BARGAINING OR BIOLOGY?
THE HISTORY AND FUTURE OF PATERNITY LAW AND PARENTAL STATUS

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Paternity suits make good headlines,[1] but they often make bad law. The headlines are news, no doubt, because people care as much about the tangential question, who was sleeping with whom, as they do about the ultimate question, who is the father? This article will suggest that whatever the allure of examining peoples' sex lives, the law should abandon its interest in determining biological paternity. The legal rights and duties of fatherhood should emanate from commitment and contract, not from sex or genes.

Currently, fatherhood is a status that brings with it rights and obligations. For the most part these rights and obligations attach regardless of whether one meets or exercises them. They attach, at least according to paternity doctrine, by virtue of one's blood connection to the child. This article challenges that law of parental status at two levels. First, it demonstrates that often, notwithstanding paternity doctrine, blood has little to so with one's status as father. What matters instead is one's relationship with the mother. More specifically contract, or private bargaining between individuals, often tells us more about who the law will consider a father than does blood. Second, this article suggests that thinking about fatherhood as a fixed status is

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[1] *See, e.g.,* Pat Moore, *'I Just Want to Know the Truth'; Man Seeks Proof That He's Son of Conway Twitty*, ST. LOUIS POST-DISPATCH (Mo.), Jan. 8, 1996, at 3E; *Puzzle: Why Do Jacko's Kids Have White Skin?*, PALM BEACH POST (Fla.), Feb. 15, 2003, at 1D; *Jefferson Fathered Slave's Children, Foundation Says*, CHI. TRIB., Jan. 27, 2000, at 4N; *Ice-T Hit With Paternity Suit*, SAN ANTONIO EXPRESS-NEWS (Tx.), June 9, 2002, at 2J.

problematic. One's status as father (or mother) should depend on whether one exercises the rights and fulfills the obligations of parenthood, not on whether one has a blood connection.

This second level challenge, to the idea of fixed fatherhood, is a logical outgrowth of the first challenge, to paternity law, because it is the logical outgrowth of thinking about parenthood as contract. If one fails to meet the obligations of a contract to parent, one can lose the rights that the contract provides. By the same token, if one promises to perform the obligations of parenthood, or performs them in a context in which a promise to do so can be inferred, then one can be bound in contract, not because of one's status, but because of one's deliberate acceptance of fatherhood.

The argument begins in Section I with a brief historical and contemporary explication of the paternity suit. Section I then demonstrates just how little the law actually cares about biological paternity by examining those cases in which the law rejects biology as a basis for paternity. The last part of Section I analyzes potential rationales for holding a biological father accountable as a father on the basis of biology alone. None of the rationales that might justify holding biological fathers automatically responsible for the support of their biological children can be reconciled with the case law, constitutional doctrine or contemporary mores.

Section II of the article suggests a different theory of paternity, one that can reconcile much of the case law, constitutional doctrine and contemporary mores. It reveals that courts often root paternal obligation in contract with the mother, not biology. This section shows how contract theory is remarkably consistent with the traditional framework which let marriage define paternity, appropriately parallels the contractual framework governing most parenthood decisions in the reproductive technology area, is already operating in many of the equitable cases vesting obligation in non-biologically related persons, and better reflects the way that fatherhood is experienced by both parents and children.

Thus, Section I shows just how little paternity law is actually rooted in genetics. Section II shows just how much it is rooted in contract. Section III moves from the descriptive to the normative in order to explore the theoretical nature of that contract in more detail. First, it

examines how contracting for parental rights fits the reliance and will theories of contract, the consideration theory of contract and relational theories of contract. Section III then scrutinizes the entitlements and obligations that are actually exchanged in these contracts. It suggests and defends two ideas that are likely to be controversial. First, a gestational mother holds all initial rights and obligations to a child.[2] With some built-in limitations, parental rights and obligations are the mother's to contract away as she chooses. Second, the obligation to support a child can be limited temporally, so that the paternal obligation reflects what was bargained for in the agreement between mother and father, not a static notion of fatherhood. Section III concludes with some examples of how the contract regime would work in practice.

Section IV explores the relative costs and benefits of embracing this contract model. Among the benefits is the elimination of the current distinction between how parental status is determined for parents of children born by virtue of reproductive technology and how parental status is determined for parents of children born by virtue of sexual intercourse. Also eliminated is the distinction between how parental status is assigned to straight and gay parents. The partner of a gestational mother (or one who contracts with that mother) acquires parental rights and obligations by virtue of an agreement with the mother, not by virtue of genetics. More important, the proposal offered here recasts fatherhood as a truly volitional status, a set of rights and obligations that one willingly agrees to. It does so, in part, by severing the the legal link between sexual activity and reproduction, as medicine now routinely does, and as is necessary in order to bring the law of parental status up to date with contemporary mores and the contemporary law of sexual activity. The proposal also makes clear that if one does not fulfill the obligations of fatherhood, one can lose the status of father, and if one enjoys the rights of fatherhood, one can become a father.

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[2] This idea is not new. Martha Fineman endorsed a mother-focused family that eliminated all notions of fatherhood almost ten years ago. See MARTHA FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 228-233 (1995). This article does not go nearly as far. It endorses a family structure in which mothers hold initial rights and obligations, but in which those rights and obligations are almost always shared with fathers. See infra Section III.

Among the possible costs of the proposed system is increased direct state expenditure for children. The state could no longer demand that the male participant in a heterosexual encounter be automatically responsible for any biological issue of that encounter. It is not actually clear that the proposed system would be more expensive than the current one because most of the men who are now liable as genetic fathers would be liable as contractual fathers.[3] Nonetheless, without doubt, the system proposed here works best with greater government expenditure on children. Mothers will be less vulnerable if the state takes more responsibility for supporting children. Today, the United States is the only industrialized country, save China, to not provide subsidies to the caretakers of children.[4] Numerous eminent scholars routinely call for such subsidies.[5] If we embraced the caretaking norm that most of the rest of the world embraces, the parental status model endorsed here would run little risk of making mothers too vulnerable.

Alternatively, as is the case in many other countries, biological fathers could be held accountable for their reproductive activity without necessarily becoming legal fathers. Numerous other countries make biological fathers reimburse the state for part of the support of their biological issue, but what they pay is closer to a fine than a support obligation.[6] Such a fine

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[3] See infra notes 169-174 and text accompanying.

[4] See Social Security Administration, Research Report #65, SSA Publication No. 13-11805, Social Security Programs Throughout the World - 1997 xxvi, xxx-xxxv, xxvi. The Personal Responsibility and Work Opportunity and Reconciliation Act of 1996, 42 U.S.C. § 101 et seq. Provides for "Temporary Aid to Needy Families (TANF)" but those subsidies, as the name so obviously indicates, are temporary and needs-based. Most of the rest of the world provides for caretakers, regardless of their class, for the full term of a child's minority.

[5] See, for instance, Fineman, supra note 2 at 231-32 (suggesting "[w]e [s]hould face, value and therefore subsidize caretaking and caretakers.") and Robin West, *The Right to Care* in THEORETICAL PERSPECTIVE ON DEPENDENCY: CONSEQUENCES FOR WOMEN AND POLITICAL LIFE at 88, 88 (E.Kitay & E. Feder eds., 2000) (supporting a right to "doulia," defined as "a right to some measure of state, social or community support for caregiving labor."). See also Anne L. Alstott, Work vs. Freedom: A Liberal Challenge to Employment Subsidies, 108 Yale L. J. 967, 992-994 (1999) (endorsing cash payments for single mothers in poverty).

[6] See Alfred Kahn & Sheila Kammerman, *Introductory Note: Child Support in Europe and Israel*, in CHILD SUPPORT: FROM DEBT COLLECTION TO SOCIAL RESPONSIBILITY at 45-49 (A. Kahn & S. Kammerman eds. 1988)

could deter irresponsible sexual behavior without making fathers out of people who never intended to be or acted as parents.[7]

I offer these ideas in the introduction so as to assuage concerns about the ramifications of adopting the proposed contract model. The semi-biological system we have now survives, in large part, because of fear of what happens to children if we relieve biological fathers of automatic parental responsibility. Thus, we let an incoherent, outdated and remarkably inconsistent paternity system govern mostly because we are too scared of what happens if we abandon it. As a result, we often let men who have enjoyed the benefits of fatherhood escape parental obligation, we preference blood over nurturing in a way that denies functioning parents rights, and we force men who never intended to be or acted as fathers, to be fathers. Both children and adults deserve a system in which parental status is determined in a fair, understandable and coherent manner. Contract provides that system and this article shows how.[8]

Before starting, a note on gender is in order. This article uses the terms mother and father in their biological and social senses, not in the sense to which they refer to the sex of a person who is parenting. I do this both for convenience (the parental roles have traditionally been so gendered that it is much easier to refer to the gendered label than to describe the work being done) and to underscore what can be important differences in the jobs that parents perform. Yet women can father and men can mother. What is important is not the sex of the people performing the roles, but how adults allocate the rights and responsibilities of parenthood. This is an article about how and why the law should construe parental rights as a function of the private bargaining between the adults who negotiate the rights and obligations of parenthood.

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[7] For more on the benefits of this idea, see infra notes and text accompanying 311-314.

[8] Moving towards a parental rights regime rooted in contract is a first step, a step that this article endorses. Deciding which particular contract doctrines will be most appropriate in what situations requires more analysis. *See infra* text accompanying notes 209-217. For instance, the extent to which legislatures should impose boilerplate terms, the applicability of third party beneficiary analysis and the use of unconscionability analysis are all questions that are left for another day. The thesis here is limited to presenting contract as the appropriate construct through which to conceptualize the origins and obligations of parental status.

I. The Incoherence of Paternity Law

A. The Origins of Legal Paternity

A biological father's duty to support his non-marital children originated in England in 1576, as part of the British Poor Laws. Parliament passed a law allowing Justices of the Peace to seek reimbursement from fathers whose biological children were receiving public assistance.[9] Thus the paternal support duty originated as an attempt to help alleviate the state's burden for poor children. Children and unwed mothers of children who were not receiving public assistance had no right to support from a biological father. It was not until 1844 that British unwed mothers, regardless of their welfare status, acquired the right to sue biological fathers for support.[10]

In this country, the rationale for and implementation of paternity obligations varied widely. Several states developed the duty of paternal support in a criminal context, as an incident of punishment for bastardy or fornication.[11] Other states did not recognize any duty to support. As late as 1971, Texas and Idaho refused to impose any support obligation on an unmarried father.[12] Virginia imposed an obligation only on unmarried fathers who voluntarily and formally acknowledged children as their own.[13] Other states acknowledged a duty to support but vested

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[9] VITEK, DISPUTED PATERNITY PROCEEDINGS § 1.02(3) (5th ed. 1997).

[10] *Id.*

[11] HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 109 (1971).

[12] *Id.* at 22.

[13] VA. CODE ANN. § 20.61.1 (1960).

the right to sue in the mother, not the child.[14] In 1949, a North Carolina court explicitly denied a child's right to have his paternity investigated.[15]

In those states that did recognize a duty to support, the amount of the award was left to the complete discretion of judges.[16] Some states required that judges not take the child's illegitimacy into account when setting the support amount,[17] but other states mandated it.[18] Given the discretion vested in judges, there was very little to prevent a judge from awarding whatever amount he felt appropriate. There were no rules or principles guiding the determination. These vagaries are understandable given the mixed motives of traditional paternity law. As one New Jersey court summarized: "Filiation statues are generally considered to represent an exercise of the police power for the primary purposes of denouncing the misconduct involved, punishing the offender or shifting the burden of support from society to the child's natural parent."[19] The amount of the paternity award and the person entitled to collect it can vary significantly depending on whether the purpose of the award is to discourage the underlying sexual conduct, punish the biological father for not marrying the mother, or support a child in need of resources.

B. Current Law

In 1984, Congress imposed a degree of uniformity on paternity law. The Federal Child

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[14] IND. CODE ANN. § 3-625 (1968); S.D. CODIFIED LAWS § 25-8-5 (1969).

[15] Allen v. Hunnicutt, 52 S.E.2d 18 (N.C. 1949).

[16] KRAUS, *supra* note 11, at 23.

[17] *Id.*

[18] Florida, for instance, had a separate statutory scheme for the support of illegitimate children, setting the monthly amount of support for illegitimate children under six years old at $40/mo. FLA. STAT. ANN. § 48-7-4 (1966).

[19] State v. M., 233 A.2d 65, 67 (N.J. Super. Ct. App. Div. 1967).

Support Act of 1984 required all states to allow children to sue for paternity up until their eighteenth birthday.[20] The child's right to sue is usually coterminous with the mothers, but the mother's right can be limited by statutes of limitations[21] and by contractual agreement.[22] The child's right to sue cannot be so limited. The Child Support Enforcement Amendments of 1984[23] required all states to promulgate guidelines pursuant to which courts should award support. These guidelines require that "all earning and income of the absent parent" be taken into account in setting an award and that the award be based on "specific descriptive and numeric criteria."[24] In reality, what this means is that all states have tables or formulas that set the child support award as a percentage of income while allowing for a few discretionary variables to overcome the presumption in favor of the percentage. In other words, far from the basic poverty standard which served as the basis for the state's right to reimbursement in the original paternity suits, children are now entitled as much to what a father can give them as to what they may need.[25] Indeed, in virtually all states, a child's entitlement to child support is determined as a

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[20] 42 U.S.C.A. § 666(a)(5) (Supp. 1985)

[21] *See* for instance, 750 ILL. COMP. STAT. 45/8 (2003).

[22] Contractual agreements limiting child support are subject to judicial scrutiny in order to ensure that children's interests are being served. Thus, mothers are usually not allowed to waive all support, Budnick v. Silverman, 805 So. 2d 1112 (Fla. Dist. Ct. App. 2002), but they can limit (often substantially) the amount they would otherwise get. *See* Lester v. Lester, 736 So. 2d 1257 (Fla. Dist. Ct. App. 1999) (mother's decision to accept extra tuition in lieu of judicial re-adjustment of child support amount binding); Gerhardt v. Estate of Moore, 441 N.W.2d 734 (Wis. 1989) (mother's lumpsum settlement for child support binding as against mother, but not against the child).

[23] Pub. L. No. 94-378, 98 Stat. 1305 (1984).

[24] 45 C.F.R. § 302.56(c) (2003). The Family Support Act of 1988 requires that the guidelines act as rebuttable presumptions. Pub. L. 100-485, 42 U.S.C. § 667 (Supp. 1997).

[25] Determining what a child "needs" inevitably requires a baseline determination. If we assume that public assistance actually meets a child's basic needs, then a need standard would obligate a biological father to pay the public assistance amount and no more. If we assume that public assistance does not adequately meet most children's needs, how does one determine what need is? In the spousal maintenance context, statutory guidelines usually suggest that courts determine need with reference to the standard of living enjoyed during the marriage. *E.g.* 750 ILL. COMP. STAT. 5/504 (2003). Thus, the need baseline is based on what the spouse enjoyed before. For many children subjects of paternity actions,

function of the parent's income, regardless of what kind of relationship that parent has with the child or with the child's other parent.[26]

The child's entitlement also often attaches regardless of the biological father's actions or intent when creating the child. Many cases suggest that the child's entitlement to support emanates from the mere fact of biological connection. Thus, children who are born as the result of acts that made their mothers guilty of statutory rape are still entitled to support from their biological fathers.[27] Fathers who were deceived about birth control and had no intent or desire to bring a child into the world are nonetheless fully responsible for child support and have no action in tort for their emotional or financial injury.[28] In *Budnick v. Silverman*, a man who entered into a Preconception Agreement in which the mother agreed not to identify him as the father in any public way (including on the birth certificate) and not to initiate a paternity action against him, was nonetheless responsible for child support when the woman did file a paternity action because "the rights of support and meaningful relationship belong to the child, not the parent; therefore neither parent can bargain away those rights."[29] Thus, much paternity law seems to be based on a strict liability theory for genetic contribution. One is responsible for

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there is no standard from before upon which to base a child support award because they have not lived with the father who they are suing.

[26] In one famous case a biological father claimed that his paternity obligation should be limited, if imposed at all, because of the mother's misrepresentation about birth control. The court found the mother's actions completely irrelevant. The financial content of the child's right to support was a function of "the means of the parents" and nothing else. *In re* Pamela P. v. Frank S., 449 N.E.2d 713, 715 (N.Y. 1983).

[27] Kansas *ex rel.* Hermesmann v. Seyer, 847 P.2d 1273 (Kan. 1993); San Luis Obispo v. Nathaniel J., 57 Cal. Rptr. 2d 843 (Ct. App. 1996); Mercer County Dep't of Soc. Serv. v. Alf M., 589 N.Y.S.2d 288 (Fam. Ct. 1992) (defendant father's mental disability, by virtue of which he may have a statutory rape claim, does not excuse his support obligation).

[28] Wallis v. Smith, 22 P.3d 682 (N.M. 2001) (father cannot sue in tort to recover compensatory damages stemming from girlfriend's misrepresentation about birth control); Moorman v. Walker, 773 P.2d 887, 889 (Wash. 1989) ("the moral responsibility for creating a human life is not voidable as if sex were a simple contractual transaction"); *Pamela P.*, 449 N.E.2d at 715 (obligation must be determined without "consideration of the 'fault' or wrongful conduct of one of the parents.").

[29] *Budnick*, 805 So. 2d at 1113.

one's genetic offspring no matter what the circumstances of that offspring's creation. This kind of strict liability regime makes sense if the right to support is the child's right and if the child is vested with that right by virtue of the biological connection per se.

The problem with this theory is that there are many, many instances in which biological connection alone does not render a man responsible for the support of his offspring. One can group the instances in which the state routinely ignores any right a child may have to support from a biological parent into four categories: (i) the voluntary and involuntary termination of parental rights, (ii) artificial insemination cases, i.e. fertilization that did not result from sexual intercourse, (iii) cases in which the law presumes, declares or finds paternal obligation in the absence of any evidence that the man obligated actually is biologically related to the child, and (iv) cases in which the law holds a man responsible as a father because he has been acting as a father, notwithstanding the knowledge that he is not biologically related.

C. Rejecting Biology

1. Legal Termination of Parental Rights

The state may divest someone of parental status if it finds, by clear and convincing evidence, that the person is unfit to parent.[30] In such a case, the parent loses all rights and obligations to the child and the child has no claim to the adult's purse. However, a parent cannot necessarily relinquish his parental rights and obligations even if that parent claims that he is or would be an abusive and neglectful parent. A parent who wishes to voluntarily divest him or herself of all parental rights and obligations may do so only if the other parent of the child also wishes that he relinquish his rights *and* if there is another person ready to adopt the child. Some

[30] Santosky v. Kramer, 455 U.S. 745, 768 (1982).

states make this clear by statute.[31] Others rely on case law. In *In re A.B.*,[32] both mother and father agreed that it would be better for the child if the biological father's legal status was severed so that he could not come between the mother and the child. The Wisconsin court refused the severance because "[p]arental rights may not be terminated merely to advance the parents' convenience and interests, either emotional or financial."[33] This means that blood automatically vests an unwilling man with parental obligation only as long as the state wants to keep the man obligated. In most cases, the state takes its clues from the mother. If she wants to continue to keep the biological father liable for support, the state will not relieve the biological father of his parental obligation. If she is willing to sever the biological ties and have someone else assume responsibility, the state will allow severance. Not only might this seem somewhat arbitrary from the obligor's perspective, the child, in whom the support right is vested, has no say.[34] A child who might want to continue to receive whatever support he or she could get from a biological father will not be heard if there is another man willing to support. What this suggests is that though a child may have some kind of right to be supported, he or she does not have a right to be supported by a biological parent per se.

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[31] Arkansas processes privately filed termination petitions only in adoption proceedings. ARK. CODE ANN. § 9-9-220 (Michie 1993). The state may file a termination petition only when it is "attempting to clear a juvenile for permanent placement." ARK. CODE ANN. § 9-27-341 (Michie 1993). Delaware prohibits termination of one parent's rights unless there is a contemplated adoption unless "continuation of the rights to be terminated will be harmful to the child." DEL. CODE ANN. tit. 13, § 1103(b) (1993).

[32] 444 N.W.2d 415 (Wis. Ct. App. 1989).

[33] *Id.* at 419. *See also In re* D.P.C., 375 N.W.2d 221 (Wis. Ct. App. 1985). One California court, which has not been cited or followed by any other court, came out differently, *In re* Joshua M., 274 Cal. Rptr. 222 (Ct. App. 1990).

[34] One might argue that the state takes the child's interest into account by using a Best Interest of the Child standard in evaluating all termination and adoption decisions. In practice, however, adoptions in which there is a willing non-biological parent and a biological parent who wants to relinquish his rights seem to be approved perfunctorily. At least 42% of all adoptions are step-parent adoptions. Victor Eugene Flango & Carol R. Flango, *How Many Children Were Adopted in 1992,* 74 CHILD WELFARE 1018, 1027 (1995).

2. Reproductive Technology and Fatherhood

The second category of cases in which biology alone does not control a man's obligation involves artificial insemination. Most states have statutes divesting a man who voluntarily sells or donates his sperm of all parental rights and obligations, as long as the insemination using his sperm is performed by a licensed medical professional.[35] For cases in which amateurs succeed in artificial insemination without the aid of a professional "the preconception intent of the parties governs who are the legal parents after the child is born."[36] Thus, a man may knowingly assist in the creation of a child, but if his preconception intent is that he not assume responsibility for the child, he is not responsible, as long as the child is conceived by means other than sexual intercourse.

The preconception intent standard is widely endorsed by commentators and courts alike as the appropriate one to decide disputed parental rights issues stemming from reproductive technologies that allow us to conceive without intercourse and separate genetic contributions from gestational ones.[37] It is completely inconsistent with the a strict liability regime based on the child's right to support from a biological parent, however. *Budnick v. Silverman*, the

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[35] Most states also have statutory provisions automatically vesting paternal rights and obligations in a husband who consents to his wife being artificially inseminated by a licensed professional. *See, e.g.,* CALIF. FAM. CODE § 7613 (2003).

[36] *See* Lori Andrews, *Legal Aspects of Assisted Reproduction*, 54 ANNALS OF N.Y. ACAD. SCI. 688, 674 (1988).

[37] *See* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); McDonald v. McDonald, 608 N.Y.S.2d 477 (App. Div. 1994); Lori Andrews, *Legal and Ethical Aspect of New Reproductive Technologies*, 29 CLIN. OBSTET. & GYN. 190 (1986) (arguing the preconception intent should govern in cases of artificial insemination); John Lawrence Hill, *What Does it Mean to be a Parent? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 418 (1991) ("the intended parents should be considered the 'parents' of the child born of [reproductive technologies]"); Marjorie Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 302 ("legal rules governing modern procreative arrangements and parental status should recognize the importance and legitimacy of individual . . . intentions"). *But see*, Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835 (2000) (arguing that parental determinations in cases of reproductive technologies should be governed by existing family law rules, many of which do not honor intent).

preconception contract case mentioned above, illustrates this anomaly perfectly. Mr. Silverman claimed that the preconception contract in which the mother agreed not to name him or legally pursue him as the father made him nothing other than a sperm donor, albeit one that donated the "old-fashioned way."[38] He argued that he had no obligation because the Florida statute relieved sperm donors of parental rights and responsibilities.[39] The court held that the Florida sperm donor statute did not apply to conceptions that happen the "old-fashioned way." In other words, a preconception contract is determinative if the conception happens in a "new-fangled" way, but irrelevant if the conception happens by means of intercourse. Again, we see arbitrary enforcement of a child's right to support from a biological parent, but some assurance that the child will be supported. Most reproductive technologies are expensive. Most of the people using them with the intent of becoming parents have the ability and desire to support a child.[40] Vesting parental rights in those who spend money with the intent to support a child helps ensure that the child will be supported.

3. Legal Non-Biological Fathers

The third category of cases in which the biological father is not held responsible for the support of his child involves the law, by presumption or declaration, making someone else the father. The most common example of this is the common law presumption that the husband of a

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[38] Budnick v. Silverman, 805 S.2d 1112, 1114 (Fla. Dist. Ct. App. 2002).

[39] FLA. STAT. ch. 742.14 (2001).

[40] The exception to this is simple insemination of a woman who wishes to bear a child herself. This is relatively inexpensive and increasingly popular among unmarried women. If there is no husband who, by statute, becomes the father of the artificially inseminated baby, the responsibility for supporting the child falls solely on the woman. *See, e.g.,* the discussion of CAL. CIV. CODE § 7005(b) in Jhordan C. v. Mary K., 179 Cal. App. 3d 386, 392 (Ct. App. 1986). "[T]he California Legislature has afforded unmarried as well as married women a statutory vehicle for obtaining semen for artificial insemination without fear that the donor may claim paternity . . ."That child becomes the modern equivalent of fillius nullius. See infra text accompanying notes 87-91.

woman who gives birth to a child is the father of the child.[41] For many years, Lord Mansfield's Rule prohibited either spouse from giving testimony that would cast the legitimacy of a marital child in doubt,[42] and a putative father did not have standing to challenge the paternity of a husband.[43] Thus, for most intents and purposes, the marital presumption of the husband's paternity was irrebutable.

The extent to which the modern marital presumption can be rebutted varies from state to state.[44] In most states, the husband, the wife and the putative biological father have the opportunity to rebut, but that opportunity is temporally limited. A husband who has cause to be aware that a child might not be related to him biologically, but who fails to question biological paternity once he has reason to can be held responsible for child support.[45] Comparably, a man who knew that he was the likely biological father, but failed to bring an action in time, can be barred from claiming any parental rights he might want to establish.[46] As a matter of constitutional law, the Supreme Court has said that a putative father has no constitutional right to establish his paternity even if he has a relationship with the child, as long as the mother is married to someone else and wishes to stay married to that someone else.[47] By the same token, a mother who wishes to bar a biological father from asserting paternity on the basis of the marital

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[41] This common law presumption is now codified in the UNIFORM PARENTAGE ACT, § 7611(a) (2000).

[42] Goodright v. Moss, 2 Cowp. 291, 98 Eng. Rep. 1257 (1777).

[43] LESLIE HARRIS & LEE TEITELBAUM, FAMILY LAW 1052 (2d ed. 2000).

[44] *Id.* at 995.

[45] Markov v. Markov, 758 A.2d 75 (Md. 2000); See also *In re* Paternity of Cheryl, 746 N.E.2d 488, 497 (Mass. 2001) (man was not husband, but did accept responsibility as father even after having reason to believe he might not be biologically related).

[46] *See* 750 ILL. COMP. STAT. 45/8 (2003).

[47] Michael H. v. Gerald D., 491 U.S. 110 (1989).

presumption is free to do so only if her marriage is still intact.[48] If she is separated or having difficulty with the man presumed to be the father of the child, the biological father may have standing to sue. A judge evaluates the state of the marriage.[49] Thus, the biological father's rights and obligations are dependent on what a judge thinks of the strength of a marriage that the biological father has nothing to do with. No one has an obligation to tell the child any of the facts that might be relevant to the child's right to support from his or her biological parent. Not only does this make it highly unlikely that a child will pursue his right to support from a biological parent, it makes it highly unlikely that the child will learn the biological facts. Preferencing stability over information in this way may make it more likely that the child will be adequately supported, however. Men who live with children are likely to help pay for them, regardless of whether those men are biologically related to the child.[50] Vesting paternity in the man living with the child may help ensure support.

The marital presumption is not the only presumption that vests paternal rights. Most paternity statutes also presumptively name the man listed on the child's birth certificate[51] and/or a man who "receives the child into his home and openly holds out the child as his natural child" as the father.[52] In cases in which two of these presumption clash or where one of the presumptions clashes with biological evidence, courts often resolve the issue with reference to a Best Interest

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[48] *See* B.S. v. T.M., 782 A.2d 1031, 1034 (Pa. Super. 2000).

[49] *Id.*

[50] NANCY DOWD, REDEFINING FATHERHOOD 26 (2000). Men are most likely to support children that they live with. This is true even if the non-biologically related father knows that the children he is supporting are not his biological offspring. *See also* FRANK FURSTENBERG, *Good Dads - Bad Dads: Two Faces of Fatherhood, in* THE CHANGING AMERICAN FAMILY AND PUBLIC POLICY 193, 204 (Andrew Cherlin ed., 1988).

[51] *E.g.* 750 ILL. COMP. STAT 45/5 (a)(2) (2003); UNIFORM PARENTAGE ACT, § 7611(c)(1) (2000) (though the birth certificate only creates a presumption if the man named on the birth certificate and the mother have attempted to marry after the child's birth).

[52] UNIFORM PARENTAGE ACT, § 7611(d) (2000).

of the Child analysis, not by virtue of a blood test.[53] It is not uncommon for courts to simply refuse to order blood tests in a case of clashing presumptions.[54] The courts do not want to know the biological answer. Thus, a biological father's responsibility may depend on whether a judge thinks that someone else, albeit someone by law presumed to the be the father, is a better father. Again, the child does not appear to have a right to support from a biological father, so much as he or she has a right to support from someone in addition to a mother.

The Final Judgement Rule also effectively holds non-biologically related men responsible for children whom they can prove are not their own. Once a child support or paternity order is entered, it is very difficult to re-open it, even with definitive biological evidence.[55] Many times, courts simply refuse to order the blood tests that would make the biological evidence compelling.[56] Contemporary judicial refusals to order blood tests parallel the historic refusals to admit testimony about "access"[57] and they strongly suggest that the law treats paternity as a social construction not a biological fact. The proposed Uniform Parentage Act limits anyone who has formally acknowledged paternity to two years within which he can try to rescind that acknowledgment, and then only on the basis of fraud, duress or material mistake of fact.[58] Once

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[53] *See* N.A.H. v. S.L.S., 9 P.3d 354, 357 (Colo. 2000); Davis v. LaBrec, 549 S.E.2d 76 (Ga. 2001) (same).

[54] *In re* Kiana A., 93 Cal. App. 4th 1109 (2001); *See also* Monmouth County v. R.K., 757 A.2d 319 (N.J. Super. Ct. Ch. Div. 2000).

[55] *See* Ex parte State *ex rel.* J.Z., 668 So.2d 566, 569 (Ala. 1995) ("policy in favor of finality [of paternity judgements] means that a prior adjudication should not be subject to relitigation in the absence of truly compelling circumstances"); Richard B. v. Sandra B.B., 625 N.Y.S.2d 127, 143 (App. Div. 1995) ("unequivocal trend" has been to "zealously safeguard the welfare, stability, and best interests of the child by rejecting untimely challenges affecting his or her legitimacy").

[56] A trial in judge in the case finally decided as *In re* Paternity of Cheryl, 746 N.E.2d 488 (Mass. 2001), refused to order genetic testing notwithstanding a father's post-support agreement motion stating his belief that he was not the biological father. The Supreme Judicial Court implicitly endorsed this decision, suggesting that a refusal to order blood tests would be appropriate in light of "the weight of authority enforcing the finality of paternity judgments." *Id.* at 496.

[57] *See supra* note 42.

[58] UNIFORM PARENTAGE ACT, § 308 (2000).

again, stability trumps information, but the child's right to support from someone in addition to the mother is protected.

4. Functional Non-Biological Fathers

Finally, some courts hold a man responsible for child support because the mother and child have come to rely on that support. Originally, courts debated this issue in the context of step-parents.[59] Some step-parents who had provided support were not be allowed to withhold it after divorce if the child and mother had come to rely on that support.[60] Other courts, worried about the incentive such rulings could have on potential sources of support, did not hold step-parents responsible even if the mother and child had relied.[61] Today, genetic testing has greatly expanded the class of cases in which reliance arguments are made. Because it is now possible to positively exclude as biologically related men who have acted as fathers, many cases now involve attempts by men who previously thought they were the father to absolve themselves of support obligations when they learn definitively that they are not biologically related. In these cases, some courts look to whether the functional father took affirmative steps to prevent locating the biological father.[62] Others simply require a finding that the child or mother relied on the de

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[59] Step-parents are always required to support children for whom they are acting in loco parentis during their marriage. Thus, there is no question that a step-father has some responsibility to help clothe and feed a child with whom he is living. The harder question is whether that obligation continues after the step-father and the child have separated.

[60] Miller v. Miller, 478 A.2d 351 (N.J. 1984).

[61] *In re* Marriage of A.J.N. and J.M.N., 414 N.W.2d 68, 71 (Wis. Ct. App. 1987)("[t]his type of family relationship should be encouraged rather than discouraged through the possible consequence of becoming permanently financially obligated for child support."); Knill v. Knill, 510 A.2d 546, 552 (Md. 1986) (step-father who cared for child as his own was not estopped from denying paternity because "[s]uch conduct is consistent with this State's public policy of strengthening the family... [and he] should not be penalized for his conduct...").

[62] W. v. W., 779 A.2d 716 (Conn. 2001).

facto parent.[63] Technically, these courts estop men from denying responsibility for a child because allowing them to do so would hurt the child. Often, these men have been deceived into thinking that they were the father, but they are still found responsible if the child relied on the mistaken fact of fatherhood.[64] In this class of cases, knowledge of, availability of and the liquidity of the biological father can be crucial. If the biological father can be found and is able to support, courts often absolve the functional father of any obligation.[65] If the biological father is unknown or unavailable or broke, the functional father will be ordered to pay. Thus, the functional father's obligation is dependent on the availability and financial condition of a man whom he has nothing to do with and may well have never met. Courts determine paternity in a manner that protects a child's right to be supported, but not the right to be supported by a biological parent.

D. Rationale for Paternity Law

The above analysis suggests that far from reifying a child's right to support from a biological parent, what paternity doctrine endorses is a child's right to support from two parents. Paternity law is about biparenting as much as it is about biology. The rationale for such a regime might be articulated this way: A child is best off with two parents, if no other man fills the role, the biologically connected man should. There are several problems with this rationale. First, it finds minimal support in history. As mentioned, the original justification for paternity law was rooted in the state's fiscal needs. The state may have hoped that the legal obligation to support would force a marriage (and thereby secure two parents), but the legal obligation itself

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[63] Markov v. Markov, 758 A.2d 75 (Md. 2000); M.H.B. v. H.J.B., 498 A.2d 775 (N.J. 1985); Wright v. Newman, 467 S.E.2d 533, 535 (Ga. 1996).

[64] Commonwealth v. Andreas, 369 A.2d 416 (Penn. 1976); *In re* Paternity of Cheryl, 746 N.E.2d 488, 500 (Mass. 2001).

[65] Monmouth County v. R.K., 757 A.2d 319 (N.J. Super. Ct. Ch. Div. 2000), citing Miller v. Miller, 478 A.2d 351 (N.J. 1984).

did not create a father.[66] Biologically-related men owed support but they could not petition for custody or visitation.[67] It has only been recently that unwed fathers who were adjudged responsible could claim any paternal rights.[68] Traditionally, a paternity suit did not give a child a parent, it gave her a paycheck.

Things are different today. Men adjudged to be fathers have parental rights that they can exercise so it is generally more accurate to view the paternity suit as giving a child a parent in addition to a paycheck. Still, it gives a child an unwilling parent and it is quite unclear why that is fair to the unwilling parent or good for the child. There are three possible answers. First, holding an unwilling man responsible is appropriate punishment for the underlying conduct. Second, children have a moral claim to their biological father's resources. Third, the unwilling man assumed the risk of pregnancy and can therefore be held responsible. The first of these theories is father-driven. The second of these theories is child-driven.[69] The third idea, assumption of risk, collapses into the first two.

1. Punishment of the Father

Unquestionably, the punishment rationale was very much at the core of early paternity doctrine. As the New Jersey court said in 1967, "filiation statutes . . . denounc[e] the misconduct involved [and] punish the offender."[70] Various feminist scholars still defend paternity doctrine

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[66] *See* LAWRENCE STONE, THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500-1800 600-650 (1997). Particularly among propertyless classes, the mother was often content with the financial settlement alone. *Id.* at 641.

[67] *See* KRAUSE, *supra* note 11, at 30-32. Before Stanley v. Illinois, 405 U.S. 645 (1972), unwed fathers had no constitutionally protected parental rights to their children even if the mother died.

[68] *See, e.g.,* Illinois Parentage Act, 750 ILL. COMP. STAT. 45/2-3 (2003).

[69] I am grateful to Naomi Cahn for underscoring this distinction.

[70] *See* State v. M., 233 A.2d 65, 67 (N.J. Super. Ct. App. Div. 1967).

because they see it as necessary to curb irresponsible male sexual behavior.[71] Paternity doctrine also punishes men who cannot be considered irresponsible however. It makes male victims of statutory rape responsible for child support[72] and it carries no exception for male victims of deceit and fraud. More basically, it punishes men for activity that enjoys considerable constitutional protection.[73] The most recent Supreme Court decision on the subject leaves little doubt that there is some constitutionally protected right to sex,[74] though that right is probably limited to non-procreative sex.[75] Nonetheless, given the special status of non-procreative sex, it seems quite odd to punish people who, without any intent to do so, engage in procreative not non-procreative sex. Admittedly, men can and almost certainly should use their own form of birth control more often than they do if they do not wish to be fathers, but birth control does fail and couples routinely rely on a woman's representation as to her own use of birth control. Condoms cannot completely solve the problem of unwanted fatherhood any more than birth control pills and diaphragms can solve the problem of unwanted motherhood. To the extent that paternity doctrine is still rooted in punishment, we punish men who, in many instances, have done nothing wrong.

2. Entitlement of the Child

The other rationale for holding unwilling men responsible as fathers, that children have a

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[71] Nancy D. Polikoff, *The Deliberate Construction of Families Without Fathers: Is It an Option for Lebsian and Heterosexual Mothers?*, 36 SANTA CLARA L. REV. 375, 375-76 (1996); DOWD, *supra* note 44 at 174-75.

[72] *See supra* notes 21 and 22 and text accompanying.

[73] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-2 at 1421-31, 1435 (2d ed. 1988); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187; Robin West, *Integrity and Universality: A Comment on Ronald Dworkin's Freedom's Law*, 65 FORDHAM L. REV. 1313, 1325 (1997).

[74] Lawrence v. Texas, 156 L. Ed. 2d 508 (2003). *See also generally*, David B. Cruz, *"The Sexual Freedom Cases"? Contraception, Abortion, Abstinence and the Constitution,* 35 HARV. C.R.-C.L., L. REV 299 (2000).

[75] *See* Cruz, *supra* note 74.

moral claim to their fathers resources, may have more weight. Judges and commentators talk in terms of the child's "natural" right to his father's resources.[76] Causation, not punishment, seems to underlie this rationale. "But for" the father's sexual activity, the child would not have been born. Therefore the child has a right to the father's financial support. The problem with this formulation is that given the constitutional treatment of reproductive decision-making, the mother is the far better proximate cause of the child's existence. She has significantly more control over the decision to become a parent. If part of what the constitution protects is the right of "the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to . . . beget a child,"[77] the constitution protects women better than men. Once the child is conceived, a man has no right to terminate the pregnancy[78] and the law will hold him accountable as father even if he had no past and has no present intent or desire to parent. He cannot relinquish parental status unless the mother and the state are willing to let him relinquish that status.[79]

This disparate treatment of men and women may be justified. The significant emotional and physical burdens of pregnancy[80] make any decision to beget a child necessarily much more

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[76] *See, e.g.,* Weinand v. Weinand, 616 N.W.2d 1, 6 (Neb. 2000) ("The statutory duty to support [the child] is placed squarely upon her *natural parents*") (emphasis added). "A Child has an unequivocal moral claim on those responsible for conception who have not made alternative provisions for the child's well-being."June Carbone and Naomi Cahn, *The Genetic Tie* (draft on file with author). Blackstone, although a strong advocate of the marital presumption, also suggests that the "duty of parents to provide for the maintenance of their children, is a principle of natural law." 1 WILLIAM BLACKSTONE, COMMENTARIES *446-47.

[77] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); *See also* Planned Parenthood v. Casey, 505 U.S. 833, 852 (1992) ("[I]n some critical respects the abortion decision is of the same character as the decision to use contraception, to which Griswold v. Connecticut, Eisenstadt v. Baird, and Carey v. Population Services International afford constitutional protection. We have no doubt as to the correctness of those decisions.").

[78] *Casey*, 505 U.S. at 894-95.

[79] *See supra* Section IC1.

[80] Eileen McDonagh, *My Body, My Consent: Securing the Constitutional Right to Abortion Funding*, 62 ALB. L. REV. 1057, 1073-74 (1999) (describing the severe physical burdens of pregnancy).

arduous for women than men. Thus, it is much more important that a woman be free from state interference into the decision to beget a child because the process of begetting is so much more difficult for her. Moreover, as several scholars have argued and as many more have observed, mothering and fathering, at least as constructed and lived in this society, are usually very different tasks. Mothering a child who has already been born is much more emotionally and physically taxing than fathering that child.[81] Given the financial tradeoffs that women routinely make when they mother, it is also more expensive than fathering.[82] As the Supreme Court has repeatedly found,[83] men and women are often not similarly situated with regard to parenthood.

The fact that most fathers are not mothers, does not necessarily justify making unwilling men fathers, however. The truth is we force fatherhood on men in a way we do not force motherhood on women and we do that in the name of protecting a child's right to support from biological parents even though the law routinely ignores, obfuscates or simply rejects biology as the basis for parenthood. As we saw in Section IC, the law does not protect a child's right to support from a biological parent, though it may protect a right to support from some one in addition to the mother. Why should the child have a moral entitlement to support from a biological parent only sometimes?

3. Assumption of Risk

Perhaps the answer lies in an assumption of risk. When engaging in sexual intercourse, men assume the risk that a court will not find someone better suited to be the father of any

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[81] Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody,* 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 142-53 (1992); FINEMAN, supra note 2.

[82] Women tend to mother by sacrificing job opportunities and career advancement. Men typically father by not sacrificing those things. *See generally* Joan C. Williams, *Deconstructing Gender,* 87 MICH. L. REV. 797 (1989).

[83] Lehr v. Robertson, 463 U.S. 248, 266-67 (1983) (biological fathers not necessarily entitled to block adoption if they do not have relationship with mother and/or child); Miller v. Albright, 523 U.S. 420, 435 (1998) (to transmit citizenship to foreign born illegitimate child, citizen mother performs necessary substantive contact at birth, but father must show he acted, before child turned 18, in manner sufficient to establish paternity); Nguyen v. INS, 533 U.S. 53, 68 (2001) (knowledge of child and fact of parenthood is established at birth for mothers but not fathers and therefore it is permissible for citizenship statute to distinguish between mothers and fathers without violating equal protection).

potential child. Perhaps regardless of whether they have done anything wrong by engaging in intercourse, and regardless of how much more say a woman has in bringing the child into the world, men should still share some of the risk of unwanted pregnancies. Forcing men to assume this risk would help deter them from engaging in irresponsible sexual behavior and would honor whatever duty flows from blood connection.

Accepting the legitimacy of either of these assumption of risk arguments, which are essentially deterrence and moral obligation arguments, hardly requires endorsing paternity doctrine, however. First, if the concern is deterrence, why do we choose to deter with paternal status? The involuntary imposition of the status of fatherhood on unwilling men says something rather disturbing about our notion of fatherhood. When we use paternal status as a deterrent, we imbue that status with a negativity that diminishes those men who fulfill the role willingly and honorably and lovingly. It is odd that we "deter" the reckless philanderer by imposing on him the same obligation we impose on a man who purposefully helps bring a child into the world and willingly nurtures that child. We impoverish children's and adults' understanding of fatherhood when we make it about resources and only resources.[84]

Second, if the concern is moral obligation to blood dependents, one must ask why we treat the moral obligation to young dependents so vastly differently than the moral obligation to old dependents. The Social Security system in this country makes the dependency of the elderly a social concern. The young and able-bodied pay money into an entitlement program for the elderly.[85] In contrast, paternity doctrine and the state's remarkably stingy support of children make children's dependency a private concern. It is hard to see why an adult's moral obligation to a child he never wanted or intended to have is greater than his moral obligation to parents who probably wanted and almost certainly sacrificed for him. The obsession the law seems to have

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[84] A tax on biological fathers, as mentioned in the introduction and as discussed infra text accompanying 311-314could adequately serve a deterrent function without making unwanted men fathers.

[85] For a discussion of how the social security benefit system actually operates, see Regina T. Jefferson, *Privatization: Not the Answer for Social Security Reform,* 58 WASH. & LEE L. REV. 1287 (2001).

with protecting a child's "right" to support from someone in addition to the mother,[86] helps keep children's dependency private, but why? We collectivize our moral responsibility for the elderly, why do we refuse to do the same for the young? [87]

Third, it is not at all clear that enforced fatherhood in these circumstances is good for the child even if it does provide the child with some resources.[88] The harm that comes to the child from the animosity between parents can easily outweigh whatever benefit more resources bring.[89] In all likelihood, the child would be better off with resources emanating directly from the state rather than from a reluctant father who is not likely to pay very much[90] or very consistently[91] and is unlikely to assume a meaningful role as father.[92] If our concern is children why we do we

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[86] *See supra* Section IC.

[87] As also mentioned in the introduction and as discussed more fully infra text accompanying notes 307-310, most of the rest of the industrialized world does collectivize moral responsibility for the young.

[88] Studies of unmarried women's attempt to collect child support suggest that the costs to the children stemming from friction between the parents may outweigh the benefits gained by any added support the biological father is able to give. Sara McLanahan et al., *Child-Support Enforcement and Child Well-Being: Greater Security or Greater Conflict*, *in* CHILD SUPPORT AND CHILD WELL-BEING 239, 254 (Irwin Garfinkel et al. eds., 1994)

[89] *Id.*

[90] Studies indicate that approximately 2 of every 10 fathers were unemployed the week before being interviewed and 56% of unwed fathers live below or just above the poverty level. Sara McLanahan et al., *The Fragile Families and Child Wellbeing Study, Baseline National Report* 3, 10-11 (Bendheim-Thoman Ctr. for Research on Child Wellbeing, Princeton U., Mar. 2003), *available at* http://crcw.princeton.edu/files/nationalreport.pdf. Researchers hypothesize that over one quarter of unwed fathers are not steadily employed. Wendy Sigle-Rushton & Sara McLanahan, *For Richer or Poorer: Marriage as an Anti-Poverty Strategy in the United States* 13 (working paper, Bendheim-Thoman Ctr. for Research on Child Well-being, Princeton U., June 2003), *available at* http://crcw.princeton.edu/workingpapers/WP01-17-FF-Sigle.pdf.

[91] TIMOTHY GRALL, U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT 2 (1999). Of custodial mothers who were awarded child support, only 45.9% have received payment in full. Approximately 41% of all child support award money has not been received. *Id.*

[92] Fathers who never were or cease to stay married to their children's mother usually drift out of their children's lives.. *See* DOWD, *supra* note 50 at 204. This trend is all the more likely with unwed fathers because unwed mothers are more likely than wed mothers to oppose paternal involvement. I-Fen Lin & Sara McLanahan, *Parents' Judgments About Nonresident Fathers' Obligations and Rights* 16

assume that children will be better off with unwilling and resistant fathers?

The inability to answer these questions convincingly suggests that none of the rationales for biological paternity doctrine survive scrutiny. If the current doctrine is rooted, as the traditional doctrine was, in relieving the state of the burden to support, only those biological fathers of children receiving public assistance should be liable. If the current doctrine is rooted in punishment, we should not hold male victims of rape and deceit liable, and we are left having to explain why behavior that the state has no business regulating becomes behavior that the state can punish merely because of the (common) failure of a birth control method. We also must ask whether the punishment of fatherhood fits the crime of procreative sex, and, more fundamentally, whether we want fatherhood to be considered a punishment. If the doctrine is rooted in the child's needs, then what the father owes should be a function of other resources available to the child. A child-centered approach would make both the award and the determination of obligation a function of the child's needs, not the father's ability. If the current doctrine is rooted in the child's moral entitlement to support from his or her biological father, one cannot explain the myriad of presumptions that preclude the child from suing and often from even finding her biological father and one must confront the fact that we force this moral obligation on men in a way that we do not force it on women. We also must ask why we make the parent-to-child obligation to support private, while we make the child-to-parent obligation to support public and whether the child is actually better off with an unwilling father.

The next section explores an alternative theory that does a better job of explaining legal fatherhood. It suggests that a man's explicit or implicit agreement with a child's mother provides a more comprehensive framework for understanding paternity.

II. Contracting for Paternity

(working paper, Bendheim-Thoman Ctr. for Research on Child Well-being, Princeton U., June 2000), *available at* http://crcw.princeton.edu/workingpapers/WP00-03-FF-Lin.pdf.

Perhaps surprisingly, the law is remarkably comfortable letting contract confer parental status. Indeed, to the extent that the marital presumption used to reign supreme, contract as a basis for paternity has more historical support than does biology.[93] The law of legitimacy (which lets the marital contract determine paternal relationships) predates the law of paternity by at least a thousand years.[94] Today, it is contract that currently governs the law of paternity in almost all cases involving non-traditional means of conception and it is increasingly contract that governs the law of paternity in most cases involving men who have acted like fathers toward a child. This section explores the reliance on contract in more detail.

A. The Marital Presumption as Contract

For most of western history, marriage, not blood, determined fatherhood. Evolutionary biologists may tell us that genes determine fatherhood,[95] but the law has always told us something else. For the Romans and the pre-sixteenth century British, many children simply had no fathers. A child born out of wedlock was *filius nulius*, or child of nobody.[96] As mentioned earlier, a child born in wedlock was the child of the husband unless evidence showed that the

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[93] For a brief discussion of the extent to which it is appropriate to treat marriage as a contract, see *infra* notes 99-103 and text accompanying.

[94] *See* Joseph C. Ayer, Jr., *Legitimacy and Marriage*, 16 HARV. L. REV. 22 (1902).

[95] *See generally,* ROBERT WRIGHT, THE MORAL ANIMAL (1994); RICHARD DAWKINS, THE SELFISH GENE (1989). Close reading of the evolutionary biology literature also reveals that the best reproductive strategy for men is actually to have some offspring whom they do not father, that is, to have some offspring who are provided for by other men. For an explication, see Katharine K. Baker, *Gender, Genes and Choice: A Comparative Look at Feminism, Evolution and Economics,* 80 N.C. L. REV. 465 (2002).

[96] *See* Ayer, *supra* note 94. *See also* 1 BLACKSTONE, *supra* note 70, at *458-59. The patriarchy implicit in the illegitimacy doctrine is implicit in the phrase *filius nulius.* An illegitimate child was considered the child of nobody even though it was perfectly clear who his or her mother was. It was only the father who was missing.

husband had no "access" to his wife[97] but neither husband or wife could testify to non-access.[98] Moreover, a child born two weeks into a marriage, was just as legitimate as the one born 40 weeks into the marriage. Although there were disturbing racial exceptions to the marital presumption and some men might have been able to establish illegitimacy of a marital child if they wanted to,[99] the law was indisputably comfortable with letting marriage determine paternity. A man became a father by marrying, and only by marrying, a woman.

There may have been both stability and practicality reasons for letting marriage be the arbiter of paternity. Asking biological questions, the answers to which can disrupt families, crush existing relationships, and reveal disquieting truths about the reality of sexual behavior may do more harm than good.[100] Moreover, historically, it was often impossible to get an accurate answer to paternity questions. Before genetic testing,[101] proving paternity was even harder than proving other notoriously difficult to prove sexual acts, like adultery or rape. With paternity, the question is not just whether a sexual act took place, but whether the particular sexual act was the one that led to the birth of a child. With no real way to ascertain a reliable answer, there was

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[97] Originally the lack of access could be established only if the husband was "beyond the four seas of England." *See In re* Findlay, 253 N.Y. 1, 7 (1930).

[98] *See* Mary Louise Fellows, *The Law of Legitimacy: An Instrument in Procreative Power*, 3 COLUM. J. GENDER & L. 495, 498-99 (1993).

[99] As Professor Fellows insightfully details, 19th century American courts did not apply the marital presumption in cases involving children who had African-American features. *Id.* at 500. Moreover, the fact that some people could testify to non-access, even if the husband and wife could not, suggests that the courts wanted to afford married men some protection against having to support children who did not share their genetic material. *Id.* at 507.

[100] Paternity cases have always been "sordid spectacles" and the parties on all sides often wanted to avoid them. KRAUSE, *supra* note 11, quoting MAXINE B. VIRTUE, FAMILY CASES IN COURT 36-37 (1956).

[101] Although various forms of blood testing appeared first in the 1930s, and experts interpreting those tests often gave statistical probabilities that sounded determinative (i.e., a 95% chance of paternity), most of that testing could not prove paternity. *See* Ira Ellman & David Kaye, *Probabilities and Proof: Can HLA and Blood Group Testing Prove Paternity?,* 54 N.Y.U. L. REV. 1131 (1979). It has only been the last 10 years' advances in DNA matching that have allowed us to determine paternity reliably. DAVID FAIGMAN, DAVID KAYE, MICHAEL SAKS & JOSEPH SANDERS, MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 19-1.4 (1997).

little point in asking the question.

Marriage was the arbiter because the law needed some arbiter; biological questions were too messy. One might ask why the law needed an arbiter at all though. Why insist that certain children have legal fathers when children of unmarried mothers did not? The answer seems to be in part to protect (at least some) children and in part to respect the institution of marriage. In his Commentaries, Blackstone writes that these two goals were actually one. "[T]he main end and design of marriage . . . [is] . . . to ascertain and fix upon some certain person to whom the care, the protection, the maintenance and the education of the children should belong. . . ."[102] This view suggests that at its core, the agreement to marry was about children as much if not more than it was about husband and wife. The state supported marriage because it was through marriage that children got support. If the "main end and design" of the agreement to marry was to support children, then sub-agreements or assumptions about fidelity needed not trump the primary obligation to support children.

An early British court deciding an awkward legitimacy case in 1304 placed the sanctity of marriage, not children, at the core of the marital presumption. The court would not question the paternity of a child born to a woman whose husband had been abroad for three years because "the privity between a man and his wife cannot be known."[103] In other words, the law treated the decision to marry as primary. It was not the law's place to interfere with the unit created by marriage, regardless of what transpired during the marriage.

In *Goodright v. Moss,* [104] Lord Mansfield seemed to echo this view, though he also emphasized the collateral benefit of supporting children. The bar to husband and wife testifying about access was "a rule founded in decency, morality and policy, that they shall not be permitted to say after marriage, that they have had no connection, and therefore that the offspring is

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[102] 1 BLACKSTONE, *supra* note 76, at *444-45.

[103] Y.B. 32 & 33 Edw. 1 (R.SA.) 60, 63 (1304) (Hengman J.), *quoted in* WILLIAM MCGOVERN, JR., SHELDON F. KURTZ & JAN ELLEN REIN, WILLS, TRUSTS AND ESTATES 35 n.23 (1988).

[104] 98 Eng. Rep. 1257 (1777).

spurious." Lord Mansfield, like the court in 1304, argues that marriage links two people together and the law has no place weakening that link. Marriage is a contract to be together and regardless of whether the wife was also "together" with someone else, she is still in a unit with the husband.

To be sure, honoring contract was not the only reason for preferencing marriage over blood. Using marriage not blood also helped ensure the orderly distribution of property. Indeed, one might reject Blackstone's view that marriage was an institution designed primarily to protect children and instead argue that marriage was an institution designed primarily to facilitate the orderly distribution of property. It is far easier for a probate court to identify the children of an intestate's marriage than all the children whom the intestate may have begotten. Moreover, given marriages' ability to regulate women's sexual behavior, marriage was a way of helping steer a man's property to his biological issue. As long as wives were not allowed to engage in sexual relations with anyone other than their husbands, husbands could fairly safely assume that children of the marriage were "their" children. The problem, of course, is that infidelity is as old as the institution of marriage.[105] The marital presumption of paternity and the evidentiary rules about testifying to access were necessary because everyone has always acknowledged that marriage is an imperfect protector of biological inheritance lines.

A full historical discussion of the reasons for the elevation of marriage over blood is beyond the scope of this article. What is clear, though, is that by preferencing marriage, the law was preferencing a kind of contract. Of course, "marriage... is something more than a mere contract"[106] and I do not mean to suggest that contract doctrine can or should be used to govern all aspects of the marital relationship. The law has never done so and there are sound reasons for

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[105] Indeed, possibly older than marriage. Sarah Blaffer Hrdy has documented how female apes who are supposed to be "loyal" to the male head of their troop, often stray away in search of other companions. Sarah Blaffer Hrdy, *Empathy, Polyandry and the Myth of the Coy Female, in* FEMINIST APPROACHES TO SCIENCE 119-20 (Ruth Bleier ed., 1986).

[106] Maynard v. Hill, 125 U.S. 190, 210-11 (1888).

it continuing to adopt contract principles reluctantly.[107] The inescapable fact though, is that the joint decision to enter into a marriage looks more like contract than anything else.[108] It may be a contract to enter into a status,[109] but the agreement to enter that status must be a mutual one that involves rights and duties for both parties.[110] Traditionally, by agreeing to enter into that status, husband and wife were agreeing to support and raise any children born to the marriage. Because husband and wife agreed to raise children, they were bound to be father and mother, regardless of whether the children born to the marriage were biologically related.

B. The New-Fangled Way: Parenthood by Express Contract

A great many children today are conceived by means other than sexual intercourse.[111] Courts, with the weight of scholarly commentary behind them, almost always use contract to determine who the parents of these children are. In the most common and familiar case, the biological father of a child born by virtue of insemination through a sperm bank has signed away his rights and obligations as a father. The law honors the sperm donor's intent not to be a father and the contract in which he makes that intent known. Surrogacy contracts, which have gotten considerably more media attention than sperm donation contracts, are also usually enforced. The degree of regulation varies from state to state, but few states ban surrogacy contracts and

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[107] Ira Mark Ellman, *"Contract Thinking" was Marvin's Fatal Flaw*, 76 NOTRE DAME L. REV. 1365, 1373 (2001) (people do not think of relationships like marriage in contract terms).

[108] "[I]t [is] of contract that the relation should be established." *Maynard,* 125 U.S. at 211, quoting Adams v. Palmer, 51 Me. 481, 483 (1863).

[109] *Id.*

[110] A marriage is voidable if a court determines that either party made a misrepresentation concerning the essentials of marriage and thereby induced consent. IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXTS, PROBLEMS 118 (3d ed. 1998).

[111] Exact figures are impossible to generate because there is no registration or notification requirement for sperm donation or, in many states, surrogacy arrangements.

most states enforce them.[112] With traditional surrogacy contracts, in which a woman enters a contract with a man who provides the sperm which she then uses to impregnate herself, the law honors the traditional surrogate's intent not to be a mother, despite her genetic connection to the child. The law finds the traditional surrogate's intent in the surrogacy contract.[113] When it honors gestational surrogacy contracts, in which a surrogate mother gestates another woman's ova fertilized with another man's egg, the law allows the gestational surrogate to sign away whatever parental rights she might acquire by virtue of her gestational labor. It also allows the contract to bestow parental rights on the male and female genetic contributors. It is the through the contract, not the genetic contribution, that the "intended" parents acquire their parental rights.

Johnson v. Calvert,[114] probably the most well known and important gestational surrogacy case decided to date, makes this perfectly clear. In *Johnson*, after blood tests confirmed that the egg donor was the genetic mother, the court was faced with conflicting presumptions of motherhood under the California statute. The surrogate acquired parental status by virtue of "her having given birth to the child;"[115] the genetic mother acquired her parental status by virtue of the blood test. The court found that "[b]ecause two women each have presented acceptable proof of maternity, we do not believe this case can be decided without enquiring into the parties'

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[112] For a review of the regulation of surrogacy laws, see http://www.kentlaw.edu/islt/TABLEIV.htm.

[113] The primacy of the contract over the genetic contribution is evident in the courts' treatment of the men in these situations. If surrogacy situations were really treated as instances in which the sperm donor impregnated the surrogate the "old-fashioned way" then a surrogate's husband would, in almost all states, be entitled to a presumption of paternity. As indicated *supra,* note 53, many courts use a Best Interest of the Child standard to adjudicate competing claims to paternity when more than one man enjoys the presumption of paternity as both men would in a traditional surrogacy contract case (one by virtue of a blood test; the other by being married to the mother). Yet even in *In re* Baby M, 537 A.2d 1227 (N.J. 1988), a case which struck down surrogacy contracts, the New Jersey Supreme Court never thought about bestowing parental rights on Mary Beth Whitehead's husband.

[114] 851 P.2d 776 (Cal. 1993) (en banc).

[115] CAL. CIV. CODE § 7003(1) (1993) (repealed 1994).

intentions as manifested in the surrogacy agreement."[116] In letting contract interpretation guide their decision about parental rights, the Court relied on commentators who have emphasized the reliance interest[117] and the expectations[118] created in the intending parents by the contract.

The *Johnson* court invoked a "but for" causation argument also, but the Court did not rule that "but for" the Johnsons' actions the child would not have been born. Instead the court wrote, "[b]ut for *their acted-on intention*, the child would not exist."[119] Intent, not action, was at the core of the decision. Thus the court held that when there are competing presumptions of motherhood under the California act "she who intended to procreate the child -- that is, she who intended to bring about the birth of a child that she intended to raise as her own -- is the natural mother."[120] The *Johnson* court was confident enough of its analysis to go on to declare that "in a true 'egg donation' situation, where a woman gestates and gives birth to a child formed from the egg of another woman with the intent to raise the child as her own, the birth mother is the natural mother under California law."[121] Less than a year later, the Supreme Court of New York was faced with the very case the *Johnson* court foresaw. Completely persuaded by *Johnson's* analysis, the New York court held that a gestational mother who had intended to raise the children born from her as her own, was the natural mother even though she had no genetic

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[116] *Johnson,* 851 P.2d at 782.

[117] *See* John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights,* 66 N.Y.U. L. REV. 353, 415-16 (1991) ("The intended parents rely, both financially and emotionally, to their detriment on the promises of the biological progenitors and gestational host.")

[118] Shultz, *supra* note 37, at 300-03. ("When []intentions are deliberate, explicit and bargained for, where they are the catalyst for reliance and expectations, as is the case in technologically -assisted reproductive arrangements, they should be honored.")

[119] *Johnson,* 851 P.2d at 782 (emphasis supplied). A "but for their action" test could not have resolved the dispute because "but for" the surrogate's action, the child would not have been born either.

[120] *Id.* at 782.

[121] *Id.* at 782, n.10.

connection to the children.[122]

Courts in cases involving non-expert artificial insemination and usually involving no written contract, also rely on intent to determine parenthood.[123] In the absence of explicit contract, courts find implicit ones. In *C.M. v. C.C.*,[124] a New Jersey court found relevant and determinative the known donor's "consent and active participation" in the artificial insemination and from that evinced an intent "to assume the responsibilities of parenthood."[125] The sperm donor was thus declared the father. In *Jhordan C. v. Mary K*,[126] although the Court explicitly failed to reach the question of whether an oral or written nonpaternity agreement between the parties would be binding,[127] it nonetheless took particular care to note that the parties' conduct during the pregnancy and for three months after the birth did not evince an intent to exclude the biological father.[128] Hence the biological father was declared the father. In *R.C. v. J.R,*[129] the Colorado Supreme Court, after surveying most of the decided cases and reviewing most of the legal commentary on the subject, held that the determinative question on whether the sperm donor should receive parental status was whether "[the sperm donor and mother] at the time of

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[122] McDonald v. McDonald, 608 N.Y.S.2d 477 (App. Div. 1994).

[123] *See* R.C. v. J.R., 775 P.2d 27 (Colo. 1989); Jhordan C. v. Mary K., 179 Cal. App. 3d 386, 392 (Ct. App. 1986); C.M. v. C.C., 377 A.2d 821 (N.J. 1977).

[124] 377 A.2d 821 (N.J. Juv. & Dom. Rel. Ct. 1977).

[125] *Id.* at 824-25.

[126] 179 Cal. App. 3d 386 (Ct. App. 1986).

[127] *Id.* at 396.

[128] Admittedly, this court operates from a presumption that the biological father should be the father, but that presumption could be overcome by evidence that the parties' intent was that he not be the father. *Id.*

[129] 775 P.2d 27 (Colo. 1989).

insemination agree that [the sperm donor] will be the natural father."[130]

Courts are more split on the role of intent when the party claiming parenthood is not biologically related to the child and did not carry the child to term. In *Nancy S. v. Michele G.*,[131] a California court rejected the visitation claim of a woman who had, together with her partner, decided to have and rear two children. The non-child bearing partner sued for parental rights after the couple split. The partner was listed on each child's birth certificate as the father, lived with and helped raise the children for several years and shared custody of the children for a time after the couple split.[132] The court held that "[a]lthough the facts . . . [were] relatively straightforward regarding the intent of the natural mother to create a parental relationship between [the non-biological mother] and her children" using intent as a standard would be ill-advised because it would depend too much on "elusive factual determinations."[133] In contrast, in *E.N.O. v. L.M.M.* the Supreme Judicial Court of Massachusetts relied extensively on a coparenting agreement executed by a lesbian couple.[134] So did a Pennsylvania court in *J.A.L. v.*

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[130] *Id.* at 35. In one case in which a court did not rely on preconception intent when it granted paternal rights to a sperm donor, the court looked to the post-birth relationship that had developed between the child and the sperm donor. Thomas S. v. Robin Y., 618 N.Y.S.2d 356 (App. Div. 1994). The court looked to the functional agreement between the biological mother and the biological father which indicated mutual intent to have the biological father assume a paternal role. Their behavior post-birth modified or trumped whatever the court may have been able to glean about pre-conception intent.

[131] 279 Cal. Rptr. 212 (Ct. App. 1991).

[132] *Id.* at 214.

[133] *Id.* at 219.

[134] 711 N.E.2d 886 (Mass. 1999). In doing so, the court distinguished an earlier case involving the claim of a functional father because there was no indication that the functional father and them other had agreed that he should assume a parental role and he had not been "intimately involved in the decision to bring the child into the world. Id. At 891, citing C.M. v. P.R., 649 N.E.2d (Mass. 1995).

E.P.H. "[135] Preconception intent is critical to courts' allocations of parental rights.[136] In *Karin T. v. Michael T.*,[137] the court held that a woman who had changed his identity to become a man and participated in a marriage ceremony with a woman was responsible for the children born to the marriage through artificial insemination. The parties had signed an agreement in which the man agreed that the children were "his own legitimate . . . children."[138] The court held that "[t]he contract and the equitable estoppel which prevail in this case prevent the respondent from asserting her lack of responsibility by reason of lack of parenthood."[139]

In her book, *Defining the Family, Law Technology and Reproduction in an Uneasy Age,* Janet Dolgin argues that in relying on intent in reproductive technology cases, courts have not been relying on contract.[140] She theorizes that courts are wary of relying on contract in this area because contract principles invoke the rules of the marketplace and courts resist applying those rules to the family.[141] Had they been willing to rely on contract, she opines, they would have simply looked to the documents and not struggled to discern intent. In short, she argues that the opinions use a subjective not an objective theory of contract and thus cannot accurately be

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[135] 682 A.2d 1314 (Pa. Super 1996) (relying on a document that recited the biological mother's and her partners' joint decision to conceive and raise a child).

[136] Also important is the distinction between visitation rights and a finding of paternity. Lesbian and gay male partners often do not seek an adjudication of paternity or maternity. They seek custody or visitation rights under something like a de facto parenthood theory. *See* E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999). Courts may be more comfortable granting custody rights as opposed to parental status to a non-biologically related person, but it is not at all clear that there is an important substantive difference between an award of custody and a determination of parenthood. Legal custody gives one the right to make decisions on behalf of the child. *See* ELLMAN ET AL., *supra* note 110 at 613. Those decisions may be challenged in court by another person with custody rights. The right to custody is best understood as the right to parent, albeit with some interference from other parents.

[137] 484 N.Y.S.2d 780 (Fam. Ct. 1985).

[138] *Id.* at 782.

[139] *Id.* at 19.

[140] JANET DOLGIN, DEFINING THE FAMILY: LAW, TECHNOLOGY AND REPRODUCTION IN AN UNEASY AGE 180 (1997).

[141] *Id.* at 178-82.

described as relying on contract.[142] Although Dolgin's assessment of the courts' discomfort with these cases is certainly sound, she dismisses the importance of contract too readily. Contracting for parental rights outside of the construct of marriage is a novel, difficult and weighty proposition. There are, after all, very important third parties involved.

The idea that courts would use simple objective theories of contract interpretation when children's existence and ultimate care are at stake is rather simplistic. "Objective" interpretations depend on context. "[S]ubjective intent . . . is relevant . . . insofar as it helps a court ascertain the 'objective' meaning of certain terms."[143] The meaning attached to words and actions is a function of norms and conventions.[144] Words and actions serve as manifestation of intent only when there is a commonly understood convention that gives those words and actions meaning. The sheer novelty of contracts in the reproductive technology area makes it likely that courts will need to struggle with objective interpretation. There are no commonly understood conventions. In addition, the courts' and the parties' lack of familiarity with the technology make it important for courts to scrutinize the contracts particularly carefully. Finally, and possibly most important, the parties to these contracts are contracting into and out of status that enjoys significant constitutional protection.[145] It is implausible and arguably inappropriate to think that at this nascent stage of technological baby-making a court would enforce a surrogacy contract with the facility and efficiency with which it enforces a contract for the sale of widgets. The norms

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[142] *Id.* For more on the difference between objective and subjective theories of contract interpretation see 1 E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.6 (2d ed. 1998).

[143] Randy Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 304 (1986).

[144] *Id.* at 303.

[145] The Supreme Court's protection of parental rights has a long and venerable history. *See* Meyer v. Nebraska, 262 U.S. 390 (1923) (striking down law prohibiting the teaching of a foreign language because it violated parents' rights to educate their children as they wished); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (striking down compulsory public school attendance for the same reason); Prince v. Massachusetts, 321 U.S. 158, 164 (1944) (reifying a parent's right to "bring up [a] child in the way he should go"); Wisconsin v. Yoder, 406 U.S. 205 (1972) (striking down compulsory high school education law because it violated parent's ability to raise their children in the Amish tradition).

pursuant to which people act in this arena are still emerging and thus courts must be particularly careful in assessing what words and actions will have what legal meaning. This does not mean that courts are not using contract. It means they are using contract carefully.

C. De Facto and Equitable Fathers: Parenthood by Implicit Contract

The final class of cases in which courts rely on contract theory involve de facto and/or equitable fathers. As mentioned earlier, a growing number of courts are holding non-biologically related men responsible for the support of children for whom they have been functioning as fathers.[146] Courts also allow non-biologically related men who want to claim parental rights to do so with regard to children for whom they have been functioning as father.[147] In both cases, the courts estop one party from claiming a lack of paternity based on biology alone. Various different theories underlie these findings of estoppel, but they all involve notions of bargain or reliance. That is, they all involve notions of contract. Those courts using a theory of implied or express bargain emphasize the consideration the putative father has received by acting as father. Those courts using a theory of express[148] or implied[149] promise emphasize reliance.

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[146] *See* Monmouth County v. R.K., 757 A.2d 319 (N.J. Super. Ct. Ch. Div. 2000); Markov v. Markov, 758 A.2d 75 (Md. 2000); J.M. v. S.M., 750 N.E.2d 34 (Mass. App. Ct. 2001).

[147] Tregoning v. Wiltschek, 782 A.2d 1001 (Pa. Super. Ct. 2001) (mother estopped from denying paternal status of man who had acted as father); *In re* Marriage of Roberts, 649 N.E.2d 1344, 1346 (Ill. App. Ct. 1995) (biological mother estopped from denying husband's paternity of the child when she represented to him that he was the father and, relying on that representation, he developed a relationship with the child.)

[148] *See* Nygard v. Nygard, 401 N.W.2d 323 (Mich. Ct. App. 1986) (man asked pregnant woman to marry him knowing that he was not the biological father of the children to be born and promising to raise them as his own.)

[149] *Markov*, 758 A.2d at 81-83 (man's eleven year contact with biologically unrelated children, during which he continually insisted on treating and raising the children as his own, established reliance sufficient to estop man from denying responsibility); *Monmouth County*, 757 A.2d at 327 (man who never married mother but acted as "psychological parent" to biologically unrelated children estopped from denying paternity).

In *Clevenger v. Clevenger*, a California court ruled that an express oral agreement to support the child was enough to hold a non-biologically related man responsible as father.[150] In *Wade v. Wade*, a Florida court looked to the man's behavior, holding himself out as the father, claiming the son as a dependent, signing the birth certificate, as well as "the benefits of his representations as the child's father, including the child's love and affection, his status as father . . . and the community's recognition of him as the father" to find the putative father estopped from denying paternity.[151] In another case involving a man trying to repudiate his paternity, a Pennsylvania court emphasized that "the dispositive issue should be whether the putative father has indicated by his conduct that the child is his own."[152] Because he had so indicated, he was estopped from denying his paternity.

Biological mothers can also be estopped from denying parental rights to men who have acted as father. Under both the equitable parent and de facto parent doctrines, a growing number of states recognize rights in non-biologically related men who have acted as fathers.[153] The courts recognize these rights at the request of the men. Quite obviously, if these men did not find benefit in the parental relationship, they would not make claims for custody.

All of these cases involve courts finding that the benefits a man receives by functioning

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[150] 11 Cal. Rptr. 707 (Ct. App. 1961). The court did not indicate whether a mistake of fact (that the man presumed, incorrectly, that he was the biological father) would void the contract. *See also* Peitros v. Peitros, 638 A.2d 545, 548 (R.I. 1994) (man liable for support based on his "voluntary and continuous course of conduct as the child's only father" and the fact that the mother's choice to not terminate the pregnancy was a "direct result of [the man's] assurances that he would assume the parental role").

[151] Wade v. Wade, 536 So. 2d 1158, 1160 (Fla. Dist. Ct. App. 1988).

[152] Gonzalez v. Andreas, 369 A.2d 416, 418 (Pa. Super. Ct. 1976).

[153] *In re* Marriage of Gallagher, 539 N.W.2d 479 (Iowa 1995) (husband allowed to bring claim for custody for 2 year old child he treated as his own); Bupp v. Bupp, 718 A.2d 1278 (Pa. Super Ct. 1998) (mother's ex-boyfriend who lived with child for a year and acted as father can bring action for custody when couple separates); *In re* Marriage of Sleeper, 929 P.2d 1028 (Or. Ct. App. 1996) (mother estopped from denying husband's paternity even though both spouses knew the child was not biologically related to the husband). The ALI Principles incorporate both the equitable parent and the de facto doctrines into its parental rights section. *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(b)-(c) (2002).

as father confer rights and obligations that cannot be abandoned upon demand. The obligations follow the benefits because his behavior constitutes "conduct that would lead a reasonable person in the [mother's] position to infer a promise in return for performance or promise. . . "[154] The mother can count on his continued support because she allowed him to enjoy the benefits of fatherhood. He can count on his continued ability to receive the benefits of fatherhood because he met the obligations of fatherhood.

Recently, courts have focused more on reliance and less on the benefit the putative father received. Sometimes courts talk about the reliance of the child;[155] sometimes they talk about the reliance of both the child and the mother.[156] Often the courts are ambiguous about who relied[157] and sometimes they talk only about the reliance of the mother.[158] This confusion about who must rely is understandable and ultimately unimportant. To separate a child's reliance from that of his acknowledged parent makes no sense. Unless one operates at the extremes of wealth, if a parent is hurt financially -- as any parent would be if a source of support disappeared -- the child

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[154] 1 FARNSWORTH, *supra* note 142 at 235.

[155] *In re* Paternity of Cheryl, 746 N.E.2d 488, 496 (Mass. 2001). ("Cheryl knew and relied on [the man who had been supporting her] as her father"); Monmouth County v. R.K., 757 A.2d 319, 331 (N.J. Super. Ct. Ch. Div. 2000) ("[child] has been financially reliant upon [man who had been supporting her]"; Godin v. Godin, 725 A.2d 904, 911 (Vt. 1998) (man estopped from denying paternity because financial and emotional welfare of the child who depended on man for 14 years trumped fact that man and child were not biologically related.)

[156] Nygard v. Nygard, 401 N.W.2d 323, 327 (Mich. Ct. App. 1986) ("The circumstances of this case are such that the promise must be enforced if injustice is to be avoided. Because of defendant's promise an obligation arose both to plaintiff and to the child."); Wright v. Newman, 467 S.E.2d 533, 535 (Ga. 1996) (man who for 10 years acted as father to child estopped from denying paternity where both mother and child "relied upon [man's] promise to their detriment.")

[157] *Monmouth County*, 757 A.2d at 327 ("there was reasonable reliance"); C.C.A. v. J.M.A., 744 So.2d 515 (Fla. Dist. Ct. App. 1999) (holding that father-child relationship of 2 years was sufficient amount of time for court to apply paternity-estoppel principle).

[158] *Markov,* 758 A.2d at 83. ("it is incumbent upon Appellee . . . to prove sufficiently that her reliance upon Appellant's prior conduct and verbal representations has resulted in a... loss."); Perkins v. Perkins, 383 A.2d 634, 636 (Conn. 1977) (man, who was "for all intents and purposes the father of the child" for over 2 years, estopped from denying obligation to support child where mother relied on man's commitment).

will be hurt also. The child is in no position to rely financially because the child does not make financial decisions. To the extent that courts feel the need to find financial reliance,[159] they inevitably will look to reliance of the acknowledged parent (i.e., the mother), not just the child. When they find that reliance, they estop the putative father from disclaiming his support. This trend toward reliance suggests that courts are switching contract doctrines and relying more on notions of promissory estoppel than mutual assent. The nature of the relationship and/or the longevity of the period of support readily support findings that the mother "rel[ied] on the promise" and the putative father "had reason to expect the reliance that occurred."[160]

Whether they use theories of mutual assent or promissory estoppel, courts are looking to the functional relationship between two adults to determine parenthood. By examining that functional relationship they find intent and consideration and reliance.

Before leaving the discussion of parenthood by implicit contract, it is also worth noting that, perhaps unwittingly, the Supreme Court's doctrine of paternal rights is remarkably consistent with a contract theory. The string of Supreme Court cases dealing with claims of unwed fathers that starts with *Stanley v. Illinois*[161] and ends with *Michael H. v,. Gerald D.*[162] suggests that the most important factor in determining whether a genetic father will be entitled to constitutional protection of his parental rights is his relationship with the mother. In *Stanley* and *Caban v. Mohammed*,[163] cases in which the court protected the father's constitutional rights as a parent, one could readily find an implicit agreement between the mother and father to share parental rights. Peter Stanley had lived with the mother of his children intermittently for 18

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[159] Several courts have been reluctant to estop a man from repudiating paternity based only on the emotional reliance of the child. *See Markov,* 758 A.2d 75; *K.B. v. D.B. & Another, 639 N.E.2d 725 (Mass. App. Ct. 1994).*

[160] 1 FARNSWORTH, *supra* note142 at 161-63.

[161] 405 U.S. 645 (1972)

[162] 491 U.S. 110 (1989)

[163] 441 U.S. 380 (1979)

years. Mr. Caban had consistently visited and sometimes assumed custody of his children for five years. In contrast, in *Lehr v. Robertson*[164] and *Quilloin v. Walcott*[165] the court denied both biological fathers parental rights because neither had maintained a relationship with the mother of the children. Justice Stewart's dissent in *Caban* was quoted with approval by Justice Stevens in *Lehr*. "Even if it be assumed that each *married* parent after divorce has some substantive due process right to maintain his or her parental relationship, it by no means follows that each *unwed* parent has any such right. Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring."[166] Justice Stewart's reference to marital status makes clear that the enduring relationships from which paternal rights grow are relationships with the mother not just the child.[167] When the relationship with the mother is strong enough, and more particularly when the mother manifests her intent and desire for the biological father to assume the role of father, the biological father receives constitutional protection for his paternal rights.[168] If the mother has not entered into a relationship with the biological father with regard to parenting the child or if she has clearly committed to parenting with someone else,[169] biology alone will not grant fathers constitutional

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[164] 463 U.S. 248 (1983)

[165] 434 U.S. 246 (1978)

[166] *Lehr*, 463 U.S. at 260, quoting *Caban*, 441 U.S. at 397 (emphasis added, citations and italics omitted)

[167] The situation in Lehr is all the more significant because the uncontested facts revealed that the mother actively prevented the biological father from developing such a relationship. She did not agree to him being the father of the child, and because of the greater control she had over the child at birth, her desires trumped. *Lehr*, 463 U.S. at 268-69.

[168] For further explication of this theory, see Janet Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637 (1993) (arguing that the more the biological father and mother's relationship resembles the stereotypical nuclear family, the more likely the Court is to acknowledge paternal rights).

[169] *See* Michael H. v. Gerald D., 491 U.S. 110 (1989). (The mother in that case was married to someone other than the biological father. The court held that the biological connection plus a relationship with the child was not enough to secure constitutional protection for the biological father.)

protection.

D. Parenthood as Lived: Contracts in Practice

The *law's* comfort in letting contact, not biology, confer parental status may be partially explained by *parents'* willingness to let contract determine parental status. Agreement or patterned behavior between biological mothers and fathers is the most important predictor of paternal support. Marital status is more important than race, education, age, and family size in predicting the likelihood of a child support award.[170] In one of the most comprehensive studies of child support in this country, Andrew Beller and John Graham found that only 15% of never-married mothers received child support awards.[171] Close to half (43%) of never-married mothers who did not receive an award said they did not want one, which suggests that mothers themselves do not see biology as the lynchpin of male responsibility.[172]

The great majority of women who do want a child support payment, and therefore sue for paternity, pursue men with whom they have had a relationship of some duration. Two-thirds of paternity suits involve women suing men who were present at the birth of the child.[173] Over 80%

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[170] ANDREA BELLER & JOHN GRAHAM, SMALL CHANGE: THE ECONOMICS OF CHILD SUPPORT 89 (1993).

[171] Id. at 20.

[172] This suggests that the recent improvements in DNA matching have had and will have minimal impact on the likelihood of women filing for paternity. In 1986, only 3% of mothers without a child support award cited an inability to establish paternity as a reason that were not receiving child support *Beller and Graham, supra note 170* at 21. A comparably large (42%) percentage of ever-divorced mothers said they did not want an award. *Id.* Many of the ever-divorced women had remarried and thus had an alternative source of support, but that simply underscores the conclusion that a substantial percentage of both never-married and divorced do not see biology as the lynchpin of male responsibility.

[173] Esther Wattenberg, *Paternity Actions and Young Fathers, in* YOUNG UNWED FATHERS: CHANGING ROLES AND EMERGING POLICIES 213, 226 (Roberta I. Lerman & Theodora J. Ooms eds., 1993).

of unwed fathers help mothers with pregnancy either emotionally or financially.[174] At the time of the child's birth, 82% of unwed parents are romantically involved, and 51% live together.[175] Approximately 85% of unmarried fathers continue their relationship with the mother through the pregnancy and for an average of two to three years into the child's life.[176] Thus, the vast majority of women who get child support from unmarried fathers have claims rooted in relationship as well as blood.

The most important factor in predicting continued contact between a separated father and his children is the father's relationship with the children's mother.[177] Significantly, his relationship with the mother is more important than the extent of his involvement with the children prior to separation.[178] Interviews also suggest that men's subjective sense of responsibility toward their children is linked more to their feelings toward the mother than their feelings toward their children.[179] One of the most transparent manifestations of this phenomenon is men's tendency to support and nurture the children with whom they live more than children to whom they are biologically related.[180] Fathers who, for whatever reason, can no longer cooperate with a former partner, often find a new one. It is the children of that new partner whom

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[174] McLanahan et al., *supra* note 88, at 11.

[175] *Id.* at 3.

[176] Victoria Williams & Robert Williams, *Identifying Daddy: The Role of the Courts in Establishing Paternity* in 28 JUDGES' J. 2, 5 (1989).

[177] DOWD, *supra* note 50 at 3. Initial reports from the Fragile Families Project at Princeton University indicates that while in a relationship with the father, unwed mothers are more supportive of fathers' rights than are wed mothers. Once the romantic relationship has ended, however, they are substantially less likely to be supportive of his rights. Lin & McLanahan, *supra* note 84 at 16.

[178] Dowd, supra note 50, at 3.

[179] WILLIAM MARSIGLIO, PROCREATIVE MAN 95 (1998) (citing FRANK FURSTENBERG AND ANDREW CHERLIN, DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART (1991)).

[180] Nancy Dowd elaborates on this process of "serial" parenting. *See* DOWD, *supra* note 50, at 26-31, 204.

they support both financially and emotionally.[181] Thus, when the parenting agreement with the first woman breaks down, they make a new agreement with a new woman and they support that new woman's children.

There are also significant groups of people, particularly low income people, for whom parenting apart has become the norm.[182] In these groups, researchers have found that parental status is "negotiated."[183] Frank Furstenberg argues that mothers and children in the inner city don't think of their biological fathers as their fathers unless those men have "done for" the children, both financially and emotionally. Often, the man who "does for" the child is not the biological father. The person who emerges as the father is the one whom the mother has allowed to "do for" the child.

Judges are also aware of the importance of the mother-father relationship. Despite Congress' attempt to eliminate the distinction between marital and non-marital children, judges award substantially more child support to women who were married to the father than to women who were not. After correcting for education, age, race, region and the number and ages of children, Beller and Graham still found an average award of $786 less for unmarried women.[184] The unmarried biological father's likely lower income level may account for much of this unexplained differential, but Beller and Graham estimate that at most it could account for 73% of the differential.[185] In other words, unmarried women get less child support simply because they are not married. This suggests that the judges awarding the support view the marital agreement as a critical part of determining the extent of the biological father's responsibility.

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[181] *Id.*

[182] *Id.* at 119.

[183] "Negotiated" is Frank Furstenberg's term. *See* Frank Furstenberg, *Fathering in the Inner City: Paternal Participation and Public Policy, in* FATHERHOOD: CONTEMPORARY THEORY, RESEARCH AND SOCIAL POLICY 119, 131 (William Marsiglio ed., 1995).

[184] BELLER & GRAHAM, *supra* note 170 at 111.

[185] *Id.*

In sum, as a matter of subjective expectation between the parties, as a matter of how children actually experience who their parents are, and as a matter of how judges award child support, implicit or explicit private agreements between adults play a critical role in determining the extent of paternal responsibility. This is not to say that private agreement or contract explains all allocations of parental status. The increased paternal identification requirements passed as part of the 1996 Welfare Reform Act[186] unabashedly adopt blood over contract as the sin quo non of parenthood. By most accounts, these measures have increased the amount of child support paid by men.[187] Moreover, as discussed in Section I, some courts refuse to honor the intent of the biological parents particularly if the intent was to relieve the biological father of obligation.[188] My argument is not that contract or intent always governs, but that contract governs much more than the letter of paternity law would suggest.

III. The Contract

The last section examined how law and real life already let principles from contract determine parental status. It was, for the most part, descriptive. This section moves into the normative in order to explore and justify in more detail the nature of the contractual relationship.

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[186] Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified in scattered sections of 42 U.S.C.)

[187] It is still not clear that the amount of support collected exceeds the enforcement costs, however. Leslie Harris, *Reconsidering the Criteria for Legal Fatherhood*, 1996 UTAH L. REV. 461, 476. Nor is it at all clear that making this men involved in their biological children's lives is good for the children. Unwed mothers who are not romantically involved with the biological father have substantially higher opposition to fathers' involvement than do either unwed mothers who are romantically involved with the father or ever-married mothers. Lin & McLanahan, *supra* note 92 at 16. Studies indicate that the cost on the child of friction between unmarried parents may be greater than the benefit gained from increased resources supplied by the non-custodial parent. *See* McLanahan et al., *supra* note 88.

[188] *See* Budnick v. Silverman, 805 So. 2d 1112 (Fla. Dist. Ct. App. 2002); *In re* A.B., 444 N.W.2d 415 (Wis. Ct. App. 1989).

The first part of this section looks at contract formation and examines how a parental status contract can be made under a reliance theory, a will theory, a bargain theory or a relational theory of contract. The second and third parts of this section look more closely at the terms of the contract. Part two analyzes the entitlement that is bargained for and part three analyzes the scope of the contractual obligation incurred. The rules explored in the latter parts of this Section are presented in the spirit of an offer, examples of the ways in which a contract regime might operate. I do not mean to suggest that the rules presented here are absolute or essential. I invite counter-offers.

A. Contract Theory

There are many theories of contract and it may well be impossible to explain all contractual relations with one model.[189] Without going into any one theory in too much detail, this part will sketch how reliance and will theory, bargain theory and relational contract theory all support the idea that parental status can arise from implicit or explicit agreements to share parental rights and obligations.[190]

1. Reliance and Will Theory

Reliance and will theory, both stalwarts of contract interpretation, are party-based theories of contract formation. The primary concern of both theories centers on the contracting parties; reliance theories protect the promisee, while will theories protect the promisor.[191] Either theory can explain why the law should enforce a parental status contract. It is easy to justify parental contracts under a reliance theory because in most cases it is easy to find reliance on the part of the mother and/or child. The only question is whether the reliance is reasonable. A mother's

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[189] Patrick Atiyah, *Contracts, Promises and the Law of Obligations*, 94 L.Q. REV. 193, 195 (1978).

[190] This section will not discuss efficiency theory because it is particularly unlikely that one would see economic efficiency as the goal of family law. "Efficiency notions . . . cannot completely explain why certain commitments should be enforced unless it is . . . shown that economic efficiency is the exclusive goal of a legal order." Barnett, *supra* note 143.

[191] *See id.* at 271-72.

reliance on a man's explicit promise "to treat the baby as his own"[192] hardly seems unreasonable, particularly in light of a long history of letting the connection between husband and wife determine the parenthood of the child.[193] Relying on an implicit promise to support, though potentially more ambiguous, is unlikely to be unreasonable also. The implicit promise will only be found when the relationship between the promisor and the mother is obvious and interdependent enough for the law to assume a promise. By the same token, the longer and more enmeshed the relationship, the more likely that reliance on the relationship is reasonable. Thus, if one can find the implicit promise one can probably find reasonable reliance.

Will theories are concerned with the promisor.[194] In particular, will theories surmise that a contract has not formed unless the terms of that contract reflect the will of the promisor. Will theory suffers from the subjective/objective problem discussed earlier.[195] If the promisor's subjective will contradicts an objective interpretation of her words or actions, will theory founders in its struggle to give words meaning. As a result, will theories inevitably bend to other interests, like reliance or fairness.[196] Nonetheless, will theory cannot be dismissed entirely because it gives moral force to why a promisor must be held to his promises. Holding a promisor accountable honors the promisor's autonomy which she exercises in the contract by manifesting her will. Thus, the question from will theory in the parental contract context is whether imposing parental status on a provider because of what he explicitly or implicitly agreed to do respects his autonomy.

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[192] Nygard v. Nygard 401 N.W.2d 323, 325 (Mich. Ct. App. 1986)*; See also* Karin T. v. Michael T., 484 N.Y.S.2d 780 (Fam. Ct. 1985).

[193] *See supra* Section IIA .

[194] Among the more important champions of will theory are Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933), and Charles Fried, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981).

[195] *See supra* note 143-145.

[196] Barnett, *supra* note 143 at 273-75.

One's response to this query probably depends on how one views the interdependency of family groups. If one sees all parties in a family as basically independent beings, as some have argued the law increasingly construes them,[197] then respecting autonomy might mean not binding a man who has become a part of a family unit precisely because he is, at core, independent. He should be viewed by the parties and the law as an autonomous individual, free to exercise his own will at any time. He should, for instance, be able to say "I intended to have a relationship with the mother, but not the child(ren)." The law need not presume any other intention. On the other hand, if one sees family units, even nontraditional family units, as essentially interdependent, then a man's claim that his autonomy interest trumps the needs of the interdependency seems remarkably feeble. Unless a man explicitly claims "I intend to have a relationship with you [the mother], but not your child(ren)," it may make more sense to assume that he is willingly undertaking responsibility for the children because he is willingly interjecting himself into an obviously interdependent unit. The forseeability of the harm caused to everyone by his withdrawal from the unit will be transparent.[198] By becoming part of a family unit, a man (or woman) forseeably chooses to subordinate his autonomy interest.[199] Under a will theory, one can hold a man responsible as a father if he has acted like a father because it is simply unreasonable for him to proclaim that his subjective intent was to be a "father-for-a-time," with that time ending whenever he walks away. Family members form bonds and create dependencies

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[197] *See* Dolgin, *supra* note 168.

[198] A sports analogy comes to mind. A Point Guard on a basketball team cannot claim that she is responsible only to the Center for damages incurred when she left the team. Even if the only person the Point Guard intended to have a relationship with was the Center, the obvious forseeability of the damage that her departure would cause to the rest of the team should make her responsible to the other players as well. For a discussion of what courts generally do when parties to a contract fail to include terms to cover forseeable problems, see 2 FARNSWORTH, *supra* note 142, at 327-38.

[199] The recent ALI principles suggest that the same kind of thinking should govern the law of cohabitation. Unless the cohabiters specifically contract out of the law or marital dissolution, the law of marital dissolution should govern their break-up. *See* ALI, *supra* note 153 at § 6.02 cmt. a, 915.

that must be met on an on-going basis.[200]

2. Bargain Theory

The bargain theory of consideration, probably the best known and widely used theory of contract, posits that a contract is a contract and not an unenforceable agreement when consideration is bargained for and passes from both sides. Bargain theory focuses less on the parties and more on the process of contract formation. To find a bargain contract in the parental status context one needs to find bilateral consideration passing from both sides. This is not hard. The mother offers to let her partner share in the parenting of her child/ren. The father accepts by participating, financially and emotionally. The mother relinquishes some of her parental rights in order to receive emotional and financial support. The father incurs obligations for financial support in order to participate emotionally in the life of the family. He gains the benefits of parenthood. She loses control that she would otherwise have to steer the upbringing of the child.[201] The father figure cannot be heard to say that there are no benefits because all of the petitions for rights and visitation made by non-biologically- related functional parents attest to the fact that functional fathers receive consideration.[202] Thus, there is bilateral consideration and there is a contract.

3. Relational Contract Theory

Relational contract theory looks to relationships between parties to find the existence and

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[200] Though they may not have to form permanent bonds. *See infra* text accompanying notes 258-261.

[201] For more on what these rights involve, see *infra* text accompanying notes 224-227. The reason why parental rights are vested in the mother in the first instance is explored *infra* in Section IIIB.

[202] *See* equitable parent cases discussed *supra* text accompanying notes 153.

terms of a contract.[203] Ian Macneil suggests that whenever an on-going relationship between the parties is likely to be more important than a discrete transaction or communication between the parties, the law should look to the relationship itself rather than to specific terms or the lack thereof. As Charles Goetz and Robert Scott put it, "[a] contract is relational to the extent that the parties are incapable of reducing important terms of the arrangement to well-defined obligations."[204] With relational contracts, the "existence of formal communication does not automatically trigger the application of [] neoclassical" contract interpretation.[205] "Rather the preliminary question must always be asked: do the formal communications indeed reflect the sharp past focus and strong intentions necessary to put these communications high in the priorites of values created by the contractual relationship."[206] If the written agreement looks quite obviously different than the lived relationship then the written agreement will have limited importance. In such a case one would look to the relationship itself to find terms.

The recent Family Law ALI guidelines for custody suggest a comparable approach to determining the terms of a post-divorce custody award. Instead of relying on abstract concepts like joint custody, best interest of the child, or tender years presumptions, the ALI argues that courts should use the past relationship to determine future rights and obligations.[207] In many ways, the ALI rules adopt suggestions made by Robert and Elizabeth Scott in a piece that

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[203] Relational contract theory dispenses with much of the theoretical purity and formality of the previously addressed theories. Instead of looking to what is explicitly presented, or in Ian Macneil's phrase, "presentiated," in a formal contract, relational contract theory examines how people act and what they come to expect. Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978).

[204] Charles J. Goetz and Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981).

[205] Macneil, *supra* note 203 at 894.

[206] *Id.*

[207] "Unless otherwise resolved by agreement of the parents . . . the court should be required to allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parent's separation . . . ." ALI, *supra* note 153 at § 2.09(1).

explored the benefits of viewing marriage as a relational contract.[208] Among other suggestions in that piece, the Scotts argue that relational contract theory can help determine optimal custody and support rules for divorce. I am arguing that relational contract theory is just as good at helping courts determine custody and support issues even if the parties were never married and even if they are not biologically related to the children. In other words, relational contract theory is just as good at determining parental status as it is at determining custody rights. The relationships of unmarried parents or married people whose children are not necessarily their biological issue do not differ in material ways from the relationships of married people whose children are their biological issue. The interdependency and exchange and reliance are often identical. Once one acknowledges that legally enforceable rights and obligations can come from the relationship itself, not only from some formal legal agreement, then it is not hard to find parental rights and obligations bestowed by virtue of the relationship. Once one finds parental rights and obligations bestowed by virtue of relationship, one finds parental rights and obligations bestowed by virtue of implied contract. If parental rights and obligations are bestowed by virtue of contract, parental status is bestowed by virtue of contract.

The next part explores the terms of the contract in more detail. My claim is that contract theory and doctrine provide a superior framework for determining parental status than does the current regime. My claim is *not* that all agreements to parent are obviously legally enforceable contracts. The relationship between mother and father, at least if it is significant enough to give rise to parental status, is likely to be complex and messy and subjective; it is not likely to conform to the classical model of contract.[209] However, as most contract scholars agree, there

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[208] Elizabeth Scott & Robert Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1306 (1998) ("[T]he substantive legal rules defining the conditions for divorce, alimony, spousal support, and, to a lesser extent, child custody, are usefully analyzed as contract default rules.")

[209] According to Professor Eisenberg, "[c]lassical contract law was marked by several characteristics. It was axiomatic and deductive. It was objective and standardized. It was static. It was implicitly based on a paradigm of bargains made between strangers transacting on a perfect market. It was based on a rational-actor model of psychology." Melvin Eisenberg, *Why There is No Law of Relational Contracts*, 94 NW. U. L. REV. 805, 805 (2000).

are precious few arrangements, commercial or otherwise, that conform to the classical model of contract.[210] "All contracts are relational, complex and subjective."[211] The debate between current contract scholars is not about whether contracts are discrete willful acts with defined objective terms (almost none of them are), but about the role contract law should play in adjudicating contractual disputes involving complicated relationships, modified terms and irrational behavior.[212] There are those who want to expand contract law to better incorporate all of the bargaining relationships that do not conform to the classical model.[213] There are others who suggest that we are better off restricting judges to their traditional role as formalistic interpreters of objective terms because judges are quite incapable of incorporating adequately or fairly the variety of norms and subjective understandings that permeate most contractual relationships.[214] The model offered here is consistent with either an expansive or a restricted understanding of contract interpretation. The rules we choose to apply to agreements between people who act like parents may be a function solely of private agreement, of public policy or of some combination.[215] An expansionist might look to a vast array of norms, relationships and policy concerns to interpret the contract between mother and father. A formalist might make all necessary policy determinations ex ante and impose legislatively mandated boiler plate for many

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[210] *Id.* at 805-08.

[211] Robert Scott, *The Case of Formalism in Relational Contract*, 94 NW. U. L. REV. 847, 852 (2000).

[212] *Id.*

[213] Professor Eisenberg would fall into this category, *see* EISENBERG, *supra* note 209, as would McNeil, *see supra* note 203.

[214] *See generally* Scott, *supra* note 211. Scott argues that if we are worried about the opportunistic behavior in a formalist regime, legislatively mandated boilerplate can protect inexperienced parties to the contract. *Id.* at 87. Eric Posner would probably also be an example of someone who would favor a minimal role for judges in contract interpretation. *See* Eric A. Posner, *A Theory of Contract Law Under Conditions of Radical Judicial Error*, 94 NW. U. L. REV. 749 (2000).

[215] Landlord-Tenant law is a good example of a field in which contract principles blend with historical property doctrine and legislative mandate such that courts interpret rights and obligations based on a mixture of private agreement, public policy and traditional status relationships.

or most parental status contracts.[216] Whichever rules we choose to apply, contract doctrine can be used "as a structure of argument."[217]

B. The Entitlement at Issue

Before one can accept the idea that parental obligations can arise from contract one must accept the idea that parental status can be appropriately conceptualized as property, or at least an amalgam of alienable rights and obligations. As many have noted, there is an intrinsic relationship between contracts and property.[218] Contracts are vehicles for transferring property. In Randy Barnett's formulation, a contract is a "manifestation of an intention to alienate rights."[219] I have elsewhere explained some of the benefits of using property paradigms in the

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[216] Scott gives the example of the disclaimer of warranty language required by the UCC as an example of legislatively mandated boilerplate. Scott, *supra* note 211 at 874. Legislatively mandated boilerplate in this context might involve requirements that a man who lived with a child for a given period of time necessarily assume some financial responsibility for that child, regardless of the intent of the parties.

[217] Jay M. Feinman, *Relational Contract Theory in Context*, 94 NW. U. L. REV. 737, 748 (2000). Ira Ellman argues that "contract thinking" is a wholly inadequate mechanism for viewing most familial obligations. *See* Ellman, *supra* note 107, at 1375-77. Ellman argues that what gives rise to obligation is the relationship itself, not an abstract notion of contract. There are several responses. First, in the case of implicit contracts there is little difference between the relationship itself and the contract. The terms of the contract are the relationship as it was lived. Second, the relationships that Ellman cites as creating "enforceable duties .. . arising from the relationship" not a contract (landlords and tenants, employers and employees, lawyers and clients) all involve relationships that also include a contractual component. In all of these cases, the contract may not define the complete obligation, but that does not mean that the obligation could arise without the contract.

[218] Steven Cheung, *Transaction Costs, Risk Aversion and the Choice of Contractual Arrangements,* 12 J.L. & ECON. 23, 23 (1969) ("transactions conducted in the market place entail outright or partial transfers of property rights among individual contracting parties"); Anthony Kronman, *Contract Law and Distributive Justice*, 89 YALE L. J. 472, 472 (1980) (Contracts "provide for the exchange of property"); Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483, 523 ("exchange relations . . . presuppose some idea of property . . ."); Barnett, *supra* note , at 301 (explaining the interdependence of a consent theory of contract and entitlements theory).

[219] Barnett, *supra* note 143 at 304.

family law area.[220] Among other things, property paradigms help courts resolve competing claims to child custody in a manner that maintains family autonomy and rewards those adults who have sacrificed for and invested in the child.[221] Nonetheless, there is a strong resistance to property rhetoric when it comes to characterizing family relationships, particularly relationships with children.[222] It may be more palatable to think of an agreement between parents not as a contract for property but as a "manifestation of an intention to alienate rights."[223] Whatever formulation one chooses, if one acknowledges that courts are currently using notions of contract to guide their decisions as to parental status, then one acknowledges that courts are currently using notions of property to determine parental status. Therefore it is important for us to analyze the nature of the property at issue. What is it that is transferred between adults that allows courts to reach conclusions as to parental status?

1. The Origins of the Entitlement

The property at issue in the parental contract is the entitlement to parental status. Parental status brings with it parental rights. For some, parental rights include the rights to discipline and educate, and the rights to choose medical treatment, religious traditions, geographical location and social contacts for their children.[224] For others, in particular those parents who are not married to the other parent of a child, parental rights are more limited. They are more limited because in cases of conflict between two never married or divorced parents, it is a court that

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[220] *See* Katharine K. Baker, *Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection*, 59 OHIO ST. L. J. 1523 (1998).

[221] *Id.* at 1576-85.

[222] *See* Naomi Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L. J. 1, 49 (1997); Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J. L. & FEMINISM 7, 16 (1989); Milton Regan, Jr., *Spouses and Strangers: Divorce Obligation and Property Rhetoric*, 82 GEO. L. J. 2303, 2350 (1984); Barbara Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1811-14 (1993).

[223] Barnett, *supra* note 143 at 304.

[224] *See* Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 884-85 (1984).

decides what is in the child's best interest.[225] Nonetheless, in those cases, parental status at least brings with it the procedural right to challenge the ways in which a child is being reared. Parental status also brings with it a presumptive right to spend time with the child. Even if one does not have legal custody, all states have a heavy presumption in support of parental visitation.[226] It is that visitation that many non-biological parents fight for when biological parents want to keep them at bay.[227]

Parental status also brings with it obligations, most obviously the duty to support the child. At present, as described earlier, the degree of one's obligation is not tied to the strength of one's entitlement to a relationship with the child. One's obligation is a simple function of one's income, a raw percentage, and that attaches absolutely and regardless of one's relationship with the child.

The contractual model offered here suggests that when adults contract for parental status they contract to either alienate or acquire parental status vis a vis a child. Parents who alienate their parental rights are agreeing to share those rights with someone else. They are agreeing to co-parent. They are agreeing to give someone else the procedural right to challenge the way in which the child is being reared and to give that person a right to petition for visitation. The co-parents who receive these rights are agreeing to accept the rights and responsibilities (i.e., the duty to support) of parenthood. They accept the contract because, for whatever reason, they want to act as a parent to a child.

There still is a question of initial entitlement though. One can only agree to contract away property that one has. Where do the rights come from for those parents who have not gotten them through exchange with another parent? One might think the answer to that question is the genetic material that one's body produces. Hence, men could sell sperm and women could

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[225] *See* Baker, *supra* note 220 at 1545-48.

[226] *See* ELLMAN ET AL., *supra* note 110 at 684-85.

[227] *See supra* text accompanying note 153.

sell eggs and in doing so they would alienate not only their genetic material but the parental status that might accompany that genetic material. If this were the case though, genetic connection per se would give one parental status as long as one had not contracted that status away. As we saw, such is not the case either constitutionally or as a matter of common law. Men who are genetically connected to a child do not necessarily enjoy the rights (or the obligations) of parenthood if someone else is filling the parental role.[228]

Instead, the property interest appears to emanate with the mother. De facto if not de jure, it is the gestational mother who controls whether a biological father, or any other person, is able to establish a relationship with the child and thereby secure parental rights.[229] As a preliminary matter, it is the pregnant woman and only the pregnant woman who decides whether to remain pregnant. Once that decision is made, the pregnant woman can, with remarkable ease, prevent a biological father from ever knowing about a child's existence. For biological parents who are not living together, it is the woman who decides whether the biological father knows about the pregnancy, how participatory the biological father (or any other potential "father") can be during the pregnancy and, at least when the child is young, how much contact the father can have.[230] She can thereby all but ensure that his parental rights will never be exercised. She can also take measures to make it very likely that parental status will be vested in someone else. She can do that by marrying someone else, by letting someone else adopt the child or by simply sharing her life with someone else. As numerous researchers have found, women have always determined

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[228] *See supra* Section IC.

[229] If the pregnant woman is married, that is, if she has previously agreed to share parental rights with someone else, she does not have as much control. *See infra* Section IIIB2 and text accompanying.

[230] It is extraordinarily difficult and not much fun to care for a pre or nominally verbal child that one does not know. One takes care of such a child by anticipating and/or rapidly understanding that child's needs. Experience with the child or excellent communication with a person who does have that experience is the only means by which one can become comfortable. Moreover, to transport a child of that age, or even to play with him or her, one needs to be equipped, with car seats and cribs and age appropriate toys. Thus, if the primary caretaker is resistant to sharing her relationship with the child, it is easy to see how the adult who nonetheless wants such a relationship is fighting an uphill battle.

the extent of paternal involvement with children.[231] From conception on, de facto parental status is something that the woman has and can, at her discretion, mete out to someone else.[232]

Although courts have never put it in these terms,[233] the above suggests that the gestational mother gains parental status through her gestational investment, not through her genetic contribution. A father gains parental status through his relationship with the mother. If the gestational mother has not contracted her labor out (in a gestational surrogacy contract)[234] or previously agreed (through marriage or another form of contract)[235] to share parental rights, then she has exclusive control. Once she agrees, either explicitly or implicitly, to share that control, she has a co-parent.

To some this paradigm may seem highly unfair. The woman, by virtue of labor that a man cannot give, has more access to parenthood does a man. Yet the very same factors that make it unfair to hold an unwilling man liable for a child that he never wanted, make it appropriate to vest the gestational mother with sole parental status. It is her decision to undergo the huge and very costly burdens of pregnancy.[236] Up until birth, the mother has, of necessity, invested far

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[231] Jane Mosely & Elizabeth Thomson, *Fathering Behavior and Child Outcomes: The Role of Race and Poverty, in* FATHERHOOD: CONTEMPORARY THEORY, RESEARCH AND SOCIAL POLICY 148 (William Marsiglio ed., 1995) ("Women orchestrate men's relationships with children.") DOWD, *supra* note 50, at 121 ("[M]others are the gatekeepers or facilitators to men's relationships with children.")

[232] This is less true for biological parents who are living together, but as long as the woman has an exit alternative, she has a means of blocking the biological father's involvement.

[233] Justice Stewart in his *Caban* dissent that was subsequently quoted by the majority in *Lehr* did indicate that gestational labor was a critical factor in distinguishing between the initial parental rights of two biological parents. "The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures." Lehr v. Robertson, 463 U.S. 248, 260 n.16 (1983), citing Caban v. Mohammed, 441 U.S. 380, 397 (1979).

[234] *See* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

[235] *See* E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999) (lesbian couple signed parenting agreement prior to the birth of the children delineating their intention to share parental rights and obligations).

[236] As I have previously described it, a "A biological father gives his sperm. A gestational mother gives: her egg (usually), her liver, her bladder, her iron supply, her pulmonary system, her digestive system, the elasticity of her skin and often her psychological well-being." Baker, *supra* note 220 at 1586.

more of herself than has the biological father. Conscientious men may try to invest time and money in the pregnancy, but the decision as to whether to accept that effort is the mother's. At a very basic level, there is simply no comparison between what a mother necessarily gives during pregnancy and what a man can give. Thus, by virtue of her sole responsibility and labor, the mother obtains sole parental rights. It follows, then, that she should shoulder all the obligation.

What this paradigm suggests, quite logically, is that all pregnant women should be treated alike. A woman who gets pregnant the old fashioned way should be treated just as a woman who gets pregnant by virtue of artificial insemination. If there is a pre-existing marriage or contract suggesting that the pregnant woman intends to share her rights and responsibilities, the law should honor that contract and vest parental status in a co-parent. If there is no such contract, the woman is on her own.[237]

2. Limitations on the Contract

To a certain extent, the degree to which a mother shares the rights and responsibilities that she acquires by virtue of gestation is up to her, but the number of people she can contract with and the extent to which she can completely alienate her parental status must be limited. Scholars disagree about the relative harms and benefits of multiple parental figures in a child's life,[238] but most can probably agree that there should be some limit on the number of legal "parents" a child should have. The more adults that have standing to assert visitation rights and challenge the parenting decisions of others, the greater the likelihood of litigation. As almost all family law commentators have recognized, judges are remarkably ill-prepared and institutionally

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For more on the physical cost of pregnancy, see McDonough, *supra* note 80 at 1073-74.

[237] As discussed infra note 292-296 and text accompanying, the idea of vesting mothers with sole parental rights and responsibilities is not new. See also FINEMAN, supra note 2. What is new is giving providing a mechanism for the law to recognize the individuals with whom mothers share those rights legal recognition to the people with whom the mother then shares those rights and responsibilities.

[238] *Compare* Bartlett, *supra* note 224 *and* Cahn, *supra* note 222 (arguing that children benefit from continued contact with various different parental figures) *with* Emily Buss, *"Parental" Rights*, 88 VA. L. REV. 635 (2002) (arguing that judicial (in)capacity and children's welfare argue against too many adults having the right to challenge how a child is being reared).

ill-suited to make sound parenting decisions.[239] The more people there are with parental rights vis a vis the same child, the greater the likelihood that a judge will be deciding what is in that child's best interest. The extraordinary pecuniary and emotional toll this can take on a child suggests that, for the child's sake, the law should limit the number of contracts a mother can make with regard to any one child.[240]

On the other hand, if a father abandons a mother and child, the mother should be able to contract with someone else. By abandoning, the first father loses his right to be a parent and frees the mother up to contract with someone else. If she contracts with someone else that new person becomes the father, with his own parental rights and obligations. The first father stays obligated until the mother contracts with someone else. Once she does, the first father loses rights and obligations. This is what currently happens in the adoption context [241]

The law should also limit the extent to which the mother can alienate her rights. The bonding and reliance that give rise to the equitable and de facto parenthood doctrines[242] suggest that a parent should not be able to alienate her rights and responsibilities completely. That is, she should not be able to sell her child. Children form bonds. In order to protect those bonds, the law must forbid the complete alienation of a parent's parental rights. If a parent abdicates her rights by abandoning the child, the law cannot necessarily stop her or him, but the law can forbid

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[239] *See* Buss, *supra* note 238. For a discussion of the critiques of the Best Interest of the Child Standard, see Baker, *supra* note 220 at 1559-61.

[240] I agree with Professor Buss, supra note 238, that two is probably an optimal number but that in certain situations, 3 or 4 might be permissible. In contrast, the ALI, by giving parents by estoppel, de facto parents, biological parents who are not legal parents and legal parents standing to challenge custodial and parental decision-making plans, seems to endorse an almost infinite number of people with parental status. ALI, *supra* note 153 at § 2.03.

[241] When a custodial parent finds someone else whom she wants to adopt her child, the state terminates the parental rights of the other parent, if he has abandoned. See e.g. 750 ILL. COMP. STAT. 50/1-9 (2003) (consent of a parent is not required if the parent has failed "to maintain a reasonable degree of interest, concern or responsibility for the child's welfare.")

[242] *See* note 153 and text accompanying.

a parent from getting paid to effect such an abandonment.[243]

3. Abandonment and Contractual Rights

Unfortunately, parenting studies suggest that abandonment by fathers is common. Forty to sixty percent of children do not live with their fathers.[244] Only sixteen percent of children in fatherless households see their father at least once a week.[245] Forty percent of children who live in fatherless households have not seen their fathers at all in the past year.[246] The chances of a child not having seen his or her father increase with time. One study found that ten years after divorce, nearly two-thirds of the children of those divorces have not seen their father at all in the past year.[247] Abandonment by mothers is not unheard of, but noncustodial mothers are much

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[243] One might argue that a mother should be able to sell her newborn child because the bonds are not sufficiently developed. Prominent legal economists have previously made the argument that such sales would promote efficiency in troubled adoption markets. Elisabeth M. Landes and Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEG. STUD. 323 (1978). Adopting the model produced in this article need not lead one to adopt the Landes and Posner solution, however. The evidence from adoption studies suggests that complete alienation of one's parental rights is difficult for a child, even if done at birth and particularly if done by the mother. DAVID BRODZINSKY, DANIEL SMITH & ANNE BRODZINSKY, CHILDREN'S ADJUSTMENT TO ADOPTION: DEVELOPMENTAL AND CLINICAL ISSUES (1998); Madelyn Freundlich, *Adoption Research: An Assessment of Empirical Contributions to the Advancement of Adoption Practice,* 11 J. SOC. DISTRESS & THE HOMELESS 143 (2002). Although many pro-life activists might disagree, there is a strong argument to be made that we should not encourage adoption because adoption is hard on children. In those cases in which a pregnant woman knows that she does not want or cannot handle parenthood we can allow the complete alienation of parental rights but only if done on a voluntary basis. There are also policy concerns about the class effects of allowing women to sell their newborns. Poor mothers might make a business of selling their babies to richer parents. The law can be concerned enough about the morality of that market to forbid outright alienation of parental rights, even for newborns. Encouraging alienations by enforcing contracts for money would facilitate a market that we do not wish to encourage.

[244] Wade F. Horn, *You've Come a Long Way Daddy: After Being Pilloried and Left for Dead, the Fatherhood Ideal is Making a Comeback*, 1997 POL'Y REV. 24 (Horn's study, which showed that 40% of children live in a fatherless household, was based on pre-1990 data. He predicted that the number would be 60% in the 1990s.)

[245] *Id.*

[246] *Id.*

[247] Frank F. Furstenberg, Jr., *Good Dads - Bad Dads: Two Faces of Fatherhood*, *in* THE CHANGING AMERICAN FAMILY AND PUBIC POLICY 190, 203 (Andrew Cherlin ed., 1988)

more likely than noncustodial fathers to visit their children.[248] In other words, women abandon but with far less frequency.

The prevalence of abandonment by fathers suggests that a legal label of father does not keep men sufficiently connected to their children to ensure that child support gets paid or that contact gets maintained. Thus, it is not clear we would have any fewer involved and paying fathers if the law acknowledged that abandonment and deprived abandoning fathers of their legal status as parents. Abandonment would also not relieve a parent of parental status unless the other parent contracted with someone new. A parent stays liable for the terms of the contract unless the other parent has mitigated the damages caused by the disintegration of the first agreement by finding another parent who explicitly or implicitly agrees to assume parental status.[249] The proposed regime thus gives no added incentive for fathers to abandon children.

The greater concern is probably the incentive effect on potential new fathers. Will subsequent men form a relationship with a mother if they know that they could become legally responsible for her children? It is this very concern that makes some judges wary of holding step-parents responsible for child support.[250] There are several responses. First, the elasticity of men's preference curves may not be as great as the concern suggests. If someone wants to share his life with a woman and her family, the factors urging him to do so may well overwhelm misgivings he has about future liability. This is particularly likely to be true if one assumes that the pool of women with whom he might share his life is heavily populated by women with children. Second, the extent to which many men already serial parent suggests that men are not averse to taking on new responsibility. They are averse to having contact with their ex-partners. Most divorced and separated men have children in their lives, even if those children are not their

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[248] JUNE CARBONE, FROM PARTNERS TO PARENTS 160 (2000).

[249] Thus, marriage to a woman (or man) with children would not automatically trigger responsibility for step-children unless the first husband (or wife) had abandoned the children.

[250] *See* discussion in Knill v. Knill, 510 A.2d 546 (Md. 1986).

biological issue.[251] The proposal offered here would make these men's decision-making process with regard to children a little clearer. If they are going to have children in their lives, they must either continue their contact with an ex-spouse/partner or incur the risk of new liability with another mother. Third, if on the one hand people are concerned that men won't become involved with children that are not their biological issue because those men will be worried about future liability, and the other hand people are concerned about the extent to which men already abandon their biological issue, we need to rethink current presumptions regarding men's entitlement to parent. If, because they could avoid child support, most men would avoid having children in their lives, it tells us something remarkably disturbing about the likelihood that men will be responsible parents. If we cannot count on men to be responsible parents, it is not clear why we should be concerned about granting them parental rights at all.

By honoring contracts to share parental rights, the law honors the emotional and financial bonds that develop between children and adults. Particularly if the number of parents stays limited, there is every reason to believe that children will benefit from a contract to share parental rights. The financial and emotional burdens of single parenthood, though not insurmountable, are significant.[252] By finding someone with whom to share those burdens, a mother helps ensure that a child has both the emotional and financial support that he or she needs. Currently, the law often assigns a second parent on the basis of biology. Empirical research and common sense suggest that biology alone is a significantly inferior proxy of willingness to support than is an agreement with the mother. An agreement with the mother is volitional action or words with regard to parenting, not action with regard to sexual behavior. It is a decision by two adults to

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[251] *See* DOWD, *supra* note 50 at 28-29.

[252] After summarizing the most important research findings on single parenthood, June Carbone writes "[i]ntact families do better than single-parent families not because a biological father and mother are necessarily indispensable to children's well-being, but because intact families bring a greater array of economic and emotional resources to child-rearing." CARBONE, *supra* note 248 at 118.

share parenting.[253] Far more deliberation and concern is likely to go into a decision as to whether to share one's life with a woman and her child then is likely to go into a decision as to whether to have sex.

In sum, the entitlement at issue in parenting contracts is the entitlement to parental rights and responsibilities. As an initial matter, unless she has already agreed to share part of that entitlement, the mother has an exclusive right to that entitlement. If she has agreed to share it, the person with whom she has so agreed is the other parent. If she has not previously agreed to share, she is the sole parent unless and until she contracts with someone else. The terms of her contract must be limited, however. She cannot alienate her rights completely. She must always remain a parent and she can only contract with multiple people if a former contracting partner has abandoned the contract.[254] If a former contracting partner has abandoned,[255] a new person may assume the previous partner's status by contracting with the mother.

C. The Obligation at Issue

The previous parts explained how and why the law of contract can determine parental status. This part explains how the law of contact can also help determine the extent of parental obligation. The contract regime like the one offered here can help reorient the law's approach to how much child support a parent owes. As discussed above, federal legislation currently requires that all states establish numerical criteria and guidelines that determine child support obligations based on a raw percentage of income. The extent of the noncustodial parent's previous

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[253] Of course, not all biological parents are adults. The contract model suggests that the law might apply special scrutiny to contracts between minors. In those cases, it is perhaps not best to defer the private arrangements of the parties.

[254] Contracting with a new partner if the former partner abandons would be akin to a right to mitigate damages. Given the dignity and privacy concerns involved in a new contract, there should be a right but not a duty to mitigate.

[255] A mother (or father) should not be able to force an abandonment by the other parent by refusing to let the noncustodial parent visit. The noncustodial parent has legally enforceable rights to visit until he has abandoned.

relationship with the mother and/or the child is irrelevant. This might change, at least for some fathers, if the law took the notion of contract more seriously.

In cases of explicit contract, the obligation owed by the father would be determined by the explicit contract or the background rules the law imposed on those contracts. For instance, in cases of marriage or adoption, the law might demand that a person who explicitly contracts to be a father is contracting to be a father for the entire minority of the child. Even if the marriage only lasted two years, the father would be obligated as father for 18 years of the children's lives because that is what he agreed to.[256] An agreement to marry would be a legal agreement to share parenting during and after the relationship, just as an agreement to marry is a legal agreement to share income streams during and after the marriage.[257] These cases would look identical to what we have today and the award could be established under the current income percentage guideline system.

In cases of implicit contract, however, the law might make the child support obligation proportional to the interdependence within the family. If one discerns parental status from the behavior of the mother and father, not from their explicit agreement, one must ask what that behavior tells us about the duration of the obligation. Is it appropriate to discern an 18 year commitment from a relationship that lasted two years? The answer could be yes simply because we can impute to any potential father the responsibility for understanding that fatherhood is permanent. The problem with this answer is that even now when the law says that fatherhood is permanent, a vast number of children and fathers fail to experience it that way. Why should we expect men to understand the inevitability of something that is demonstrably not inevitable?

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[256] Most states extend the child support obligation through the age of majority. Some states extend the obligation beyond that if the child is pursuing high school or college education. *See* ELLMAN ET AL., *supra* note 110 at 498-99.

[257] All states have maintenance laws which, depending on the circumstances of the marriage, entitle one spouse to a share of the other spouse's income stream at least for a time. *Id.* at 396-99. Maintenance obligations, like the parenting obligations discussed here, largely depend on the length of the relationship and the degree of reliance. *Id.* at 394-95.

Why not hold men responsible for an obligation defined by the extent of the relationship?[258]

For instance, if the family existed as a family for seven years, the father could be obligated as a family member for another seven years. At the end of those additional seven years his contractual obligation would be fulfilled and he could cease payment. He would also, however, lose his parental status. The extent of the relationship would determine the extent of the obligation. He would be bound while separated for as long a period of time as he was together with the family unit.[259] Every year that he demonstrates his desire to be a part of the family, enjoys the benefits of family and lets the other family members come to rely on him as a member of the unit, he incurs a year of post-separation obligation. Every year that the mother lets him parent, she incurs a year of post-separation infringement on her parental rights.[260] If the noncustodial parent does not want to lose his parental status at the end of his required obligation (seven years in the above example), he should be allowed to maintain his parental status by maintaining his obligation. That is, he can opt into permanent parental status. A person who has acted as a parent for the full length of the contract and whom the mother has accepted as a parent should be able to maintain that status permanently.[261] Thus, the ability to terminate the relationship at the contract's end would be vested solely in the noncustodial parent, likely the father. This would minimize the chances that children would have to suffer the loss of a parent.

At a theoretical level, this regime differs substantially from the regime we have now, but

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[258] Again, the notion of letting the interdependencies developed during a relationship determine the obligations after the relationship has recently been adopted by the ALI in its treatment of cohabiting couples. ALI, *supra* note 153, at § 6.02. Adopting the regime suggested here would simply expand the areas in which the law lets lived relationships, that is, implicit contracts, dictate post-relationship responsibilities.

[259] These numbers are just suggestions. A state could also decide to make someone bound for twice as long as he had actually acted as a family member or for half as long.

[260] Indeed, by letting him in at all, she may lose the right to ever regain exclusive parental rights because he can exercise his option to be a permanent parent.

[261] That permanent status could be terminated by the state only upon a finding of abuse or neglect.

in practice, the number of payments might well be similar. The separated father who meets his obligation for the full contract term is likely to be concerned and involved enough with his children's lives to maintain his support. If he wants to maintain his rights to see his children, he will have to maintain his support.[262] He will stay father for eighteen years.

Many fathers who are supposed to stay fathers for eighteen years under the current regime do not, however. They abandon two to three years after separation. A regime that explicitly limited their obligation would not make much difference. At the margin, in some cases, one might see a difference. For instance, a man who was only obligated for three years might only pay for three years, whereas now, because he's obligated for fifteen years he pays for five years. This is possible, but highly speculative; the fathers that pay are likely to visit and if they visit they are not likely to want to relinquish their parental status.

As it is now, there is a hesitancy to hold non-biologically related men who have clearly been a part of a family unit to the obligations they have incurred as part of the unit precisely because their behavior does not seem to warrant holding them responsible for the child's full minority; the current law does not have a way of holding them responsible for something though less than everything. The rigidity of the system now, both in terms of who is responsible for paying and what he is responsible for paying may help make uniform the awards that courts order, but there is no place in the current system for multiple or serial fathers. This means that men who gain the benefits of parenthood are often left free to ignore the burdens of parenthood, and some men who have never enjoyed the benefits of parenthood because they never wanted it, are nonetheless required to pay.[263]

Using the construct of contract doctrine further, courts could determine child support with reference to the damages suggested by the contract. Whether one labels these damages

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[262] Otherwise he would be in breach and the mother would be able to contract with someone else.

[263] The ALI's custody and visitation provisions foresee multiple adults having visitation privileges, but they don't envision very many multiple or serial sources of child support. *Compare* ALI, *supra* note 153 at § 2.03 *with* § 3 et seq.

reasonable reliance or expectation damages, the calculation would likely be the same. Parents rely on other parents by incurring debt, forgoing jobs and forgoing other relationships that might bring in more money. The longer a family unit lasts, the greater the reliance, the more reasonable the expectation that the support will continue and the larger the number of opportunities to contract with someone else that will have passed by. The child support award should reflect those costs.[264]

This is not to say that child support awards should be the reliance or expectation measure, per se. To make it such would assume that the noncustodial parent was necessarily the breaching party. Not only would this run the risk of re-introducing problematic fault determinations into family law,[265] it would necessarily make the financial cost of break-up for the non-custodial parent greater than the cost of break-up on the custodial parent. The custodial parent would not have to bear any of the costs associated with losing the economies of scale that accompany shared living space.[266] Although it might be nice to spare the child the cost of those lost economies, such an approach is not realistic and unfair to non-custodial parents who may not have done anything wrong. Instead, reliance and expectation measures should be used as a

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[264] It is important to remember, though, that a decision to discontinue employment or education or to forego a more lucrative job because of the support someone else is providing is only reasonable if there are sound reasons to presume that the source of support will continue. An explicit promise to provide support would provide reasonable assurance of long term support as would a long-term relationship. In those cases, the dependent parent might be entitled to something like reliance damages. Relying on a short term relationship (for instance, one year) to provide long term support would not be reasonable. The damages in a short term relationship should be more limited precisely because it would be unreasonable to assume that a short term commitment is a long term commitment.

[265] Although some have argued that the advent of no-fault divorce hurt women financially, *see* LENORE J. WEITZMAN, THE DIVORCE REVOLUTION (1985), there is not a huge cry, from feminists or others, for the re-establishment of fault determinations. Few people seem to relish the idea of a third party judge with no previous knowledge of the parties deciding who was more at fault in the relationship. Moreover, from a feminist perspective, a fault regime might hurt women even more than they are currently hurt by divorce law. Women institute divorce proceedings more often then men do. Margaret F. Brinig & Douglas W. Allen, *"These Boots Are Made for Walking": Why Most Divorce Filers Are Women*, 2 AM. L & ECON. REV. 126, 126-27 (2000).

[266] For an analysis of the impact of family dissolution on the collective standards of living, see ELLMAN ET AL., *supra* note 110, at 315-20 ("Maintenance of two households requires duplication of expenditure, particularly for housing and transportation and entails lost economies of scale.")

ceiling from which to determine the child support award. From that ceiling, judges can determine an appropriate child award measure, taking into account the costs that will be associated with the noncustodial parent having to establish a home for himself.[267]

Admittedly, child support awards under such a system would be harder to determine and more variable than they are now. Some readers may legitimately question whether contract law is up to the task of determining what the award should be. Figuring out the primary caretaker's reliance or expectation interest will be very difficult. Indeed, it is a difficulty that, historically, family law was familiar with. Before the federal legislation requiring uniform percentage grid systems for determining child support,[268] family court judges around the country had very little guidance on what standards should be used to determine child support. Several studies concluded that this led to wildly erratic system, both because of too few awards of child support being ordered[269] and because of too much variability in the awards that were made.[270] The percentage grid system brought a great deal of wanted consistency to child support awards.[271]

The grid system is popular and works well in many contexts, but it seems ill-suited to deal with situations in which notions of fatherhood (or parenthood) are contested. It is one thing to say that someone who everyone agrees is and should be treated as a father as traditionally understood must pay 20% or 25% of his income in child support regardless of how well that percentage figure actually reflects the caretaker's reliance or need. It is another thing to say that

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[267] What should not be subtracted from the reliance ceiling is the costs a noncustodial parent may incur with new children. The parties may be asked to share, to some extent, the inevitable cost of a break-up, but the custodial parent should not be asked to bear the burdens of future relationships from which she gets no benefit.

[268] See supra text accompanying notes 20-24.

[269] See Nancy Thoennes et al., *The Impact of Child Support Guidelines on Award Adequacy, Award Variability and Case Processing Efficiency*, 25 FAM. L. Q. 325, 326 (1991) (citing studies). I Garfinkel and P. Wong, Child Support and Public Policy (Nov. 1987) (paper presented at the Prganization for Economic Cooperation and Develpment, Paris)

[270] Id.

[271] Id. at 344-45.

someone who never intended to be or acted as father should be so responsible, and it is still another thing to say that someone who never explicitly accepted the responsibilities of fatherhood but nonetheless let others reasonably rely on him as a father for a period of years should be responsible for paying 20% of his income in child support for the full period of the child's minority. This latter man is a father of sorts, but should he be a father forever?

If one answers yes to that question and is comfortable holding temporary or implicit fathers responsible for supporting a child for the full term of the child's minority then one can simply use the grid. The grid system could apply to anyone who is a father and one need not look t contract doctrine to help craft an award. In such a regime, we would use on contract law only to determine who the father is, not what he owes. At the other extreme, if one thinks the contract regime should be adopted in total, then we should abandon the grid system altogether and let the wording and/or nature of the adult contract always determine the extent of the parental obligation. This article endorses a middle course, one that uses the popular uniform grid system in cases where there is ready consensus on who the father is and on the scope of his obligation,[272] but one that endorses more of a reliance based system in cases where paternal status is more tenuous and the scope of the obligation more ambiguous.

Thus, under the system proposed here, most of the men held responsible now and any man who willingly opted into the status of permanent father could still be bound by the current guidelines. Remember, though, that many of the men who would be held responsible under a contract regime currently have no liability under the guidelines because they are not the biological fathers of the child. The contract-based support amount would most likely apply to unmarried biological fathers who currently pay sporadically and incompletely and to non-biological fathers who rarely pay anything at all.

As it is now, the determining factor in whether a non-biological father owes anything is often whether the biological father can be found. This is an arbitrary system that makes

[272] This would probably be the case in marriage situations or situations in which there was an explicit promise to accept the responsibilities of fatherhood.

nonbiological father's obligation a function of what someone else does, and a biological father's obligation a function of his sexual conduct, not his parenting conduct. The regime offered here would eliminate that arbitrariness. Parents who have parented would be obligated as parents. This regime would be harder to administer because it is nuanced, but it is nuanced in a way that reflects the reality of contemporary parenting. A more flexible, albeit potentially more variable system stands a better chance of making men who currently act as fathers, responsible as fathers.

D. Examples

Some examples may help bring the various strands of this proposal together.

1. The Easy Cases

Frank, a New York City police officer made famous in print and on film for his willingness to expose corruption in the Police Department, slept with a woman named Pamela, who told him she was using birth control when she knew that she was not.[273] Pamela got pregnant and sued Frank for child support. In 1983, a New York court found Frank liable for child support in an amount proportional to what he earned.[274] Under the proposed regime, Frank would not be liable for child support, nor would he have any rights as a father. The rights and responsibilities for any child born of the sexual liaison would be vested in Pamela alone unless and until she found someone else willing to assume the role of father.

Tamara Budnick and Frederick Silverman signed an agreement in which they agreed that Frederick would not assume any responsibility for a child born of their sexual liaison.[275] In 2002, a Florida court found Silverman responsible for child support notwithstanding the contract. Under the proposed regime, he would not be responsible because the contract clearly indicates his intent not to parent.

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[273] See Carbonne, supra note at 248.

[274] See In re Pamela S., supra note 26. For the story of Frank Serpico's career, see PETER MASS, SERPICO (1973).

[275] See Budnick, supra note 22.

Ann and Dudley Nygard met in July of 1982.[276] In October of 1982, Ann discovered that she was 5 months pregnant. Dudley asked Ann to stay with him, notwithstanding both of their knowledge that the pregnancy could not have resulted from their sexual activity. He also agreed "to raise the child as his own."[277] Ann and Dudley married in December of 1982 and separated in May of 1984. A Michigan court ordered Dudley to pay child support, finding either that the oral contract was enforceable, of, if barred by the statute of frauds, that Dudley was bound under doctrines of equitable or promissory estoppel.[278] Under the current regime, the case would come out precisely the same way, either because of Dudley's explicit promise to act as father or because, by marrying Ann he agreed to be a father to any children born of the marriage.[279]

Stephen and Robin Markov were married in 1986.[280] Ten months later, Robin gave birth to twins. After a rocky marriage, the parties separated in March of 1997. The parties agreed that by 1992, both realized that the twins were not Stephen's biological issue. Nonetheless, Stephen continued to see the twins and make child support payments until May of 1998. At that time, Stephen denied responsibility for supporting the twins based on his lack of biological connection. A Maryland court found that Stephen could be held responsible for child support, notwithstanding the lack of genetic connection, but only upon Robin presenting sufficient evidence that the biological father could not be found.[281] Under the proposed regime, the presence of the biological father would be irrelevant. Stephen would be held responsible as

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[276] See Nygard, supra note 148.

[277] Id. at 323.

[278] Id. at 99, 100.

[279] The marital contract has never been subject to the statute of frauds.

[280] See Markov, supra note 45.

[281] Id. at 311-312.

father and would have rights as father because he agreed to raise children born to the marriage.[282]

2. The Harder Cases

Amy and Tom dated fairly regularly but were not married. Amy got pregnant. Tom supported her emotionally and with some financial assistance throughout the pregnancy. He was present at the birth of the child (Lisa) and stayed as a regular presence in Amy and Lisa's life until Lisa was three years old. He contributed to Amy's household, paying for food, clothes and other expenses for the Lisa. By the time Lisa was three, Tom began to drift away. He was around much less and contributed almost nothing. By the time Lisa was four, Amy no longer knew where he was.

At this point, Amy could sue for paternity. The suit would be based on an implicit promise to support though, not on Tom's blood relationship to Lisa. The facts of this paternity case would look remarkably similar to the average facts alleged in paternity suits now. As mentioned, most fathers sued in paternity were present for the birth of the child and remained in a relationship with the mother for two to three years after the child's birth.[283] What would likely be different is the extent of Tom's obligation. Tom would be liable for an amount of support that reflected Ann's reasonable reliance on his contributions. He would be liable for, for instance, three years of subsequent support. During those three years he would have full parental rights. If he paid for those three years - and at any time prior to the end of those three years - he would have the right to opt into permanent parental status. If he did so, the amount of his obligation would be determined by standard child support guidelines.

If Amy did not sue Tom for paternity, it is very likely that another man (call him Bill)

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[282] If the parties wanted to contract out of the marital presumption ex ante, there would be no reason not to let them. Thus, parties could design a marital presumption that applied only in cases in which the children were biologically related. For policy reasons, though, the state should probably require that such a contract include a provision requiring genetic testing at birth so that the parties would know all relevant biological facts as soon as possible.

[283] See text accompanying notes 173-176.

would enter Amy and Lisa's life and assume a parent-like role.[284] As Bill provided continuing emotional and financial support to Amy and Lisa's household, he would make himself potentially responsible and potentially protected as a father. Whether Bill became legally responsible would depend on whether Tom had drifted away. If Tom was an obvious presence in Lisa's life, then there could be no reasonable reliance on Bill as father. However, if Tom ceased acting as father, he would be deemed to have abandoned his paternal relationship, and Bill could assume that role either explicitly or implicitly. Again, the facts of this situation are perfectly common.[285] If Amy and Bill explicitly agreed that Bill should assume parental status, the situation would be functionally identical to the hundreds of step-parent adoptions that currently happen every year in this country.[286] Bill would be the equivalent of a step-parent adopter and Tom's right would be terminated during that adoption proceeding.[287] What would be different is if Amy and Bill did not explicitly agree that Bill would assume parental status. Under the proposed model, a court should be free to infer such an agreement in the absence of explicit words or contract. Once that agreement can be inferred from the parties behavior, Bill can sue Amy to maintain contact with Lisa if Amy tries to bar him from such, and Ann can sue Bill for support if Bill drifts away like Tom did.

3. The Modern Cases

Dick and Fred are a gay couple that wants to have a child. Dick enters into a surragacy arrangement with Beth. Either using an ovam purchased from someone else or using Beth's ovum, Beth is impregnated with Dick's sperm. Pursuant to the surrogacy contract, Beth

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[284] Serial fatherhood is common. See Dowd, supra note 50 at 28-29 and "parenting is rarely done in isolation." Id. at 205.

[285] Id.

[286] To be a step-parent adoption, Ann and Bill would have to marry first, but the point is that the growing trend if for courts to be particularly willing to let a "new parent" become "the other parent" fi the first parent has not met the responsibilities of parenthood. See ELLMAN ET AL., supra note 110 at 1398-1399.

[287]See for instance, In the Matter of JJJ, 718 P.2d 948 (Alaska, 1986) (first father's parental rights terminated when step-parent wanted to adopt).

relinquishes all her parental rights at birth. If Dick has not previously signed a parenting agreement with Fred, Dick is the sole parent. If Dick and Fred have signed a parenting agreement, Dick and Fred are the co-parents to the child born as a result of the surrogacy agreement.

Laura is a single woman. She wants to be a mother. She convinces her friend Gary to have intercourse with her in the hope that she will get pregnant. Laura and Gary never discuss Gary's future role as a father. Laura gets pregnant and gives birth to Billy. During the pregnancy and after birth Laura and Gary maintain their friendship. Gary sees Billy from time to time, often bringing him gifts. The relationship between Laura and Gary cannot be considered interdependent. They do not live together; they do not provide for each other economically; they do not make mutual decisions about Billy's well-being; Laura does not rely on Gary for care or support of Billy. . Laura cannot sue Gary for child support and Gary cannot sue Laura for parental rights.[288] If Laura chooses to, she can marry or otherwise contract with another man or woman. It would be by virtue of that subsequent contract that Billy would acquire a second parent.

IV. Advantages and Disadvantages

Using contract doctrine as a construct through which to interpret parental status offers a more coherent paradigm than does the current system. It also does a better job of incorporating contemporary mores and contemporary technology. In addition, it has positive policy implications. It also has some negative policy implications. This section looks at the policy advantages and disadvantages of a parental status regime based on contract.

A. Advantages

[288] Compare Jhordan c. v. Mary K., supra note 40. (Sperm donor friend who visited with child and remained friendly with mother held to be legal father because there was no evidence that the parties did *not* intend him to be. Under the proposed regime, the burden would be on the person trying to establish parenthood to prove intent, not on the person denying parenthood to prove lack of intent.)

Bargaining or Biology?

The proposed model embraces two major distinctions that contemporary family law ignores: first, the distinction between mothers and fathers (or primary caretakers and secondary caretakers),[289] and second, distinctions between fathers. In doing so it eliminates two distinctions that currently have great salience in the law of parenthood; the distinction between "technologically produced" and "regularly produced" children, and the distinction between straight parents and gay parents.[290] The proposed model eliminates the current distinction between technologically produced children and others by adopting the model that we currently use for determining the parenthood of technologically produced children: contract. Under the proposed regime as under the contemporary law of reproductive technologies, preconception intent, as manifested in an agreement with the gestational mother, would be the critical factor in determining parenthood at birth, and post-conception intent, as manifested, implicitly or explicitly, in an agreement with the primary caretaker, would be the critical factor in determining parental rights and obligations as the child grows. The proposed model eliminates the distinction between gay and straight parents also because it acknowledges that one gains parental status not by a biological connection to the child but by contributing to and situating oneself in the interdependence of a family structure that includes children. Whereas courts now often struggle to determine the status of the non-biological gay parent/partner, under the proposed regime it would be clear. That person, man or woman, is the "father" and she or he is the father by virtue of an agreement with the mother.

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[289] It is important to emphasize here that not all family structures will have primary and secondary caretakers. If two adults who had truly shared both caretaking and support obligations were to split up, it would be clear that both adults had parental status and that both adults shared parental obligation. The contract would dictate that each party continue sharing, both the rights and obligations, as they had been doing. See text accompanying note 291.

[290] Arguably the proposed model replaces distinctions made possible by modern society with distinctions that had more relevance historically. Technologically-produced children and same-gender parents are new phenomena that have salience. Though tender years presumptions, alimony laws and legitimacy doctrine used to make distinctions between mothers and fathers and between fathers, those doctrines have decreased in importance recently. I am arguing that these much older distinctions are actually more relevant than the modern ones, though for very different reasons than those that historically justified them.

At this point, readers concerned about sex equality are probably bristling at the labels of mother and father. How can we achieve sex equality, much less degender caretaking,[291] if we structure the law of parenthood around the very sex differences that we are trying to eliminate? As mentioned in the introduction, this article uses the term mother in its biological and social sense, but not necessarily in the sense that it means "female parent." Comparably, it uses the term father to mean "partner of mother" not necessarily "male parent." I do this, following Martha Fineman's lead,[292] to ensure that what has legal meaning and value is precisely the biological and cultural contributions that mothers have traditionally made. What need not be salient is the sex of the person parenting. If a man is mothering a child because the female parent has abandoned the child, or for any other reason, then the law should treat that man as a mother. If a woman is fathering a child by supporting the family structure economically while someone else is doing more of the caretaking, then the law should treat that woman as a father. If both parents are doing identical jobs, then the labels are irrelevant anyway. For the most part, the law needs to be concerned with the rights and obligations of parenthood only when a family unit breaks up and the parties look to the law to determine relative responsibilities. The labels of mother and father are remarkably unimportant at that stage because the contract analogy proposed suggests that the rights and obligations should be based on the established pattern of behavior of the family as it existed when it was intact. Which sex held which role is irrelevant. The rights and obligations follow the established role, not gender.

Of course, the one place where sex is salient is at birth. Men cannot mother a child in utero. For those primarily concerned with degendering all notions of parenthood, a regime that not only acknowledges but rewards women's gestational labor may seem problematic. On the

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[291] On the importance of degendering caretaking, that is, spreading the costs of caring for others from women to men, see Katharine K. Baker, *Taking Care of Our Daughters*, 18 CARDOZO L. REV. 1495, 1520-24 (1997).

[292] *See* FINEMAN, *supra* note 2, at 234-35. ("I have deliberately (even defiantly) chosen not to make my alternative vision gender neutral by substituting terms such as 'caretaker' [for] mother . . . I believe it is essential that we reclaim the term. Motherhood has unrealized power.")

other hand, for many, much of the law's current refusal to acknowledge or reward women's gestational labor seems extraordinarily unjust. As discussed, men simply cannot invest what women must invest in pregnancy, and what women must invest is huge. Rewarding that investment with superior rights simply reflects a principle basic to the common law[293] and to more recent trends in family law: rewarding investment with rights.[294] Refusing to honor what is unquestionably a greater contribution smacks more of oppression than equality.[295] Thus, the reward that the proposed model offers to gestational mothers is not offered as a retreat from ideals of gender equality, but as an embracing of those ideals. Only if we recognize and reward the labor that women have always done and, to a large extent, continue to do, can we expect a world of meaningful equality.

The distinction between mothers and fathers proposed here builds on Martha Fineman's suggestion to restructure the family relationship around the caretaking-based parent-child dyad instead of the sexually-based husband-wife dyad. By making the gestational mother-child relationship primary, the proposed model gives significant parenting power to women. It also, like Fineman's model, helps unmask dependencies that the sexual family model hides. Fineman, more than any other feminist or family scholar, has made us all realize how much dependencies beget dependencies. By taking care of dependents, caretakers become dependent because the person in need of care demands the time, resources and energy that the caretaker

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[293] Locke wrote that "'tis labor that puts the difference of value on every thing." JOHN LOCKE, TWO TREATISES OF GOVERNMENT 338 (Peter Laslett ed., New American Library 1965). David Ellerman suggests that labor desert theory, or rewarding those who have invested more, is the principal normative theory of property law. David Ellerman, *On the Labor Theory of Property*, 16 PHIL. F. 273, 302-04 (1985). Some may argue that property theories should not apply to children, but virtually all scholarly and practical proposals for custody determinations suggest that relative emotional investment in the child should be a determinative factor. *See* Baker, *supra* note 220, at 1581.

[294] As discussed, *supra* text accompanying notes 204, the ALI suggests that custody and parental rights should be awarded based on the established patterns within the family unit. Established patterns serve as proxies for relative investment.

[295] For more on the difference in male and female contribution, see Katharine K. Baker, *Biology for Feminists*, 75 CHI.-KENT L. REV. 805, 822-23 (2000).

would otherwise use to take care of herself.[296] The proposed model recognizes that women often try to meet these dependencies by entering into relationships with others. It recognizes that in meeting those dependencies men must not be viewed simply as generous philanthropists, but as individuals willingly undertaking obligations in return for benefits. It forces men to take their family obligations seriously because it holds them responsible only for those obligations that they have willfully accepted.

Where this proposal differs from Fineman's is in its ability to incorporate fathers and reward them when they deserve it. As I have argued elsewhere, a world in which women have all the parental power and all the parental responsibility is not necessarily a feminist ideal.[297] The evidence suggests that the vast majority of mothers want to share the rights and responsibilities of parenthood with someone else.[298] Women want someone with whom to share the physical, financial and emotional burdens and they want someone with whom to share the joy. For many parents, it is simply more fun to parent together than apart. In order to make it worthwhile to men for them to share in the hard and the fun, the law must be prepared to honor the sacrifices they make and the desires they demonstrate to parent.

By honoring those sacrifices and desires, the proposed model draws men into the family unit, but in a much more rational and just fashion than does contemporary paternity law. Instead of relying on confused and inconsistent invocations of punishment and deterrence, the proposed model links parental status to a willful acceptance of parental responsibility. Instead of assuming that genetic contribution gives rise to moral responsibility, the proposed model assumes that parental participation gives rise to moral responsibility. Instead of assuming, without explanation, that the child's entitlement must be tied to the parent's income, the proposed model links the child's entitlement to what the child and his or her primary caretaker have bargained for

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[296] FINEMAN, *supra* note 2, at 103.

[297] Baker, *supra* note 291, at 1514-19.

[298] *Id.* at 1519.

and come to rely on. It also links parental obligation to parental rights in a way that can explain why someone must continue to pay support even if he is not acting as a parent. He must continue to pay because he agreed to pay. By rooting parental status in contract, the proposed model provides a unified understanding of where parental rights and obligations come from, while still recognizing that different contracts will require different remedies. It makes distinctions between different kinds of fathers in order to make sense of legal fatherhood.

As should be clear, also, by dispensing with biology as the nominal sin quo non of fatherhood, we are not likely to be dispensing with the biparenting norm that paternity doctrine currently reifies. The great majority of children will have at least two parents because most mothers share parental status at some point during a child's life.[299] Moreover, the two parents they have will be individuals who chose parenthood, not individuals on whom the law imposed parental status. Some children may have mothers who chose not to parent with somebody else. Other children may have fathers who abandon them after a time. The children in either of these categories would, of course, find plenty of similarly situated friends among the children in our current regime. Today, the children of women who are not married and have not previously agreed to share parental rights when they choose to buy sperm, have no fathers. Comparably, children of women who are not married and have not previously agreed to share parental rights when they have sex often raise the child without a father and refuse to pursue the biological father in paternity. Other single women who want to parent and are tired of or uninterested in waiting for marriage simply choose to adopt.[300] There is little reason to believe the proposed model will increase the number of children in these categories.[301] As many children as have

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[299] DOWD, *supra* note 50, at 205 ("Parenting is rarely done is isolation.").

[300] *See* Bonnie Miller Rubin, *Adoption Brings Kids into Singles' Lives*, CHI. TRIB., May 11, 2003, at C1.

[301] There is some possibility that women will not pursue the father in the new regime because they will receive enough money from the state to support the child without the man's contribution. This is possibly true, but again, speculative. The fact is that women will always have an incentive to try to bargain with a man because she stands to gain more support from the bargain.

fathers today will likely have fathers under the new regime, but they will have fathers who willingly assumed the role.[302]

I consider the foregoing to be advantages of the proposed regime. Eliminating distinctions that needlessly exclude deserving people from parental status while at the same time recognizing that varying kinds of investment and commitment should give rise to proportional rights and obligations are positive developments for the law of parenthood. The proposed regime brings disadvantages also, however, most notably the problem of cost.

B. Disadvantages

The current system ensures that, except for children born to single women by virtue of artificial insemination, there are always two *potential* sources of financial support for a child and it mandates that each potential source pay a given percentage of his or her income. Thus, the current system helps eschew state responsibility for children. More single mothers may be in need of financial help in the proposed regime because they will not be able to pursue the biological father of the child for the full percentage of his income that the current regime makes him responsible for paying to her. This could be a considerable disadvantage.

It also might not make much difference. Most of the child support that gets paid, gets paid voluntarily.[303] Almost half of the of unwed women who could pursue the biological father for paternity, choose not to.[304] Those that do make paternity claims can usually base the claim on relationship as well as blood.[305] Moreover, regardless of the theory of their claims, most unwed mothers have precious little to gain, even if their claims are successful. The average unwed

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[302] Some children today have legal fathers whom the state, though not the mother, has chosen to pursue. To my knowledge, there is no indication that these state-pursued fathers are fathers in anything like a nurturing or cultural sense.

[303] Harris, *supra* note 187, at 476.

[304] See *supra* notes 171-172.

[305] *See supra* text accompanying notes 173-176.

father earns just over $16,000 a year.[306] Money spent on enforcement might be more efficiently spent on a direct subsidy to children. Also, of course, in the proposed regime, there would be more money coming from a source that is now only tapped sporadically, non-biological fathers who have acted as fathers. Thus, it is actually quite hard to estimate how much more a contract regime would cost.

Even if the proposed system did require greater governmental expenditure on children, however, budgeting for those resources would do nothing more grave than bring the United States up to par with the rest of the industrialized world. The current scheme in this country, which assumes bilateral obligation stemming from blood and assumes that two parents acting alone should be able to meet all of the needs of children, is followed virtually nowhere else in the world. As mentioned earlier, with the exceptions of China and the United States, every industrialized country has a family allowance program that provides regular cash payments to families with children regardless of need.[307] Some of these programs are employer based; others are run completely by the government.[308] Many of these countries also supplement the basic

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[306] Lauren M. Rich, *Regular and Irregular Earnings of Unwed Fathers: Implications for Child Support Practices* 11 (working paper, Bendheim-Thoman Ctr. for Research on Child Wellbeing, Princeton U., July 1999), *available at* http://crcw.princeton.edu/workingpapers/WP99-10-FF-Rich.pdf. This author notes that if one includes underground employment in the fathers' earnings, the average goes up 5%, but there is no guarantee that underground earnings could be traced and captured by authorities looking for child support.

Statistics tracking child support enforcement over the last decade show an increase in the percentage of child support cases with collections, but a decrease in the amount collected per case. Vicki Turetsky, *Child Support Trends* slide 7 (Center for Law and Public Policy, Washington, D.C., May 2003), *available at* http://www.clasp.org/Pubs/Pubs_ChildSupport.

[307] Social Security Administration, Research Report #65, SSA Publication No. 13-11805, Social Security Programs Throughout the World - 1997 xxvi, xxx-xxxv, xxvi. China, and most non-industrialized nations, depend far more heavily on extended family extended family networks for both financial support and parental figures. C.K. YANG, THE CHINESE FAMILY IN THE COMMUNIST REVOLUTION 150 (1959) (grand and great-grand parents are often responsible for child care); Maria G. Cattell, *The Discourse of Neglect: Family Support for the Elderly in Samia, in* AFRICAN FAMILIES AND THE CRISIS OF SOCIAL CHANGE 157, 157 (Thomas S. Weisner & Candice Bradley eds., 1997) (in sub-Saharan Africa, extended families continue to be the primary support system for society's vulnerable members, including children and the elderly); ANDREA B. RUGH, FAMILY IN CONTEMPORARY EGYPT 201 (1984) (families are under social pressure to help their less fortunate relatives, elderly are rarely institutionalized except when no family caretakers remain).

[308] SSA Report, *supra* note 4.

family allowance amount in single-parent households.[309] In other words, most of the industrialized world does not consider the dependency of youth a matter of private concern.[310] If the United States could sever its allegiance to privatizing the dependency of youth, the proposed contractual framework would appear both less radical and less costly. The fact is that there are young dependents, just as there are old dependents, who need our collective help because taking care of them is more than any one person can manage on his or her own. Collective responsibility for children should follow from the fact that children, like the elderly, are needy, not from the fact that they are fatherless.

There are any of a number of ways that the polity could meet this collective responsibility. First, of course, any extra money needed in light of an altered system of parental status could come from general revenue. Rhetorically, it is very easy for politicians to talk about supporting children. The proposed regime would give them a reason and a way to implement that support. Alternatively, some sort of payroll tax, not unlike the current FICA system, could amply supply a family allowance program designed to give dependency assistance. Much greater per child tax deductions, coupled with a program that adequately provided for children whose parents were earning too little to take advantage of tax deductions, could also achieve the desired goals.

Moreover, as suggested earlier, if we are deeply concerned about the moral obligation or deterrent functions that a biologically-based paternity system may serve, a tax on biological fathers could serve those functions just as well while providing additional income for children. Again looking at the United States' peer countries, most biological fathers pay something

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[309] Austria, Denmark, Israel, Netherlands, Sweden and F.R. Germany all have special support for one parent families. *See* Alfred Kahn & Sheila Kammerman, Introductory Note: *Child Support in Europe and Israel, in* CHILD SUPPORT: FROM DEBT COLLECTION TO SOCIAL POLICY 45 (Alfred Kahn & Sheila Kammerman eds., 1988). France also has a special allowance for single parents. *See* SSA Report, *supra* note 4, at 133.

[310] The non-industrialized world is less likely to have state support, but also much more likely to have extended family support. The non-industrialized world does not assume that two parents acting alone can raise a child.

towards support of their children, but what they pay is a fraction of the subsidy that caretaker's receive. The government assumes the primary responsibility for providing a minimum standard of support.[311] Moreover, these biological fathers usually have limited, if any, parental rights.[312] What this means is that men have less of a need to avoid detection (because they will not be responsible for that much support) and mothers have less need to hide the biological father's identity (because he cannot meaningfully interfere with her parental rights). These differences may well account for the vastly different rates of paternity establishment in the United States and its peer countries. In most of the United States' peer countries, the paternity establishment rate for children of unmarried mothers hovers around 90%.[313] In the United States, it is 30%.[314] Thus, perhaps ironically, making biological fatherhood significantly less important legally, may make it easier to find and secure money from biological fathers.

A tax on biological fathers would not provide all of the funding needed, but it could help defray the cost. It would also not make men fathers in either the financial or the social sense because fatherhood would come from relationship not blood. Men would have status as fathers not because women and children need support, but because the men have meaningfully participated as family members.

V. Conclusion

There is a great deal of discussion these days about both genetics and fatherhood. On

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[311] Kahn & Kammerman, *supra* note 6, at 45-49.

[312] *See* W. Craig Williams, *The Paradox of Paternity Establishment: As Rights Go Up, Rates Go Down*, 8 J. LAW & PUB. POL'Y 261 (1997) (comparing the relative paternal rights and paternity establishment rates in the United States, Denmark, the Netherlands, and Germany).

[313] Kahn & Kammerman, *supra* note 6, at 368. In Sweden, a country with particularly generous family support allowances, it is 95%.

[314] DOWD, *supra* note 50, at 6.

what seems like a daily basis, the biological sciences make new discoveries about the relevance of biology in our lives.[315] Comparably, the debate within the social sciences about the importance of fathers in children's lives rages on.[316] There can be little doubt that both genes and fathers (or, more precisely, two parent families) matter, but there are loads of reasons to doubt that a genetic father matters.

This article has shown that the law has always been willing and at times eager to dismiss the importance of the genetic connection. It has dismissed the importance of that connection most often when there is a different relevant connection, between the mother and another man, in the child's life. It is increasingly dismissing the importance of genetic connection when genetics are separated from sexual activity. The advances in technology that allow us to learn more about the role of genetics in our lives also make it possible to distill genetics from gestation, sexual activity, and intent to be a parent. The more these previously inseparable factors can be isolated, the more the law must come to terms with how important each factor is to determining parental status. Intent to parent is emerging as the primary determinant of parental status. Relaxed social norms with regard to sexual behavior and parenting patterns are also forcing courts to confront

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[315] *See* Tim Radford, *'Genetic Shield' May Beat Cancer; DNA Offers Hope of Altering Path of Evolution,* Guardian (London), April 24, 2003, at 9 (discussing potential of genetic therapy that could interrupt further inheritance of cancer gene); Benedict Carey, *DNA Research Links Depression to Family Ties*, L.A. Times, July 7, 2003, § 6, at 3 (announcing breakthroughs in the determination of genes linked to inherited susceptibility to depression); Marilynn Marchione, *Gene Analysis Better At Spotting Cancer Risk; DNA Chip Can Help Determine Treatment for Breast Tumors, Doctors Say*, Milwaukee Journal Sentinel (Wis.), at 1A (discussing how the structure of a woman's DNA, analyzed with the aid of microchips, can assist doctors in determining a how successfully a woman will respond to chemotherapy for breast cancer); Karen Auge, *Genetics Poised to Drive Medicine; DNA Profiles May Transform Health Care into Prevention,* Denver Post, May 13, 2003, at A-01 (discussing advances in preventative and personalized medicine can increase the success of treatments by allowing doctors to predict inherited responses to drugs based on patient's genetic makeup).

[316] *Compare generally* WILLIAM GALSTON, A LIBERAL DEMOCRATIC CASE FOR THE TWO PARENT FAMILY, THE RESPONSIVE COMMUNITY 1, 14 (1990-91) (arguing for more rigid norms of father presence) *and* DAVID BLANKENHORN, FATHERLESS AMERICA (1995) (arguing that fathers are essential to a child's healthy upbringing); *with* MICHAEL LAMB, THE ROLE OF THE FATHER IN CHILD DEVELOPMENT (3d ed. 1997) (arguing that what is important to children is the resources that second parents can bring to the child and his or her primary caretaker, not the second parent, per se) *and* FINEMAN, *supra* note 75 (endorsing a regime in which fathers had no official role to play in the family).

equitable claims to parenthood when there is indisputably no genetic connection. Courts receptivity to these claims turns largely on the extent to which the mother and father figure seem to have manifested a mutual intent to parent.

This trend away from genetics and towards contract is a positive development. It is a development that reconciles paternity precedent with technological advances, legal norms with parenting practices and sexual mores with parental obligations. It is a development that makes every parent-child relationship a wanted parent-child relationship. The science of genetics increasingly tells us who we are. It need not tell us who our parents are.