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PARENTAGE AT BIRTH: BIRTHFATHERS AND SOCIAL FATHERHOOD

Nancy E. Dowd*

INTRODUCTION

Deciding who should be a child's legal parents at birth seems a simple task. Instinctively, the answer is the child's biological mother and father. Historically, the answer would have been different depending on whether the child was born within a marriage or not; marriage trumped biology, at least with respect to fathers.¹ A husband was generally presumed to be the father of a child born to his wife, even if there was no genetic connection.² Because the line between legitimacy and illegitimacy was jealously guarded, children born outside of marriage could not rely on genetic connection to identify their father or their mother. Illegitimate children were viewed as the "children of no one," although legal responsibility for their care was placed on biological mothers.³ Fathers, other than husbands, could generally choose whether to be parents, rather than be assumed to have that responsibility.⁴ In addition, traditional gender roles dictated that fathers nurtured their children very little; their responsibilities were breadwinning, discipline, and managing the family as the patriarchal head of the household.⁵ Adoption was a mechanism to shift children

* Chesterfield Smith Professor of Law, University of Florida Fredric G. Levin College of Law. I am deeply indebted to Professor James Dwyer, who organized the Parentage Rights Conference at the College of William & Mary School of Law in the fall of 2005. The conference participants provided invaluable comments and critique that informed the final form of this article. I benefited, in addition, from the insights and readings of my colleague, Barbara Bennett Woodhouse. Professor Woodhouse suggested the use of the term "birthfather" to name the social, as opposed to the genetic, father present at birth. Finally, Kenneth Farmer has provided invaluable research assistance that made this article possible.

¹ On the historical model of parentage, see generally Mary R. Anderlik & Mark A. Rothstein, *DNA-Based Identity Testing and the Future of the Family: A Research Agenda*, 28 AM. J.L. & MED. 215, 222-24 (2002); June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011 (2003).

² *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); see also Niccol Kording, *Nature v. Nurture: Children Left Fatherless and Family-Less When Nature Prevails in Paternity Actions*, 65 U. PITT. L. REV. 811, 812 (2004) (discussing the history of the marital presumption).

³ See NANCY E. DOWD, IN DEFENSE OF SINGLE-PARENT FAMILIES 40, 89 (1997) (recognizing the common law notion that a child without a legally recognized mother or father and without a surname was labeled "the son of no one").

⁴ *Id.* at 92.

⁵ NANCY E. DOWD, REDEFINING FATHERHOOD 34 (2000) [hereinafter DOWD, REDEFINING FATHERHOOD].

from one set of parents to another, either voluntarily or involuntarily, when connected to state power to terminate parental rights, but adoption still presumed the existence of initial parents.⁶

A number of changes have moved parentage away from the marital/genetic/patriarchal model that valued the marital family above genes or social fatherhood. First, the stigma attached to non-marital parenthood has eroded. The number of children born outside of marriage has significantly increased and now constitutes one-third of all births.⁷ The rate of cohabitation, whether temporarily before marriage or as a permanent relationship in lieu of marriage, increased tenfold between 1960 and 2000 to eleven million couples in 2000.⁸ Strong social and constitutional arguments have also eroded the harsh traditional distinctions between legitimate and illegitimate children.

Second, fathers have asserted a new, more engaged model of fatherhood. Nurture is valued rather than simple biological or marital ties, or actions limited to economic breadwinning.⁹ Egalitarian norms have replaced the patriarchal model, so parenthood in a heterosexual family is seen as a partnership rather than as a hierarchy, and as gender-neutral rather than gender-defined.¹⁰ Heterosexual norms also have been challenged by gay and lesbian families, suggesting fatherhood without motherhood and vice versa.¹¹

⁶ See generally FAMILIES BY LAW: AN ADOPTION READER (Naomi R. Cahn & Joan Heifetz Hollinger eds., 2004). It is interesting to note, however, that until a series of cases challenged state adoption laws, the only parent whose legal surrender was deemed essential by many states was the biological mother; only after those cases were biological fathers given due process rights to notice and an opportunity to be heard before the child could be placed for adoption. See generally *id.*

⁷ See Stephanie J. Ventura & Christine A. Bachrach, *Nonmarital Childbearing in the United States, 1940–99*, in NAT'L VITAL STAT. REPS., Oct. 18, 2000, at 1, 2 (noting the percentage of births to unmarried women rose from 3.8 percent in 1940 to 33 percent in 1999).

⁸ See Alternatives to Marriage Project — Statistics, <http://www.unmarried.org/statistics.html> (last visited Dec. 21, 2005) (citing 2000 census statistics). An estimated two-fifths of children will live in a household with cohabitants before the children reach age 18. See *id.*; see also Lynne M. Casper, Philip N. Cohen, & Tavia Simmons, *How Does POSSLQ Measure Up? Historical Estimates of Cohabitation* (U.S. Bureau of the Census, Population Division, Working Paper No. 36, 1999) (concluding that the number of cohabiting households increased from 1.5 percent, or 1.1 million, in 1977, to 4.8 percent, or 4.9 million, in 1997), available at <http://www.census.gov/population/www/documentation/twps0036/twps0036.html>.

⁹ See DOWD, REDEFINING FATHERHOOD, *supra* note 5, at 173.

¹⁰ The egalitarian gender-neutral ideal is especially evident in the Supreme Court's decision upholding the Family and Medical Leave Act because it combats discrimination grounded in restrictive gender roles that affect both mothers and fathers. *Nev. Dep't. of Human Res. v. Hibbs*, 538 U.S. 721 (2003). Martha Fineman has written especially cogently on the consequences of equality rules in an unequal social context, and the distance between the vision and the reality, particularly where care generates dependency. MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004); MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991).

¹¹ See Melanie B. Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents*, 25 N. ILL. U. L. REV. 433 (2005); E. Gary Spitko, *From Queer to Paternity: How*

Third, non-marital fathers have gained rights and responsibilities. Concern about the fair treatment of non-marital fathers, especially in adoption, has refocused the definition of parentage to support paternal rights.¹² Concern over the economic well-being of non-marital children has energized child support enforcement, generating stronger efforts at paternity establishment.¹³ From abysmal numbers thirty years ago, the paternity establishment rate for non-marital births is now nearly seventy percent.¹⁴ The combination of imposing greater economic responsibility and linking child support to custodial rights has resulted in non-marital fathers having legal status parallel to divorced fathers. In theory, marital status now has little to do with custody or child support obligations.¹⁵ This erasure or minimization of marital status in the definition

Primary Gay Fathers Are Changing Fatherhood and Gay Identity, 24 ST. LOUIS U. PUB. L. REV. 195, 198 (2005) (arguing that increased visibility of primary gay fathers has the potential to weaken traditional gender roles associated with the fatherhood identity and to undermine the perception that gay men are unsuited for fatherhood).

¹² Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 885–92 (2000) (reviewing changes in nonmarital parenting and adoption law); see also Nancy E. Dowd, *Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers*, 54 EMORY L.J. 1217 (2005) [hereinafter Dowd, *Fathers and the Supreme Court*].

¹³ See Elaine Sorensen & Mark Turner, *Barriers in Child Support Policy: A Review of the Literature*, available at <http://www.ncoff.gse.upenn.edu/litrev/sblr.htm> (last visited Sept., 26, 2005) (discussing the gradual federalization of child support and increased enforcement).

¹⁴ Ronald Mincy, Irwin Garfinkel & Lenna Nepomnyaschy, *In-Hospital Paternity Establishment and Father Involvement in Fragile Families*, 67 J. MARRIAGE & FAM. 611, 611 (2005). For the difficulties in calculating paternity establishment, see Sara S. McLanahan, *The Consequences of Nonmarital Childbearing for Women, Children, and Society*, in U.S. DEP'T OF HEALTH & HUMAN SERVS., REPORT TO CONGRESS ON OUT-OF-WEDLOCK CHILDBEARING 229 (1995), available at <http://www.cdc.gov/nchs/data/misc/wedlock>. Because paternity has been linked to child support enforcement, statistical data reflects the collection of child support by the state within the welfare system, so paternity rates are measured in terms of that goal.

There are no national statistics collected on paternity establishments. It has become common practice to use as a proxy for the rate of paternity establishment (CSE), the annual number of paternities established by state child support enforcement programs divided by the number of children born outside of marriage in that year. This is not an actual measure of the rate of paternity establishment for several reasons. First, the numerator includes paternities established by the CSE program for children ages 0–18, which the denominator only includes children from age 0 to 1 year. Second, CSE data does not include paternities established outside the CSE system, either privately, through the courts or voluntary acknowledgments or through the marriage of the parents.

Id. at 235 n.2.

¹⁵ See DOWD, REDEFINING FATHERHOOD, *supra* note 5, at 93. Significant barriers remain, however, to the involvement of non-marital fathers in the lives of their children. Sorensen & Turner, *supra* note 13 (“Visitation and custody of children has not been one of the mandates of the child support enforcement system.”).

of fatherhood implicitly challenges the justifications for the marital presumption that traditionally trumped genetics.

All of these changes pale, however, when compared with the technological change that has occurred with respect to establishing biological parentage.¹⁶ DNA testing now makes it possible to identify the biological parents of every child.¹⁷ It is possible to imagine establishing biological identity for every child in the not-too-distant future. DNA testing erases the historic distinction between fathers and mothers: mothers can be known because they give birth, while fathers have to be established.¹⁸ The certainty that the woman who gives birth is the biological mother also is no longer an absolute; in the era of egg donation, surrogacy, and other biotechnological advances, the possibility exists that intended parents, male and female, may have no biological or gestational connection to a child.¹⁹

Modern principles of parentage center on children's well-being and social benefit.²⁰ The question raised by our changed context is how we should define parentage consistent with those principles. The more narrow question raised by this symposium is what rules we should follow at birth. In this article, I focus on parentage by looking exclusively at fathers. In my prior work on fatherhood, I have argued that our legal

These studies amply suggest than many fathers do want to be involved, but suffer from economic disadvantages and a lack of skills and resources that inhibit or undermine these desires over time. At the same time, personal and community barriers can also exist. . . . [S]ome young unwed fathers operate within gender and sexual codes that discourage responsible behavior and emotional involvement with their children or sexual partners.

Id.

¹⁶ Also with respect to *becoming* a parent — a related development. We can assist or overcome physical or biological difficulties that formerly could only be resolved by adoption. This has had the effect of reinforcing biological reproduction over adoption. *See generally* ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION* (1999).

¹⁷ *See generally* Mary R. Anderlik, *Disestablishment Suits: What Hath Science Wrought?*, 4 J. CENTER FOR FAMS., CHILDREN & CTS. 3 (2003); Anderlik & Rothstein, *supra* note 1; Nancy E. Dowd, *From Genes, Marriage and Money to Nurture: Redefining Fatherhood*, 10 CARDOZO WOMEN'S L.J. 132 (2003).

¹⁸ Historically that distinction was linked to patriarchal privilege and the primacy of property. *See* Garrison, *supra* note 12, at 864.

¹⁹ *See, e.g.*, *K.M. v. E.G.*, 117 P.3d 673, 681 (Cal. 2005); *In re C.K.G.*, 173 S.W.3d 714, 716–17 (Tenn. 2005) (taking “intent” into consideration as a factor for establishing legal maternity). For a recent review of reproductive technologies and their implication for parentage, see Garrison, *supra* note 12, at 903 (arguing that a separate structure should not be created, but rather that children of these technologies should be treated the same as children conceived through coitus).

²⁰ Marsha Garrison describes the modern model as child centered with the presumptive benefit of a two-parent family. *See* Garrison, *supra* note 12, at 882, 892. June Carbone and Naomi Cahn also identify the strong preference for two parents in both existing models and in their own. *See* Carbone & Cahn, *supra* note 1, at 1021.

definition of fatherhood should be based on nurture.²¹ Nurture includes the physical, psychological, emotional, and spiritual care of children. It is both qualitative and quantitative, and requires a positive relationship not only with the child but also with the child's other caretakers, if there are others.²² It is developmental and age sensitive, performed differently depending on the age and stage of children's development, as well as individualized, ultimately defined by the particular needs of the individual child.²³

My focus has been on fatherhood after children are born, looking at what fathers do. I have particularly concentrated on the implications of my definition of fatherhood for issues of custody, post-divorce or in non-marital families. The challenge of this symposium has been to ask how I would translate the principle of defining fatherhood as nurture into rules that apply at birth. The rules are linked: the rules at birth should reflect principles that would also be followed in custody, visitation, and child support determinations when those determinations based on an actual record of care occur later in a child's life.

I propose that at birth we identify a "birthfather" in order to confer parentage. I use the term "birthfather" here not to identify the biological father, but rather to establish whether a social father is present at birth.²⁴ A "birthfather" would have demonstrated acts of nurture toward the child and an affirmative commitment to cooperative parenting with the mother. This status would be based on his actions during the pregnancy, his presence at childbirth, and his voluntary acknowledgment of paternity. Second, I would recognize biological fathers as presumptive birthfathers, by way of a rebuttable presumption at birth that social fatherhood will be coextensive with biology. Third, I would permit more than one legal father. While the biological father and birthfather might be the same person, in some instances there will be a biological father and a social father (and even the potential for more than one social father in a child's lifetime). Finally, I would separate economic responsibility from the privileges and rights of social fatherhood.

I set forth how these principles might be implemented by offering a draft revision of the Uniform Parentage Act (UPA).²⁵ I begin my analysis with a brief commentary

²¹ See DOWD, REDEFINING FATHERHOOD, *supra* note 5, at 157 ("My core thesis is that the redefinition of fatherhood must center around the nurture of children."); see also Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993) (articulating a model of generative fathering grounded on the actions of fathers).

²² DOWD, REDEFINING FATHERHOOD, *supra* note 5, at 177.

²³ *Id.* at 39–40, 161.

²⁴ Typically, a "birthfather" is a term used in the adoption world to identify the biological father who surrenders a child for adoption. I mean to use that word differently here — to identify social fatherhood, but also to link it specifically to birth. My focus in this piece is on *establishing* parentage without considering the implications of these rules for adoption.

²⁵ UNIF. PARENTAGE ACT (amended 2002) [hereinafter UPA], *available at* <http://www.law.upenn.edu/bll/ulc/upa/final2002.htm>.

on the UPA and its underlying principles. I then describe in greater detail the parentage principles I have articulated above that would be operative at birth. I follow with draft revisions of some sections of the UPA, as well as suggestions for drafts of necessary new sections. I conclude by addressing some of the implications of these proposals.

I. THE UNIFORM PARENTAGE ACT

The Uniform Parentage Act, as amended in 2002, incorporates two good policy choices: (1) treating children the same regardless of the marital status of their parents, and (2) treating mothers and fathers the same, as much as possible.²⁶ Section 202, which eliminates marital status distinctions, is admittedly not perfect. Although the text states a clear principle of equality, the commentary indicates that equal treatment does not mean all distinctions are eliminated, a position that at first glance seems in conflict with itself.²⁷ Presumptions of intent with respect to donors under the Uniform Probate Code are the example given in the commentary — one might be a child of the donor but not be included as one of the donor's children for inheritance purposes.²⁸ This example reveals a set of assumptions about when relationships matter and when they are “merely” genetic or social links. This assumes that a biological father cannot or is unlikely to be a social father if his biological child does not live in his household. It also assumes that a non-genetic child who lives with a man who acts as the child's father is, nevertheless, not his “real” child. Therefore, the child would be disqualified from inheritance unless the testator clearly provides otherwise. I would argue the inequality permitted by the commentary is based on layers of assumptions that ought not be made nor reinforced in a statute. Equality should mean no distinctions based on the marital status of the parents or the derivative status of children. The notion that some children are not “legitimate,” which has died a slow social and legal death, should be completely eliminated.

The UPA also treats mothers and fathers the same, to the extent feasible.²⁹ Here, some difference is necessary for real equality even if all children are genetically identified (which would equalize mothers and fathers in that respect) because pregnancy constitutes unique caregiving.³⁰ After birth, however, caregiving expectations should be equal. Identification of parents may differ, but the expectations of parents should be the same. There are provisions for identification of mothers, even though

²⁶ UPA § 202 & cmt.

²⁷ UPA § 202 cmt.

²⁸ *Id.*; UNIF. PROBATE CODE § 2-705(b).

²⁹ UPA § 202 cmt.

³⁰ For an argument that pregnancy places women in a unique position that should be recognized with unique legal status at birth, see Katherine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1 (2004).

biological determination is generally not an issue.³¹ Because identification of genetic mothers generally is not problematic, recognition of social mothers at birth is generally uncommon, outside of assisted reproduction.³² With respect to mothers, it is assumed that biological and social motherhood coexist.³³ I would argue that same assumption, as a legal presumption, should apply to fathers.

The UPA recognizes four kinds of fathers: acknowledged fathers, adjudicated fathers, alleged fathers, and presumed fathers.³⁴ An acknowledged father is one who voluntarily claims paternity, with the consent of the mother, based on genetic parenthood.³⁵ The UPA clearly imagines a genetic father who is not married to the mother but maintains a relationship with her and likely is present at birth. A valid acknowledgment is equivalent to an adjudication of paternity.³⁶ An adjudicated father is one whose paternity has been established by a court, and the classification can include both genetic and non-genetic fathers.³⁷ An alleged father is one who claims or is alleged to be a genetic father.³⁸

A presumed father may be a man linked to the child through marriage, or linked by the father's cohabitation with the child coupled with his "holding out" the child as his own.³⁹ Thus, a presumed father may be either a genetic father or purely a social father without a genetic connection.⁴⁰ Presumed fathers are held responsible for the children they parent by the requirement that a presumed father may file a denial of paternity only if there is an acknowledged father to take his place.⁴¹ Presumed fathers are protected from the claims of other fathers because the UPA imposes limitations upon challenges to parentage even by genetic fathers.⁴² Under section 607, a child with a presumed father cannot be subject to adjudication any later than two years after the birth of the child.⁴³ Similarly, section 608 provides that genetic

³¹ UPA § 201(a) (relating to the mother-child relationship).

³² UPA § 106 cmt (recognizing that maternity disputes are "extraordinarily rare," and thus, the UPA is written in terms applicable to paternity). After birth, of course, social mothers are likely to exist in the same way that social fathers are — as stepparents — whether in a relationship of cohabitation, long term commitment, or marriage.

³³ The exception is assisted reproduction.

³⁴ UPA § 102 cmt ("Four separate definitions of 'father' are provided by the Act to account for the permutations of a man who may be so classified.").

³⁵ UPA § 301.

³⁶ UPA art. 3 cmt.

³⁷ UPA § 102(2).

³⁸ UPA § 102(3).

³⁹ UPA § 204.

⁴⁰ UPA § 204 cmt (creating a presumption of paternity when a man resides with and holds a child out as his own for the first two years of the child's life).

⁴¹ UPA §§ 302, 305.

⁴² Under section 606, if a child has no presumed, acknowledged, or adjudicated father, there is no limitation on when an action to establish parentage can be filed. UPA § 606.

⁴³ There is the narrow exception that such a filing can occur at any time if the presumed father and the mother of the child never cohabited or engaged in sexual intercourse during

testing can be denied when a child has a presumed or acknowledged father when it is “inequitable” to do so.⁴⁴ As the commentary indicates, this permits a father who knows he might not be the genetic father but who accepts his relationship with the child and fosters a social parenting relationship to maintain that relationship.⁴⁵ Two of the factors that may be considered in denying testing are the best interests of the child and the knowledge of the father.⁴⁶ Thus, the section recognizes the doctrine of paternity by estoppel.⁴⁷ The UPA goes a long way toward recognizing social fatherhood without a biological connection through the category of presumed fathers.

The UPA’s recognition of social fathers, however, is bounded by the requirement that a child have only one father. A social father, most notably a marital father who is not the genetic father, is strongly supported by the UPA, but that man takes the sole place available, a principle of one father for each child.⁴⁸ There is no provision for additional social fathers. So, for instance, a stepfather who acts as a social father to a child and economically supports the child during marriage may not be recognized as a father under the Act.

The American Law Institute (ALI) Principles relating to custody recognize social fatherhood under the concepts of parent by estoppel and de facto parent.⁴⁹ A parent by estoppel is very similar to a presumed parent. A person who has lived with a child for at least two years, who acted as a father and believed he was the biological father, but who also continued his care of the child even when he found out he was not the biological father, may be recognized as a parent under this doctrine.⁵⁰ Alternatively, a person who has lived with the child since birth, took responsibility for the child, and acted as a parent based on an agreement with the child’s parent or parents, may be a parent by estoppel.⁵¹ A de facto parent is even more loosely defined as one who has lived with the child for at least two years and who actually

the time of probable conception and the presumed father never held out the child as his own. UPA § 607.

⁴⁴ UPA § 608.

⁴⁵ UPA § 608 cmt.

⁴⁶ UPA § 608(b) (providing a range of factors the court should consider in evaluating a motion for genetic testing).

⁴⁷ UPA § 608 cmt (incorporating the doctrine of paternity by estoppel which recognizes a presumed or acknowledged father as the father of a child when the man holds the child out as his own with the consent of the mother knowing that the child may not be his own).

⁴⁸ UPA art. 3 cmt (“By ignoring the real possibility that the child will have both an acknowledged father and a presumed father, Congress left it to the states to sort out which of the men should be recognized as the legal father.”); *see also* UPA § 607 (limiting the circumstances and time frame under which a proceeding may be brought to adjudicate the parentage of a child).

⁴⁹ AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1) (2002). The ALI recognizes “legal” fathers as its third category of fathers, who are fathers as defined by state law and thus fathers under parentage statutes. *Id.* § 2.03(1)(a).

⁵⁰ *Id.* § 2.03(1)(b)(ii).

⁵¹ *Id.* § 2.03(1)(b)(iii–iv).

cared for the child more than or equal to the care provided by the primary caregiver for a period of time not less than two years.⁵²

Because the ALI Principles apply to parents' custody claims, in most instances, the focus is on a time frame significantly after birth. These principles do not, therefore, answer the question of parentage *at* birth. Yet the recognition of the conduct of fatherhood, rather than formal status, as critical is similar to the recognition of social fatherhood under the UPA. The ALI formulation, therefore, should be kept in mind in terms of reformulating the UPA. Both should be consistent in their valuing of social fatherhood.

I would propose several changes to the existing UPA. First, I would give stronger recognition to social fathers. I would recognize parentage at birth of a "birthfather," based on a nurture standard. Biological fathers would be presumptive birthfathers. I would not maintain the marital presumption, or alternatively, not give it much weight. Second, I would recognize multiple fathers. Instead of identifying only one legal father, I would recognize genetic and social fathers. Third, I would split parental rights and responsibilities. Economic support of a child would be required of the genetic father. Social rights would be a function of performing social fathering. If a social, non-genetic father voluntarily assumed the economic responsibilities of the genetic father, then the genetic father's legal fatherhood could be terminated. All of these proposals are centered on the core principle that fatherhood should be defined around nurture. I explore that principle and the reasoning behind my proposals in the next section.

II. NURTURE AS THE STANDARD OF FATHERHOOD

A. *Defining Fatherhood as Nurture*

The establishment of parentage at birth is an expression of our definition of fatherhood. We assign parentage to achieve what is best for the welfare of children. Parentage at birth should be defined by looking backward from the conduct that we hope to encourage from the start.⁵³

Fatherhood should be defined as the conduct of nurturing children. This core principle is simply reflective of what children need. Caregiving also benefits men because positive, loving caregiving is transforming and maturing. In addition, caregiving benefits mothers because caregiving is not performed in a vacuum. Rather it is

⁵² *Id.* § 2.03(1)(c).

⁵³ As Cynthia Mabry reminds us, our definitions and policies also can have a disproportionate impact on certain groups of children. Cynthia R. Mabry, *Who Is the Baby's Daddy (and Why Is It Important for the Child to Know)?*, 34 U. BALT. L. REV. 211, 229-34 (2004). As Professor Mabry points out, given the benefits of fathers to children, encouragement of involved social fatherhood is particularly critical to African American children. *See id.* at 231.

performed in relation to other caregivers. While a single caregiver may raise a child, the presence of others benefits not only the child but also the other caregiver. Egalitarian, co-equal, shared parenting may be expressed either directly to the child or in the form of support to the other parent, thereby benefiting the child directly or indirectly.

I have defined nurture elsewhere as including the physical, emotional, intellectual, and spiritual care of children.⁵⁴ Nurture is inseparable from what we have traditionally defined as “mothering.” The content of nurture changes as children grow and develop, but the ultimate goal of affirmative support for children remains the same. Qualitatively, nurture is focused on the well-being of the child. Quantitatively, it requires not only care of the child but also imposes a duty of affirmative support and cooperation with other caregivers.⁵⁵

“Holding out” is the closest that the common law comes to defining parenthood as nurture or social fatherhood. The “holding out” doctrine looks to a man’s social conduct, and infers his knowledge and intention to be a father to a particular child. Rather than the state imposing fatherhood, as it does by the marital presumption, “holding out” permits the establishment of fatherhood based on individual choice that is then ratified by the state. “Holding out” occurs when a man acts as a parent:

changing the child’s diapers; feeding him; taking him to the doctor; bathing him; taking the child on visits away from the mother’s home; allowing the child to call him daddy; giving the child gifts or cards; attending parent-teacher conferences or school events; giving the child his surname; voluntarily providing financial support for the child; and providing or building a loving relationship with the child.⁵⁶

⁵⁴ See DOWD, REDEFINING FATHERHOOD, *supra* note 5, at 157.

⁵⁵ Other commentators emphasize the importance of relationships over genetics. See, e.g., Baker, *supra* note 30 (arguing in favor of functional fatherhood and the differential understanding of motherhood and fatherhood at birth because of women’s unique function); Carbone & Cahn, *supra* note 1 (discussing the importance of establishing long term commitments for children, whether biologically based or not, and advocating genetic testing at birth, in the contexts of the separation of sex and procreation and the separation of marriage and childrearing); Garrison, *supra* note 12, (identifying the well being of children and the preference for a two parent family as the core principles of parentage law that should be applied to assisted reproduction rather than a separate set of parentage rules); Melanie B. Jacobs, *When Daddy Doesn’t Want to Be Daddy Anymore: An Argument Against Paternity Fraud Claims*, 16 YALE J.L. & FEMINISM 193 (2004) [hereinafter *When Daddy Doesn’t Want to Be Daddy Anymore*] (emphasizing the importance of a relationship over genetics to a child’s well-being, and the particular importance of this principle for non-traditional families).

⁵⁶ Niccol D. Kording, *Little White Lies that Destroy Children’s Lives — Recreating Paternity Fraud Laws to Protect Children’s Interests*, 6 J.L. & FAM. STUD. 237, 244–45 (2004).

It is also linked to conduct toward the mother: “holding out” can only occur if the man cohabits with the child’s mother.⁵⁷ But “holding out” remains biologically-based because part of the conduct that is measured is whether the man represents the child as his biological offspring.⁵⁸

The “holding out” doctrine might be viewed as supporting the notion of social fatherhood and nurture, but in order to do so, it must be separated from its roots in patriarchal privilege. “Holding out” was linked to the separation of children as legitimate or illegitimate and to the fathers’ “choice” whether to acknowledge the child. Reconstituting “holding out” as social fatherhood is not about property rights in children but rather reflects a child’s right to care.

Social fatherhood also breaks from the traditional definition of fatherhood as economic breadwinning.⁵⁹ Economic support should not be sufficient to claim the rights of fatherhood; that claim should be grounded in care. Economic support is a responsibility owed to children that should not generate rights.⁶⁰ Ideally, we may hope that the nurturing father would provide economic support as well. If economic support and care can be separated, however, they may be performed by different individuals. In addition, where private economic support is insufficient, the state should ensure the well-being of children and provide equal opportunity to maximize their life chances.⁶¹ The social benefit of children to the community more than justifies their claim on public resources.

Defining fatherhood as centered on nurture means that social fatherhood is the core goal of defining parentage. At the birth of a child, it might seem that there is little information from which to assess social fatherhood. But there is concrete conduct that can guide us about who is most likely to act as an affirmative social father. At birth, I would argue we should assume the most likely social father is the “birthfather”: the man who is present at birth, who has been committed to the mother and the child during the pregnancy, and who voluntarily acknowledges, indeed embraces, his ongoing role as a father.

The available data on non-marital births supports the notion that birth is a critical event for fathers.⁶² A significant number of birthfathers, genetic or social, are present at the birth of their children.⁶³ Increasingly, they voluntarily acknowledge paternity.⁶⁴

⁵⁷ *Id.* at 246.

⁵⁸ *Id.* at 243.

⁵⁹ See DOWD, REDEFINING FATHERHOOD, *supra* note 5, at 173.

⁶⁰ Children’s economic needs are significant, and poverty has predictable, disastrous consequences for children. See *infra* note 145 and accompanying text.

⁶¹ On the insufficiency of child support, see DOWD, REDEFINING FATHERHOOD, *supra* note 5, at 144.

⁶² See generally MARSIGLIO, *infra* note 81 and accompanying text; REED, *infra* note 66 and accompanying text.

⁶³ *Id.*

⁶⁴ See Mincy, Garfinkel & Nepomnyaschy, *supra* note 14.

The dramatic rise in paternity establishment for non-marital children attests to this. The rate is now nearly seventy percent, and a recent study indicates six of seven paternities are voluntary, virtually all of which are acknowledged at the hospital.⁶⁵

This data is not surprising considering the powerful connections and experiences of men at birth. Professor Richard Reed has gathered both quantitative and qualitative data about marital and non-marital fathers' experiences of childbirth.⁶⁶ The shift in the norm to father presence at childbirth has been well-documented; what Reed details is how the role of the father at birth is constructed.⁶⁷ "Like boot camp and fraternity initiation, birth ritual separates men from society, imposes its symbolic processes on them, and finally reintegrates them into conventional society as changed beings."⁶⁸ Reed finds the hospital birthing ritual to be almost exclusively dominated by a biological perspective, rather than including social, spiritual, or psychological aspects.⁶⁹ The father is cast in the role of coach, who must be rational, powerful, and an advocate for his spouse or partner.⁷⁰ Nurture and empathy are not part of the role.⁷¹ Nor is attention given to the man's feelings on becoming a father; the process is very mother-centered.⁷² Early parenting is stressful individually and

⁶⁵ *Id.*

⁶⁶ RICHARD K. REED, *BIRTHING FATHERS* (2005).

⁶⁷ *Id.* at 11–31. The change in fathers' role at birth has been constructed, not made: "[F]ew activities are defined by fathers themselves. Mothers, nurses, obstetricians, as well as families and the general public, offer very specific guidelines for fathers' actions in the hospital birthing room." *Id.* at 12.

⁶⁸ *Id.* at 14.

⁶⁹ *Id.* at 20, 74.

⁷⁰ *Id.* at 212.

[T]his blueprint leaves little room for a man's capacity to be empathic and nurturing — two of the principle components of the new father. Our birthing ritual relies on three cultural beliefs about the idealized American man [men should be rational, powerful, and leaders], beliefs that are as outdated as they are unattainable. American men in hospital birthing are caught between a rock and a hard place: if they fulfill the expectations created according to these outdated norms, fathers undermine their connection with both mother and child.

Id.

⁷¹ *Id.*

⁷² *See id.* at 213–14.

[T]his role of the rational male distances them from their own experience of birth. A father struggles to stay both rational and fully connected with his partner. He tries to empathize with a birthing mother from whom he is working to distance himself. Few fathers can do both, and most men are destined to fail at both; they suffer through the birth as neither rational coaches nor empathic partners.

Id. at 214. Ignoring men is implicit in the mother-centered construction of birth: The essentialist aspect of the biological model ignores fathers because they are men. Birth is not just for bodies; it is for *women's* bodies

relationally.⁷³ Reed's research strongly supports the connection of birthfathers to their children, along with a lack of strong support for fathers.⁷⁴

The empirical data thus strongly suggests that men present at birth, birthfathers, are committed to the child and the mother, and intend to remain an active presence in the lives of both mother and child. It also is clear that this connection has occurred in spite of, not because of, the medical and legal structures and rules.⁷⁵ Childbirth is a golden moment of relational connection that all fathers should be encouraged to attend, just as committed responsibility to children must be modeled and supported.

At the same time, we must be cautious not to invest the single act of presence at the birth with determinative weight. "We neither know about the long-term effects, if any, of participation in childbirth on the father-child relationship nor understand the effects of delivery room presence on those fathers who for cultural, psychological, or other reasons do not participate — or participate less willingly — in childbirth."⁷⁶ In addition, it seems clear that the push for higher paternity establishment as a means to collect child support, not as recognition and support for nurture, may also act as a deterrent for some fathers to be present or to voluntarily acknowledge paternity. Finally, as Reed's research shows, the current social construction of men's role at childbirth may actually set up men to stumble as they begin fatherhood, reinforcing impossible patriarchal norms rather than supporting realistic nurture of the child and the father's partner.⁷⁷ Thus, in establishing markers of "birthfathers," it is important that existing barriers to fatherhood be recognized, and, therefore, that factors defining a "birthfather" be flexible and inclusive until those barriers are more fully understood and addressed.

As the biology of birth moves forward, men find themselves pushed aside, or reduced to practical nurses, managing the most mundane and insignificant tasks in a highly choreographed drama.

Id. at 227.

⁷³ *Id.* at 19.

⁷⁴ *See id.* at 228.

Thus, although fathers discover that birth is filled with wonder and beauty, there is often another side to their experience. Many men feel insignificant in the process or find themselves awash in a sea of loyalties. At a time when they are realizing what is often a long-awaited dream, they are unsure of their role, rights, and responsibilities. Without a sense of their clear direction and control, they become willing members of a birthing team that respects neither their contribution nor experience.

Id. *See also* Woodhouse, *supra* note 21.

⁷⁵ *Id.* at 241–42. On alternatives that would better support fathers, see *id.* at 229–41.

⁷⁶ NAT'L CTR. ON FATHERS & FAMILIES, THE FATHERING INDICATORS FRAMEWORK: A TOOL FOR QUANTITATIVE AND QUALITATIVE ANALYSIS 17 [hereinafter INDICATORS FRAMEWORK], available at <http://www.ncoff.gse.upenn.edu/fif/FIF-report.pdf> (last visited Jan. 11, 2006).

⁷⁷ *See* REED, *supra* note 66 at, 229–34.

The translation of nurture into parentage rules at birth is captured, therefore, by the concept of "birthfather," defined as a man present at birth who is committed, as demonstrated by past acts during the pregnancy as well as present acts including voluntary acknowledgment of paternity and concrete future plans for the child. These factors would be persuasive but not mandatory. If other factors demonstrated a record of care and a commitment to future care, they could substitute for these factors.

The UPA does not define parental rights and responsibilities; the Act simply provides that one who is a parent has the legal status of a parent-child relationship and that rights and responsibilities are determined by the states.⁷⁸ Either the expectation of social parenting should be express in the UPA or a further shift in state laws, including custody laws, would have to occur to support social parenting. At the constitutional level, nurture should be the standard that would be the basis to invoke protection of the child-parent relationship under substantive due process or equal protection analyses.⁷⁹

B. Biological Fathers as Presumptive Birthfathers

If you support nurture as the standard of fatherhood, it is reasonable to expect that nurture would be connected to biological fatherhood, but it is essential to attach fatherhood responsibilities to fatherhood rights. In other words, we should assume that biological fatherhood will lead to social fatherhood, and express that expectation. In the absence of conduct that defeats the assumption, the unity is presumed and supported, at least at birth. Attached to that presumption, however, would be a demonstration and an expectation of social parenting.

Why assume that biological fatherhood and social fatherhood coincide, and support biological fathers at birth? Certainly our socialization supports such a connection, most strongly within marriage.⁸⁰ Our norm or ideal is that children should be conceived and born within a marriage with the implicit promise to nurture and economically support them. Professor William Marsiglio, who has studied men's reproductive attitudes and identities, emphasizes both the high level of men's expectations of becoming fathers, as well as how strongly fatherhood is socially constructed and biologically linked.⁸¹ "This domain of life is structured and experienced in ways that are fundamentally shaped by physiological and social dimensions related to biological sex and gender."⁸² As he points out, men have a "paternal identity," a recognition of biological fatherhood, but their actions are strongly socially constructed in

⁷⁸ UPA § 102(14) & cmt.

⁷⁹ See generally Dowd, *Fathers and the Supreme Court*, *supra* note 12.

⁸⁰ Both the campaign for "responsible fatherhood" and the effort to limit marriage to heterosexual couples draw on this social norm.

⁸¹ WILLIAM MARSIGLIO, *PROCREATIVE MAN* (1998).

⁸² *Id.* at 50.

a very gendered way.⁸³ Some eighty to ninety percent of all men expect to be fathers, and that expectation is strongly biologically linked.⁸⁴ During pregnancy, men may physically react to the pregnancy; estimates of expectant fathers experiencing pregnancy-like symptoms range from eleven to sixty-five percent.⁸⁵ Childbirth is a critical moment in creating the father-child bond.⁸⁶ A presumption that biological dads will be birthfathers links into this empirical evidence of men's strong connection to the children they help to create, thereby linking genetic and social fatherhood based on powerful social norms.⁸⁷

The patterns of men as fathers also support a norm of linking biological and social fatherhood. The presumption of social parenthood connected to biological parenthood should be considered within the social and demographic context of conception. First, roughly half of all pregnancies are unintended.⁸⁸ Of the unintended pregnancies, nearly half are terminated by abortion.⁸⁹ It seems reasonable to assume many of the pregnancies carried to term reflect fathers' commitments, as well as other factors. One study of non-marital families found over eighty percent of the mothers were involved with the father at the time of birth; ninety-nine percent of the fathers wanted to be involved in the life of the child, and ninety-three percent of the mothers wanted the father involved.⁹⁰ Second, the rate of paternity establishment for non-marital children has climbed to nearly seventy percent.⁹¹ Most of the increased rate is composed of voluntary acknowledgments.⁹² If paternity was linked more strongly to an expectation of care rather than to payment of child support, there is every reason to believe the rate might increase further.⁹³ Third, marital children are presumed the

⁸³ *Id.* at 6 (“[A] paternal identity in its crudest form represents men’s recognition that they see themselves as being someone’s father. Possessing a paternal identity does not guarantee, however, that men will necessarily behave in a particular way, and men’s resolve to be a ‘responsible’ father figure varies considerably.”).

⁸⁴ *Id.* at 108.

⁸⁵ *Id.* at 23.

⁸⁶ *Id.* at 7.

⁸⁷ Professor Marsiglio suggests institutional responses in support of fatherhood that focus on giving men greater knowledge and experience in child care, which he suggests could be located in family planning clinics, schools, and non-school programs for new fathers. *See id.* at 170.

⁸⁸ *Id.* at 112.

⁸⁹ *Id.*

⁹⁰ This is a nationally representative sample of non-marital families, called the Fragile Families Project. *See* Sara S. McLanahan & Marcia J. Carlson, *Welfare Reform, Fertility and Father Involvement*, 12 *CHILD. & WELFARE REFORM* 147, 150–60 (2002) (reporting percentages from a 1997 Fragile Families study that showed that 41 percent of non-marital births in the early 1990s were to cohabiting couples), available at http://www.futureofchildren.org/usr_doc/6-mclanahan.pdf.

⁹¹ *See* Mincy, Garfinkel & Nepomnyaschy, *supra* note 14, at 611.

⁹² *Id.*

⁹³ This is linked to the strong connection of fathers, a strong incentive, and the barriers to involvement that include inability to provide support. *See* McLanahan, *supra* note 14, at 2;

biological children of the husband, but estimates of false attribution of paternity are significant.⁹⁴ It is not clear how husbands would react if biological identity is known at birth, versus a later “surprise.”

Men reflect a pattern of parenting within relationships.⁹⁵ Most men become fathers, most commonly in their twenties or thirties, and their experience of fatherhood begins at the birth or adoption of children.⁹⁶ While men, more so than women, may more commonly engage in serial parenting, rather than maintain a linear connection to their children, that appears to be because women are powerful mediating influences on men’s relationships with their children, and men’s relationships are strongest when they cohabit with their children.⁹⁷ The pain men feel from separation from their children is real. Fathers’ patterns of diminished relationships post-divorce should not be interpreted as abandonment. Frequently this reflects more complex feelings of frustration and fear as well as a lack of a healthy post-divorce model of parenting.⁹⁸

In their review of socio-biological sources as well as studies on step-parenting, payment of child support, and other data, Professors Carbone and Cahn note that patterns of male attachment and support of children are complex.

[P]aternal tendencies to father as many children as possible and to invest more in biological than non-biological children are offset by maternal preferences and the role of intimate relationships in mediating paternal involvement. . . . [T]he most distinctive evolutionary feature was development of the ability to construct contracts that facilitated assumption of “mutual duties, obligations, and responsibilities.”⁹⁹

Certainly, men, more frequently than women, have relationships with children after birth as step-parents. This reinforces the pattern of social parenting, linked to a relationship

Mincy, Garfinkel & Nepomnyaschy, *supra* note 14; Patricia R. Brown, Steven T. Cook & Lynn Wimer, *Voluntary Paternity Acknowledgment* (Inst. for Research on Poverty, Discussion Paper No. 1302-5, 2005), available at <http://www.irp.wisc.edu/publications/dps/pdfs/dp130205.pdf>.

⁹⁴ Estimates of the numbers of children born during marriage that are not biologically related to the husband are difficult to establish. It is estimated that in 1999, almost one-third of the paternity cases evaluated by blood banks excluded the person tested as the father. *See* Jacobs, *supra* note 55, at 201.

⁹⁵ *See* DOWD, REDEFINING FATHERHOOD, *supra* note 5, at 22.

⁹⁶ *Id.*; *see also* Joyce A. Martin et al., *Births: Final Data for 2003*, in NAT’L VITAL STAT. REPS., Sept. 8, 2005 at 9–10.

⁹⁷ *See* DOWD, REDEFINING FATHERHOOD, *supra* note 5, at 26.

⁹⁸ *See id.* at 58–65.

⁹⁹ *See* Carbone & Cahn, *supra* note 1, at 1037–38 (quoting HELEN E. FISHER, *THE SEX CONTRACT: THE EVOLUTION OF HUMAN BEHAVIOR* 222 (1982)).

with a partner who also is a caregiver.¹⁰⁰ It might be argued that because men's patterns are social fathering patterns, biology should simply be ignored.¹⁰¹ In my view, we should not reject the link between genetic bonds and social conduct, but rather embrace that link as a good predictor of social parenting at birth, *when biological fathers are present at birth*. A biological standard for parentage at birth would confer responsibilities for financial support of children, as well as rights connected to social parenting. The unity of social and economic fatherhood based on genetic connection could be defeated by lack of care or negative care prior to birth, an unexplained failure to be present at birth, or a refusal to voluntarily acknowledge paternity. If it were defeated, a genetic father would retain the responsibility for economic support, but not have any recognized social rights. At a minimum, at birth, most children would have a genetic father who would have economic responsibilities (or all children would have an established genetic father if a universal scheme of genetic identification existed).

This model is consistent with our legal norms of personal, familial, and reproductive privacy.¹⁰² Constitutional analysis places a high value on parents because of their social role.¹⁰³ Presuming fatherhood at birth based on genetic connection honors the reproductive rights of fathers and reinforces a norm of care, to the benefit of children. The presumption and identification of genetic and social fatherhood preserves family privacy and personal decision-making. Recognition of the biological father as a presumed social father based on the evidence likely to be present when such a determination must be made, supports a norm of care tied to reproductive responsibility, all to the benefit of children.¹⁰⁴

Pre-birth conduct that would prevent caring rights would be any conduct that harms mother or child (a standard which would remain post-birth) or neglect of the

¹⁰⁰ See ROSE M. KREIDER, U.S. CENSUS 2000 BUREAU, ADOPTED CHILDREN AND STEP-CHILDREN: 2000, at 19 (2003) (reporting data on households with stepchildren under 18 by householder's living arrangements: 2,281,620 with a male stepparent and 147,242 with a female stepparent), <http://www.census.gov/prod/2003pubs/censr-6.pdf>.

¹⁰¹ See, e.g., Baker, *supra* note 30.

¹⁰² See, e.g., Eisenstadt v. Baird, 405 U.S. 438 (1972) (recognizing the right of the individual to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child); Griswold v. Connecticut, 381 U.S. 479 (1965) (finding a marital right to privacy and to choose contraception); Skinner v. Oklahoma, 316 U.S. 535 (1942) (ruling that there is a fundamental interest in procreation); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (protecting parents' rights to direct their child's rearing and education); Meyer v. Nebraska, 262 U.S. 390 (1923) (upholding the right to teach a foreign language in a parochial school). Gender analysis also is implicated. See, e.g., Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).

¹⁰³ See Troxel v. Granville, 530 U.S. 57 (2000) (recognizing parents have a fundamental liberty interest in caring for and guiding their children).

¹⁰⁴ See Woodhouse, *supra* note 21, at 1755 & n.16 (looking to a child-centered definition of parenting and recognizing nurture as paramount).

child (*e.g.*, non-support of the pregnancy) when the father has notice of the pregnancy (unless notice is presumed from sexual intercourse, putting the burden on the father to be responsible during intercourse). If severe enough, abuse or neglect could lead to removal or termination of rights. If the father was unaware of the existence of the child, biological paternity could be established at any time, but only financial support would be required. A greater role could be allowed, however, if it was in the best interests of the child to permit the father to have caring responsibilities, and the father demonstrated commitment to care once he had knowledge of the child. The best interests determination would consider the relationship of the child to other caregivers, including whether a social father or second mother had taken on the full responsibility for economic support until the child reached the age of majority.

A genetic father may or may not have a relationship with the mother, and the relationship may range from a casual relationship to cohabitation to marriage.¹⁰⁵ If the parents are not living together, actual custodial rights would be determined by a court. If the court follows the distinction between rights and responsibilities, then the court would look to actual care or a plan for care; if the social father does not continue to perform care, he would nevertheless retain financial responsibility.

DNA technology makes it feasible to genetically identify the father of every child. I would support identifying biological parents for all children. The benefit to children of DNA testing is knowledge of identity and the security of some economic support.¹⁰⁶ A less radical position would be that DNA testing should be used as it is now, as one of several ways in which parentage is established, but not as a right of every child.

A presumption that a biological father is a social father at birth should not be read to support a biological model of fatherhood during the child's lifetime. As I have long argued, the definition of fatherhood should be rooted in nurture, which is a social fatherhood definition.¹⁰⁷ Professor Marsha Garrison's review of parentage law similarly sees the biological link as important but not determinative; the law ignores biology as its primary principle, instead grounding parentage determinations on children's best interests and the value judgment that two parents usually are better than one, thus preferring at least one father over no father.¹⁰⁸ I do not presume that parentage remains stable during a child's lifetime, although committed and involved social parents are clearly what benefit children the most, and legal rules should, to the extent possible, support such parental commitment.

¹⁰⁵ See Casper, Cohen & Simmons, *supra* note 8, at 9 (attributing the growth in out-of-wedlock births to the large increase in cohabitation — in years 1980–84, 29 percent of out-of-wedlock births were to cohabiting couples, while 1990–94 saw an increase to 39 percent).

¹⁰⁶ See generally GENETIC TIES AND THE FAMILY: THE IMPACT OF PATERNITY TESTING ON PARENTS AND CHILDREN (Mark A. Rothstein et al. eds., 2005).

¹⁰⁷ DOWD, REDEFINING FATHERHOOD, *supra* note 5, at 157.

¹⁰⁸ See Garrison, *supra* note 12, at 882–94.

My presumption also does not preclude the recognition of a purely social father. From birth, social fatherhood is recognized as the core principle. Moreover, with respect to the issue of “paternity fraud” or “paternity disestablishment,” my definition would reject the notion that the lack of a genetic link should sever actual relationships. Social fatherhood values relationships and benefits the child. My definition, therefore, places me firmly in the camp of those who have argued against severing relationships based on after-the-fact discovery of the lack of a genetic link between father and child.¹⁰⁹ If DNA testing were universal, such discoveries would disappear because genetic identity would be established at birth. Alternatively, Professors Carbone and Cahn have argued for a model of universal DNA testing at birth or an acknowledgment of paternity that would estop any later DNA evidence to the contrary.¹¹⁰ This would re-orient the notion of fatherhood away from genetics by making genetic identity known, but grounding fatherhood in commitment and care.

C. Social Fatherhood

In addition to presuming that, at birth, genetic fathers would be birthfathers, I also would allow for a greater degree of recognition for birthfathers who lack biological connection than does the existing UPA. Social fatherhood is currently recognized under the UPA but with limits. In many instances, a biological father can displace a social father, particularly if the social father is a non-marital father. Under a scheme that values nurture, a social father could not be displaced, and his lack of genetic connection would not be determinative of legal parentage. Social fathers would, with the consent of the mother, be able to acknowledge paternity, with or without genetic connection.

How do you establish social fatherhood? For genetic fathers at birth, social fatherhood is presumed in the absence of contrary evidence. With universal genetic identification, some genetic fathers will not be present at birth through lack of knowledge or intentional conduct. Lack of knowledge would be justification to permit a father to establish a plan to be a social father, but that intention would still be subject to the best interests of the child.

The non-genetic social father could establish his social fatherhood by his demonstrated care of the mother during the pregnancy, his presence at the birth, and his plan for future care, including voluntary acknowledgment of paternity. Instead of benefiting from a presumption, this conduct would have to be established.

The consent of the mother would translate into the second component of social fathering; that is, in addition to commitment and demonstration of nurture of the child, the father must demonstrate a positive relationship with the mother. Consent of the

¹⁰⁹ See, e.g., Baker, *supra* note 30 (arguing for use of contract theory); Carbone & Cahn, *supra* note 1; Kording, *supra* note 2, at 846.

¹¹⁰ Carbone & Cahn, *supra* note 1, at 1012.

mother would presume a positive relationship which is essential to social fatherhood. Marriage would also be a basis to presume a positive relationship with the mother. Rather than serving as a basis for presuming paternity, marriage instead would be evidence of a positive relationship with the child's other caretaker. Of course, both consent and marriage would be subject to challenge based on information that defeats the positive assumption, such as domestic violence, separation in advance of divorce, or the termination of cohabitation.

Recognition of social fatherhood at birth should be linked to a custody structure that would reinforce this principle beyond birth. The ALI Principles supporting social fatherhood in custody determinations are an example of recognizing social or functional fatherhood.¹¹¹ The additional recognition of a social father post-birth would depend on a best interests determination.

The principle of social fatherhood also would permit other social fathers to be recognized who might voluntarily take on the responsibility for a child during the child's life.¹¹² Most notably, it would include stepfathers who act as social fathers. The configuration of blended families is an increasingly commonplace phenomenon.¹¹³ It seems in the best interests of children to recognize multiple fathers. At the same time, a social father would have more limited financial responsibilities unless he voluntarily assumes full responsibility from a biological father or assumes that responsibility in the absence of a genetic father. In other words, subsequent social fathers may take on partial economic responsibility in addition to caregiving, as in the common provision of economic support by stepfathers when they cohabit with their stepchildren, but those economic responsibilities would not continue if the couple subsequently divorces.

D. Abolish the Marital Presumption

If social fatherhood is the model, then what of the marital presumption?¹¹⁴ The existing basis of the marital presumption is the defense of marriage and, therefore, is focused on adult interests and well-being.¹¹⁵ In addition, it presumes that knowledge of lack of genetic connection will result in a refusal to maintain a relationship with the child.¹¹⁶ If the basis for the marital presumption were instead based on the

¹¹¹ See *supra* notes 49–52 and accompanying text (discussing the principles of parent by estoppel and de facto parent).

¹¹² See generally Donald C. Hubin, *Daddy Dilemmas: Untangling the Puzzles of Paternity*, 13 CORNELL J.L. & PUB. POL'Y 29 (2003).

¹¹³ See DOWD, REDEFINING FATHERHOOD, *supra* note 5, at 27.

¹¹⁴ For a review of the current positions of the states on the marital presumption, see Carbone & Cahn, *supra* note 1, at 1049–65.

¹¹⁵ See Kording, *supra* note 2, at 818.

¹¹⁶ Modern statutes that permit disestablishment of paternity also implicitly reflect that presumption or legitimate that response. See Jacobs, *supra* note 55, at 227–33.

commitment of marital fathers to parenting whether the child is genetically linked to them or not, it would redefine the presumption in a significant way.¹¹⁷ This could play out in two ways. One, we can presume, as we do now, that a married father living with his wife will provide care, and for privacy reasons, we might not inquire or intervene further. Alternatively, marriage would not signify commitment to care. The assumption of nurture instead would attach to both marital and non-marital fathers, based on genetic connection at birth or social fatherhood, or both.

The marital presumption at most should only establish a relationship with the other parent that is required of social parenthood. It should not be a basis to presume care of the child. If the marital presumption is retained, it should only satisfy the requirement of a positive, caring relationship with the other parent. Actions that indicate, rather than assume, care of the child are still necessary. Most relevant are the caring actions of the father during the pregnancy, his presence at the birth, and his care of other children, indicating his likely care of the child to be born.

In essence, I am proposing either redefining the marital presumption as we know it or abolishing the marital presumption entirely. This makes sense particularly in view of the high rate of non-marital cohabitation and non-marital childbirth, as well as the rate at which children born during marriage are not related to the husband.¹¹⁸ With respect to married women, the tricky issue is whether as a matter of policy it is better to permit the marital presumption to continue to mask the biological link or lack thereof, on the assumption it might ensure better economic and social care to the child, or whether it is better to know the child's biological identity and also to permit the husband to choose at the time of birth whether to be a social/legal father or not.¹¹⁹ The abolition of the marital presumption would preferably occur in conjunction with universal DNA testing, so that paternity rates would not fall nor would economic support rates decline. We would implement identification of genetic parents and reorient our understanding of fatherhood to emphasize social fatherhood over genetic connection. The phenomenon of "duped dads" is on a collision course with improved technology. We should support parenting as a social, not a biological, event. Genetic links and marriage might facilitate that care, but they are not substitutes for care.¹²⁰

¹¹⁷ This is akin to Carbone and Cahn's proposal that every child be DNA identified unless there is an acknowledged father who takes responsibility for full fatherhood without regard to genetic connection. *See* Carbone & Cahn, *supra* note 1.

¹¹⁸ *See supra* notes 8, 90 (providing rates of cohabitation and non-marital births). For the estimate of children born during marriage not related to the husband, *see supra* note 94.

¹¹⁹ *See supra* note 94 and accompanying text. Organ donation data indicates a range of five to twenty percent for donors genetically unrelated to fathers; some medical studies put the range at between five and thirty percent. *See* Anderlik & Rothstein, *supra* note 1, at 221.

¹²⁰ One final alternative, if we separate economic responsibilities and social parenthood, might be to link economic responsibilities to marriage and genetic ties, but not recognize full social fatherhood absent the father being a nurturing father.

E. Fatherhood and Motherhood

How would fatherhood based on nurture compare to motherhood? Biological and nurturing motherhood are assumed to coincide. What is most different between mothers and fathers at birth is that biological motherhood commonly is obvious from birth (leaving aside reproductive technologies that permit otherwise). Universal DNA identification could verify the genetic connection of both mother and father. Whether the mother is married or not would be irrelevant. Pre-birth conduct would be relevant, and of course, here the standard would be dissimilar since the relationship of mother to child pre-birth is different. The principle, however, would remain the same. If you make the obligations parallel, then the mother's relationship with the genetic father is relevant to her legal motherhood. Mothers would not be permitted to hide the pregnancy or mislead the father about fatherhood. Doing so would not per se disqualify the woman as the legal mother, but the principle here should be facilitation of positive relationships with the father unless there are extenuating circumstances, such as domestic violence.

As with fathers, if a mother abused or neglected her child during pregnancy, it would be a basis for termination of rights or removal of the child until the conduct issues were resolved.¹²¹ The distinction between economic and social rights would be the basis of assigning custodial rights after birth. Stepmothers, like stepfathers, would have similar social rights but limited economic responsibilities.

An intriguing recent example following the principle that, whenever possible, mothers and fathers should be treated equally, is *Elisa B. v. Superior Court of El Dorado County*.¹²² In *Elisa B.*, a lesbian co-parent was determined to be a legal parent responsible for child support using principles derived from paternity actions. The court used California's adoption of the UPA's expression of gender neutrality and equality as a basis for "borrowing" language and principles established for fathers to analyze

¹²¹ On prosecuting mothers for pre-birth conduct, see Jean Reith Schroedel & Pamela Fiber, *Punitive Versus Public Health Oriented Responses to Drug Use by Pregnant Women*, 1 YALE J. HEALTH POL'Y L. & ETHICS 217 (2001).

¹²² 117 P.3d 660 (Cal. 2005); see also *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005) (holding the lesbian partner who supplied the ova to a partner who produced the children to be the children's second mother, even though she later waived her parental rights). In *K.M.*, the court concluded that "[a] woman who supplies ova to be used to impregnate her lesbian partner, with the understanding that the resulting child will be raised in their joint home, cannot waive her responsibility to support that child. Nor can such a purported waiver effectively cause that woman to relinquish her parental rights." *Id.* at 282. See also *Kristine H. v. Lisa R.*, 117 P.3d 690 (Cal. 2005) (holding that lesbian partner is precluded from challenging a stipulated judgment of the partners that a child born to one partner would be the child of both partners). In *Kristine H.*, the court did not decide whether a stipulated judgment establishing parentage is valid, but instead held that a partner is estopped from challenging the judgment's validity because it would be unfair to the other partner and the child and would contravene public policy favoring two parents for a child rather than one. See *id.* at 695.

whether this non-biological same sex adult was a “mother” or “parent.”¹²³ Because the lesbian co-parent was an intended parent and had acted as a functional social parent during the child’s life and immediately after the women separated, the non-biological parent in this case fulfilled the UPA definition of a presumed parent.¹²⁴ While this case involved determining parentage based on post-birth conduct, the application of principles developed with fathers in mind to a non-biological mother who was a social parent is the same kind of analysis that I am suggesting could be applied at birth. The significant difference is the radical distinction between the actions of parenting that can be evaluated.¹²⁵

III. STATUTORY PROPOSALS

Translating the principles that I have outlined into statutory form is challenging. The draft proposals in this section include both revisions to existing sections of the UPA and proposals for adding new sections. The proposals presented are by no means comprehensive, but rather are the key changes that would re-orient the UPA toward parentage determined at birth that honors social parenting. Some proposals fundamentally re-orient some of the base assumptions of the UPA. In particular, defining the implications of nurture within the UPA would require extensive revision since the Act currently leaves the determination of explicit obligations and rights of parentage to the states.¹²⁶ Similarly, shifting to allowing multiple fathers from the current single-legal-father principle of the Act would be a significant revision.

¹²³ *Elisa B. v. Superior Ct.*, 117 P.3d 660, 665–67 (Cal. 2005). The court also rejected the application of the principle that a child can have only one mother, which arose when two mothers contested custody in a case involving a surrogate and an intended mother, because that limitation arose in the context of a heterosexual family where more than one mother would have equaled three parents. *See id.* Under my principle of multiple parents, in both contexts the court would resolve the issue in favor of multiple parents if that is also supported by the best interests of the child.

¹²⁴ *See id.* at 670.

We conclude, therefore, that Elisa is a presumed mother of the twins under section 7611, subdivision (d), because she received the children into her home and openly held them out as her natural children, and that this is not an appropriate action in which to rebut the presumption that Elisa is the twins’ parent with proof that she is not the children’s biological mother because she actively participated in causing the children to be conceived with the understanding that she would raise the children as her own together with the birth mother, she voluntarily accepted the rights and obligations of parenthood after the children were born, and there are no competing claims to her being the children’s second parent.

Id.

¹²⁵ For an argument that the difference has great significance, and should confer the power on mothers to decide who to contract with to be a legal father, see *Baker*, *supra* note 30.

¹²⁶ This is implicit, not explicit, in the UPA.

I begin with revisions to the existing UPA. These include revising the definition of presumed paternity in section 204 to expand social fatherhood under the “holding out” principle, and eliminating the marital presumption. A revision of voluntary acknowledgment of paternity under section 302 is also proposed to reflect social fatherhood as the key basis for paternity. I then propose adding three new sections: (1) Genetic Paternity, which limits the consequences of biological paternity to economic responsibility, in the absence of social fatherhood; (2) Social Acknowledged Paternity, which permits the recognition of additional social fathers; and (3) Multiple Fathers, which states the principle that a child may have multiple fathers. In addition to these sections, the introductory commentary to the Act would include the concept of birth-fathers and define that term, as well as including the broader principle of nurture or social fatherhood as the core definition of fatherhood.

A. Revisions to Existing Sections

1. Article 2, Parent-Child Relationship

The primary change in this article would be section 204, the Presumption of Paternity. The current section 204 retains the traditional statement of presumption of paternity based on marriage:

- (a) A man is presumed to be the father of a child if:
 - (1) he and the mother of the child are married to each other and the child is born during the marriage;
 - (2) he and the mother of the child were married to each other and the child is born within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce [, or after a decree of separation];
 - (3) before the birth of the child, he and the mother of the child married each other in apparent compliance with law, even if the attempted marriage is or could be declared invalid, and the child is born during the invalid marriage or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce [, or after a decree of separation];
 - (4) after the birth of the child, he and the mother of the child married each other in apparent compliance with law, whether or not the marriage is or could be declared invalid, and he voluntarily asserted his paternity of the child, and:
 - (A) the assertion is in a record filed with [state agency maintaining birth records];

- (B) he agreed to be and is named as the child's father on the child's birth certificate; or
- (C) he promised in a record to support the child as his own; or
- (5) for the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own.¹²⁷

The revision would remove the marital presumption. Sections (a)(1)–(4) would be eliminated; what would remain is the provision currently numbered (5), which presumes paternity on the basis of cohabitation and “holding out” during the first two years of the child's life.¹²⁸ This presumption would not be rebuttable as currently allowed by adjudication under Article 6;¹²⁹ rather, it could only be rebutted based on the inadequacy of the actions of nurture or a negative relationship with the mother. Nothing in this section would prohibit a genetic father from being a presumed father, but genetic connection would not be required. This standard would focus on social fatherhood, and it would be critical to flesh out what “holding out” means in the commentary. A strong nurturing standard, instead of the traditional breadwinner model of solely economic fatherhood and claiming children as if they were objects of property, would be emphasized.¹³⁰ This standard could be used for both marital and non-marital fathers.

The revised Section 204 would read as follows:

Section 204. Presumption of Paternity (Revised)

A man is presumed to be the father of a child if, for the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own.

The commentary to this revised section would articulate what “holding out” means. That definition would be reframed based on modern notions of social fatherhood rather than on historic notions of patriarchal privilege and the construction of a social story of biological parentage. “Holding out” a child as “his own” would not be limited to, nor construed as, a statement of biological parenthood, but rather it would be a statement of social relationship and commitment. If the father is living with the child,

¹²⁷ UPA § 204(a).

¹²⁸ UPA § 204(a)(5).

¹²⁹ UPA art. 6.

¹³⁰ For suggestions on what might be included in specific articulation of the nurture standard, see DOWD, REDEFINING FATHERHOOD, *supra* note 5. See generally INDICATORS FRAMEWORK, *supra* note 76 (discussing the factors included in the National Fatherhood Project).

it is presumed that residence is voluntary. This presumption could be defeated if cohabitation is involuntary or if the quality of life with the father is inconsistent with nurture.

2. Article 3, Voluntary Acknowledgment of Paternity

Under the UPA, voluntary acknowledgment of paternity is recognized in large part due to federal encouragement of this route to establish paternity as a means to increase child support to non-marital children.¹³¹ Under the current wording of Article 3, a man can be an acknowledged father if he is the genetic father and if he has the support of the mother in being recognized as the father.¹³² A child could have both a presumed and an acknowledged father under the UPA; an acknowledged father, however, could not displace a presumed father unless the presumed father denies paternity.¹³³ Otherwise, a court proceeding would be necessary to establish parentage.¹³⁴

My modification of this section permits acknowledgment of paternity without the requirement of belief in, or actual knowledge of, genetic paternity. An acknowledged father could be either a genetic or non-genetic father. The status would depend on his social connection and conduct as a father in relation to both the child and the mother. That would require actions of nurture, including, but not limited to, actions of support during the pregnancy, presence at the birth, and commitment to the ongoing nurture of the child. This would not require cohabitation with the mother, but rather simply an affirmative, cooperative relationship with the mother.

Under the existing UPA, if there is a presumed father and an acknowledged father, and if the presumed father does not deny paternity, the acknowledged father cannot claim paternity short of a court proceeding.¹³⁵ Under my principle that a child can have more than one father, such a determination would not be required. What would be required, however, would be determining who would be the father with child support responsibilities versus the father (or fathers) with social rights. Under my scheme, the genetic father would have child support responsibilities unless the social father takes on full paternity responsibilities. Both fathers might have social or nurturing rights if each acts as a social father, subject to what serves the best

¹³¹ UPA art. 3 cmt (“[T]he Welfare Reform Act[] conditions receipt of federal child support enforcement funds on state enactment of laws that greatly strengthen the effect of a man’s voluntary acknowledgement of paternity. . . .” (citing 42 U.S.C. § 666(a)(5)(c))).

¹³² UPA § 301.

¹³³ UPA § 302(b)(1) (allowing coexistence of acknowledged and presumed fathers without requiring the presumed father assert a denial of paternity).

¹³⁴ UPA art. 3 cmt (“Sections 302–305 clarify that, if a child has a presumed father, that man must file a denial of paternity in conjunction with another man’s acknowledgment of paternity in order for the acknowledgement to be valid. If the presumed father is unwilling to cooperate, or his whereabouts are unknown, a court proceeding is necessary to resolve the issue of parentage.”).

¹³⁵ UPA § 607.

interests of the particular child. The difference between them is that the acknowledged father has demonstrated his nurture prior to, and at the time of, birth; the presumed father is recognized only *after* he has nurtured the child, when he has done so in the first two years of the child's life.

The revised section would read as follows:

Section 302. Execution of Acknowledgment of Paternity (Revised)

a. An acknowledgment of paternity must:

1. be in a record;
2. be signed, or otherwise authenticated, under penalty of perjury by the mother, unless she is married to the man, and by the man seeking to establish his paternity;
3. state whether the man has nurtured the child and is committed to nurture of the child, by stating his acts with respect to the child and mother, including but not limited to: his support of the pregnancy; his presence and support at the birth of the child; and his commitment to the full responsibilities of nurturing the child including a cooperative relationship with the mother;
4. state that the signatories understand that the acknowledgment is the equivalent of a judicial adjudication of paternity of the child.

The revision eliminates the requirement of genetic paternity or a belief in genetic paternity and replaces that requirement with the demonstration of social fatherhood at birth. It also eliminates those parts of the section as currently drafted that require that the acknowledged father not knowingly be in a contest for paternity with a presumed father. The factors listed are intended to maintain flexibility, keeping in mind the range of contexts in which fathers find themselves. The necessity of consent of the mother is retained, or the mother must be married to the man, as a means to ensure that the relationship between mother and father is cooperative and affirmative. This revision is also consistent with the principle of multiple fatherhood.

B. New Sections

In addition to these revisions of existing sections of the UPA, new sections would need to be added to the Act. Also, underlying principles would need to be further articulated in the commentary to a revised UPA.

1. Revised Commentary: Principles of Social Fatherhood, Birthfathers, and Multiple Fathers

The introductory commentary to the UPA sets out some of the major principles of the Act. The revisions that I am suggesting would require an articulation of the principles of social fatherhood, the concept of birthfather as I have used it here to define who would be a legally recognized father at birth, and acceptance of the idea of multiple fathers.

The articulation of the concept of nurture and its components should include both qualitative and quantitative norms, and the scope of care should include physical, psychological, emotional, and spiritual care. The National Center on Fathers and Families has developed a Fathering Indicators Framework (FIF) that could be incorporated into the commentary.¹³⁶ The FIF identifies six categories, based on empirical research, as indicators of meaningful fatherhood: father presence, caregiving, developing child social competence and academic achievement, cooperative parenting, healthy living, and material and financial contributions.¹³⁷ This analytical tool can put concrete form on the concept of nurture. In addition to defining what social fatherhood is, the commentary would reference this more detailed analytical framework.

Second, the commentary should define and explain the concept of “birthfather.” The recognition of the legal father ideally begins at birth and continues as a sustained parent in the child’s life. Social fatherhood in its best form means the nurture of a child for a lifetime. That requires identifying the father whose actions at birth demonstrate nurture. Most clearly, a “birthfather” literally is present at the birth of his child and participates to the extent that he is capable of assisting in the birth, and is ready to acknowledge and pledge to be a nurturing father to the child, including voluntary acknowledgment of paternity. This father ordinarily would also have supported the mother during her pregnancy, in whatever ways he is capable of providing support. While there might be exceptions to this expectation, or reasons why it might not be fulfilled, the expectation should be clearly articulated, not simply assumed from the father’s presence in the hospital at the birth.

Similarly, the father’s commitment to a lifetime of nurture should be articulated, not merely assumed by the act of voluntary acknowledgment. The importance of child-birth would be supported not by acts of the state to ensure collection of child support, but rather by actions of the state both before and after the birth to educate, support, and assist new parents in their nurturing role of the child and each other. The commentary would indicate that the categories of acknowledged, genetic, and social fathers permit alternative ways to recognize birthfathers consistent with the principle of social fatherhood.

Finally, the commentary would articulate and explain the principle of multiple fatherhood. On the one hand, this would accept multiple fathers as a reality in children’s lives, and the importance to children of support from those who provide nurture. Instead of a vision of singular fatherhood, and therefore of displacement

¹³⁶ INDICATORS FRAMEWORK, *supra* note 76, at v. The FIF is based on seven “core learnings” about fatherhood based on empirical studies: fathers’ care; father presence matters; joblessness and unemployment are major impediments; systemic barriers create obstacles to father involvement (*e.g.*, public benefits, child support, and paternity system); co-parenting skills are needed; role transition to parenthood is significant; and intergenerational learning significantly influences fathers. *Id.*

¹³⁷ *Id.* at 2.

or non-recognition of multiple fathers, the model embraced here would be the model of affirmative parenting and the ability of multiple adults to cooperatively support a child. At the same time, the principle of multiple fatherhood would be connected to the view that not all legally recognized fathers are social fathers. A genetic father who is not a social father may retain legal obligations of support, even if he does not have legal rights of care. The controlling principle of multiple fatherhood would be the best interests of the child, not the rights of adults.

In addition to these principles in the commentary, three sections would be added to clarify genetic and social paternity.

2. New Section: Genetic Paternity

Every child should have an identified genetic father. A genetic father could be established voluntarily, by testing, or involuntarily, in an adjudication. The importance of a genetic father to a child, at a minimum, is critical medical and genealogical/cultural history. In addition, the genetic father must be held economically responsible for the child. The economic responsibility remains unless a social father voluntarily agrees to take on that lifetime task. At the same time, at birth, genetic fathers are presumptive social fathers, subject to rebuttal of that assumption of nurture. Accordingly the section on genetic paternity would read as follows:

Genetic paternity is established if a man voluntarily submits to genetic testing as defined by Article 5 and is established as the genetic father pursuant to Section 505, or is an adjudicated father based on genetic testing under Article 6.

a. A genetic father is presumed at birth to be a social father with full legal rights and responsibilities. This presumption may be rebutted if the genetic father (1) failed to support or adversely affected the mother's pregnancy; (2) was not present for the birth of the child; or (3) fails to voluntarily embrace a full commitment to the future care of the child.

b. A genetic father may be a presumed or acknowledged father.

c. A genetic father who does not satisfy (a) or (b) shall have duties of economic support but no rights of social relationship or nurture.

3. New Section: Social Acknowledged Paternity

This section would define the possibility of becoming a social father after the first two years of a child's life.

A man who is not a presumed, acknowledged, genetic, or adjudicated father of a child who

(a) marries the mother of a child, or

(b) who cohabits with a child for a minimum of two years and has the consent of the mother; may sign an acknowledgment of social paternity. This status will terminate with the end of cohabitation or dissolution of the marriage unless the man adopts the child.

The revised presumed father standard, using the “holding out” concept to establish paternity, only identifies social fathers until the child reaches age two. This section seeks to provide recognition of a social father who does not meet this standard but who subsequently comes into the child’s life, most notably a stepfather. The goal of this section would be to recognize stepfathers as social fathers while the child is living with them. The section would not impose economic responsibility, although as a matter of practice it is clear that many, if not most, stepfathers do economically support the children who live with them.

4. New Section: Multiple Fathers

The principle of multiple fathers would require changes in a number of sections of the UPA, which currently are premised on the one-father-per-child model of fatherhood. It would require clarification of economic responsibilities, particularly when a social father is living with a child while the genetic father is not. One might continue to hold the genetic father exclusively responsible for child support, but for the well-being of the child, one would support the social father’s economic support of the child as well. This section thus would read:

A child is not limited to one legal father. One father will have economic responsibility for the support of the child but multiple fathers may be social fathers to the child, subject to the best interest standard.

This section simply states the principle of acknowledging multiple fathers, which would also be articulated in the opening commentary to the Act. Multiple fatherhood recognizes the separable pieces of paternity, an insight cogently unraveled by Donald Hubin.¹³⁸ It also recognizes the current pattern of social fatherhood, which may include multiple fathers at the same time, or a series of social fathers dependent on the relationship of the father(s) to the mother. The critical justification for multiple fatherhood, however, is the value of social fatherhood to children.

¹³⁸ Hubin, *supra* note 112, at 70–72. Hubin argues that economic support obligations should be linked to causation, not to genetic links. In other words, who caused the child to come into being? Genetic and causal paternity are usually, but not always, the same. On the other hand, he links social rights to relationship, and a moral claim to rights. *See id.*

IV. IMPLICATIONS

The changes that I have proposed may be viewed as radical. I adopt social fatherhood as the core meaning of fatherhood, while family law is currently in an uneasy, ambiguous position regarding genetic and social parenthood.¹³⁹ Genetic definitions offer the lure of simplicity, but social parenthood reflects children's needs and legitimate moral claims.

One objection that might be raised to the principles that I have suggested might be that they can be read as a rejection of the value of marital parenthood. In the current climate of division over the meaning and definition of marriage,¹⁴⁰ disengaging parenthood from marriage might be seen as a move that would further undermine marriage and harm children, who benefit from the stability of marriage. My response to this objection is that children need function, not form; they need care, not status.¹⁴¹ Marital fathers should all be social fathers, so this standard does not undermine marriage; it supports it. My proposals would simply make clear that what matters to children is long-term commitment and meaningful care. That can be accomplished by abolishing the marital presumption or by recasting it from its patriarchal, property-linked history to one grounded in children's best interests.

A second, more serious objection and definite concern is the cost of implementation. This raises a series of questions. How difficult would it be for the legal system to take on the task of identifying and supporting social fatherhood? As outlined above,

¹³⁹ For an overview of the concept of fatherhood and changes in its social definition, see DOWD, REDEFINING FATHERHOOD, *supra* note 5, at 213–31 (redefining fatherhood as social fatherhood and uncoupling social connection with economic responsibility). See also Anderlik & Rothstein, *supra* note 1, at 222; Jacobs, *supra* note 55, at 201–16; *id.* at 233 (“The legal trend of permitting paternity disestablishment is at odds with the trend of recognizing the legal rights of nonbiological parents who have actively cultivated parent-child relationships with their children.”).

¹⁴⁰ See generally *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding that the common law definition of marriage did not include same-sex couples); *Baker v. Nelson*, 191 N.W.2d 185, 185–86 (Minn. 1971) (referencing dictionary and common usage to define marriage); *Singer v. Hara*, 522 P.2d 1187, 1192 (Wash. Ct. App. 1974) (stating that legal history finds the definition of marriage so obvious that it barely needs mentioning). See also *Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980) (“Thus there has been for centuries a combination of scriptural and canonical teaching under which a ‘marriage’ between persons of the same sex was unthinkable and, by definition, impossible.”); *Dean v. District of Columbia*, 653 A.2d 307, 309 (D.C. 1995); *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973) (referencing dictionary and common usage to define marriage); *De Santo v. Barnsley*, 476 A.2d 952, 953–54 (Pa. Super. Ct. 1984) (relying on the traditional definition of marriage).

¹⁴¹ For a critique of marriage and the responsible fatherhood movement, see Scott Coltrane, *Marketing the Marriage “Solution”: Misplaced Simplicity in the Politics of Fatherhood*, 44 SOC. PERSP. 387, 391 (2001) (“[M]y reading of the recent research suggests that the institution of marriage is in fact quite healthy, that the recent trend toward diversity in family forms is inevitable, and that national campaigns to promote idealized father-headed families will have little influence on marriage rates or fathering practices.” (citation omitted)).

there are concrete, specific definitions of nurture that can be used to ease this process. Articulating what constitutes care also makes nurture more visible and, hopefully, more valued. Because the definition is inherently subjective, is there a risk of bias from a system that men have long complained is biased against them as fathers? The complaints of bias are important to address (both those of fathers and those of mothers) but require monitoring the system and children's well-being, not rejection of a definition of parentage that focuses on what children need. Is this standard also inherently more intrusive than fatherhood identified by a marriage license or a DNA test? Clearly this is a more intrusive standard, but focusing on actions and relationships is clearly superior to accepting "easy" markers of status that are not always good predictors of future conduct.

Certainly there are many examples of legal standards that present the same sorts of issues, but the underlying goal outweighs those concerns. One need go no further than the "best interests" standard so pervasive in determining issues related to children.¹⁴² Just as with "best interests," a nurture standard forces us to concentrate on children's needs and make more visible what nurture means.

A third objection might be that there are dangers to disengaging economic responsibility from social parenting. The research on child support patterns indicates that economic support is more likely paid when the parent is socially engaged in parenting the child.¹⁴³ From that data, it might be argued that the separation of rights and responsibilities that I have suggested would be potentially disastrous. The child support data also shows, however, that the significant increase in resources devoted to enforcement have translated into only modest gains in children's well-being.¹⁴⁴ The greatest

¹⁴² The best-interests custody model has long been criticized for its indeterminacy and unpredictability. See, e.g., Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1998); Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1181 (1986). The best-interests standard has also been criticized for its tendency to generate costly and protracted litigation. See, e.g., Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 262 (1975). The best-interests standard has been further criticized for its tendency to inspire judges to rely on personal moral codes. See, e.g., JAMES C. BLACK & DONALD J. CANTOR, *CHILD CUSTODY* 42 (1989) (observing that lack of guidance leads courts to rely on their "upbringing, biases, and, perhaps, irrationalities . . . [which is] utterly without any necessary relation to what is best for the child in question"); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 14 (1987) (noting the best-interests standard invites a trial judge "to add some preferences of her own").

¹⁴³ Paul R. Amato, *More Than Money? Men's Contributions to Their Children's Lives*, in *MEN IN FAMILIES: WHEN DO THEY GET INVOLVED? WHAT DIFFERENCE DOES IT MAKE?* 241-78 (Alan Booth & Ann C. Crouter eds., 1998).

¹⁴⁴ McLanahan & Carlson, *supra* note 90. While strong child support enforcement has not significantly improved child welfare, researchers have found an impact on preventing unwanted pregnancies because strong enforcement affects male reproductive behavior. See Chien-Chung Huang, *Pregnancy Intention from Men's Perspectives: Does Child Support Enforcement Matter?*, 37 PERSP. ON SEXUAL & REPROD. HEALTH 119 (2005), available at <http://www.guttmacher.org/pubs/journals/3711905.pdf>.

economic disaster for children is poverty because it has so many lifelong implications that are bad for the child and bad for society.¹⁴⁵ Instead of holding on to the illusion that private economic support, if paid, would be sufficient to substantially reduce children's poverty, we need to be more realistic about addressing that problem.¹⁴⁶ At the same time, using genes to impose responsibility should also make collecting private support easier.

Social fatherhood, however, should be separate from economic obligation, because it confers rights of relationship. To some extent, we already do this by de-linking rights of custody and visitation from actual payment of child support, so this principle is not new.¹⁴⁷ What I argue for here is a standard that recognizes the critical importance of social parenting to children, in the hope that resources and structural changes will follow to support social parenting. Valuing social fatherhood and seeing it distinctly from economic obligation is essential to children. Recognizing that social fatherhood is critical to children and irreplaceable, while economic obligations can be redistributed, is also important.

Finally, a social fatherhood standard would have an affirmative racial impact. Every evaluation of potential parentage rules, and particularly rules aimed at non-marital children, must also take account of the racial context within which those rules operate. Non-marital births for African American children are two times above the national rate of non-marital births, so any policy regarding non-marital births will have a disproportionate racial impact.¹⁴⁸ Discouragement of nurture because of punitive rules focused on economic fatherhood and marginal gains to children from strict enforcement of those rules is especially counter-productive for black children.

¹⁴⁵ See Martha S. Hill & Jodi R. Sandfort, *Effects of Childhood Poverty on Productivity Later in Life: Implications for Public Policy*, 17 CHILDREN & YOUTH SERVS. REV. 91, 92 (1995) ("To the extent that childhood poverty reduces an individual's subsequent capacity for serving important adulthood roles, it can mean a handicapped work force, an ill-prepared electorate, and possibly substantial public expenditures."); see *id.* (finding that the receipt of child support is positively related to child outcomes, such as educational attainment, standardized test scores, school behavior, and access to health care and nutrition). See generally Elaine Sorensen & Chava Zibman, *Child Support Offers Some Protection Against Poverty*, NAT'L SURV. AM.'S FAMS. (Urb. Inst./Assessing the New Federalism, Washington, D.C.), Mar. 2000, available at <http://www.urban.org/publications/309440.html>.

¹⁴⁶ See generally Elaine Sorensen & Chava Zibman, *To What Extent Do Children Benefit from Child Support?* (Urban Inst., Discussion Paper No. 99-11, 2000), available at <http://www.urban.org/publications/309299.html> (examining the impact of child support on child poverty and income equality among children who have a parent living elsewhere).

¹⁴⁷ See FLA. STAT. § 61.13(4) (2005) (prohibiting the denial of noncustodial parents visitation rights for failure to pay child support as well as prohibiting withholding child support payments for failure to abide by visitation rights).

¹⁴⁸ Chien-Chung Huang, *The Impact of Child Support Enforcement on Nonmarital and Marital Births: Does It Differ by Racial and Age Groups?*, 76 SOC. SERV. REV. 275, 275 (2002) (noting that according to 1998 figures, the percentage of non-marital births was 69 percent for African Americans, compared to 33 percent for the country as a whole).

Beyond these objections, other implications of adopting the standards that I am suggesting are also important to keep in mind. First, parentage laws must be integrated with custody laws. The application of custody and visitation laws is the place where ongoing responsibility really plays out. Intact marriage shields parents from court intervention, which seems appropriate, but at divorce the past record would affect future rights, subject to change in the amount of care during the post-divorce period. Parentage laws, to the extent they identify one father for each child, at best reflect a predictive standard based on the only information that we have, which in most cases is either pre-birth or immediate post-birth conduct. Custody laws may be predictive as well, but they also can generally take into account past conduct. Second, the interaction of multiple fathers and the balancing of their roles is a topic that deserves extended discussion, particularly the role and expectations of step-fathers. Treating blended families as having different challenges and strengths is a major need in family law.¹⁴⁹ Finally, if we truly want better parents, and particularly better fathers, then we must actively support the education of fathers as well as structural changes that would permit more fathers to balance work and family in order to nurture their children.

¹⁴⁹ See Eric G. Andersen, *Children, Parents, and Nonparents: Protected Interests and Legal Standards*, 1998 BYUL REV. 935, 954 (discussing child-nonparent relationships in light of the interaction between a number of interests).