, exclude employer contributions to health and life insurance policies from taxable income. Fineman, supra note 287, at 2205; see also Stephanie Coontz, THE WAY WE NEVER WERE 68–92 (1992) (describing the pervasive and nearly invisible benefits middle and upper class families receive). Nevertheless, public discourse views these families as “self sufficient” and “independent” while it views non-dominant families as needy, inadequate and a threat to social mores and the public fisc. Fineman, supra note 287, at 2213.

358. See RUBIN, supra note 340, at 147 (“The traditional privacy of the home, and the freedom to govern family relationships in that protected environment free from government intrusion, has not applied to welfare families.”). Poor women of color are most likely to be subjected to forced medical treatment regarding pregnancy. Nancy Ehrenreich, The Colonization of the Womb, 43 DUKE L.J. 492 (1993); Lisa C. Ikemoto, Furthering the Inquiry: Race, Class, and Culture in the Forced Medical Treatment of Pregnant Women, in CRITICAL RACE FEMINISM, supra note 136, 139–40; see also Dorothy Roberts, Motherhood & Crime, 79 IOWA L. REV. 95, 124 (1993) (describing surveillance of pregnant women).


360. See generally Wyman v. James, 400 U.S. 309 (1971) (requiring women receiving AFDC benefits to permit state social workers to conduct police-like searches of their homes without a warrant).

361. See generally Harris v. McRae, 448 U.S. 297 (1980).
Families receiving welfare historically faced regulation of who could live in the family home and with whom the mother could create a domestic partnership. The Personal Responsibility and Work Reconciliation Act of 1996 (PRWRA) continues to govern personal decisions, including with whom a mother has sex leading to birth of a child and a mother's decision about whether to work outside of the home. PRWRA also permits states to condition benefits on certain parental conduct, such as attendance of parenting classes. Moreover, receipt of PRWRA's Temporary Assistance to Needy Families (TANF) like its predecessor, AFDC, requires parents to seek child support from non-custodial parents who must then contribute child support in an amount dictated by the state.

Poor families are also more likely than middle-class families to experience the child protection system, a family law that is more public than that normally associated with families—the laws of domestic relations that govern inheritance, marriage, divorce, and custody between parents. Although the domestic relations system

362. See Dorothy Roberts, The Only Good Poor Woman: Unconstitutional Conditions and Welfare, 72 DENVER U. L. REV. 931, 941-42 (1995); see also Callahan & Roberts, supra note 14, at 1198 (noting that seventy-five percent of women placed on Norplant as a condition of probation for child abuse and neglect are minority women and one hundred percent are poor).

363. See Katherine Hunt Federle, Child Welfare and the Juvenile Court, 60 OHIO ST. L.J. 1225, 1225-29 (1999) (noting that welfare law restricted mothers from living with men and from having children with men to whom they were not married); see also Roberts, The Only Good Poor Woman: Unconstitutional Conditions and Welfare, supra note 362, at 941-42 (discussing increased regulation of families receiving welfare).


365. Federle, supra note 363, at 1229.


367. Id. at 246 (citing 42 U.S.C.S. § 608(b)(2)(A)(ii) (Lexis 1998)). Some states condition support on the children's grades, parental attendance at parent-teacher conferences and participation in family counseling. See Brito, supra note 366, at 246-47.

368. See Fineman, supra note 103, at 964-65 (noting how the states force women on public aid to submit to paternity and child support proceedings regardless of the mother's desire to involve the father and discussing court intrusion into single mother's extra familial relationships). This support enforcement requirement usually applies to mothers, but also applies to custodial fathers and other custodial relatives. Parents who do not receive aid can determine for themselves whether to seek support and how much. If they cannot agree, about custody and support, however, then a court may decide.

369. Daan Braveman & Sarah Ramsey, When Welfare Ends: Removing Children From The Home For Poverty Alone, 70 TEMP. L. REV. 447 (1997); Garrison, supra note 357. Ironically, the public system, characterized by coercive state intervention into families, is shielded from public view by confidentiality laws, while the more private system is open to public view. Adoption proceedings, which may be consensual or coercive, are also confidential. Eliza-
sanctions state intervention into parental decisionmaking and custody, it is a mechanism for private dispute settlement which typically presumes that the parents, not the state or third parties, will maintain custody and control of the child. The child protection system, however, involves the state as a party, generally prosecuting the action and obtaining custody of the child or supervision of the parent. Coercive judicial and administrative intervention, the disruption of family relationships, and a markedly reduced deference to parental custody and control distinguish the public system from the private family law system.

The child protection system is arguably a descendant of the American (and English) poor laws and Post-Reconstruction-era laws, both of which in different contexts required poor, and Southern Black, children to be bound out for labor, apprenticeship, and "better" lives and training than they would have with


371. Garrison, supra note 158, at 395; Garrison, supra note 357, at 1769-70; see also Czapskiy, supra note 135, at 968 (noting that noncustodial parents nearly always given visitation).

372. Edwards, supra note 370, at 206 (noting that the state takes an assertive role in and is a party to the proceedings). Some characterize public benefits system (AFDC and now TANF) as the public family law of the poor. Rubin, supra note 340, at 147-48.

373. Although the private family law also may be intrusive and coercive, the distinctions between these two systems of family law and litigation are stark and well-documented. See, e.g., Edwards, supra note 370; Marsha Garrison, Why Terminate Parental Rights?, 55 Stan. L. Rev. 423, 432-42; Gordon, supra note 320; Jean Koh Peters, Three Systems of Family Law: A Preliminary Historical Investigation, in Jean Koh Peters, Representing Children in Child Protective Proceedings app. A (1997). Of course, these certainly are not the only family law systems. Native American and enslaved African American families have, for example, experienced extraordinarily detrimental race based de jure treatment. Laws sanctioned widespread removal of Native American children from their families and reservations. See Monsivais, supra note 127, at 2. See generally The Destruction of American Indian Families (Stephen Unger ed., 1977). Currently, Native Americans may enjoy a distinct de jure family law designed to remedy past Anglo-American violations and promote, and preserve, Native American tribal norms. See Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 (Lexis 2001) (providing special procedure for custody and adoption proceedings involving Native American children); Barbara Ann Atwood, Tribal Jurisprudence and Cultural Meanings of the Family, 79 Neb. L. Rev. 577 (2000) (reporting distinctions between Anglo-American and tribal family jurisprudence). Laws pertaining to slaves prohibited marriage and any rights to rear or direct the rearing of their children, while literally allowing fathers to own their children and brothers to own their siblings. E.g., Davis, supra, note 9; Adrienne D. Davis, The Private Law of Race and Sex: An Antebellum Perspective, 51 Stan. L. Rev. 221 (1999) (examining antebellum and post bellum testamentary and interstate laws as applied to relationships involving enslaved and formerly enslaved people); Peters, supra note 373; see also Peggy Cooper Davis, Introducing Robert Smalls, 69 Fordham L. Rev. 1695, 1702 (2001) (describing Robert Smalls who when a slave had been the property of his brother).
their own parents.\textsuperscript{374} The newer system, like its predecessors, largely targets poor and minority families\textsuperscript{375} and often confuses poverty with neglect.\textsuperscript{376} It, thus, intervenes to protect children by directing parental conduct and child rearing techniques, frequently removing children from their families.\textsuperscript{377} Indeed, of the approximately 560,000 children in state-supervised substitute care, forty-two percent (239,516) are identified as "Black Non-Hispanic," thirty-six percent (203,000) as "White Non-Hispanic," fifteen percent (84,924) as "Hispanic," two percent (8,910) as non-Hispanic Native American, and one percent (6,304) as Asian/Pacific Islander.\textsuperscript{378} Most of these children come from poor families.\textsuperscript{379}

The predominance of poor families, particularly poor African American families, in this system is not surprising, given their visi-
bility and their dependence on public benefits, both of which make families more likely to come to the attention of public authorities. Social scientists debate whether the prevalence of poor families in the child welfare system is primarily due to higher levels of abuse and neglect in poor families or to state decisionmaking bias. Assessments of the existence of child abuse and neglect, however, are largely subjective and the decision to intervene is related to the decisionmaker's views about the viability of families and the benefits of intervention. Although definitive proof of race and class bias may have eluded empirical researchers, evidence suggests that indicators of poverty may be confused with indicators of potential child abuse or neglect, and that risk-assessors are unconsciously biased to see minority and socio-economically disadvantaged families as pathological. Racial and

380. Appell, supra note 5, at 584; Braverman & Ramsey, supra note 369, at 461–462.
382. Throughout this discussion, "intervene" is used to include decisions to contact the child abuse and neglect hotline, to investigate allegations, to find those allegations to be founded, to coercively provide services, and to remove children from their families.
383. Bilha Davidson Arad, Parental Features and Quality of Life in the Decision to Remove Children at Risk from Home, 25 CHILD ABUSE & NEGLECT 47, 48 (2001); Ira J. Chasnoff et al., The Prevalence Of Illicit-Drug Or Alcohol Use During Pregnancy and Discrepancies In Mandatory Reporting In Pinellas County, Florida, 322 NEW ENG. J. MED. 1202 (1990); Anne P. Vulliamy & Richard Sullivan, Reporting Child Abuse: Pediatricians' Experiences with the Child Protection System, 24 CHILD ABUSE & NEGLECT 1461 (2000). Studies also show that loyalty to or familiarity with parents correlate to a reduced likelihood of reporting suspicions of child abuse and neglect to authorities; Korbin et al., supra note 381; Gail Zellman, The Impact Of Case Characteristics on Child Abuse Reporting Decisions, 16 CHILD ABUSE & NEGLECT 57 (1992). This familiarity may also be a class marker if richer families are more likely to have social relationships with their doctors, are more likely to spend more time with doctors at visits, are more likely to have the same doctor each time they seek medical care, or are more likely to be able to afford preventive rather than just emergency care.
384. See Drake & Zuravin, supra note 381 (rehearssing studies and arguing those showing such biases are faulty).
385. See Judith Larsen et al., Medical Evidence in Cases Of Intrauterine Drug & Alcohol, 18 PEPP. L. REV. 279, 287–88 (1991) (noting the similarities between factors used in assessment for prenatal drug use and factors associated with poverty, including lack of prenatal care). Indeed, some legal definitions of abuse and neglect are skewed toward children in poverty. See id. at 282–83 (discussing the broad use of child endangerment statutes).
386. See Zellman, supra note 383, at 69 (remarking that socioeconomic status and race had an effect on reporting judgments). Particularly noteworthy in Zellman's study is that when race and socioeconomic status were subtly stated, they had a greater effect on reporting, but when they were clearly stated, they had less effect. See id. at 69–70. These findings suggest that unconscious biases affect intervention decisions. See Sandra T. Azar & Corina L. Benjet, A Cognitive Perspective on Ethnicity, Race, and Termination of Parental Rights, 18 LAW & HUM. BEHAV. 249 (1994) (describing the role of unconscious cultural values that influence professional and judicial assessments of the adequacy of parenting); Loring Jones, Decision
economic bias in child welfare is particularly evident in the detection and diagnosis of drug use during pregnancy. Pregnant poor and African American women are significantly more likely to be identified as drug users, even though the rate of drug use is relatively even across socioeconomic and racial groups.\(^{387}\)

Regardless of the propriety of child protective intervention,\(^{388}\) once the system has identified the families, they become even more public than previously. State caseworkers supervise, survey, and assess these families. They make recommendations to courts for determining if, and when, the children should be removed from, or returned, home, and if removed, whether a court should terminate parental rights.\(^{389}\) Unlike the domestic family law system that presumes a basic unity of interests between parents and child,\(^{390}\) the child welfare system separates parents from children, providing greater financial benefits for children in substitute care than in home care.\(^{391}\) In addition to being structurally anti-family,
the child welfare system is often administrated without respect for family unity, strengths, or needs. The psychological parent theory has "never been closely followed in contexts of deciding whether to remove a child from her home for placement in foster or orphanage care." This devaluation of families is reflected in punitive, rather than helpful, practices and in a reluctance to return children to their families.

Moreover, once the state coercively removes children from their families, it all too frequently fails to provide meaningful and sufficient services to support or reunify the families. On the contrary, the unavailability of needed services and inappropriateness of some provided services are well-established. For example, drug use is cited as a risk factor in twenty to ninety percent of child pro-

sor AFDC. Garrison, supra note 357, at 1814; Leroy Pelton, Child Welfare Policy and Practice: The Myth of Family Preservation, 67 Am. J. Orthopsychiatry 545, 548–49 (1997). In addition, there are greater federal financial incentives for state agencies to provide foster care, rather than family preservation services. ASFA limits the amount of time a state may provide family preservation services, 42 U.S.C.S. § 629a(7) (Lexis 1998 & Supp. 2001), provides technical assistance for expediting adoptions, 42 U.S.C.S. § 673b(i) (Lexis 1998), and financial incentives for adoption, 42 U.S.C.S. §§ 673(a) & 673b (Lexis 1998 & Supp. 2001). See also Garrison, supra note 357, at 1813 ("[N]eglected children are popular, but welfare recipients are not."). Indeed, estimated federal funding for foster care was approximately $3.6 billion in 1997 and only $500 million for family preservation and support services that same year. Pelton, supra note 359, at 1489 ("[C]hild removal is a way to serve 'innocent' children without 'rewarding' their 'undeserving' parents").

392. Appell, supra note 5, at 600; Margaret Beyer, Too Little, Too Late: Designing Family Support to Succeed, 22 N.Y.U. Rev. L. & Soc. Change 311, 312–313 (1996); Brooks, supra note 156, at 955–59; Garrison, supra note 158, at 374. Even family preservation services—those services intended to keep children from coming in to foster care—are defined not to serve the families who need the most assistance, "[c]hronically troubled families, families 'unmotivated' to get help, families with addicted care-givers, and homeless families," and families not amenable to short term treatments. Sandra M. Stehno, The Elusive Continuum of Child Welfare Services: Implications For Minority Children and Youth, 69 Child Welfare 551, 554 (1990). Instead, family preservation services are designed on a short-term crisis intervention model that insures these services will help a small minority of the families in need. Ira M. Schwartz & Gideon Fishman, Kids Raised by the Government 43–46 (1999). Moreover, this model was developed in White, non-urban areas so it is not surprising that it may not be appropriate for the communities that populate child welfare in the largest numbers. See Stehno, supra at 554.

393. Davis, supra note 9, at 348.

394. Appell, supra note 5, at 605–06; Beyer, supra note 392, 312–313; Brooks, supra note 156, at 958; Buss, supra note 377, at 438–43; Oberman, supra note 268, at 508–11.


396. Schwartz & Fishman, supra note 392, at 49; Appell, supra note 5; Beyer, supra note 392, at 313, 324; Saunders, et al., supra note 386, at 351; Clarice Dibble Walker et al., Parental Drug Abuse and African-American Children in Foster Care, in 1 Child Welfare Research Review 109, 114–17 (Richard Barth et al. eds., 1994). Others argue that too many services are provided to families in the child welfare system. E.g., Barthelet, supra note 188.
tection cases, with the higher percentage in such highly populated states as Illinois, New York, and California. Yet those who need substance abuse treatment may find it unavailable or encounter long waiting lists. Moreover, substance abuse generally cannot be “cured” or resolved quickly. Although recovery is marked by relapses, the state may require parents to be absolutely drug free at all times before they can have any unsupervised contact with their children. Similarly, inadequate food, shelter, and childcare are frequent causes of child abuse or neglect. Yet, child welfare services are not set up or funded to correct these material


399. Ross Testimony, supra note 397, at 7–8; D’Aunno & Chisum, supra note 398, at 53.

400. This is the author’s experience in two different urban jurisdictions (Cook County, Illinois and Clark County, Nevada). See also Appell, supra note 5, at 592 (describing a case in which a mother was required to have six consecutive months of drug free urine, in order to obtain even unsupervised visits with her daughters). Others have noted unrealistic judicial expectations of recovery. See Richard C. Boldt, Evaluating Histories of Substance Abuse in Cases Involving the Termination of Parental Rights, 3 J. Health Care L. & Pol’y 135, 142–44 (1999) (describing judicial treatment of relapse as failure); Judith Larsen & Cindy S. Lederman, Drug-Exposed Infants and the Miami Criteria For Judicial Decisions in Dependency Cases, 14 Int’l J.L., Pol’y & Fam. 86, 97 (2000) (noting that parent child contact may be barred if the parent is not completely abstinent and how punitive and unsound this approach is). Many experts recognize that relapse is part of recovery and advocate looking at patterns and length of drug use as well as involvement in treatment and recognition of triggers when assessing whether the child can safely return home. D’Aunno & Chisum, supra note 398, at 53.

401. See Pelton, supra note 359, at 1485–86. In fact, a number of social scientists have characterized the primary problems of the families in child welfare to be poverty related and have suggested that the child welfare system, with its focus on individual family pathology and substitute care, is an inappropriate response to what are at root economic problems. Eric C. Albers et al., Children In Foster Care: Possible Factors Affecting Permanency Planning, 10 Child & Adolescent Soc. Work J. 329, 340 (1993); Leroy Pelton, Enabling Public Child Welfare Agencies to Promote Family Preservation, 38 Soc. Work 491 (1993); Stehno, supra note 392, at 554.
Moreover, PRWRA limitations will make it more difficult for poor families to obtain federal and state funding for poverty relief and childcare.

Thus, once parents and children (and often siblings) are separated through state intervention, their prognosis for timely reunification, if any, is poor. Minority children in particular typically spend more time in state care than White children. ASFA's mandate that the state seek termination of parental rights after a child has been in substitute care for fifteen months undermines the integrity of these families, particularly in light of the well-documented inability of the child welfare system to provide timely services. Moreover, once the state terminates parental rights to one child, protection of the parents' parental rights for their other children diminishes because ASFA expressly permits states to abandon family preservation or reunification attempts when the parents have previously had their rights to a child terminated. Once the state severs the children's ties to their parents, the children lose their legal ties to the remainder of the family and have no guarantee that they will become members of new families. On the contrary, every year the state creates hundreds, if not thousands, of legal orphans, children who have no legal or flesh and blood parents. The number of these legal orphans will increase with the application of ASFA's mandatory termination of parental

402. See Pelton, supra note 359, at 1485; Stehno, supra note 392, at 554; Walker et al., supra note 396.
403. Pelton, supra note 359, at 1481–82.
404. William Wesley Patton & Sara Latz, Seversing Hansel from Gretel: An Analysis of Siblings' Association Rights, 48 U. MIAMI L. REV. 745, 745 (1994) ("Approximately 35,000 brothers and sisters a year are separated into different foster or adoptive homes without a formal or statutorily mandated due process hearing.").
406. In addition, recovery from substance abuse is a lifelong process and even achieving some consistent sobriety is unlikely within the ASFA time frames, particularly given the under-supply of affordable substance abuse services. Dorothy Roberts, The Challenge of Substance Abuse for Family Preservation Policy, 3 J. HEALTH CARE L. & POL‘Y 72, 73, 76–80 (1999).
408. Termination of parental rights does not guarantee adoption, but simply makes a child available for adoption. Recommended approaches advocate termination of parental rights even when there is no prospective adoptive home in sight. DONALD N. DUQUETTE & MARK HARDIN, U.S. DEP'T OF HEALTH & HUMAN SERVICES, GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION CONCERNING PERMANENCE FOR CHILDREN VI-30 (June 1999).
409. Martin Guggenheim, The Effects Of Recent Trends To Accelerate The Termination Of Parental Rights Of Children In Foster Care: An Empirical Analysis In Two States, 29 Fam. L.Q. 121 (1995). As of September 1999, states reported that 46,000 children are legal orphans and had been for an average of twenty-three months. AFCARS REPORT, supra note 378. On average, at any given time, 8,000 legal orphans have no current prospects for adoption. U.S. GENERAL ACCOUNTING OFFICE, FOSTER CARE: HHS COULD BETTER FACILITATE THE INTER-JURISDICTIONAL ADOPTION PROCESS 2 (GAO HEHS-00-12, Nov. 1999).
rights provisions.\textsuperscript{410} These public children will have no family privacy. Their parents will be the state.\textsuperscript{411}

Even children who maintain legal ties to their families may spend significant time in state care, while some never return home during their childhoods. Like legal orphans, these other public children, most of the half million children in foster care, rely on the state to provide basic parenting functions: food, education, clothing, medical care, shelter, and, hopefully, a sense of home and family. Unfortunately, these public children do not always receive basic parenting from the state. Foster children may go hungry, without health care, without permanent or even long term homes, and they may also suffer physical and sexual abuse by their state-supported care-givers.\textsuperscript{412} Moreover, the state must assume the parental role of preparing children who will reach majority in foster care to live independently\textsuperscript{413}. Yet these children who reach majority in foster care are more likely than not to leave the foster care system dependent and vulnerable, without the skills or support systems to make homes for themselves.\textsuperscript{414} Thus, children

\begin{itemize}
  \item \textsuperscript{410} See Stephanie Jill Gendell, \textit{In Search of Permanency: A Reflection on the First 3 Years of the Adoption and Safe Families Act Implementation}, 39 Fam. Ct. Rev. 25, 33 (2001) (noting since ASFA, termination of parental rights petitions have increased and plans to reunify children with their families of origin have decreased).
  \item \textsuperscript{411} Just as a privileged perspective may view husbands and fathers as oppressors of wives, mothers, and children, the view that parents are the oppressors of children may arise from a privileged perspective of those who have corporal parents. See, e.g., Woodhouse, supra note 68, at 1827–29; see Annette R. Appell, \textit{The Move Toward Legally Sanctioned Cooperative Adoption: Can it Survive the Uniform Adoption Act?}, 30 Fam. L.Q. 483, 495–500 (1996) (describing importance of birth parents to children in foster care). Similarly, equating children with slaves seems to be at best hyperbolic and at worst demeaning to adults who actually are or were slaves and therefore not permitted to engage in basic autonomous adult actions such as marrying, choosing whether and how to bear and raise children, owning property, and voting. See Amar & Widawsky, supra, note 54; Woodhouse, supra note 54, at 326; see also Buss, supra note 377, at 439 (For children in state care, "the only thing worse than being 'owned' by their parents is being owned by the public system.").
  \item \textsuperscript{412} Chaifetz, supra note 377, at 2–8, 19–21 (reporting studies showing that foster children are ten times more likely to be abused, and four times more likely to be sexually abused, than children in the general population; twenty-two percent of children in state care claimed they were not getting enough food; and twenty-six percent claimed they did not have proper seasonal clothing). The GAO found that there were 77,000 children aged sixteen to twenty in foster care in 1998, but only 42,680 received independent living services. U.S. General Accounting Office, Foster Care: Effectiveness of Independent Living Services Unknown 4, 16 (GAO/HEHS-00-13, November 1999) [hereinafter GAO Independent Living Services].
  \item \textsuperscript{413} 42 U.S.C.S. § 675(5)(C) (Lexis 1998). Every year, approximately 20,000 foster children are discharged from care because they reach the age of majority, from 18 to 21 years old. GAO Independent Living Services, supra note 412, at 1.
  \item \textsuperscript{414} Id. at 3–12 (rehearsing studies and the GAO's own findings that from twenty-five to fifty-one percent of young "adults" leaving foster care had been homeless, incarcerated, dependant on public assistance, without employment and without a highschool education); Mary Lee Allen & Robin Nixon, \textit{The Foster Care Independence Act and John H. Chafee Foster Care
removed from their neglectful and abusive homes do not necessarily find a safe and nurturing harbor, let alone a new family.

In sum, family privacy is elusive for many mothers and children. Some women must overcome significant financial and social barriers to becoming and being mothers. Some do not meet dominant norms of motherhood because they are poor, non-White, not married, or otherwise fail to resemble mothers. Their experience of public life is not particularly welcome or helpful. On the contrary, it exposes families to further intervention and ultimate dissolution. With these public families in mind, I assess the threat of revisionist models and perspectives in the next subsection.

C. Harms of Diminishing Family Privacy

The preceding subsection helps complete the revisionists' portrayal of family privacy. This fuller picture holds two important lessons for the revisionists. First, the state views women through its own biases that frequently equate the failure to meet mothering ideals with a reason to intervene. Second, the purpose of this intervention is not to affect the parent's assessment of her and her families needs and interests. Instead, intervention second guesses, or directs, the mother's decisions about her own and her children's lives. These are important lessons because revisionists seek to make families more public by increasing opportunities and grounds for state-sanctioned intervention that minimize the more determinate maternal biological connections and maximize potentially biased standards of maternal conduct.

The remainder of this section explores the disturbing consequences that may flow from the substitution of less determinate care-giving norms for more determinate biological norms. As the preceding subsection reveals, decisionmakers are less likely to defer to parents who do not satisfy decisionmakers' norms regarding what it means to be a parent. Yet revisionist standards would give decisionmakers even more discretion to intervene in and reform families than under current doctrine, thus injecting the state into

the arguably impermissible role of choosing between different conceptions of the good life. This intervention will have greater impact on parents, particularly mothers, who are already more vulnerable to intervention because they do not look like parents. This result is particularly problematic because the revisionists would remove liberalism’s protection of family privacy while leaving intact other aspects of liberalism that reinforce bias and material disparities, which in turn make parents more vulnerable to state intervention.

Under revisionist standards, whoever acts like, or wants to be, a parent is the parent. Divorced from biology, these standards make the parent-child relationship even more contingent, subjective, and indeterminate. Defining parent this way is particularly challenging when there are multiple candidates who have, or seek to have, relationships with the child. The lack of cultural and scientific consensus as to optimal caregiving, children’s best interests, and the relative importance of relationships, exacerbates the difficulty in resolving these disputes. Standards that seem neutral, natural, or scientific, may in fact simply be value judgments, frequently arising out of, or constituting, dominant norms of family and motherhood (for example, “married,” “White,” “heterosexual,” “middle class”). Commentators and decisionmakers who

415. See Appell & Boyer, supra note 49, at 78–82 (describing indeterminacy of best interests of the child standard and competing views about what is most important to and for children). See generally Azar & Benjet, supra note 386 (discussing cultural diversity regarding assessing parenting ability and the strength of families); Davis, supra note 157, at 354–364 (rehearsing different social science theories about children’s developmental needs and different family forms).

embody these norms may not appreciate this insight. Yet families who do not embody these norms are less likely to survive scrutiny. The parental rights doctrine's definition of parent, though value-laden and socially constructed, is more objective (determinable) and more private (less government) than revisionist definitions. It is easier to determine who gave birth to a child than who is the truest or best caregiver.

Moreover, both biological mothers and fathers suffer under the new standards because they dismiss the work that parents, particularly mothers, have undertaken to become parents. The new standards effectively require parents to "earn" parenthood again. The parental rights doctrine protects this earned status by requiring proof of unfitness or consent before persons outside the family can gain parental status. The revisionists would permit such usurpation on the grounds that third parties are entitled to be parents, without regard to the fitness or the consent of the biological parents.

This devaluation of gestation and birth harms mothers, particularly because it neutralizes motherhood as a biological connection and devalues mothers compared to non-parents and fathers. Discounting the maternal contributions to childbearing frees parent-child relationships from sex (in any sense of the term) because the person (woman) who bears the child is no longer different from any other "parent." This new virtual motherhood minimizes women's role in the production of children and marginalizes the maternal focus of parenting definitions. Instead, this definition equates actual or prospective post-birth caregivers with mothers, thereby decreasing the maternal power in relation to the father or any other current or prospective caregivers. Mothering is no longer different from fathering and a parent is someone who acts like, or wishes to be, a parent.

These revisionist standards also bind women to constricting social scripts. Ideological visions of motherhood require that mental illness, and addiction. See Appell, supra note 5 (describing experiences of such mothers in the child welfare system).

417. See Azar & Benjet, supra note 386, at 250, 252 (noting that mental health professionals have a bias toward promoting "optimal" families and "observe families through [their own] cultural filters that operate outside their awareness and often will persist in their established views in spite of contradictory evidence.") (citations omitted).

418. The relative" is used to underscore that the construction of biology and mothers is social not natural, and to note the problem of splitting the baby when the role of "biological mother" is divided between gestational and genetic contributors.

women appear to be completely devoted to their children and inhibit viewing the mother multi-dimensionally and as an individual separate from her child. Although women who fall outside of these dominant norms are more likely to lose their maternal rights, even mothers who meet the norms may lose their status if they deviate from the ideal of motherhood defined solely by selfless nurturing. When the measure is a mother's conduct and behavior, rather than bearing and begetting, she loses the presumption that her choices are best for her child, while the state gains the power to evaluate whether her choices are good or selfless enough for the child. To justify or re-earn their status, mothers will have to live up to certain idealized standards, perhaps subverting their own values and assessments of their children's interests.

Moreover, viewing these revisionist perspectives in the context of public families reveals a largely structural anomaly. Proposed revisions to parental rights doctrine challenge certain fundamental liberal principles while leaving other aspects of liberalism in place. In other words, these largely unchallenged aspects promote or tolerate the very conditions that make families vulnerable to intervention. The causes and persistence of class, race, and gender inequalities are much more complex and fundamental than the tenets of liberal theory. It is clear, however, that liberalism has not been very effective in overcoming these problems. On the contrary, American liberal notions of individualism promote individual responsibility, capitalism, and self interest while resisting community responsibility, economic justice and altruism. Judicial

and breast feeding as selfless child giving, in its most extreme form reducing mothers and women to vessels): Michelle Oberman, Turning Girls Into Women: Re-Evaluating Modern Statutory Rape Law, 85 J. Crim. L. & Criminology 15, 64–67 (1994) (noting the tenaciousness of compulsory maternal altruism that also tends to view women as wholly able to care for their children or wholly unable); see also Chodorow & Contratto, supra note 263, at 63–67 (discussing constricting psychological constructs of motherhood).

420. Appell, supra note 5, at 584–87; Ashe, supra note 416, at 2547–48; Kline, supra note 347, at 120–21.

421. Cf. Theodore J. Stein & Tina L. Rzepnicki, Decision Making in Child Welfare: Current Issues and Future Directions, in CHILD WELFARE, CURRENT DILEMMAS—FUTURE DIRECTIONS 259, 275 (Brenda G. McGowan & William Meezan eds., 1983) ("[T]here is a strong probability that if ideal standards were applied to the community at large, a majority of families would be found wanting. . . .").

422. Chodorow & Contratto, supra note 262, at 203; Davis, supra note 157, at 365–66.

423. This is true of all of the models and most of the perspectives above. Some suggest wealth distribution or value modification, but mostly in the context of private, nuclear family, or parent-child dyadic relationships.

424. West, supra note 14, at 1912; see also Callahan & Roberts, supra note 14 (describing how liberalism fails to recognize or support the moral equality of all people); Lani Guinier, No Two Seats: The Elusive Quest for Political Equality, 77 VA. L. REV. 1413, 1477–80 (1991) (arguing that majority rule as currently constructed promotes a winner take all mentality that does not benefit from shared power and is not responsive to minority interests).
remediation of poverty, sexism, and racism has stalled.\textsuperscript{425} Government assistance programs for the poor have practically insured that they will remain poor.\textsuperscript{426} Racial and other minorities are less likely to have their values represented through elected officials.\textsuperscript{427} These inequities in jurisprudential, legislative, and political power do not suggest that greater governmental intervention into families will reflect the pluralism of the population or that the state will understand, let alone respect, diverse conceptions of the good life.\textsuperscript{428} Revisionists simply give the state more power to reinforce and replicate dominant or majoritarian\textsuperscript{429} values and biases (whatever their content may be) at the expense of families who resist or apparently depart from these values.


\textsuperscript{426} AFDC and other federal and state cash programs for the undeserving poor have been effectively structured to maintain income disparities and dependency. See Handler, supra note 359 (cataloging the close relationship between limiting welfare benefits and the effect of labor markets); Creola Johnson, Welfare Reform and Asset Accumulation: First We Need a Bed and a Car, 2000 Wis. L. REV. 1221, 1227 (noting that welfare benefits are at bare subsistence levels); Roberts, supra note 362, at 946–47 (describing how the market benefits from depressed wages and joblessness, and how the United States has failed to take steps to ameliorate these and other structural impediments to wealth gain, including lack of child care). Federal unemployment benefits and mandates have remained extremely low and under localized control insuring that such benefits do not drive wages up or place workers in better bargaining positions vis-à-vis employers. See Handler, supra note 359, at 915–22.

\textsuperscript{427} See Mary Becker, Patriarchy And Inequality: Towards A Substantive Feminism, 1999 U. CHI. LEGAL FORUM 21, 75–76 (noting that the major political parties do not speak to interests of poor Americans who are in the minority). See generally Becker, supra note 425, at 2018 (showing lack of representation of women and minorities in Congress); Guinier, supra note 424 (examining the failure of one person per vote to achieve meaningful representation for racial minorities, even when their members are elected).

\textsuperscript{428} On the contrary, the continued relative ideological and demographic homogeneity of the state (in the form of judges, legislators, and administrators) militates against pluralistic decisionmaking. See Sylvia R. Lazos Vargas, Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralistic Polity, 58 Md. L. Rev. 150, 160–205 (1999) (describing unexamined dominant epistemologies and differences between majority and minority world-views).

\textsuperscript{429} “Majority” is not used in its literal numeric sense to suggest that legislation or other decisions made by elected officials necessarily embody the will of the majority of citizens. See Robert W. Bennett, Conversational and The Sense of Difficulty, 95 NW. U. L. REV. 845, 848 (2001) (noting that much of the United States government is not majoritarian); Lazos Vargas, supra note 428, at 152 n.1 (defining majority in social, rather than numeric, terms). Instead, “majority” is used to signify official decisionmaking based on popular or dominant norms.
Families with less property and less political or normative dominance will lose their autonomy, and perhaps dissolve altogether, under a scheme that dismantles family privacy while preserving or promoting property and power disparities. Thus, the revisionists' selective approach discounts the importance of private value production in a way that will disproportionately affect the most vulnerable and diverse members of the polity. One need not delve very deeply to see how diminution of parental rights is detrimental to, or will adversely affect, poor families and particularly poor families of color. For example, Professor Raymond O'Brien devotes a law review article to the right of poor children (who are disproportionately of color) to be saved from their families of origin. Professor Bartholet also connects poverty, race and inadequate families while arguing for easier termination of parental rights and normalization of adoption by, apparently, wealthier, more mainstream families.

This presumptive devaluation of economically disadvantaged families and families of color contradicts liberal theories supporting family privacy. These theories view individuals as moral actors who define and create value and circumscribe governmental authority to restrict individual freedom and define values in ways that limit this freedom, except, of course, to prevent harm, protect others, or promote public welfare. The responsibility for rearing children rests with individuals, usually the parents, whose right and role is to create and reproduce value in and through intimate associations and to rear children in diverse settings that prepare them for life as democratic citizens. Parental rights doctrine's presumption that parental decisions are in their child's best interests protects diverse values that drive or inform the parent-child


431. BARTHOLET, supra, note 188, at 96–102; see also Barbara Bennett Woodhouse, "It All Depends on What You Mean by Home": Toward a Communitarian Theory of the "Nontraditional" Family, 1996 UTAH L. REV. 569, 584 (putting her support of de facto families "in context" at the dependency, juvenile and family courts).

432. See supra Part I; see also Callahan & Roberts, supra note 14, at 1209 (reciting permissible reasons for state intervention with individual liberties); Galston, supra note 115, at 240–41, 246 (arguing that value pluralism is a central component of liberalism and limits government's ability to establish a hierarchy of good, although permits protective intervention); Stephen A. Gardbaum, Why the Liberal State Can Promote Moral Ideas After All, 104 HARV. L. REV. 1350, 1352 (1991) (arguing that the liberal state promotes values of "autonomy, equality, human dignity, and tolerance").

433. See supra text accompanying notes 116–22.

434. See supra text accompanying notes 111–15.
relationship. Coercive state intervention to redefine families according to state norms subverts the parent’s own ideas about the good life for them and their children.

This subversion contradicts both liberal rationales for family privacy—privacy as protective of individual autonomy and as instrumental to democratic citizenship. Imposition of state norms interferes with individual self-definition and reproduction. In the context of the continuum of family privacy, this imposition will primarily affect value production in poor and other non-dominant families because they are most vulnerable to surveillance and intervention. However, as noted above, the state is not sufficiently representative of economic, cultural, racial, and sexual minority groups and does not respect those values of minority groups that do not mirror dominant norms. Thus, increased intervention also undermines the role of these families in creating independent citizens because intervention would minimize or eliminate these families as sites of production of values that diverge from that status quo.

This elimination of non-dominant families is self-perpetuating, as it undermines the socialization of children who, as adults, may challenge state norms. These non-dominant families may try to conform but face great challenges to joining the ranks of the dominant because liberalism has failed to empower, or to provide adequately for or improve the social and material conditions of, large numbers of men, women, and children. In any event, even as norms change over time, they continue to reflect those who are dominant and deflect those who are not. An example of the contingency of specific norms and persistence of bias in the child

435. “State norms” refer to the fact that courts resolve disputes about custody or parenthood and that courts or legislators define grounds for family reformation. These decision-makers are most likely to base their rules on cultural or self-referential values, thereby interfering with private value production. See Azar & Benjet, supra note 386, at 250–52, 263–65 (describing cultural, including race and class, bias in judicial, mental health, and child welfare decisions). Even the psychological parent theory is both culturally biased and has expanded to areas beyond its scientific validity. Davis, supra note 157, at 353–62.

welfare context is the categorization of the Irish and Polish people as separate and inferior "races" in late nineteenth and early twentieth century New York City. As other persons of other "races," particularly African Americans, have filled the places in this system that European immigrants once occupied, the patterns of intervention remain the same. Poor families and families who deviate from the dominant ideology must fight to protect their own integrity.

By supporting parental rights doctrine and by using liberal philosophy to do so, the Article does not mean to imply that liberalism or the structure of our government is the best, or even a good, way to achieve equality, justice, or the good life. Instead, this Article cautions abandonment of the limited protections liberalism provides family integrity, until we have a system that is premised less upon biased race, class and gender distinctions and expectations. Increasing the state's role in defining and assessing families within this system will merely reinforce these inequities. There is no reason to suppose that the state will value non-dominant families any more under the proposed standards. On the contrary, these non-dominant families already experience state intervention pursuant to more (though not very) determinate rules for intervention. More contingent standards would further compromise the ability of such families to maintain their integrity and to keep their children out of substitute care. State rearing of children limits parents' ability to create and inculcate values. Moreover, this limitation could have a homogenizing effect on cultural and moral diversity, because it excludes families that do not meet dominant cultural and moral norms.

Thus, in the absence of a more radical challenge to the prevailing political, economic, and ideological structure in the United States, we should be cautious about dismantling autonomy-based protections for individual liberties, particularly family privacy, that help promote moral and political equality and counteract the si-

437. Linda Gordon, The Great Arizona Orphan Abduction 11-13 (1999). Wealthy, protestant child savers of this era sent children of these and other immigrant "races" to Midwestern and Western states as orphans to be placed with better families. See id. at 3-19. Cf. Chambers & Polikoff, supra note 166, at 523 (remarking how during the twentieth century lesbian and gay families went from invisibility and incomprehensibility to prominence and legal recognition).

lencing effects of economic and ideological inequality. Revisionist standards upset the structure of this liberal democracy because they do not have "roots in the language or design of the Constitution." The language and design of the Constitution, arguably, include the protection of private value production. Although biases and wealth inequities prevent full realization of this ideal for all, revisionist standards exacerbate these inequalities and undermine this fundamental liberal value of moral equality. These revisionist standards are, therefore, suspect because taking families out of the realm of privacy reduces autonomy and gives the state power to decide how to, and who will, rear children. In theory, that power would permit the majority of the electorate to define families, excluding non-majoritarian ideas of family, and would be contrary to notions of individual autonomy. Such selective revisions to liberal theory would be unbalanced and unjust.

CONCLUSION: THE VIRTUE OF PARENTAL RIGHTS DOCTRINE

The parental rights doctrine is a progressive tool that protects individual moral liberty and simultaneously retains sufficient flexibility to accommodate non-marital, non-nuclear family forms. It provides relatively objective, deferential, and determinate standards that leave to individual self-determination family creation and, to some extent, definition. Parental rights doctrine guards

439. See Dorothy Roberts, The Meaning of Blacks’ Fidelity to the Constitution, 65 FORDHAM L. REV. 1761, 1763–64 (arguing that African American support of the Constitution and rights theory is instrumental).
441. See Balkin, supra note 438, at 2367–70 (describing how it is that democracies may preserve unjust distinctions among groups). Of course, since less than half of the electorate votes in this country, Becker, supra note 427, at 74, a powerful minority would define families.
442. Again, "individual autonomy" is referred to in the specific context of United States constitutional law and theory without examining whether autonomy is "natural," possible or intelligible. See Ashe, supra note 416, at 2540–41 (rehearsing postmodern critiques of autonomy); West, supra note 258, at 5–12, 61–70 (critiquing masculine ideas of autonomy as separation). There is a certain irony in questioning the coherence of the concept of autonomy from the perspective of those who experience severe governmental or financial limitations to their own actual freedom. See Callahan & Roberts, supra note 14, at 1218 (liberal theory protects choices of the economically privileged and offers no support to the economically disadvantaged); Patricia J. Williams, Alchemical Notes: Reconstructing Ideals from Deconstructed Rights, 22 HARV. C.R.-C.L. L. REV. 401 (1987) (explaining that from the perspective of persons who have had no rights and for whom rights have great meaning, rejecting rights theory is cavalier).
against governmental or majoritarian decisions about who are acceptable parents. It also tolerates, and even promotes, diversity because parental rights afford parents considerable latitude in deciding how to raise their children. This too protects self determination and limits majoritarian usurpation and homogenization of value production. Parental rights protections may not be as important or meaningful to those parents whose values dominant culture shares. However, such protections are undoubtedly most welcome to, and needed by, those families who depart from these values or the dominant norms these values are likely to reflect.

Parental rights doctrine offers principled and fair solutions to many conflicts about children. Detailed exploration of precisely how parental rights doctrine accommodates changing family structures is beyond the scope of this Article. The Article will make explicit, however, what has been implicit in its exposition of the doctrine and illustrate the doctrine's enduring utility. Stripped to its core components, the parental rights doctrine, with its mixture of biological and social connections, is remarkably flexible and responsive to diverse family formations that both honor and support the role and place of the family in our constitutional system. The doctrine defines parenthood as a status that the mother must, and does, earn when she bears and gives birth to the child. The "father" correspondingly earns his or her parenthood through connection to the mother or genetic and nurturing relationship to the child. Thus, parental rights doctrine does not automatically grant non-nurturing fathers parental status. At the same time, it recognizes that a domestic, sufficiently nurturing or supportive horizontal relationship with the "mother," so far (but not necessarily) evidenced by marriage, may establish parenthood. The parental rights doctrine—as a logical matter—also does not dictate the number of "parents" a child may have.

Decisionmakers and commentators can, and should, resolve intervention questions within the logical contours of the parental rights doctrine, which permits diminution or dissolution of parental rights based on parental consent or unfitness. Neglect and, to a lesser extent, abuse, are problematic standards that are extraordinarily contingent on cultural norms of decisionmakers. Many, including the author, have criticized these standards as class-based

443. See Naomi R. Cahn, Family Issue(s), 61 U. CHI. L. REV. 325, 329–30 (1994) (recognizing both standards and noting that the consent or unfitness requirement reflects a social choice about the primacy of birth parent versus adoptive parent rights).
and racially discriminatory.\textsuperscript{444} In principle, however, the standards permit the state to determine, and take ameliorative action, when parents fail to provide minimal parental care that harms or seriously endangers their children.\textsuperscript{445} Lower standards than these essentially replace parental values with state-created or state-sanctioned values. Reasonable people may disagree about where a child should attend school or with whom she should live, but parental rights doctrine defers to the parent’s assessment of whether the child’s loss in one area of her life is worth the gain in another, unless the parent is abusing or neglecting the child.

Parental rights doctrine also tolerates reformation or expansion of the family when parents consent. Adoption and consensual de facto parent doctrine are excellent examples of consent-based intervention. Both permit parents to change the family’s contours and hold parents to those decisions. In the consensual adoption context, parents can place their children into new families or consent to adoption by a co- or step-parent. The consensual de facto parent doctrine recognizes that there may be multiple parental figures. When parents invite another adult into the family to act like a parent, the parent has enlarged the family—created another parent. De facto parent doctrine permits persons whom the parents have in fact allowed to parent the child to assert an interest in having an ongoing relationship with the child, even when the legal parents subsequently change their minds and seek to exclude the de facto parents.

Our current parent-child relationship standards are important and empowering, even though they may appear crude to their critics. These standards are grounded in fundamental values that support constitutional theory and protect children and families who do not meet dominant norms. This protection is important to individual families and may help preserve a diverse, independent and dynamic polity. Moreover, parental rights doctrine is at root matrifocal, using the maternal acts of gestation and birth as the

\textsuperscript{444} See supra text accompanying notes 374–87; see also Santosky v. Kramer, 455 U.S. 745, 763 (1982) (noting the subjectivity of unfitness standards that make them “vulnerable to judgments based on cultural or class bias”); Guggenheim, supra note 157, at 1735 (“[E]xperts estimate that 40% to 70% of children currently in foster care have not been abused and need not be separated from their families if society sufficiently assisted poor families in raising their children at home.”).

\textsuperscript{445} See Pelton, supra note 391, at 550 (suggesting limiting child abuse and neglect definitions to “severe harm or endangerment resulting from clearly deliberate acts or gross abdication . . . of parental responsibility”).
paradigm, or anchor, for parenthood. These standards, albeit imperfect, remain superior to the less deferential approaches that critics would substitute.