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# FROM GENES, MARRIAGE AND MONEY TO NURTURE: REDEFINING FATHERHOOD

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## I. INTRODUCTION

We are poised at the threshold of establishing genetic fatherhood for all children.<sup>1</sup> This technological development and capability intersects with social and political changes in our definition of fatherhood that have affected its legal definition.<sup>2</sup> Largely in the name of gender equality and to some extent in the name of children's rights, we have moved from a legal definition of fatherhood linked to marriage towards a legal definition of fatherhood linked to genes.<sup>3</sup> Thus, while historically fatherhood existed

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\* Chesterfield Smith Professor of Law, Fredric G. Levin College of Law, University of Florida. The opportunity to think through the implications of genetic testing for definitions of fatherhood, and particularly my own work on redefining fatherhood, was made possible through a project of the Hastings Center on Genetic Ties and the Future of the Family: Ethical, Legal and Policy Implications of DNA Identity Testing. I want to thank the principal investigators of the project and the program participants for the insights and challenges raised in the context of those discussions. I also want to express my appreciation for the wonderful research support of Michael St. Jacques, who assisted me in the preparation of this essay for publication. Any errors that remain are my own.

<sup>1</sup> See Mary R. Anderlik & Mark A. Rothstein, *The Genetics Revolution: Conflicts, Challenges and Conundra: DNA-Based Identity Testing and the Future of the Family: A Research Agenda*, AM. J.L. & MED. 215 (2002); see also E. Donald Shapiro et al., *The DNA Paternity Test: Legislating the Future Paternity Action*, 7 J.L. & HEALTH 1, 41 (1992-1993); Jean A. McEwen, *Genetic Information, Ethics, and Information Relating to Biological Parenthood*, in ENCYCLOPEDIA OF ETHICAL, LEGAL, AND POLICY ISSUES IN BIOTECHNOLOGY 200, 356-63 (Thomas H. Murray & Maxwell J. Mehlman eds., 2000); Diane S. Kaplan, *Why Truth is not a Defense to Paternity Actions*, 10 TEX. J. WOMEN & L. 69, 72 (2000); Janet L. Dolgin, *Choice Tradition & The New Genetics: The Fragmentation of the Ideology of Family*, 32 CONN. L. REV. 485, 523 (2001); Battle Robinson & Susan Parker, *Who is Daddy? A Case for the Uniform Parentage Act*, 19 Delaware Lawyer 23, 24 (2001).

<sup>2</sup> For an overview of the concept of fatherhood and changes in its social definition, see NANCY E. DOWD, *REDEFINING FATHERHOOD* (New York University Press 2000); see also DAVID BLANKENHORN, *FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM* (Basic Books 1995); Cynthia McNeely, *Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court*, 25 FLA. ST. U. L. REV. 891 (1998); DAVID POPENHOE, *LIFE WITHOUT FATHER: COMPELLING NEW EVIDENCE THAT FATHERHOOD AND MARRIAGE ARE INDISPENSABLE FOR THE GOOD OF CHILDREN AND SOCIETY* (Free Press 1996).

<sup>3</sup> For a more lengthy treatment of the marital definition of fatherhood see RICHARD COLLIER, *MASCULINITY LAW AND THE FAMILY* (Routledge 1995). Richard Collier, *Waiting Till Father Gets Home: The Reconstruction of Fatherhood in Family Law*, 4 SOC. & LEGAL STUD. 1 (1995); Michael H. v. Gerald D., 491 U.S. 110 (1989) (illustrating the recognition of marital fatherhood). For a discussion of the rise in recognition of unmarried fathers as legal fathers see

almost exclusively within marriage, we have moved to include non-marital fathers within our legal definition, primarily in order to obtain monetary support for children.<sup>4</sup> At the same time, notions of gender equity have removed formal barriers to the custody and nurture of children by their fathers, although childcare disproportionately remains in mothers' hands.<sup>5</sup> This acknowledgment of men's ability to nurture and parent, however, has remained far secondary to defining men's role as purely economic, within the classic paradigm of the breadwinner.<sup>6</sup>

DNA technology has the capability to solidify this movement from marriage to genetic definitions of parenting, and to define fathering as a status that generates the duty of economic support. DNA technology could also be the basis for establishing genetic identification for all children for the purpose of obtaining economic support from their genetic fathers. No longer would we have "deadbeat dads," since genetic fatherhood would be established and better collection mechanisms would ensure greater economic support for children.<sup>7</sup> Similarly, we would no longer have "duped dads," men who thought their children were theirs, but subsequently discovered that they had no genetic connection, yet have legal obligations linked to the birth of those children during marriage.<sup>8</sup> DNA technology can be the basis to argue for an end to the marital presumption, whereby the children of a marriage are presumed to be the biological children of the

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generally Donna L. Cochran, *African American Fathers: A Decade Review of the Literature*, 78 FAMILIES IN SOC'Y 340 (1997); JOHN SNAREY, HOW FATHERS CARE FOR THE NEXT GENERATION: A FOUR-DECADE STUDY 337 (Harvard University Press 1993).

<sup>4</sup> See JYL J. JOSEPHSON, GENDER, FAMILIES AND STATE: CHILD SUPPORT POLICY IN THE UNITED STATES 130 (Rowman & Littlefield 1997); Samuel V. Schoonmaker, *Consequences and Validity of Family Law Provisions in the Welfare Reform Act*, 14 J. AM. ACAD. MATRIMONIAL L. 1 (1997); JANE KNITZER ET AL., MAP AND TRACK: STATE INITIATIVES TO ENCOURAGE RESPONSIBLE FATHERHOOD (National Center for Children 1997); David Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984).

<sup>5</sup> See Wendy Fitzgerald, *Maturity Difference and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11 (1994); see also McNeely, *supra* note 2; COLLIER, *supra* note 3, at 179.

<sup>6</sup> For more extensive treatment, see DOWD, *supra* note 2, at 93 (explaining that "economic fatherhood is now the primary concern of the law"), 208-212; see also Laura M. Argys et al., *The Impact of Child Support on Cognitive Outcomes of Young Children*, 35 DEMOGRAPHY 159 (1998); Judith A. Seltzer, *Consequences of Marital Dissolution for Children*, 20 ANN. REV. SOC. 235 (1994).

<sup>7</sup> For a discussion of the problems that stem from biological fathers who do not support their children, see generally ROSS D. PARKE, *Fathers and Families*, in HANDBOOK OF PARENTING, (Marc H. Bronstein ed., 1995); Jonathan R. Veum, *Interrelation of Child Support, Visitation, and Hours of Work*, 22 SOCIAL SCIENCE RESEARCH 229 (1993); Pamela Forrestall Roper, *Hitting Deadbeat Dads Where it Hurts: "Punitive" Mechanisms in Child Support Enforcement*, 14 ALASKA L. REV. 41 (1997); Robyn Shields, *Can the Feds Put Deadbeat Parents in Jail?: A Look at the Constitutionality of the Child Support Recovery Act*, 60 ALA. L. REV. 1409 (1997).

<sup>8</sup> See Joshua D. Abbott, *Annual Survey of Michigan Law June 1, 1997- May 31, 1998*, 45 WAYNE L. REV. 973 (1999); Diane S. Kaplan, *Why Truth is Not a Defense in Paternity Actions*, 10 TEX. J. WOMEN & L. 69, 75 (2000); Jeffrey A. Parness, *Designating Male Parents at Birth*, 26 U. MICH. J.L. REFORM 573 (1993).

married couple.<sup>9</sup> Genetic ties would link fathers to children and be the basis of legal obligation and, by implication, legal rights.

Genes should not define fatherhood. This is wrong for men, and wrong for children. Genes define identity, but that link should be separated from the obligations and rights of parenthood.<sup>10</sup> Specifically, I argue that fatherhood should be defined by *doing* (action) instead of *being* (status), with the critical component being acts of nurturing.<sup>11</sup> In this essay I define in more detail this concept of fatherhood and its characteristics; discuss the consequences related to genetic ties; and consider the policy implications of defining fatherhood around nurture when genetic ties can be established for all children. It is critical throughout to remain cognizant of the diversity of fathers and the fluidity of fatherhood. Not all fathers are alike, and fatherhood is not a fixed state.

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<sup>9</sup> In *Michael H. v. Gerald D.*, the United States Supreme Court considered the constitutionality of the California marital presumption enacted in 1872, which provides that, "[t]he issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate." 491 U.S. 115, 117 (1989) (citing CAL. CIV. PRAC. CODE § 1962(5) (repealed 1983)). The plurality outlined the history of the marital presumption, finding its roots in concepts of legitimacy:

The presumption of legitimacy was a fundamental principle of the common law. Traditionally, that presumption could be rebutted only by proof that a husband was incapable of procreation or had had no access to his wife during the relevant period. As explained by Blackstone, nonaccess could only be proved "if the husband be out of the kingdom of England (or, as the law somewhat loosely phrases it, *extra quatuor maria* [beyond the four seas]) for above nine months . . . ." And, under the common law both in England and here, "neither husband nor wife [could] be a witness to prove access or nonaccess." The primary policy rationale underlying the common law's severe restrictions on rebuttal of the presumption appears to have been an aversion to declaring children illegitimate, thereby depriving them of rights of inheritance and succession, and likely making them wards of the state. A secondary policy concern was the interest in promoting the "peace and tranquility of States and families," a goal that is obviously impaired by facilitating suits against husband and wife asserting that their children are illegitimate. Even though, as bastardy laws became less harsh, "[j]udges in both [England and the United States] gradually widened the acceptable range of evidence that could be offered by spouses, and placed restraints on the 'four seas rule' . . . [,] the law retained a strong bias against ruling the children of married women illegitimate."

491 U.S. at 124. (internal citation omitted).

<sup>10</sup> By identity, I mean that genes provide critical information about parentage that might be necessary for medical decisions, or to know and identify with an individual's racial or ethnic heritage. See, e.g., GENES AND HUMAN SELF KNOWLEDGE: HISTORICAL AND PHILOSOPHICAL REFLECTIONS ON MODERN GENETICS (Robert F. Weir et al. eds., 1994); DOROTHY NELKIN & SUSAN LINDEE, THE DNA MYSTIQUE: THE GENE AS A CULTURAL ICON (W H Freeman & Co. 1995); see also Kaja Finkler, *The Kin in the Gene: The Medicalization of Family and Kinship in American Society*, 42 CURRENT ANTHROPOLOGY 235, 241 (2001) (stating that the adoptees Finkler interviewed consistently claimed that the reason for their searches was to obtain their natural families' medical histories, they felt like "aliens" because of the lack of a biological family history and their inability to provide any history to a physician).

<sup>11</sup> For an extended version of this argument see DOWD, *supra* note 2, at 173-80.

## II. DEFINING FATHERHOOD AS NURTURE

It is tempting to think formally, in terms of status, when defining fatherhood with respect to legal rights and responsibilities. If we define fatherhood by marriage or by genetic connection, it is relatively simple to identify who is a father. Similarly, it also becomes simple to identify who has responsibility, especially financial responsibility, for children. While financial responsibility serves our social, adult needs, what matters most to children is emotional relationships and caregiving.<sup>12</sup>

My redefinition of fatherhood centers fathering on nurture.<sup>13</sup> This definition moves away from the marital model of traditional fatherhood and the bio-economic model of recent legal reforms toward affirmative means to support men's nurture of children and their interconnections with mothers and other caretakers.<sup>14</sup> It is a serious and radical change because it cannot be achieved without confronting the economic support of children and implementing true egalitarian, cooperative, mutual support models of parenting. Accomplishing these goals for all children, not just privileged ones, is an enormous task.<sup>15</sup> Economic policy is foremost. Limited or no economic support means class-limited fatherhood. Just as important as economic policy, however, is cultural policy. We must challenge entrenched concepts of masculinity and fatherhood.<sup>16</sup> Redefining fatherhood requires redefining what it means to be a man.

I would define fatherhood around nurture, not around genetics or economic responsibilities.<sup>17</sup> Fatherhood as nurture means fatherhood as function, not as status. Social fatherhood is the practice of nurture, either alone or in combination with other caretakers, contributing as closely as possible to an equal amount of caregiving in partnership with other parents. In essence, it is nonexclusive, cooperative parenting.

<sup>12</sup> See GENERATIVE FATHERING 18 (Alan J. Hawkins & David C. Dollahite eds., 1997) ("generative fathering is rooted in ethics and care"); Barbara Bennett Woodhouse, *Hatching the Egg: A Child Centered Perspective on Parents Rights*, 14 CARDOZO. L. REV. 1747, 1755 (1993) (looking to a child-centered definition of parenting, and recognizing "nurture as paramount"); DOWD, *supra* note 2, at 157.

<sup>13</sup> See generally DOWD, *supra* note 2, at 157 (stating "my core thesis is that the redefinition of fatherhood must center around the nurture of children").

<sup>14</sup> See COLLIER, *supra* note 3, at 179.

<sup>15</sup> Andrew Kimbrell explicates statistics that explore the relationship between income and the ability to support a child. See generally ANDREW KIMBRELL, *THE MASCULINE MYSTIQUE: THE POLITICS OF MASCULINITY* (Ballantine Books 1995); see also CYNTHIA COSTELLO & BARBARA KIVIMAE KRIMGOLD, *THE AMERICAN WOMAN 1996-97: WHERE WE STAND- WOMEN AND WORK* 86 (W. W. Norton & Co. 1996).

<sup>16</sup> Adrienne Burgess explores the historical construction of masculinity, specifically the connection between fatherhood and the ruler, patriarch, and the ultimate association in Christian theology between fatherhood and God. ADRIENNE BURGESS, *FATHERHOOD RECLAIMED: THE MAKING OF THE MODERN FATHER*, 4-14 (Vermilion, 1997). Fathers were also historically portrayed as heroes, leaders, shepherds and captains, but not as nurturers. *Id.*

<sup>17</sup> See DOWD, *supra* note 2, at 157.

possible to an equal amount of caregiving in partnership with other parents. In essence, it is nonexclusive, cooperative parenting.

Nurture is a rich concept, and by it I mean the psychological, physical, intellectual and spiritual care of children.<sup>18</sup> It must be seen in the context of development, and thus is fluid, not fixed, in accord with children's needs. It is both qualitative and quantitative. Qualitatively, the focus of nurture is on children's well being and the well being of other caretakers, and thus this means the childcare is interconnected with other household work.<sup>19</sup> It is also linked to the interconnection of family work and wage work, and the harmonization of fatherhood with motherhood.<sup>20</sup> Quantitatively, it means shared responsibility, as close to fifty-fifty sharing as possible, but no less than sixty-forty, or otherwise proportionate to the presence of other caregivers. It is not secondary parenting; it is co-equal parenting.<sup>21</sup>

The full support of nurture means facing and resolving gender challenges to men's identification with caregiving. One gender challenge is the very definition of masculinity in anti-care, anti-nurture terms, linked to the promotion of homophobia in the definition of masculinity.<sup>22</sup> Caring is viewed as not manly, and marked in a way that makes care a conflict-ridden action for many men. Another significant gender challenge to supporting men's nurture is resolving tensions between fathers and mothers. These tensions block egalitarian parenthood and explode in the persistence of domestic violence.

Defining fatherhood around nurture must also include all fathers, for the benefit of all children. There are race and class challenge in redefining fatherhood.<sup>23</sup> Without an economic strategy, any redefinition of fatherhood

<sup>18</sup> See *id.* at 157.

<sup>19</sup> See DIANE EHRENSAFT, PARENTING TOGETHER: MEN AND WOMEN SHARING THE CARE OF THEIR CHILDREN 159 (Free Press 1987).

<sup>20</sup> The more involved fathers are in childcare the less misogynistic men are and the more social and political power women have. See Scott Coltrane & Elsa O. Valdez, *Reluctant Compliance: Work-Family Role Allocation in Dual-Earner Chicano Families*, in MEN WORK AND FAMILIES 163-69 (Jane C. Hood ed., 1993).

<sup>21</sup> See KATHLEEN GERSON, *An Institutional Perspective on Generative Fathering: Creating Social Supports for Parenting Equality*, in GENERATIVE FATHERING: BEYOND DEFICIT PERSPECTIVES (Alan J. Hawkins ed., 1997) (suggesting that generative parenting includes equal participation in routine work, equal participation in child care, and equal sacrifices on behalf of children).

<sup>22</sup> One study in secondary schools noted that, "the dual others to normative heterosexual masculinities in schools are girls/women and non-macho boys/men. It is *against* these that many, perhaps most, boys seek to define their identities." Debbie Epstein, *Boys' Own Stories: Masculinities and Sexualities in Schools*, 9 GENDER AND EDUC. 105, 113 (1997). Cultural messages and stereotypes begin early, teaching boys that women are mothers, and that only homosexuals act like women. The logical conclusion is that to avoid being homosexual, men must avoid effeminate behavior. Since nurture has been genderized as women's work, the homophobic reaction is to avoid nurture. See DOWD, *supra* note 2, at 187-88, 191-93.

<sup>23</sup> Most of the extant scholarship on black fathers comes from a deficient, pathological perspective emphasizing their absence from the home and an inability or unwillingness to fulfill the traditional role of father. See FAMILY LIFE IN BLACK AMERICA 249 (Robert Joseph Taylor et al. eds., 1997).

will be confounded by the economic necessities of families and the gendered structure of the workplace. Without a cultural strategy, any redefinition of fatherhood will be formal rather than meaningful in the lives of children and men.

### III. IMPLICATIONS OF FATHERHOOD DEFINED AROUND NURTURE

A redefinition of fatherhood around nurture would not only lead to changes in existing legal structures but also, more significantly, to affirmative restructuring of achieving the goal of the better nurturing of children.

Changes in existing structures and doctrines of family law can be summarized as completing the dismantling of patriarchal fatherhood. Under the common law, family was defined in patriarchal terms, with the man as the head of the household, his wife as a gender-defined, unequal partner, and the children as the servants of the father.<sup>24</sup> While much of patriarchal fatherhood has disappeared under the emergence of egalitarian family norms, vestiges of patriarchy remain. One of these vestiges is the concept of illegitimacy.<sup>25</sup> A second significant vestige is the link between the payment of money and entitlement to a social relationship with children. This link is manifest in the custody, visitation and child support framework within which divorced and non-marital fathers function.

Affirmative restructuring that is necessary to accomplish redefined fatherhood is much more extensive. It would include economic, cultural and educational reforms. Economic restructuring must ensure sufficient economic support so that fathers can nurture their children, rather than being confined to breadwinning as a result of gendered economic structures in the workplace.<sup>26</sup> More broadly, work/family conflicts must be eliminated or significantly reduced. Culturally, fatherhood education is essential to reorient male norms and teach the skills and norms of redefined fatherhood.<sup>27</sup> That reorientation can be especially effective at childbirth and divorce, two places where the state already is significantly involved in the family and where men have demonstrated strong interest and commitment to fathering. Educational programs must teach nurture and confront cultural barriers with gender-specific, gender-relevant strategies.

It is essential to emphasize how critical economic policy is to the success of male nurture of children. The rate of child poverty in the United

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<sup>24</sup> See BURGESS, *supra* note 16, at 4-14.

<sup>25</sup> See DOWD, *supra* note 2, at 216.

<sup>26</sup> Fathers' experiences of work-family conflict push strongly against nurture. The sources of the conflict are structural and cultural. The strongest factor in maintaining this pattern is economic. See DOWD, *supra* note 2, at 209.

<sup>27</sup> The context of fatherhood and its practice reveals that we need to focus on ways to support men's capacity and skills to nurture, which requires education efforts and other bottom-up strategies to provide a network of support. See *id.* at 226.

States, measured under the conservative federal definition of poverty, has ranged in the last decade between one in five and one in six children.<sup>28</sup> At least some of that high poverty rate is attributable to the lack of paternal economic support of children who live in single parent households.<sup>29</sup> The possibilities for changing the rate of children's poverty include ensuring support payment under the existing system; or providing backup support under the existing system, and supplementing that support when it is inadequate. A more serious effort to deal with child poverty would provide family support to all children sufficient to cover their basic needs. It is essential, however, that such economic policies, whether limited or more radical, be combined with increased efforts to eliminate gender and race employment discrimination as well as implementing work/family policies that permit parents to parent children while engaging in wage work.<sup>30</sup> Without such comprehensive economic policy-making, men will be pushed by the gendered and racialized employment sector to engage in wage work over nurturing work. Therefore, economic necessity will undermine the needs of children for nurture from their fathers. Moreover, for some children, especially children of color, even two full time working parents will not lift them out of poverty.<sup>31</sup>

#### IV. IMPLICATIONS OF REDEFINING FATHERHOOD FOR GENETIC TIES

In redefining fatherhood, the role of genetic ties is key. This is not because genes define the status of fatherhood, but rather because it is a tempting route to ensure children's welfare by scientifically identifying their fathers. Ultimately this is a false and limited solution to children's needs.<sup>32</sup> Genes should not be the foundation on which legal fatherhood is established.

This does not mean that genes have no place in redefined fatherhood. Genes are a connection that we presume to be embedded within a relational connection, to the mother and to the child that generates a connection of care. In other words, we assume that in many if not most cases, nurture coexists with genetic ties. Genetic ties should not, however, be treated as ownership rights that create rights of access.

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<sup>28</sup> See JIALI LI & NEIL BENNET, ONE IN FOUR: AMERICA'S YOUNGEST POOR 84 (National Council of Churches 1996).

<sup>29</sup> Men are more likely to support children when they are married. See DOWD, *supra* note 2, at 24.

<sup>30</sup> The inability of men to economically support or adequately support their children is strongly race related. See *id.* at 25.

<sup>31</sup> See *id.* at 209.

<sup>32</sup> See ELIZABETH BARTHOLET, GUIDING PRINCIPLES FOR PICKING PARENTS (2003) (unpublished manuscript on file with author).



Genetic ties should, on the other hand, create identity rights. The child has a right to know their genetic identity, most strongly for medical and health reasons, but also to value cultural and social identity.<sup>33</sup> This would support a system of universal genetic identification and access to non-identifying genetic information.<sup>34</sup> Genetic identification would disconnect identity from marriage, and the historic notion of "legitimacy."<sup>35</sup> All children would be "legitimate," based upon their humanity, not upon patriarchal claim. Alternatively, the very notion of legitimacy would disappear.<sup>36</sup> A child would be recognized as itself, with genetic ties as part of her identity, and her parents would be identified by nurture, rather than by status.

In addition to rejecting the concept of legitimacy/illegitimacy, one could also make an argument for the elimination of the marital presumption as we know it.<sup>37</sup> The marital presumption functions to establish legitimacy as well as legal parenthood by assuming that any child born within a marriage is

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<sup>33</sup> See Anderlik & Rothstein, *supra* note 1. Anderlik and Rothstein define identity testing as: [T]he use of technology to establish or rule out a relationship of genetic relatedness between at least two biological samples. The term would include testing to determine the degree of genetic relatedness between two or more persons (e.g., paternity testing) and testing to determine the identity of a person or the remains of a person.

*Id.* at 215. The authors further establish the connection between genetic information and its importance to children:

The Human Genome Project has led to heightened concern about genetic identity as a factor in healthcare. If individuals lack accurate information concerning their ancestry, they may believe they are at a genetically increased risk for an inherited disorder when their risk is in fact no greater than the population-wide risk. On the other hand, other individuals may fail to take appropriate preventive measures because no presumptive parent has or is at risk for an inherited disorder. Diagnostic testing for many conditions produces ambiguous results, and testing of genetic relatives may provide information that is essential for good clinical decision-making.

*Id.* at 216.

<sup>34</sup> Diane S. Kaplan identifies the "Massachusetts Model" as an approach to resolving the paternity issues based on genetic testing stating that, "as a threshold matter the court ruled that the blood tests were admissible to establish K.B.'s paternity. Consequently, the court never addressed the efficacy of the presumption of legitimacy." Kaplan, *supra* note 8, at 77. Genetic testing eliminates 98.5% of uncertainty regarding a child's biological parentage. *See id.* at 72. Historically, the marital presumption acted to rectify uncertainty surrounding the legitimacy of a child. However, genetic testing alleviates the purpose of the marital presumption, and in doing so redefines legitimacy. A child no longer need be the child of a marriage to be legitimate.

<sup>35</sup> See DOWD, *supra* note 2, at 106-08.

<sup>36</sup> See Michael H., 491 U.S. at 117. Justice Brennan argued that:

In the plurality's constitutional universe, we may not take notice of the fact that the original reasons for the conclusive presumption of paternity are out of place in a world in which blood tests can prove virtually beyond a shadow of a doubt who sired a particular child and in which the fact of illegitimacy no longer plays the burdensome and stigmatizing role it once did.

*Id.* at 140 (Brennan, J., dissenting).

<sup>37</sup> See Kaplan, *supra* note 8, at 72; *see also In re J.W.T.*, 872 S.W.2d 189, 194 (Tex. 1994) (holding that DNA testing alleviated the need for the marital presumption).

the child of the married couple.<sup>38</sup> Universal genetic identification, rather than elective genetic identification, would squarely contradict the marital presumption. Nevertheless, if fatherhood is defined by action rather than by status, the legal father might be identified in one of two ways. First, the husband could be the legal father, under a theory of marriage that views the birth of children as a shared responsibility, regardless of genetic ties.<sup>39</sup> Alternatively, the actions of potential fathers would be evaluated to establish legal fatherhood, defined by acts of nurture. Under the first approach, the functional consequence would be slightly different from the operation of the presumption today, but our conceptions and rationalizations as well as the basis for imposing obligations would be different. Under the second approach, the outcome might be quite different from the current operation of the marital presumption, because either the husband or the genetic father, or both, could be a nurturing, social father. Under either approach, children are connected to parents not because of genetic imprint but because of intentional, ongoing caretaking. The process of adoption best exemplifies this model.

A second consequence of linking genes to identity but not to parental status, is the fact that that economic responsibility and rights to social parenthood should not be linked.<sup>40</sup> In its most radical form, what I am proposing is that genetic fatherhood should not create economic responsibility that creates social or relational rights. In a less radical form, genetic fatherhood would generate economic responsibility but not relational rights; relational rights would be dependent upon satisfying a definition of nurturing fatherhood. Economic support of children is critical to their well-being, and must be a universal norm irrespective of family form or the presence or absence of parents.<sup>41</sup> Even if all fathers were identified and all child support as currently structured were paid, we would not eliminate a substantial proportion of child poverty.<sup>42</sup> So we must implement

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<sup>38</sup> See e.g., CAL. FAM. CODE § 7540 (West 2003) (formerly Cal. C.C.P. § 1962, enacted 1872, as amended).

<sup>39</sup> What I am suggesting here is a truly egalitarian marriage, defined as shared parenting with respect to children. See MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 234 (Routledge 1995).

<sup>40</sup> See JOSEPHSON, *supra* note 4, at 31-49; Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415 (1991); KNITZER ET AL., *supra* note 4, at 35.

<sup>41</sup> Nationally, the poverty rate for children of all ages is approximately one in five. See T.J. Eller, *Dynamic of Economic Well Being, Poverty, 1992-1993, Who Stays Poor? Who Doesn't?*, Current Population Reports P70-55, U.S. Census Bureau (June 1996), available at <http://www.census.gov/prod/2/pop/p70/p70-55.pdf>; see also Woodhouse, *supra* note 12, at 1753. For further discussion of the rights and needs of children see generally Martha Minow, *What Ever Happened To Children's Rights?*, 80 MINN. L. REV. 267 (1995) and Barbara Bennett Woodhouse, *Out Of Children's Needs, Children's Rights: The Child's Voice In Defining the Family*, 8 BYUJ. PUB. L. 321 (1994).

<sup>42</sup> See generally IRWIN GARFINKEL & PATRICK WONG, *CHILD SUPPORT AND PUBLIC POLICY IN LONE PARENT FAMILIES: THE ECONOMIC CHALLENGE* (Elizabeth Duskin ed., 1990).

policies that support children while also bearing in mind that children's core needs are not purely economic.<sup>43</sup>

Linking social rights to economic responsibilities reinforces the notion of children as property, a classic hallmark of rejected patriarchal norms.<sup>44</sup> It also reinforces the role of fathers as breadwinners rather than nurturers, or defines nurture purely in economic terms when men are doing the nurturing.<sup>45</sup> Any comprehensive effort to support children economically that includes the goal of supporting men's nurturing must reward and support non-economic nurture and care.<sup>46</sup>

Another corollary of this disconnection between dollars and parental rights is the affirmative support of parenting, including the support of nurturing fathers.<sup>47</sup> One way in which this might be accomplished is through the elimination of joint *legal* custody, whereby fathers are given power over decision-making with respect to their children irrespective of whether they engage in much nurture.<sup>48</sup> At the same time, joint *physical* custody, whereby the care of children is presumptively equally shared, would be the norm for redefined fathers.<sup>49</sup> The norm, instead of the exception, would be an expectation of 50-50 parenting.

Rather than using genetic ties to identify fathers, we should focus on supporting all fathers who nurture children.<sup>50</sup> Genetic ties may create a false

<sup>43</sup> See Carrie L. Wambaugh, *Biology is Important, But Does Not Necessarily Always Constitute a "Family": A Brief Survey of the Uniform Adoption Act*, 32 AKRON L. REV. 791 (1999); see also Woodhouse, *supra* note 12, at 1753; DOWD, *supra* note 2, at 157.

<sup>44</sup> Anderlik and Rothstein point out that, "[f]or much of history, children had a legal status little different from property. Children born outside of marriage were in the most precarious position, legally and socially." *supra* note 1, at 223. See also Woodhouse, *supra* note 12, at 1753 (challenging the traditional norm that views children as property, and arguing for a role of parents as trustees rather than rights-bearers).

<sup>45</sup> See COLLIER, *supra* note 3, at 196-200; DOWD, *supra* note 2, at 31.

<sup>46</sup> The major barrier to men's nurture is the reliance on their income as the core of economic support for families. Family support must be grounded on some other mode to replace the presumed core role of male breadwinning if men are to have a real opportunity to nurture their children. See DOWD, *supra* note 2, at 162; see also MICHAEL S. KIMMEL, CHANGING MEN: NEW DIRECTIONS IN RESEARCH ON MEN AND MASCULINITY, 115-150 (Sage Publications 1988). See generally BARBARA EHRENREICH, THE HEARTS OF MEN: AMERICAN DREAMS AND THE FLIGHT FROM COMMITMENT (Anchor 1983).

<sup>47</sup> For examples of men's devalued ability to nurture, e.g., presumed and actual bias in custody see Anderlik & Rothstein, *supra* note 1, at 219, Jo-Ellen Paradise, *The Disparity Between Men and Women in Custody Disputes: Is Joint Custody the Answer to Everyone's Problems?*, 72 ST. JOHN'S L. REV. 517-18 (1998) and Judith Bond Jennison, *The Search for Equality in a Woman's World: Fathers' Rights to Child Custody*, 43 RUTGERS L. REV. 1141-42 n.7 (1991).

<sup>48</sup> For critiques of joint parental custody, see D. Lee Khachaturian, *Domestic Violence and Shared Parental Responsibility: Dangerous Bedfellows*, 44 WAYNE L. REV. 1745 (1999), Paradise, *supra* note 47, at 517 and William V. Fabricius & Sanford L. Braver, *Special Issue: Separated and Unmarried Fathers and the Courts: Non-Child Support Expenditures on Children by Nonresidential Divorced Fathers: Results of a Study*, 41 FAM. CT. REV. 321 (2003).

<sup>49</sup> See Kathryn E. Maxwell, *Preventive Lawyering Strategies to Mitigate the Detrimental Effects of Clients' Divorces on their Children*, 67 REV. JUR. U.P.R. 137, 148 (1998) (arguing that joint custody keeps parents involved in the children's lives); Fabricius & Braver, *supra* note 48, at 321.

<sup>50</sup> There is a small but growing proportion of men who are significantly involved in the

sense of fairness and equality, since every father should be a responsible father. But ignoring the differences in fathers' capabilities means allowing children to be treated differently based on their luck, or lack of it.<sup>51</sup> It is critical, then, that fatherhood policy look at fathers at the margins and place them in the center of new policy directions.<sup>52</sup> Margins operate in several ways. Class and race margins make it more difficult for poor fathers and fathers of color to nurture.<sup>53</sup> Failing to take account of those differences perpetuates family inequalities that have significant implications on children's opportunities in life.<sup>54</sup>

A different kind of marginalization is the variation in the kinds of fathers that engage in nurture, and the societal support given to assist them in that task. Non-marital fathers, stepfathers and teen fathers are less visible, less supported and less valued in social and cultural terms, although their care is often critical to children.<sup>55</sup> Adoptive fathers and gay fathers are two other subsets of fathers that are rarely thought of when constructing social policy.<sup>56</sup> The fathers at the margins have needs, but also provide valuable lessons about fatherhood.<sup>57</sup> We can better support them, and the children they nurture. We can also learn from their example how they have cared for their children despite the barriers, and what different models could contribute to their children's welfare.

## V. EVALUATING REDEFINED FATHERHOOD

How radical a change would it be to redefine fatherhood around nurture? One way to analyze this question is by looking at the current

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nurture of their children, and a dominant mode of fatherhood which little or no caretaking. *See* DOWD, *supra* note 2, at 22.

<sup>51</sup> Lack of visitation occurs in about fifty percent of all divorce cases, and more than one-third of children in divorced families do not see their fathers at all after the first year of separation. *See* Czapsanskiy, *supra* note 40, at 1449. Although the degree to which never-married fathers nurture or economically support their children is largely unknown, paternity is established for only thirty percent of non-marital children. The statistics suggest that never-married fathers are even less likely to nurture their children than divorced fathers. *See* DOWD, *supra* note 2, at 4.

<sup>52</sup> In this instance, fathers at the margins means those fathers who are nurturing at the margin from the standpoint of the central breadwinner/secondary parent model. It could also mean looking at men marginalized by race and class, and insuring that they can be a part of any new redefinition of fatherhood.

<sup>53</sup> Black fathers must be viewed within the context of their status as black males. "They experience higher rates of unemployment, poverty, morbidity, and imprisonment and have shorter life expectancy, less access to healthcare, and less education than their white counterparts." Cochran, *supra* note 3, at 342.

<sup>54</sup> *See* DOWD, *supra* note 2, at 49.

<sup>55</sup> *See id.* at 27, 51.

<sup>56</sup> *See id.* at 75-80, 121-24.

<sup>57</sup> For example, poor fathers sometimes contribute in kind what they cannot contribute in dollars. Blue-collar fathers are often more engaged in the care of their children, through split shifts, than middle class fathers. *See id.* at 51.

context of fatherhood. Most men become genetic fathers in their lifetime, usually by their twenties or thirties.<sup>58</sup> However, many fathers never become nurturers during the span of their child's life.<sup>59</sup> Of all fathers, a small number nurture their children in a way that we most strongly associate with mothers, either as primary or sole parents, or less commonly, in equal partnership with mothers.<sup>60</sup> A larger number of fathers nurture as secondary parents. That is, they are back-up nurturers to mothers, but their nurture is distinctly secondary rather than co-equal.<sup>61</sup> A third pattern of fathers are those who are largely disengaged from their children, other than providing economic support.<sup>62</sup> Finally, there are totally disengaged fathers, either because no connection was ever made or they have drifted entirely out of their children's lives, both socially and economically.<sup>63</sup>

These patterns of fatherhood are strongly but not exclusively linked to whether men share a household with their children, and their relationship with the children's mothers.<sup>64</sup> Men are more likely to nurture when they reside with their children, and they are more likely to nurture children when they have a good relationship with the children's mother. Ironically, however, those men who share a household with their children's mother are not necessarily those who nurture the most; they are more likely to be secondary nurturers. The men who tend to nurture the most are primary parents.<sup>65</sup>

Men's fathering is characteristically serial rather than linear. As men couple and uncouple with women, their nurturing tends to follow their adult relationships.<sup>66</sup> Thus, it is not uncommon that a man might father two sets of children, although not at the same time, and thus his relationship with each set of children is not constant. Women, on the other hand, are more likely to sustain their relationship with their children.<sup>67</sup>

Fathers' impacts on the lives of their children is positive, especially because their presence usually brings more economic resources, which in turn have a powerful impact on children's well being.<sup>68</sup> Mere presence of a father figure in the home, however, is not sufficient, even if economic well-being increases. That is apparent in the pattern of children in blended

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<sup>58</sup> See *id.* at 22.

<sup>59</sup> See *id.* at 23.

<sup>60</sup> See *id.* at 22.

<sup>61</sup> See KATHLEEN GERSON, *NO MAN'S LAND: MEN'S CHANGING COMMITMENTS TO FAMILY AND WORK*, 181 (Basic Books 1993).

<sup>62</sup> See DOWD, *supra* note 2, at 23.

<sup>63</sup> See *id.*

<sup>64</sup> See *id.*

<sup>65</sup> See *id.*

<sup>66</sup> See *id.* at 26-27.

<sup>67</sup> See DOWD, *supra* note 2, at 26.

<sup>68</sup> See *id.* at 27.

families, suggesting that step-fathers function in a distinctly different way.

Most significantly, fathers do not parent qualitatively in a way that is distinctive or unique. Their presence in children's lives is important and profound, but not because of their uniqueness.<sup>69</sup> Rather, nurture by multiple adults benefits children, and nurture by engaged parents is fundamentally the same, irrespective of gender.

These patterns generate many questions. Should we work within the existing patterns of fatherhood or try to change them? Should fatherhood be supported exclusively or preferentially within marriage? How do we empower fathers without subjugating mothers? Should we envision fatherhood as a single parent or dual parent role? Can we support nurturing fatherhood while insisting on financial responsibility? Will we continue to see financial responsibility in individual, and unequal, terms? How do we incorporate the fluidity and multiplicity of family structures and changes over time?

My answers, in brief, to these questions are that we should work to enhance the existing patterns of nurture by removing the barriers to fathers' ability to nurture their children. Rather than trying to reorient men's household pattern, we can support their nurture of the children that they live with as well as support, if they choose, the nurture of children that no longer share their daily life and household. To prefer fatherhood within marriage, and thus return to the distinction between children within and outside of marriage, defies demographic patterns but also, most significantly, stigmatizes and harms children for adult choices over which children have no control.

Empowering fathers without reconstituting gender inequality requires that we not look at fatherhood in isolation, or cast fathers' rights as independent of the necessity of positive interrelationship with mothers. In addition, if fatherhood is viewed under a shared, co-parenting model, as opposed to equalizing who serves as the primary parent, this contributes to equal empowerment and relational balance, but also requires resolving the puzzle of economic support of families and a reorientation of work/family structures. It likely means public as well as private support of families, not limited to needs-based support.

Incorporating the fluidity of family forms, and changes over time, means focusing on what fathers and families do, rather than what they look like. Our goal should be the long-term well-being of all children, which requires bringing the interests of those children with the greatest needs to the center of policy-making. The policies that we need to adopt must be measured by the needs of those at the margins.

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<sup>69</sup> See *id.* at 45-46.

## VI. CONCLUSION

The tragedy of 9/11 brought many things into focus. In the months that followed, the *New York Times* began to write unique obituaries about those who had died, stories that captured the essence of lives cut short, as many of those who died were quite young.<sup>70</sup> It became apparent that young men were disproportionately killed in the 9/11 attacks since such a large percentage of business people in the World Trade Center were young men.<sup>71</sup> Many were fathers. Some were soon to become fathers.<sup>72</sup> There were also fathers left among the survivors who could not be easily linked to the children they were left to nurture, or who were suddenly thrust into that role because of genetics or prior marital connections, but not their prior nurture. It became apparent, as support for families affected by 9/11 became a priority, that not all surviving fathers would meet common legal definitions.<sup>73</sup> Not all were linked by marriage to the mothers, and some could not have married the partners whose children they nurtured. This tragedy was a window on how we live and love and care for others. Of the many lessons it has to teach us, surely one is that caring and loving matters most.

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<sup>70</sup> See HOWELL RAINES ET AL., PORTRAITS: 9/11/01: THE COLLECTED "PORTRAITS OF GRIEF" FROM THE NEW YORK TIMES (Times Books 2002).

<sup>71</sup> The pattern of victims was strongly gendered, because the time of day and location of the attacks meant the victims, including the victims among the rescuers, were predominantly men, reflecting the gender distribution of work, as well as the gender distribution of work and family responsibilities. See Nancy E. Dowd, Symposium: *Law Culture, and Family: The Transformative Power of Culture and the Limits of the Law*, 78 CHI.-KENT L. REV. 785, 805 (2003).

<sup>72</sup> Sixty-three babies conceived before 9/11 were born to sixty-one women after the tragedy. See *id.* at 801.

<sup>73</sup> See *id.* at 798.