"AIN'T I A PARENT?":[1] THE EXCLUSION OF KINSHIP CAREGIVERS FROM THE DEBATE OVER EXPANSIONS OF PARENTHOOD

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ABSTRACT

Kinship caregivers—a group disproportionately populated by persons of color, particularly black grandmothers—have historically assumed parental roles, often together with a legal parent. Yet even as kin have increasingly assumed substantial parental responsibilities over the past few decades, they continue to have limited opportunities to carry the title of legal parent. At the same time, in claims involving stepfamilies and same-sex partners of parents, and cases involving assisted reproductive technology (ART), family courts have expanded their definition of parenthood to recognize the rights of other caregivers, including those whose parental claims extend beyond the so-called "rule of two."[2] The common element that these groups share is a conjugal tie with the legal parent. The differential treatment of kinship caregivers demonstrates that the concept of parenthood remains inextricably intertwined with the

1. The title references Soujourner Truth's "Ain't I a Woman?" speech, which she gave extemporaneously at a woman's rights convention in Akron, Ohio in 1851. Sojourner Truth, Ain't I a Woman (Dec. 1851), *available at* http://www.fordham.edu/halsall/mod/sojtruth-woman.html. In this speech, Truth challenged the exclusion of black women's voices, experiences and viewpoints from the women's suffrage movement. *Id.* Truth argued that the women's movement of her time needed to be inclusive of black women, who, until then, were largely invisible and ignored. *Id.* The reference to Truth in the title of this article is meant to illustrate how the discourse on expansions to parenthood may be similarly exclusionary.

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2. The "rule of two," a phrase coined by Elizabeth Marquardt, relates to the dimension of exclusivity within parenthood, typically limiting parentage to two individuals at one time, historically one mother and one father. *See* Elizabeth Marquardt, Op-Ed., *When 3 Really is a Crowd*, N.Y. Times, July 16, 2007, at A13 (referencing "the rule of two" in an editorial cautioning against expanding legal parenthood beyond two adults), *available at* http://www.nytimes.com/2007/07/16/ opinion/16marquardt.html.

concept of conjugality—whether through legal marriage, quasi-marriage, or the mere capacity to marry or engage in prescribed mating. By privileging conjugal ties, the current framing of the parenthood debate excludes nonconjugal actors, most notably relative or kinship caregivers, from consideration as legal co-parents and from the accompanying discourse around multiple parentage. This article explores parental claims both within and outside of the scope of conjugality. In doing so, it reveals that, while the discourse on expanded notions of parenthood remains marriage-centered, the underlying rationales for extending parental assignment within conjugal relationships apply with equal force to nonconjugal kinship caregiving. Ultimately, it aims to enlarge the space within the community of "legitimate" parents to include kinship caregivers.

> In her 1974 account of kinship networks in a poor black community, the anthropologist Carol B. Stack outlined the complex informal rules governing intergenerational rights over, and responsibilities to, children. "This system of rights and duties should not be confused with the official, written statutory law of the state . . ." she cautioned. "Community members clearly operate within two different systems: *the folk system* and *the legal system* of the courts and welfare offices." What is wounding when the legal system fails to recognize the folk system is not just the denial of much-needed support but the message [these kinship caregiving] families are somehow *illegitimate*.[3]

I.
INTRODUCTION

Family law scholars suggest that "[t]oday's families are characterized by increased fluidity, a loosening of the state's hold on family life, and the delegation of caregiving tasks to individuals and institutions outside the formal, legal family."[4] Although far from a recent phenomenon, an increasing number of children are currently being "parented" in the homes of relatives by nonparent caregivers, predominantly grandparents,[5] often alongside and cooperatively with a legal parent. These caregivers are disproportionately persons of color, particularly black men and women.[6]

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3. NELL BERNSTEIN, ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED 136 (2005) (emphasis added).

4. Laura T. Kessler, *Community Parenting*, 24 WASH. U. J. L. & POL'Y 47, 47 (2007).

5. *See* ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., NATIONAL SURVEY OF CHILD AND ADOLESCENT WELL-BEING, RESEARCH BRIEF NO. 15: KINSHIP CAREGIVERS IN THE CHILD WELFARE SYSTEM 1 (2010) (noting that "the increasingly favorable view of kin as foster parents ha[s] contributed to the rise in kin as primary caregivers"), *available at* http://www.acf.hhs.gov/programs/opre/abuse_neglect/nscaw/reports/kinship_caregivers/rb_15_2col.pdf; Judy Fortin, *Grandparents Take on Parenthood, Again*, CNN.COM, Dec. 9, 2008, http://www.cnn.com/2008/HEALTH/family/09/08/hm.grandparents.caregivers/index.html (noting that "2.5 million grandparents around the United States who are the primary caregivers for their grandchildren").

6. ALLEN W. HARDEN, REBECCA L. CLARK & KAREN MAGUIRE, U.S. DEP'T OF HEALTH & HUMAN SERVS., FORMAL AND INFORMAL KINSHIP CARE: EXECUTIVE SUMMARY

Yet family law itself is not keeping pace with this shifting familial caregiving landscape. While courts increasingly recognize the *legitimate* parental roles of stepparents, the same-sex partners of parents, and involved donors who helped conceive the child through assisted reproductive technology (ART), courts regard kinship caregivers as possessing *illegitimate* claims to parental status.[7] Courts' treatment of kinship caregivers as having inferior third-party or nonparent claims fails to reflect both the critical role that their parenting efforts play in the lives of the children they are rearing and, more importantly, the relationship that develops between them and those children. The only salient distinction between kinship caregivers and other nontraditional parents is

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(1997) ("African American children are most likely to live in kinship care settings, at levels four to five times as great as those for white non-Hispanic children."), *available at* http://aspe.hhs.gov/ HSP/cyp/xskincar.htm. Kinship caregiving remains disproportionately high among minority families, particularly African-Americans. *See* ADMIN. FOR CHILDREN & FAMILIES, DEP'T OF HEALTH & HUMAN SERVS., REPORT TO THE CONGRESS ON KINSHIP FOSTER CARE: EXECUTIVE SUMMARY (2000) (noting that children in public kinship care are much more likely to be African-American), *available at* http://aspe.hhs.gov/hsp/kinr2c00/; ROB GEEN, URBAN INSTITUTE, KINSHIP CARE: MAKING THE MOST OF A VALUABLE RESOURCE (2002) (citing research studies demonstrating that children in kinship foster care are far more likely to be black than children in non-kin foster care), *available at* http://www.urban.org/pubs/KinshipCare/chapter1.html (last visited Sept. 6, 2010); U.S. Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 245–46 (2001) ("In the past decade alone, ethnic minority communities have witnessed an extraordinary increase in so-called 'kinship caregiving' to the point that hundreds of thousands of American children are now raised by extended family members and nonrelatives rather than their 'legal' parent.").

7. One example of this differential treatment is the different fora in which these different claims to parenthood are typically raised. More often than not, kinship claims are relegated to the public arena of child welfare, whereas those of other nonparents—such as stepparent, same-sex partners, and parents through ART—are typically addressed in the private context of domestic relations court, the only court actually capable of conferring parental status. This differential treatment is a function of both statutory law and general practice, as observed by myself and many who practice in child welfare. Kinship caregivers have limited standing to raise claims in private domestic relations matters and are far more likely to be in either probate court seeking guardianship of the minors in their care or in dependency court in some form of a child welfare proceeding. Compare, for example, the Illinois Marriage and Dissolution of Marriage Act, 750 ILL. COMP. STAT. 5/601(b)(3) (2010), which provides standing for stepparents even when a custodial parent is living but "unable to perform the duties of a parent," with 750 ILL. COMP. STAT. 5/601(b)(4) (2010), which provides standing for grandparents only when one of the parents is deceased. Another example of differential treatment is evident in the manner in which courts distinguish between the parental claims of romantically linked "partners" versus relatives who are not romantically linked to a biological parent. *Compare In re* Jacob, 660 N.E.2d 397, 400 (N.Y. 1995) (upholding principle that homosexual partners of biological parents had standing to petition for adoption of their partner's children) *with In re* Garrett, 841 N.Y.S.2d 731, 732–33 (N.Y. Sup. Ct. 2007) (holding, twelve years later, that a maternal uncle who wished to co-parent his nephew alongside his sister, the biological mother did not have standing to adopt). In In re *Garret*, for example, the court reasoned that expansions to standing provisions in adoption law "have been predicated on the rationale that the relationship between the proposed adoptive parents is the functional equivalent of the traditional husband-wife relationship," a rationale that clearly excludes relatives. 841 N.Y.S.2d at 732.

that the latter group of adults is connected to the child via a conjugal or quasi-conjugal tie to one parent, even if only for the purposes of prescribed mating or heterosexual reproduction, while kinship caregivers are not. Since their claims arise outside of conjugality, kinship caregivers occupy the fringes of the marriage-centered discourse on expanded conceptions of parentage and parenthood.

I begin with two hypotheticals drawn from actual cases to illustrate the law's normative model of dual, conjugal, and exclusive parenthood. The following hypotheticals challenge the assumption that the law cannot and should not recognize two legal mothers, or even three or more legal parents, among whom rights and responsibilities are divided in a manner reflective of the ways in which ongoing care is delivered and significant relationships are formed. Moreover, they reveal the limited capacity of a biological and marriage-centered model to adequately capture the varied cultural and social functions of parenting. Such a reexamination of the dual, conjugal, and exclusive model may result in the attribution of parental status—with all the attendant legal rights and obligations—to more than two adults, and to ancestor/descendant-related adults for whom marital ties are impermissible.

Hypothetical #1

When her daughter, Amanda, is just two years old, Carla, twenty-two, is sentenced to ten years in prison with the possibility of early parole. Although Amanda's father's parental rights have not been terminated, he provides little financial or instrumental support to his daughter and has only sporadic contact with her. Prior to Carla's incarceration, she consents to a guardianship under which Amanda is left in the care of a first cousin, Pam, with whom Carla and Amanda have been quite close. The guardianship grants fairly broad powers, including the authority to seek medical treatment and to enroll Amanda in school. Carla's residual parental rights include the right to consent to Amanda's adoption and the right to visitation with her. Amanda maintains a close relationship with Carla through twice-monthly visitation at the prison, which is equipped with a visiting facility that encourages a great deal of one-on-one time between incarcerated parents and their young children. Over the next four years, Carla and Pam occasionally clash over decisions concerning the child, most notably about the timing and frequency of visits. In each instance in which their wishes for the child differ, Carla trumps Pam by virtue of her superior parental rights and her veiled threat of petitioning to appoint an alternate guardian. Under governing state dependency law, there is no legal basis for the termination of Carla's parental rights, as she has neither harmed nor neglected her child, and has instead made arrangements for Amanda's care by a responsible relative—Pam. The law

recognizes the primacy of Carla's fundamental right to care, custody, and control of her child, even as it allows the guardian to act as the de facto parent. After four years of consistent caregiving, Pam desires to have the relationship with Amanda made permanent and legally secure, particularly against Carla's threats to remove Amanda from Pam's care. Pam does not, however, wish to have Carla excluded from Amanda's life permanently, and would prefer to assume a co-parenting role with Carla upon her release from prison in the next few years. According to Pam, "No matter what, Carla is Amanda's parent . . . and so am I."

This hypothetical raises significant concerns about the ways in which the legal system can or will give legitimacy to the folk system of caregiving. For example, what are the benefits of vesting a maternal cousin with parental rights that would place her on equal footing with Carla, essentially creating two legal mothers not joined by a conjugal or quasi-conjugal bond?[8] How might the answer differ if the parties were a biological mother and biological father instead of first cousins? A biological mother and the child's stepfather? A biological mother and her same-sex partner? In addition, how might the answer differ if, within this family, there was an established pattern of relative caregiving over several generations?

Hypothetical #2

Tina, now twenty-six, gave birth to Shawn, now ten, while she resided with her parents, the maternal grandparents (hereinafter MGPs). Tina's substance use was and remains a frequent source of conflict between Tina and her parents. Tina is an infrequent presence in her son's life, leaving him largely in the care of his MGPs. However, there is no formal agreement regarding Shawn's care that grants MGPs legal authority *vis-à-vis* their grandson beyond a limited power of attorney. Shawn's father, who lives near the MGPs, is also only intermittently involved with his son, visiting him at the MGPs' home on average once a month and providing only meager financial support. During the occasional periods in which Tina is present in the MGPs' home, she assumes an appropriate parenting role and has developed a mutually loving relationship with her son, who refers to her as "mom." From birth, however, the MGPs have played the most active role in parenting Shawn. He refers to them as "mama and papa." Like many grandparents in this circumstance, the MGPs continue to hold out hope that their daughter Tina will eventually become a responsible mother to her child. They are thus reluctant to initiate any effort to terminate their daughter's parental rights. They are also

8. This hypothetical question assumes that the legal father also retains his parental rights, thus creating the possibility of three legal parents.

particularly leery of state involvement in their family's life. As such, they refuse to contact child protective services to seek Shawn's entry into the child welfare system or to petition to be appointed as his legal guardians. Instead, they choose to address the situation privately, remaining vigilant when Tina returns to their home out of fear that one day she may leave the house with Shawn and never return. Although there are at times points of contention among the four adults who function in some parental capacity towards Shawn,[9] they regard themselves as successfully co-parenting this child.

Under such shared parenting circumstances, what room is there for the recognition of grandparents' parental claims coextensive with those of the legal parents, essentially creating four legal parents with minimal or no conjugal ties? How does, *or should*, the law divide the rights and responsibilities of parenthood in a manner reflective of the ways in which ongoing care is delivered and significant relationships are formed, particularly within a cultural milieu in which expanded caregiving and shared parenting is the norm?

As these hypotheticals illustrate, our current conjugality-based conceptualization of parenthood often excludes third-party, nonparent caregivers who are equally deserving of legal parental status. The aim of this article is not to offer a prescriptive solution to this problem, nor to provide a detailed roadmap regarding the precise legal mechanisms by which kinship caregivers may assume parental status. Rather, my more limited goal is to elucidate the discourse on parenthood in order to expose the ways in which a marriage focus excludes a class of parental candidates. In so doing, this article aims to accommodate *vertical*[10] conceptions of multiple parentage within kinship networks. I believe this more inclusive discourse creates a space for functional families in the wider community of *legitimate* families—a space that more accurately reflects the social norms and needs of kinship caregiving families.

Part II explores kinship caregiving as a growing phenomenon in the U.S., focusing especially on its historical and cultural significance within communities of color, particularly black families.[11] In Part III, I examine

9. This hypothetical assumes that the legal father, although minimally involved, maintains some parental role and, hence, his parental rights. The other three legal parents, again, are the MGPs and Tina.

10. I use the term "vertical" and "horizontal" to reference how the family structure would be depicted within a family tree. A mother or father's spouse, quasi-spouse, or prescribed mating partner would be connected to her/him along a horizontal axis, referencing the creation of a new generation of a larger family. Throughout the article, these kinds of relationships are termed "horizontal." By contrast, a mother or father's ancestors (parents, aunts, uncles, etc.) would be aligned vertically above her or him. For the purposes of this article, the intergenerational relationships, including those to same-age, extended family members are termed "vertical."

11. I use the term "black" in this article, rather than "African-American" to refer

the core dimensions of parenthood that frame the legal parent-child relationship as *exclusive*, *dyadic*, and *horizontal*, or marriage-centered.[12] Part IV describes the circumstances under which exceptions to the traditional parentage norms are made and the compelling justifications for these departures from the norm, principally as they arise within stepfamilies, same-sex couples as parents, and individuals utilizing ART. Part V argues that the rationales underlying courts' extension of legal rights to nontraditional parents should apply in equal measure to kinship caregiving families, and that courts should apply an *emic* rather than an *etic* perspective when dealing with these claims.[13] Part VI examines the quasi-parental designations and equitable remedies available to kinship caregivers and suggests the application of a novel conception of "kinship adoption," as well as presumptions of parenthood, for relatives as parents.

II.
KINSHIP CAREGIVING

The experiences of adults raising minor relatives, formally termed kinship caregivers, reveal the limits of the current marriage-centered definition of parenthood. Far from a recent phenomenon, the practice of kinship care has roots in ancient and traditional societies throughout the world.[14] Kinship caregiving encompasses a range of family arrangements, from adult relatives who have sole responsibility for rearing a child to relatives who share childrearing responsibilities with the child's parent(s). These kinship caregiving relationships may be public and formal—as when

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inclusively both to African-Americans and to other descendants of the African diaspora.

12. In so arguing, I do not challenge the superiority of parental claims. By focusing narrowly on the specific aspects of *number* ("rule of two") and *kind* (conjugal over nonconjugal) of adults who can successfully claim parental rights, this article seeks to expand the pool of eligible parents in whom this superior right is vested. In doing so, this article picks up Janet Richard's proposal that "if a third party has functioned as a parent toward the child, that third party would also enjoy the protection of the natural parent preference and the standard for determining custody as between the 'third party parent' and the natural parent would be the best interest of the child." Janet Leach Richards, *The Natural Parent Preference Versus Third Parties: Expanding the Definition of Parent*, 16 NOVA L. REV. 733, 735 (1992). It also explores how an attachment to conjugality impedes implementation of this recommendation.

13. I use the term "emic" to describe the viewpoint of members of the cultural group in question and "etic" to describe a wider, outside perspective. *See* Elaine Chui, *The Cultural Differential in Parental Autonomy*, 41 U.C. DAVIS L. REV. 1773, 1821–22 (2008) (positing that emic perspective "allows for a more holistic view" of particular phenomenon from within, rather than outside of, cultural context) (internal citations and quotation omitted).

14. Rebecca L. Hegar, *The Cultural Roots of Kinship Care*, *in* KINSHIP FOSTER CARE: POLICY, PRACTICE AND RESEARCH 17, 18–19 (Rebecca L. Hegar & Maria Scannapieco eds., 1999) (noting that "[t]he rearing of another's child is among the oldest literary themes," reflecting an ancient tradition of alternate care woven into the mythology and norms of many different cultures).

relatives provide care within the foster care system—or private and informal. In recent years, more and more children are raised by both formal and informal kinship caregivers. Given the rich cultural history of shared parenting within extended families and the long-standing traditions of "othermothering" or "childkeeping" within the black community, the case for attribution of parental status in black kinship caregiving families is particularly strong.

A. Facts and Figures

Over the past few decades, kinship caregiving has become significantly more common in the United States. Between 1990 and 2000, the number of children under the age of eighteen living in grandparent-headed households increased by thirty percent.[15] In 2000, more than six million children across the country—approximately one in twelve—lived in homes maintained by grandparents or other relatives.[16] Forty-one percent of all children residing with a grandparent are being raised primarily by that grandparent.[17] This figure rose sharply in the past few years, increasing six percent between 2007 and 2008 alone.[18] Translated into real numbers, 2.9 million children were being raised primarily by their grandparent in 2008.[19] Slightly less than half of the children being parented primarily by grandparents—forty-nine percent—also reside with one of their biological parents.[20] Rates of participation in kinship caregiving appear to be higher in urban areas, including New York City, Detroit, Chicago, Los Angeles, and Philadelphia.[21] In Washington, D.C., for example, 14.5 percent of all children live in grandparent-headed households, with another 4.7 percent in households headed by other relatives.[22] While a small minority of

15. AMER. ASSOC. OF RETIRED PERSONS, LEAN ON ME: SUPPORT AND MINORITY OUTREACH FOR GRANDPARENTS RAISING GRANDCHILDREN 2 (2003), *available at* http://assets.aarp.org/rgcenter/ general/gp_2003_a.pdf.

16. DONNA M. BUTTS, THE ANNA E. CASEY FOUND., KINSHIP CARE: SUPPORTING THOSE WHO RAISE OUR CHILDREN 4 (2005), *available at* http://www.aecf.org/upload/PublicationFiles/ Kincare.pdf.

17. GRETCHEN LIVINGSTON & KIM PARKER, PEW RESEARCH CTR., SINCE THE START OF THE GREAT RECESSION, MORE CHILDREN RAISED BY GRANDPARENTS 1 (2010), *available at* http://pewsocialtrends.org/assets/pdf/764-children-raised-by-grandparents.pdf

18. *Id.*

19. *Id.*

20. LIVINGSTON & PARKER, *supra* note 17, at 2.

21. According to 2000 U.S. Census data, over a quarter of a million grandparents serve as kinship caregivers in just the ten largest U.S. cities. Detroit, Chicago, and Los Angeles have a combined total of approximately 89,000 grandparent caregiving families. New York City alone has a total of almost 84,000. TAVIA SIMMONS & JAN LAWLER DYE, U.S. CENSUS BUREAU, GRANDPARENTS LIVING WITH GRANDCHILDREN: 2000 7 tbl.3 (2003), *available at* www.census.gov/prod/2003pubs/c2kbr-31.pdf.

22. GRANDFACTS, A STATE FACT SHEET FOR GRANDPARENTS AND OTHER RELATIVES RAISING CHILDREN: DISTRICT OF COLUMBIA 1 (2007), *available at*

children residing with relatives—roughly 131,000—are in "formal" or "public" kinship placements within the foster care system,[23] the overwhelming majority reside in what are termed "informal" or "private" kinship arrangements.[24]

This aggregate kinship data above may not capture those caregiving settings in which a biological parent stays intermittently in the home of the grandparent caregiver, which anecdotal evidence suggests occurs with some frequency.[25] Data from the 2008 American Community Survey suggest that some sort of shared parenting may be taking place in most kinship households. According to the Survey, a parent also resides in the home with 1.6 million of the 2.6 million children being raised by grandparents.[26] It can be reasonably inferred from the data that in at least some of these households, grandparents may share parental roles and responsibilities with a legal parent in what is effectively a co-parenting relationship.[27]

While these numbers highlight the importance of parenting issues and laws regarding kinship givers, particularly grandparent caregivers, the following section explains the roots of the kinship caregiving family and the real life issues that parenting laws must take into account. These issues include, for example, whether kinship caregiving families should be compared to the predominate dyadic parenting norm and how departures from this norm cut against claims to parental status.

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www.grandfactsheets.org/ doc/DC%20%2007.pdf.

23. The approximately 131,000 foster children in kinship care make up more than one-third of the entire foster care population of 391,253 children. BUTTS, *supra* note 16, at 4.

24. For more on the distinction between formal and informal kinship arrangements, see *infra* Part II(C).

25. Since 1996, I have worked as a researcher and advocate for grandparents raising grandchildren in predominately urban communities, including Detroit, Philadelphia, and Chicago, interviewing and participating in service delivery for this community. In my work with grandparent caregivers, I have learned of many instances of effective co-parenting, particularly in informal kinship caregiving families where a biological parent resides, either intermittently or on a long-term basis, with a grandparent caregiver. Although they are not technically *legal* parents, these grandparent caregivers assume primary child-rearing responsibilities with the consent of biological legal parents.

26. U.S. Census Bureau, American Factfinder, B10002, Grandchildren Under 18 Years Living with a Grandparent Householder, *available at* http://factfinder.census.gov/servlet/DTTable?_bm=y&-geo_id=01000US&ds_name=ACS_2008_3YR_G00_&-_lang=en&-redoLog=true&-mt_name=ACS_2008_3YR_G2000_B10001&-mt_name=ACS_2008_3YR_G2000_B10002&-format=&-CONTEXT=dt.

27. Studies of kinship caregiving households have shown that grandparent caregivers raising children in private or informal care often share parental roles and responsibilities with a legal parent, as opposed to the caregiver wholly supplanting the legal parent. Catherine Chase Goodman, Marilyn Potts, Eileen Mayers Pasztor & Dolores Scorzo, *Grandmothers as Kinship Caregivers: Private Arrangements Compared to Public Child Welfare Oversight*, 26 CHILD. & YOUTH SERVS. REV. 287, 299 (2004) ("[G]randmothers providing care privately were more likely to collaborate with parents in decisions about the child and had typically provided care for a longer time.").

B. The Causes and Culture of Kinship Care

"The rearing of another's child is among the oldest literary themes," reflecting an ancient tradition of alternate care woven into the mythology and norms of many different cultures.[28] While kinship caregiving is practiced in many communities within the U.S., it is disproportionately prevalent in communities of color, especially among black families.[29] Census data confirm that, among co-resident grandparents, black grandparents are more likely than even Latino or white grandparents to be responsible for their grandchildren.[30]

The traditional nuclear family model, espoused as the Anglo-American ideal during industrialization, has never been a tradition among black families.[31] Instead, these families reflect "a complex web of factors including individual personalities and choices, as well as remnants of African culture and patterns of survival dating from the period of enslavement."[32] In particular, kinship caregiving among black families, including a sense of corporate shared responsibility for children, has historical roots in slavery and the cultural traditions brought by slaves to the United States.[33]

Black families have retained from these roots distinctive caregiving patterns that are strongly reflective of the concept of vertical parentage or shared parenting across generations.[34] Black mothers often accept nonconjugal co-parenting relationships as a solid parenting framework for

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28. Hegar, *supra* note 14, at 18.

29. SIMMONS & DYE, *supra* note 21, at 2 (noting that considerably higher rates of kinship care are found among nonwhite families).

30. *See id.* at 3, tbl.1.

31. Twila L. Perry, *Race Matters: Change, Choice, and Family Law at the Millenium*, 33 FAM. L.Q. 461, 474 (1999) [hereinafter Perry, *Race Matters*].

32. *Id.*

33. John W. Ellis, *Yours, Mine, Ours?—Why the Texas Legislature Should Simplify Caretaker Consent Capabilities for Minor Children and the Implications of the Addition of Chapter 34 to the Texas Family Code*, 42 TEX. TECH L. REV. 987, 996 (2010) ("African-Americans have relied heavily on kinship care for centuries due to influences of African collectivist cultural underpinnings and the impact of slavery on African-American families."); Sonia Gipson Rankin, *Why They Won't Take the Money: Black Grandparents and the Success of Informal Kinship Care*, 10 ELDER L.J. 153, 157–59 (2002) (noting that "[t]he Black American kinship care system developed its roots in pre-slavery Africa" and continued both during slavery and following emancipation). *Cf.* Hegar, *supra* note 14, at 20 (noting that "in West Africa [from where most slaves brought to America originate], fostering is rooted in kinship structures and affiliations and unlike its 'Western' connotations, the term is not necessarily perceived to be associated with families that are in some way disjointed or dysfunctional" (internal citations omitted)).

34. Hegar, *supra* note 14, at 20. *Cf.* Shirley Hill, *Class, Race, and Gender Dimensions of Child Rearing in African American Families*, 31 J. BLACK STUDIES 494, 495–508 (2001) ("[A]lthough Black parents have embraced most of the values of the dominant society, their American experiences and African heritage have led to some distinctive socialization patterns, most of which revolve around race, class, and gender.").

raising children.[35] Blacks are also more likely than whites to rely on relatives and fictive kin for practical support, such as help with transportation, housework, and child care.[36] Indeed, the role of extended family, particularly grandmothers, in providing support for black families is well-documented.[37] According to one study, "[b]oth co-residential and extra-residential domestic alliances are typical" among black mothers and grandmothers.[38] Similarly, the practice of "othermothering," common in the black community, presents a model of shared parenting incongruous with the norm of the exclusive nuclear family.[39] Othermothers, who can include blood relatives such as sisters, aunts or grandmothers, as well as close friends and fictive kin, are women who assist biological mothers by sharing mothering responsibilities for short or long periods in both informal and formal arrangements.[40] Many black mothers look for and receive assistance with childcare and domestic support from their mothers in lieu of their marriage partners or the father of their child for a number of reasons, including: limited economic opportunities for women in the childbearing generation; the dearth of economically-secure marriage candidates; and the burdens associated with births outside of marriage.[41]

Kinship caregiving practices are thus part of a range of strategies employed by black families coping with economic, social, and political pressures, "including child fosterage, shared living arrangements, and flexible parenting roles."[42] In doing so, these families develop dynamics of closeness, communication, and adaptability—all of which, family systems theorists believe, improve the well-being of all family members.[43] This rich

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35. *See* Robin L. Jarrett, *African American Mothers and Grandmothers in Poverty: An Adaptational Perspective,* 20 J. COMP. FAM. STUD. 387, 388 (1998) (noting that poor African-American families often rely on "child fosterage, shared living arrangements, and flexible parenting roles").

36. Kessler, *supra* note 4, at 57.

37. S. Yvette Murphy, Andrea G. Hunter & Deborah J. Johnson, *Transforming Caregiving: African-American Custodial Grandmothers and the Child Welfare System,* J. SOC. & SOC. WELFARE, June 2008, at 68 (internal citations omitted).

38. Jarrett, *supra* note 35, at 394 (1998). *See also* CAROL STACK, ALL OUR KIN 70 (1974) ("Field observations of 139 dependent children who are assigned to a grantee other than their mother [typically a maternal grandmother] revealed that practically one-half of those children's mothers generally resided in the same dwelling as their child.").

39. Kessler, *supra* note 4, at 57.

40. Stanlie M. James, *Mothering: A Possible Black Feminist Link to Social Transformation," in* THEORIZING BLACK FEMINISMS: THE VISIONARY PRAGMATISM OF BLACK WOMEN 45 (Stanlie M. James & Abena P.A. Busia, eds., 1993). *See also* Priscilla A. Gibson, *African American Grandmothers as Caregivers: Answering the Call to Help their Grandchildren,* FAM. IN SOC., Jan.–Feb. 2002, at 35 ("African American grandmothers continue to follow [a] tradition of mothering in the role of othermother *and* grandmother.") (emphasis mine).

41. Jarrett, *supra* note 35, at 389–394.

42. *Id.* at 388 (citations omitted).

43. *Cf.* Monique Y. Johnson-Garner & Steven A. Meyers, *What Factors Contribute to*

system of interdependence has helped many black families to successfully manage a range of significant life stressors, including poverty and discrimination.[44] This successful and adaptive interdependence is not necessarily reflective of a marital or quasi-marital norm, a feature that frustrates kinship caregivers' attempts to attain protected parental status.

Several factors may cause nonparent adults to become the primary caregiver for a relative's child. In some cases, kinship caregiving arrangements may develop where the legal parent(s): has a substance abuse problem; has abused, neglected, or abandoned the child; or is incarcerated.[45] These issues are particularly prevalent among children within the formal foster care system. As private or informal kinship caregiving families are not attached to any comprehensive service system or a central database tracking their particular needs, researchers are only beginning to learn why families choose to adopt informal or private kinship caregiving arrangements without state intervention.[46]

At the same time, states increasingly rely on kinship foster care placements for children within the formal foster care system due to both fiscal constraints and improved outcomes for children. Data from the National Survey of Child and Adolescent Well-Being reveal that children in kinship foster care demonstrate better outcomes on physical, cognitive, and skills-based domains than children in nonkinship foster care.[47] Children in kinship foster care also have more positive perceptions of their placements: they are more likely to report that they like who they live with, that they want their current placement to be their permanent home, and that they "always felt loved."[48] They are less likely to report having tried to leave or run away.[49] Furthermore, "both teachers and caregivers tend to rate children living with kinship foster parents as having fewer

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the Resilience of African-American Children Within Kinship Care?, 32 CHILD & YOUTH CARE FORUM 255, 256–57 (2003).

44. Rankin, *supra* note 33, at 156–159.

45. REGAN MAIN, JENNIFER EHRLE MACOMBER & ROB GEEN, THE URBAN INST., TRENDS IN SERVICE RECEIPT: CHILDREN IN KINSHIP CARE GAINING GROUND 1 (2006), *available at* www.urban.org/UploadedPDF/311310_B-68.pdf; Rob Geen, *The Evolution of Kinship Care Policy and Practice*, 14 FUTURE OF CHILDREN 131, 134 (2004), *available at* http:// www.futureofchildren.org/futureofchildren/publications/docs/14_01_07.pdf

46. Goodman, Potts, Pasztor & Scorzo, *supra* note 27, at 288. Research indicates that private kinship caregiving saves taxpayers billions over other out-of-home caregiving options paid for by the federal and state government. Conservative estimates suggest that if even half of the two million children being raised informally or privately by relatives without parents in the home were to enter the foster care system, it would cost taxpayers $6.5 billion a year. BUTTS, *supra* note 16, at 4. These numbers would undoubtedly overwhelm a system which is already significantly overburdened and underresourced.

47. TIFFANY CONWAY & RUTLEDGE Q. HUTSON, CTR. FOR L. & SOC. POL'Y, IS KINSHIP CARE GOOD FOR KIDS? 2 (2007), *available at* http://www.clasp.org/admin/site/publications /files/ 0347.pdf.

48. *Id.* at 1.

49. *Id.*

behavioral problems than do their peers in other out-of-home placement settings."[50] While there is limited research capturing the direct perspectives of children in kinship caregiving families, the research that does exist suggests that children perceive a greater degree of love, safety, and permanence in kinship caregiving arrangements when compared with those living with non-kin.[51]

C. Negotiating Status within Kinship Caregiving Families

Despite the important role they play in raising children, kinship caregivers face numerous challenges in assuming parental roles, including depleted resources, minimal instrumental support, and typical caregiver stress and burden. One of the most vexing hurdles they face is the ambiguous, often tenuous, legal status that many kinship caregivers have *vis a vis* the children they are raising.

The ambiguity of the caregiver's legal status represents one of the sharpest distinctions between formal/public and informal/private kinship care. Formal kinship caregivers have the clearest role, as they are designated foster parents by the state and have unambiguous authority in a limited range of decisions. The same cannot be said of many informal kinship caregivers, who comprise the overwhelming majority of kinship caregiving arrangements in the United States.[52] At present, there is no reliable data on the number of private kinship caregivers who have actual legal custody of or guardianship over the children they are raising. What can be inferred from small-scale studies on this population, however, is that a significant portion of these caregivers do not have legal custody or guardianship of their relative minor charges.[53] Without a legally-

50. *Id.* at 2.

51. A study comparing children in relative, nonrelative and group care reported that of the one hundred children in kinship care in 1995, ninety-four percent said they were "always loved" compared with eighty-two percent of children in nonrelative foster care who reported the same. With respect to permanency outcomes, research reveals that "odds of permanence are fifty-four percent lower for children living with nonrelated foster parents than children living with grandparents, and thirty-four percent lower for children living with aunts and uncles. The permanency odds for children living with other relatives are not statistically different from those living with grandparents." *See* Mark F. Testa, *The Quality of Permanence—Lasting or Binding? Subsidized Guardianship and Kinship Care as Alternatives to Adoption*, 12 VA. J. SOC. POL'Y & L. 499, 522 (2005) (finding that based on self-report of children, "[t]he odds of feeling a part of the family are three times as high for foster children living with grandparents, aunts and uncles as compared to foster children living in unrelated foster homes").

52. *See supra* note 23 and accompanying text.

53. Findings from limited small-scale studies suggest that a significant percentage of informal or private kinship caregivers have no legal arrangement for the care of their grandchildren. Catherine C. Goodman & Merril Silverstein, *Grandmothers Raising Grandchildren: Ethnic and Racial Differences in Well-Being Among Custodial and Coparenting Families*, 27 J. FAM. ISSUES 1605, 1610 (2006) (reporting that forty-one percent of grandmothers have no legal arrangement for the care of their grandchildren); CHERYL

recognized relationship to the child they care for, kinship caregivers often face problems "enrolling the child in school, consenting to the child's medical care, securing public assistance benefits for the child, and accessing school records."[54] At the same time, the lack of clarity about a caregiver's legal status likely undermines the stability of the caregiver-child relationship, adding to the burden of a group that is already emotionally and otherwise taxed.[55]

Currently, the only means for kinship caregivers to attain permanent, legally-protected parental status is formal adoption. However, the adoption process usually involves adversarial legal proceedings that pit kinship caregivers against another relative, often their own adult child, in order to gain some measure of security in their relationship with the children they are raising. These proceedings are usually lengthy and emotionally difficult for everyone involved. Not surprisingly, the process of litigating these issues, as well as the outcomes, can seriously strain family relationships rather than strengthen or support them.[56] Paradoxically, the process of formalizing relationships can thus move families to a point of greater perceived risk: "The parent assumes a greater risk of having parental rights terminated, the relative a greater risk of an agency decision to transfer the child [to a different caregiver], and the children a greater risk of losing a family."[57] This kind of risk has a

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SMITHGALL, SALLY MASON, LISA MICHELS, CHRISTINA LICALSI & ROBERT GEORGE, CHAPIN HALL CTR. FOR CHILDREN AT THE UNIV. OF CHICAGO, CARING FOR THEIR CHILDREN'S CHILDREN: ASSESSING THE MENTAL HEALTH NEEDS AND SERVICE EXPERIENCES OF GRANDPARENT CAREGIVER FAMILIES 18–21 (2006) (reporting approximately sixteen percent of grandparents have no legal arrangement), *available at* http://www.chapinhall.org/sites/default/files/old_reports/305.pdf. In my previous research, I found that more than one-third of the grandparent caregiver sample (N=83) lacked any legal authority to care for their grandchildren. Sacha M. Coupet, Cognitive Appraisals and Family Dynamics as Predictors of Adjustment and Well-Being in Elderly Black Kinship Caregivers 100, 149 (1997) (unpublished Ph. D. dissertation, University of Michigan) (on file with author). Many of these caregivers expressed their "fear of possible disruptions of kinship placements by biological parents or social service agencies acting on behalf of angry, spiteful, or indecisive parents." *Id.* at 149. Their fear of losing the child in their care and their desire to preserve the caregiving arrangement often made these caregivers feel "alienat[ed] from the very agencies that are intended to provide assistance." *Id.* Ultimately, caregivers' avoidance of helping agencies and perceived animosity between caregivers and the system within which they are forced to operate resulted in increased levels of caregiver stress. *Id.* Caregivers questioned aloud whether their demands for assistance would involve relinquishment of some parental control. *Id.* Conversely, many felt helpless at times to act on behalf of the children in their care without legal authority to do so, fearing that even the guardianship agreements some had provided too few safeguards and too little reassurance of permanence in the caregiving relationship. *See id.* at 150–51.

54. Jeffrey C. Goelitz, *Answering the Call to Support Elderly Kinship Caregivers*, 15 ELDER L. J. 233, 244 (2007).

55. *Id.*

56. BUTTS, *supra* note 16, at 7.

57. Madeline L. Kurtz, *The Purchase of Families into Foster Care: Two Case Studies*

temporal dimension as well, especially for older or elderly relative caregivers. Without any legal formality, these older caregivers lack authority to make permanent plans for the child or direct her care after their own incapacity or death. Permanency, a critical dimension of child welfare decision making, is thus of particular concern among this group of nonparent caregivers.[58] In short, there is a tension between the potential costs of seeking legal recognition of a kinship caregiver's parenthood and the benefits gained by such a recognition.

It is important to note that the tenuousness of the legal relationships does not necessarily lead to worse caregiving arrangements. As illustrated by caregiver reports of their long-term commitments to caregiving, many kinship caregivers are committed to remain parents to relative minors even without the corresponding title of "parent," and remain devoted even though their perceptions of permanence are not reflected in legal protections that would assure lasting caretaking.[59] In comparing relative caregivers as adopted parents and relative caregivers as long-term guardians, Mark Testa found negligible differences between the two groups with respect to stability of placement—a reasonable proxy for commitment to caregiving.[60] Similarly, children perceive relative caregivers as substitute parents, with commitments to caring for them that mirror those of legal parents.[61] According to Testa, "kinship [itself] appears to be the common denominator underlying caregivers' intent to raise a child to adulthood, children's sense of belonging, and the continuity and stability of care both before and after legal permanence."[62]

D. Stigma and Legitimacy: Kinship Caregivers as Parents, or Why the "P" Word Matters

While kinship caregivers do not have the same legal rights over the children they care for, many kinship caregivers speak about their circumstances as if they too carried (or ought to carry) the designation of legal parent. In my own extensive work within the kinship caregiving community, I have observed countless relative caregivers at conferences,

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and the Lessons They Teach, 26 CONN. L. REV. 1453, 1521 (1994).

58. Goelitz, *supra* note 54, at 244–245 ("The need to implement legally enforceable alternative permanency plans for the child is even greater among elderly caregivers, for whom mortality and morbidity are relatively immediate concerns.").

59. *See* Testa, *supra* note 51, at 533 (describing research that finds that even kin who do not adopt, and hence do not have title of parent, remain committed to caring for the children they are raising).

60. *Id.* at 525, 528.

61. *See id.* at 524 (finding that children with private guardians were no less likely to report that they felt part of the family with whom they were living than children who were formally adopted by nonparent caregivers).

62. *Id.* at 533.

community meetings, and support groups. These caregivers often express an expectation that they should have a role in the proceedings concerning their relative minors that corresponds with their parental conduct, and voice anger and frustration at the legal system's failure to accord them a meaningful opportunity to participate. Many ask, "Where are *our* rights as parents?"

The attribution of parental status matters to kinship caregivers for the practical and expressive value that the "p" word carries,[63] the compromised well-being associated with exclusion from the class of persons regarded as *legitimate* parents, and the resulting stigma that their families bear. Journalist Nell Bernstein provides a moving description of the impact of questions regarding whether grandparent caregivers parenting grandchildren are legitimately "parents."

> The questions that drive "eligibility"—*whose* child is this, anyway?—bear little relationship to the reality of grandparents' lives: they are caring for their grandchildren while their children are gone. When grandparents describe the struggles they face trying to enroll their grandchildren in school, get medical care for them, or seek government assistance—the shame and fear they face in their dealings with public institutions—one is reminded of the experience of undocumented immigrants.[64]

In another particularly poignant example of the significance of parental identity and role, a grandmother raising her granddaughter described a conversation she had with the granddaughter whom she is raising:

> [She] asked her granddaughter, Paula, 'Do you want me to be your grandmother *acting* like a parent or should I just be your *mother*?' Paula replied, "If I am your grandchild I will not have a mother or father. And if I don't have you I don't have anybody." When her grandmother signed the custody papers, Paula said, "Grandma, when I go to school tomorrow can I tell them I have a *real* Mom now?" Clearly, Paula needed her grandmother to play the role of parent. As Paula ages, her feelings may change or perhaps she will always need to see her grandmother in the guise of "parent."[65]

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63. *See* Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 58 (2008) [hereinafter Appleton, *Parents by the Numbers*] ("[T]he ['p' word] matters for several reasons even apart from the specific rights and duties that parental status typically entails [because] the label and the status it signifies have considerable expressive value.").

64. BERNSTEIN, *supra* note 3, at 136.

65. Grandparenting.org, Grandparents Raising Grandchildren, http://www.grandparenting.org/Grandparents_Raising_Grandchildren.htm (last visited Dec. 3, 2010) (emphasis added) (citing ARTHUR KORNHABER, THE GRANDPARENT GUIDE : THE

Faced with the challenge of reconciling family law's philosophical aims with the evolving reality of changing family form and structure, we are forced to figure out what place nontraditional families might occupy and whether their perceived roles can better align with their legal titles. As shown by these examples, departure from the traditional nuclear family norm comes with a price for most kinship caregiving families. The degree to which they resemble, or are distinct from, the traditional nuclear family does more than undermine caregivers' parental status claims: it also frequently makes these caregivers feel stigmatized and excluded from debates about what constitutes a family.

The ability of kinship caregivers to claim parental status is further complicated by the acrimonious tenor of contemporary debates about which particular families and what particular family constellations are legitimate.[66] The narrative used to refer to or describe kinship caregiving families illustrates the exclusion and stigma attached to them. In one recent example, an article describing the challenges facing a kinship caregiving family touted aid delivered "to help the *makeshift* family stay intact and even thrive."[67] The author's use of the word "makeshift" implies a family that is contrived or cobbled together, rather than "genuine."

As a highly disproportionate share of kinship caregiving families are families of color, the racial and cultural tenor of this debate is impossible to ignore. As Twila Perry keenly observes, "attitudes toward the structure, value and function of families do not exist in a vacuum" but reflect cultural norms, and power structures, both of which are heavily influenced by race.[68] Indeed, black families, "have [long] been at the center of debates [over 'family values,'] owing to their differences from 'mainstream' American families in terms of family structure, living arrangements, and childrearing practices."[69] Very few assessments of black families actively defend their often nontraditional forms as on a par with the nuclear family ideal. To the contrary, the kinship family has historically been viewed as a pathological form of social organization.[70] Multigenerational female-

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DEFINITIVE GUIDE TO COPING WITH THE CHALLENGES OF MODERN GRANDPARENTING (2002)).

66. Vonnie McLoyd, Nancy Hill & Kenneth Dodge, *Introduction: Ecological and Cultural Diversity in African American Family Life*, *in* AFRICAN AMERICAN FAMILY LIFE: ECOLOGICAL AND CULTURAL DIVERSITY 3 (Vonnie McLoyd, Nancy Hill & Kenneth Dodge eds., 2005).

67. Erik Eckholm, *Florida Shifts Child-Welfare System's Focus to Saving Families*, N.Y. TIMES, July 24, 2009, at A12 (emphasis added), *available at* http://www.nytimes.com/2009/07/25/us/25florida.html.

68. Twila Perry, *Family Values, Race, Feminism and Public Policy*, 36 SANTA CLARA L. REV. 345, 346 (1996) [hereinafter Perry, *Family Values*].

69. McLoyd, Hill & Dodge, *supra* note 66, at 3.

70. Kessler, *supra* note 4, at 50. The most notorious example of this framing is evidenced in the report prepared by Daniel Patrick Moynihan in which he castigated black

headed households, highly flexible and adaptive familial roles, strong familial cohesion, and shared caregiving—the very traits that have helped black families to survive substantial hardship—have been framed, from a Anglo-American majority perspective, as a "failure of values and morality" at best, and a hopeless "tangle of pathology" at worst.[71]

Undoubtedly, the marginalization of kinship caregivers reflects the marginalization suffered by black families in general. In the contemporary, more subtly discriminatory cultural context in which race is increasingly "'coded as culture,' family structure, especially the application of white nuclear family norms, is a central marker of cultural difference and implied status differentiation."[72] The current marriage-centered approach to parenthood has a disproportionate impact on black families due to the declining rates of marriage among African-Americans.[73] Racial discrimination and the nonnormative nature of many black families are used to mutually reinforce their exclusion from the privileges reserved for more "traditional" kinds of families.

As evolving conceptions of marriage and parenthood continue to stoke debate, and as departure from the nuclear family norm continues to be conflated with dysfunction, kinship caregiving families will continue to find themselves in this stigmatized and marginalized place. Existing social science literature shows that such stigma has innumerable negative effects on psychological well-being, including a diminished sense of social citizenship as a result of exclusion.[74] In examining the effects that

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family forms and hypothesized that the destruction of the black nuclear family would hinder further progress towards economic, political, and social equality. DANIEL P. MOYNIHAN, OFFICE OF POL'Y, PLANNING & RESEARCH, U.S. DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965) (noting that "at the heart of the deterioration of the fabric of Negro society is the deterioration of the Negro family"), *available at* http://www.dol.gov/oasam/ programs/history/moynchapter2.htm.

71. Perry, *Family Values*, *supra* note 68, at 350.

72. M. Belinda Tucker & Angela D. James, *New Families, New Functions: Postmodern African American Families in Context*, *in* AFRICAN AMERICAN FAMILY LIFE: ECOLOGICAL AND CULTURAL DIVERSITY, *supra* note 66, at 86.

73. Between 2000 and 2008, the percentage of blacks who had never married increased from forty-two to forty-eight percent among men, and forty to forty-four percent among women and now substantially exceeds the proportion of the black population currently married—thirty-five and twenty-seven percent, respectively. U.S. Census Bureau, Marital Status of People 15 Years and Over, by Age, Sex, Personal Earnings, Race, and Hispanic Origin, 2008, America's Families and Living Arrangements: 2008, Table A1, http://www.census.gov/population/www/socdemo/hh-fam/cps2008.html (last visited July 11, 2009). These figures stand in sharp contrast to the rates of marriage within white, non-Hispanic communities. Between 2000 and 2008 the percentage of white non-Hispanics who had never married increased from twenty-seven to twenty-nine percent among men, and twenty-one to twenty-two percent among women, figures that are dwarfed by the proportion of white non-Hispanic men and women married in 2008—fifty-seven and fifty-four percent, respectively. *Id.*

74. *Cf.* Scott Weber, *Parenting, Family Life, and Well-Being Among Sexual Minorities: Nursing Policy and Practice Implications*, 29 ISSUES IN MENTAL HEALTH

exclusion and stigmatization will have on nontraditional families, including kinship caregivers and the children they are raising, the normative question we should ask is whether "the psychological and social costs to society of the marginalization and exclusion of ... [stigmatized families] outweigh any perceived benefit to the broader community that could possibly be derived from that exclusion."[75]

E. Conclusion

Just like the caregivers Stack observed,[76] kinship caregivers may function within both a folk system in which their parental roles are acknowledged and respected and within a legal system in which their role is more closely analogized to that of a legal stranger. Their "folk-based" claims to parenthood derive from a relationship to the child devoid of any dimension of conjugality. Although both "horizontal" (conjugal or quasi-conjugal) and "vertical" (nonconjugal relative) adult caregivers may answer the question, "Ain't I a parent?," in the affirmative, only conjugal or quasi-conjugal partners' perceptions and self-conceptions of parenthood are supported in law. Kinship caregivers, left to forge their own identities, are currently caught between their perceptions of their relationship to the child they care for and the "reality" of their limited rights under the law. This raises the central question of to what degree the law can, or ought to, reflect or validate perceptions and self-conceptions of parenthood, and upon what underlying rationale.

III.
IT ALL DEPENDS ON WHAT YOU MEAN BY "PARENT"

What does it mean to accord an adult parental responsibility, legal privilege, and the corresponding title of "parent?" In theory, "categorizing someone as a parent presumptively ties his or her interests to the child's interests. This means that parents' decisions about, or affecting, their child are both presumptively cognizant of the child's needs and in the child's 'best' interests."[77] Parenthood thus protects the ability of certain adults to make decisions regarding their children that are presumptively controlling.[78]

NURSING 601, 605 (2008) (noting that social antipathy toward alternative family arrangements—specifically sexual minorities—can cause psychological effects such as "a sense of separation and noninclusion from the broader community, and a kind of reduced sense of mastery of life in the individual resulting from society's marginalizing behavior").

75. *Id.*

76. *See supra* note 3 and accompanying text.

77. Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 697 (2001).

78. *See* Katherine Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Treatment Alternatives When the Premise of the Nuclear Family Has Failed*, 70

Traditionally, family law has defined parenthood as encompassing several critical characteristics. First, it has long been accepted that "[p]arenthood, with few exceptions, is an exclusive status . . . [allotted to] only one set of parents for a child at any one time."[79] These parents are "autonomous, possessing comprehensive privileges and duties that they share with no one else."[80] Second, as Martha Fineman observes, "[t]he contour of the family entitled to protection through privacy has historically been defined as the reproductive unit of husband and wife, giving primacy to the marital tie."[81] In other words, parenthood is traditionally a dyadic relationship—two, and no more than two, adults can be considered the parents of a child. Third, the law presumes that the two parents are themselves engaged in a conjugal relationship with each other.[82] This presumption is so strong that when courts have extended parental rights to adults outside of a traditional dyad, their analysis has centered on the capacity of these adults to be in a marriage-like relationship with a legal parent or, at the very least, capable of prescribed mating with a legal parent.[83] Within this context, parenthood is thus fundamentally horizontal—a relationship shared *within*, rather than *across*, generations by virtue of a conjugal or quasi-conjugal tie. Viewing parenthood in this context, it becomes apparent that it is primarily the third core dimension of parenthood—conjugality—that precludes the formal recognition of shared or multiple co-parenting within kinship caregiving families.

A. Exclusive: The Superior Rights Doctrine

The principal barrier to claims for access to, or authority over, children by third parties, including kinship caregivers, is the superior right enjoyed by biological or legal parents over the claims asserted by nonparents. Early in its family law jurisprudence, the Supreme Court carved out parents' superior right to "establish a home and bring up children" from the general constitutional principle of liberty within the Due Process Clause of the Fourteenth Amendment.[84] As the Court subsequently found, "[t]he child is not the mere creature of the State; [as] those who nurture

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VA. L. REV. 879, 884–85 (1984) (noting extensive list of parental rights, including, among others, right to custody, religious upbringing, and medical decision-making).

79. *Id.* at 879.

80. *Id.*

81. MARTHA A. FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 110 (2004).

82. *See* Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 651 (2008) (expressing belief that marriage serves as an efficient mechanism for determining parenthood, and noting that "[w]ithout the law of marriage, we do not know who parents are").

83. *See supra* Part III(B).

84. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[85] Whether due to the intimacy of affection, fiduciary responsibility, or ownership interest in the child, parents were understood to have a privilege and corresponding burden to the care, custody, and control of their offspring.[86]

The presumption of exclusive parental rights, as embodied in the Court's superior rights doctrine, ultimately curtails the ability of kinship caregivers to gain parental status. Although the Court's early cases focused directly on line-drawing conflicts pitting parents against the state, more recently the Court's superior rights doctrine came to be used as a shield against intrusion by private third-party nonparents in *Troxel v. Granville*.[87] In *Troxel*, paternal grandparents sought visitation with their granddaughters under what the Court characterized as a "breathtakingly broad"[88] Washington State statute that granted visitation to any person at any time that it was deemed to be in the child's best interests.[89] The legal mother, who had not been found unfit, did not object to all visitation, but only to the amount that the grandparents were requesting.[90] When the lower court ordered more visitation than the legal mother desired, she appealed.[91] The Washington State Supreme Court,[92] and later the U.S. Supreme Court,[93] held that the statute unconstitutionally infringed on parents' fundamental right to rear their children.

Although the plurality's decision in *Troxel* ultimately turned on the "sweeping breadth" of the Washington State statute,[94] a majority of the U.S. Supreme Court fundamentally upheld the superior rights of parents.[95]

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85. Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

86. Family law scholars, most notably Barbara Bennett Woodhouse, have critiqued these early parental rights cases for the ways in which they reified the notion of children as chattel and the superior rights doctrine as an assertion of ownership interests above all. *See, e.g.*, Barbara Bennett Woodhouse, "*Who Owns the Child?*": Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992).

87. 530 U.S. 57 (2000).

88. *Id.* at 67.

89. *Id.* at 60.

90. *Id.* at 71.

91. *Id.* at 60.

92. *See id.* at 63 (citing *In re* Smith, 969 P.2d 21, 28–30 (Wash. 1998)).

93. *Id.*

94. *Id.* at 73. *See also id.* at 77–78 (Souter, J., concurring) (arguing that Washington State statute was overbroad as "*Meyer*'s repeatedly recognized right of upbringing would be a sham if it failed to encompass the right to be free of judicially compelled visitation by 'any party' at 'any time' a judge believed he 'could make a "better" decision' than the objecting parent had done").

95. As described in greater detail below, the plurality opinion did not dispute the notion that the parental decisions regarding the care, custody, and control of their children should be accorded "special weight." *Id.* at 73. In his concurrence, Justices Thomas similarly indicated that parents maintained superior rights as against third parties. *See id.* at 80 (Thomas, J., concurring) ("[P]arents have a fundamental constitutional right to rear their

The core of the case was a question concerning *visitation*, which is reasonably regarded as a less intrusive interference than the more substantive claim of child *custody*, although visitation is sometimes regarded as merely a lesser form of custody.[96] The plurality in *Troxel* did not determine the future of all third-party nonparental claims, declining to "define . . . the precise scope of the parental due process right in the visitation context."[97] Indeed, the Court noted that "[b]ecause much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter."[98] Yet the Court held that the decisions of fit parents should be accorded "special weight" in the face of challenges by nonparent third parties.[99] In doing so, the Court privileged parental claims to care, custody (even if only access *to* versus custody *of),* and control of children made by fit parents over similar claims asserted by third parties.

While the Court's decision in *Troxel* neither unequivocally resolved the precise metes and bounds of parental claims, nor elaborated the criteria for inclusion or exclusion from the class of persons privileged as parents, the decision has since been used to justify the curtailment of third-party claims to parental rights.[100] As Katherine Bartlett observed more than two decades ago, "[c]urrent law provides virtually no satisfactory

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children, including the right to determine who shall educate and socialize them. . . . Here, the State of Washington lacks even a legitimate governmental interest—to say nothing of a compelling one—in second-guessing a fit parent's decision regarding visitation with third parties.").

96. Domestic relations statutes in most states establish distinct rules for standing and standards governing child visitation versus custody claims. *Compare, e.g.,* 750 ILL. COMP. STAT. 5/601(b) (2010) (granting standing to parent seeking custody of her child by filing petition "for dissolution of marriage or legal separation or declaration of invalidity of marriage; or . . . for custody of the child, in the county in which he is permanently resident or found" and to grandparent who is the parent or stepparent of deceased parent if the surviving parent had been absent for a month, was in prison, or was under criminal justice supervision) *with* 5/607(a) (stating that noncustodial parents are "entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral or emotional health" and that grandparents "may file petition for visitation rights to minor child if there is unreasonable denial of visitation by parent and at least one of" several conditions exist, such as the absence of one parent).

97. 530 U.S. at 73.

98. *Id.* at 73.

99. *Id.* at 70.

100. The *Troxel* decision has been incorrectly yet widely interpreted as holding third-party nonparent visitation statutes categorically unconstitutional. *See* Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After* Troxel v. Granville, 88 IOWA L. REV. 865, 869 (2003) (noting that a "number of state courts have held their third party visitation statutes unconstitutional under Troxel" and "[o]ther courts, while not eliminating third party visitation completely, have imposed substantial hurdles to visitation").

means of accommodating [third-party caregivers]. . . . because the presumption of exclusive parenthood requires that these relationships compete with others for legal recognition."[101] This assessment remains accurate today.

A call to expand the pool of persons deemed to be vested with parental authority does not necessarily directly challenge the superior rights doctrine, but rather seeks to explore the precise factors that influence the membership of persons vested with this superior right of access to and influence over the lives of children. Indeed, "the parental rights doctrine—as a logical matter—does not dictate the *number* of 'parents' a child may have."[102] It is similarly logical that a multiple parentage model, like the traditional model, retains the core features of exclusivity, since some group of persons—whether two, three, or more—will still be vested with "comprehensive privileges and duties that they share with no one else," to the exclusion of others who are ineligible by virtue of their nonparent status.[103] Even those scholars who are apprehensive of multiple parentage must recognize that nothing in the superior rights doctrine itself limits the actual number of people in whom an exclusive and superior parental right vests. Thus, opposition to this model will have to be grounded in the other dimensions of parenthood.

B. Dyadic: The "Rule of Two"

An underlying assumption of the superior rights doctrine is the so-called "rule of two," the operative rule constraining parental claims to an exclusively dyadic model. As Susan Appleton has observed, "Family law, as part of the larger prevailing culture, has enshrined the number two. By constructing links among sex, marriage and procreation and conceptualizing each as a practice for two, family law takes as its paradigm the couple or pair."[104] Because the "ideology of the nuclear family does not script a significant role for the extended family, or for other members of the community who may play key roles in the lives of children," family law constructs "boundaries that exclude all but a limited number of relationships as legally relevant."[105]

Courts' attachment to the dyadic model seems logical considering that

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101. Bartlett, *supra* note 78, at 881. *See also* Margaret M. Mahoney, *Stepparents as Third Parties in Relation to Their Stepchildren*, 40 FAM. L.Q. 81, 85 (2006) (observing that "adherence to the traditional [two-parent] model of the family has slowed the willingness of lawmakers to extend family recognition to [third parties] who serve as parent figures for minor children").

102. Appell, *supra* note 77, at 788 (emphasis added).

103. Bartlett, *supra* note 78, at 879.

104. Appleton, *Parents by the Numbers*, *supra* note 63, at 11.

105. Allison Harvison Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 AM. U. J. GENDER & L. 505, 506–507 (1998).

"[p]arenthood [has long been] understood to be largely a natural relation founded upon biological reproduction, and legal status as a parent followed easily from recognition of that natural fact—or, in the case of adoption, from the formal creation of a substitute relation designed to replicate as closely as possible the biological original."[106] Such substitute relations—lesser forms of parenthood—are now embraced in proportion to their reflection of the prevailing heterosexual norm, otherwise defined as heterosexual mating within a socially prescribed sexual relationship. As Susan Appleton observes, "the allure of a [dyadic model] lies in its ability to naturalize a normative reality in which only enduringly monogamous heterosexual couples reproduce."[107] Along a spectrum recognizing parental claims relative to the heterosexual married norm, the farther one is from the norm, the weaker one's corresponding parental claim.

Courts use the term "third party" to differentiate between those who possess rights and responsibilities of parents and those outside of this class. The term perfectly identifies what the "rule of two" aims to distinguish—literally any person outside the traditional dyadic parentage model. In addition to signaling membership within a protected class of parents, the "rule of two" also intimates, perhaps unfairly, alleged differences in the quality and type of attachment had by third-party adult caregivers and children. By favoring the two parents who created a child, the "rule of two" places any other possible parental figures in a subordinate, or inferior, position. Third-party parenting is regarded as a nonnormative substitute for traditional dyadic parenting, a perception reflected in the rules governing third-party standing. Third-party contenders, regardless of the quality of their relationship with the child, must first survive presumptions favoring the traditional parental dyad. Only after the failure or absence of a traditional parent is established do courts assess the quality and type of attachment between the third party and the child,[108] suggesting

106. David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 125–126 (2006).

107. Appleton, *Parents by the Numbers*, *supra* note 63, at 21.

108. In *Troxel v. Granville*, for example, a plurality of the U.S. Supreme Court upheld the presumption that fit parents act in the best interests of their children and, consequently, that a finding of parental unfitness is required for the state to interfere in the private realm of the family. 530 U.S. 57, 68–69 (2000). Such state interference includes permitting third-party nonparents to seek custody of children. This presumption was recently reinforced in In re *Custody of E.A.T.W.*, in which the Washington State Supreme Court held that a Washington State third-party custody statute requires, among other things, that nonparents petitioning for custody "set forth factual allegations that, if proved, would establish that the parent is unfit or the child would suffer actual detriment if placed with the parent." 227 P.3d 1284, 1288 (Wash. 2010). This presumption is also evident in various state statutes governing child custody, in which third parties are granted standing to petition for custody only if they first demonstrate that a natural parent is either deceased, incapacitated, or unfit. *See, e.g.*, 750 ILL. COMP. STAT. 5/601(b)(4) (2010) (permitting grandparent to petition for child custody only if one parent is deceased and surviving parent is unfit). Only after a

that this nonnormative parental relationship is only worth assessing after the normative one is found to be deficient.

C. Horizontal: Privileging Conjugality

In a simplistic sense, marital status helps organize parenthood by making the identification of dyadic pairs more efficient, if not entirely accurate. Marriage has been so critical to the establishment of a parent-child relationship that the legal rights of a child under early common law hinged on the marital status of his parents: a child born outside of marriage occupied the status of *nullius filius*, which literally means "the son of no one."[109] Although the significance of marriage to the distribution of rights and benefits to the child has diminished with the elimination of distinctions based on legitimacy,[110] parental rights are still under the shadow of marriage.

Marriage's central role in defining parentage is evident in the "[t]raditional principles identifying a child's mother by birth and the father primarily on the basis of a man's marriage to the mother."[111] In heterosexual marriages, even where paternity tests reveal that a child's biological father is not his mother's spouse, the marital presumption may continue to apply because it is protective of "both marriage and the child's established bonds within an intact marital family from external disruption."[112] The presumption operates in various ways across the U.S., with some states granting only a wife and her husband standing to challenge the presumption, and others allowing the presumption to be rebutted if doing so is in the best interests of the child.[113] Parenthood, as

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third party establishes such standing will courts consider the merits of the case—i.e., whether custody of a child by a third party is in the best interests of that child.

109. *See* BLACKSTONE, 1 COMMENTARIES *459 (observing that rights of children born out of wedlock, sometimes called *filius nullius*, are very few).

110. A number of Supreme Court cases from the late 1960s through the 1970s held that classifications based on legitimacy were unconstitutional. *See, e.g.*, Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) (holding that Louisiana workmen's compensation statute that denied equal recovery rights to dependent unacknowledged illegitimate children violated the Equal Protection Clause of the Fourteenth Amendment); Levy v. Louisiana, 391 U.S. 68 (1968) (holding that denial to illegitimate children of right to recover for wrongful death of their mother on whom they were dependent violated the Equal Protection Clause of the Fourteenth Amendment); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968) (holding that witholding relief to mother of child killed in automobile accident merely because child was born out of wedlock would be denial of equal protection of the laws). *But see, e.g.*, Parham v. Hughes, 441 U.S. 347 (1979) (upholding Georgia statute that precludes father who has not legitimated child from suing for wrongful death of child).

111. Appleton, *Parents by the Numbers, supra* note 63, at 16.

112. Meyer, *supra* note 106, at 128 (citing *Michael H. v. Gerald D.*, 491 U.S. 110 (1989)).

113. Susan F. Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B. U. L. REV. 227, 234–236 (2006) [hereinafter Appleton,

Annette Appell observes, thus has at its core a central mothering dimension that brings together the critical aspects of biology and caretaking—"a biological connection between the mother and child; a nurturing connection between the prospective other parent and the mother; or a nurturing and genetic connection to the child."[114] An adult's relationship to the mother is so central that "[p]arenthood, as a constitutional matter, can be lost for failure to earn it by caring for the child . . . or it can be usurped by a person who shows affection for the mother by marrying her."[115] Arguably, marriage itself is simply a proxy for relatedness to the mother (whose biological and caretaking connection to the child are presumed through gestation) and a mechanism for assuring that the other party acquiring legal parental status, apart from the biological mother, is a deserving partner to her. In this sense, third-party parental status is dominated by the relationship to the mother, or the degree to which third parties are able to gain parental status by fulfilling their roles towards mothers.

As the obstacles facing kinship caregivers illustrate, however, not all biological relatedness and caregiving is regarded equally. Even blood-relatives who develop a caretaking connection to both mother *and* child—like grandparents, aunts, or uncles—will still find their co-parenting claims dismissed.[116] As a result, "the existing boundaries of the legal family fail to encompass the diverse ways that families function [the result being that] states support *some* families more than others," even when marriage appears to serve no obvious purpose, such as in the determination of parentage.[117] Despite the reasonably grounded criticism that "marriage is [not] an inherently more valuable relationship than others, including nonconjugal relationships characterized [instead] by care and/or interdependence," privileges that attach through marriage persist.[118]

Courts' privileging of conjugal-centered relationships over those based

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Presuming Women] (internal citations omitted). According to Appleton, there are four primary approaches regarding such presumptions in use today. *Id.* at 234. In nine states, the marital presumption grants standing to rebut only to the mother or her husband. *Id.* at 234. Twelve states allow the presumption to be rebutted if doing so would be in the best interests of the child. *Id.* at 235. At least six jurisdictions allow a husband to disestablish paternity at the time of divorce, regardless of the relationship he and the child had established during marriage, i.e., regardless of the child's best interests. *Id.* at 235–236. A few states recognize a "right" on the part of putative fathers to challenge a husband's status as father. *Id.* at 236.

114. Appell, *supra* note 77, at 694.

115. *Id.*

116. *See infra* Part V(A).

117. Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 198 (2007).

118. *Id.* at 198–200. Michael Warner has similarly argued that "[m]arriage sanctifies some couples at the expense of others. It is selective legitimacy." Michael Warner, *Beyond Gay Marriage, in* LEFT LEGALISM, LEFT CRITIQUE 259–289 (Wendy Brown & Janet Halley eds., 2002).

on interdependency or caregiving has been the subject of rich scholarly inquiry, mostly aimed at decoupling parental benefits from marital status for the purposes of distributing responsibilities and rights across a broader pool of persons.[119] Such scholars are critical of the ways in which the present system directs tangible benefits, as well as intangible moral approval, toward married couples.[120] They argue that the critical dimension relevant to defining families and channelling benefits ought to be caretaking, which they reasonably regard as having greater inherent social value, rather than sexual relationships. They also argue that the sexual dyad—including same-sex and heterosexual couples—is less deserving of a preferential claim to social resources relative to the caretaking model, because the caretaking model best reflects the role that society expects families to perform.[121]

Moreover, these critics argue that the law already ties rights and responsibilities regarding children to parenthood, not to marriage, and as such, marriage should never be a dividing line when the law's express purpose is the protection of children's interests. As Nancy Polikoff argues, "A legal system in a pluralistic society that values all families should meld as closely as possibly the purposes of a law with the relationships that law covers."[122] Polikoff aptly stresses the need for the boundaries of family definition and presumptions of family status to hew more closely to the underlying purpose of the relevant law. In this sense, a law designed to address the various aspects of dependency of children upon caretakers would automatically include those who had provided ongoing care for a substantial period of time given the child's age and circumstance.

Not surprisingly, and consistent with family law's "channelling" approach,[123] marriage-centered definition of parenthood achieves its

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119. *See, e.g.*, FINEMAN, *supra* note 81; NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (2008) [hereinafter POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE]; Melissa Murray, *The Networked Family: Reframing the Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385 (2008); Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partner Principles Are One Step in the Right Direction*, 2004 U. CHI. LEGAL F. 353 [hereinafter Polikoff, *Making Marriage Matter Less*]; Rosenbury, *supra* note 117, at 198.

120. *See generally*, POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE, *supra* note 119.

121. *See generally,* FINEMAN, *supra* note 81.

122. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE, *supra* note 119, at 128.

123. The channelling approach refers to the channelling function described in Carl Schneider's oft-cited article of the same title. Carl Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 498 (1992). The channelling function of family law refers to the development of family law as a mechanism to channel individuals into fundamental social institutions of greatest value to society—such as marriage. *Id. See also* Linda C. McClain, *Love, Marriage and the Baby Carriage: Revisiting the Chanelling Function of Family Law*, 28 CARDOZO L. REV. 2134 (2007) (questioning the continued relevance of the channelling function in the context of contemporary debates about the state of the family and family law).

intended effect of privileging conjugality. Indeed, "[f]amily law's focus on marriage to the exclusion of other [nonconjugal relationships] . . . encourage[s] people to prioritize one comprehensive domestic relationship over other relationships."[124] Although touted as "remarkably flexible and responsive to diverse family formations that both honor and support the role and place of the family in our constitutional system," traditional parental rights doctrine remains inflexible in its attachment to conjugality. It categorically excludes from the list of potential co-parents those persons who lack a conjugal-like relationship to a legal parent.[125] As noted above, by assigning privileges based on conjugal status, family law creates inequalities that arguably stigmatize certain families.[126] The resulting hierarchies place kinship caregivers—who are prohibited from entering into a marriage, or an intimate quasi-marital relationship, with the legal mothers or fathers of the children they are raising—in a permanently subordinate status when petitioning for co-extensive parenting rights.

Neither the exclusive nor dyadic dimensions of parenthood foretell this result. As a logical matter, "the parental rights doctrine . . . does not dictate the *number* of 'parents' a child may have."[127] In theory, relatives can enjoy the autonomy accorded legal parents when they take the place of one of the absent members of the dyad, typically only after completely dismantling the original dyad. It is similarly logical that a multiple parentage model, like the traditional model, retains the core features of exclusivity, since some group of persons—whether two, three, or more—will still be vested with "comprehensive privileges and duties that they share with no one else,"[128] to the exclusion of others who are ineligible by virtue of their nonparent status. A call to expand the pool of persons vested with parental authority, therefore, does not directly challenge the superior rights doctrine, but rather seeks to explore factors that influence the membership of persons vested with this superior right.

Only conjugality, broadly defined as the relatedness to a biological mother through marriage or some other enduring intimate and/or sexual relationship ("quasi-conjugality"), serves as the real barrier for kinship

124. Rosenbury, *supra* note 117, at 191 (exploring legitimacy of claims by close friends for benefits commensurate with their supportive role).

125. Appell, *supra* note 77, at 788.

126. Rosenbury, *supra* note 117, at 200–01.

127. Appell, *supra* note 77, at 788 (emphasis added). The argument that an extension of parental rights beyond the "rule of two" automatically diminishes the authority granted to the original dyad is offered in an almost arithmetic model, suggesting that the division of the total bundle of parental rights across three or more persons yields smaller individual shares than the individual share granted in a dyad. The movement to disaggregate the bundle of parental rights suggests that it is possible, if not preferable, to conceive of parental rights as the ascription of roles and responsibilities rather than a representative percentage share.

128. Bartlett, *supra* note 78, at 879.

caregivers seeking rights co-extensive with those of legal parents. In a direct illustration of the manner in which the dimensions of exclusivity and dyadism are themselves wrapped around a conjugality core, exclusion from the possibility of marriage effectively places kin out of contention for status as a second—or, in cases where it may be appropriate, even third—parent.

D. Conclusion

Driven by historical preference and judicial ease, family law currently defines parenthood as an exclusive status shared by two adults in a conjugal relationship. This definition necessarily excludes adults who do not have all of these characteristics—including kinship caregivers—from achieving parental status. It also fails to give sufficient weight to the relationship between the adult and the child they wish to parent. As discussed below, a broader definition of parenthood would grant kinship caregivers greater access to a larger share of the bundle of parental rights.

IV.
MARRIAGE'S HELPING HAND: EXPANDING FAMILY, EXPANDING PARENTHOOD, STILL OMITTING KIN

In recent years, parental status has been expanded to adults outside of a traditional heterosexual dyad—namely, within stepfamilies, same-sex couples, and those utilizing ART. As shown in these cases, courts' evolving conceptions of parenthood go far, indeed, in accommodating the shifting realities of contemporary family life and fostering the pluralism family law is said to espouse. Yet however expansive the evolving doctrine of parental status appears, family law remains oriented towards certain adult pairings, privileging one class of adults over others. For example, in stepparent adoption, courts rely on the stepparent's marital bond to a child's legal parent to grant parental rights to a nonparent adult, reifying conjugality as a defining feature of parenthood. Similarly, in cases where the pool of possible parental candidates is greater than two—in the context of same-sex couples and couples utilizing ART—courts seek out conjugal, quasi-conjugal, or prescribed mating relationships to define and limit who can obtain parental rights. In doing so, courts have continued to employ a narrow definition of parenthood, preventing successful intergenerational or intrafamilial parenting claims. Abrogations of the dyadic parental norm have taken place only within the broad shadow of marriage.

A. Stepparents

Margaret Mahoney has rightly observed that, "In spite of the long history of stepfamily issues in the legal arena, and the increased demand

for regulation in recent decades, little progress has been made in establishing a clear or consistent legal definition of the stepparent status."[129] Nonetheless, stepparents occupy a uniquely privileged position within the broader class of third-party quasi-parents vying for parental recognition.[130] Unlike other third parties who may function in a parental role, residential stepparents who seek to move into the role of legal parent face the least resistance from courts, provided that the allocation of parental rights adheres to the "rule of two."

Stepparents may petition for full parental rights over their partners' children through what is known as stepparent adoption—a procedure specifically provided for by domestic relations statutes in every state.[131] Stepparent adoption, in most instances, avoids the thorny issue of multiple parentage by requiring that the parental status of the noncustodial parent be terminated prior to adoption either through consent, court order, or death.[132] Because stepparent adoption relies on a substitutive, rather than an additive model—replacing a legal parent with a stepparent of the same gender—courts will not ascribe parental status to a stepparent if a living noncustodial parent wishes to remain in her parental role.[133]

As a general rule, stepparents who do not adopt their stepchildren can disclaim a parent-child relationship to the children of their partners upon divorce from the legal parent.[134] The extinction of the marital nexus also extinguishes the stepparent-stepchild bond, thus restoring the stepparent to the status of legal stranger. Yet some courts have held that even stepparents who do not formally adopt the children of their partners may carry obligations of support to stepchildren in ways that infer the de facto creation of a multiple parentage scenario.[135] The imposition of such

129. Margaret M. Mahoney, *Stepparents as Third Parties in Relation to Their Stepchildren*, 40 FAM. L.Q. 81, 82 (2006).

130. *See id.* at 94 n.51 ("Stepparent adoptions receive special legal treatment, compared with other categories of adoption, in certain provisions of the state adoption codes.").

131. *See id.* at 85. Although stepparent adoption statutes may not explicitly exclude couples in same-sex marriages, some courts have held that they apply to heterosexual marriage only. *See, e.g.*, S.J.L.S. v. T.L.S, 265 S.W.3d 804, 816 (Ky. Ct. App. 2008).

132. Mahoney, *supra* note 129, at 89.

133. Consent of both the custodial and noncustodial parent is required in most instances of stepparent adoption. CHILD WELFARE INFORMATION GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SVCS., STEPPARENT ADOPTION 2 (2008), *available at* http://www.childwelfare.gov/pubs/ f_step.pdf.

134. Mahoney, *supra* note 129, at 85 ("The starting premise under the traditional model of parenthood and family is that claims for legal recognition of the stepparent-child relationship will be denied.").

135. *See, e.g.*, Hubbard v. Hubbard, 44 P.3d 153 (Alaska 2002) (holding that, where stepfather convinced his wife, the child's biological mother, to stop child support action against child's biological father and requested that biological father relinquish his parental rights and consent to child's adoption by stepfather, stepfather was equitably estopped from disestablishing paternity for the purposes of paying child support); L.S.K. v. H.A.N., 813

obligations on stepparents, both within an intact marriage and post-divorce, is not grounded in any body of constitutional rights such as those granted to legal parents.[136] It is also disfavored at common law.[137] Instead, where courts have imposed parental obligations, they have done so based on a theory of equitable estoppel, holding that a stepparent who represents herself as a legal parent and whose conduct gives rise to a detrimental reliance upon her for support is estopped from shirking post-divorce support for the stepchild.[138] In addition, state legislatures and courts have developed other functional concepts for allocating stepparent rights and responsibilities, including in loco parentis, de facto parent status, and equitable adoption.[139] Where a court applies a standard such as in loco parentis or the doctrine of equitable estoppel, involving proof of an established parent-like relationship with the child to a residential stepparent, she may be granted parental status for limited purposes, which typically involve the imposition of child support obligations.[140]

In the rare instances where courts have extended the obligations of legal parenthood to stepparents who do not adopt, the decisions have turned on the unique position of a stepparent as a conjugal partner to a legal parent, a status that sets stepparents apart from other nonconjugal third parties.[141] Marriage to the parent herself is what creates the stepparent's parental obligations *vis à vis* the stepchild. It is not too far a stretch to assume that those instances in which a stepparent is made to bear obligations of support without a formal adoption may be laying the groundwork for stepparents to argue for corresponding rights and privileges to which they are currently not automatically entitled.[142]

A.2d 872 (Pa. Super. Ct. 2002) (applying estoppel to hold former same-sex partner of biological mother liable for child support, where former partner stood *in loco parentis* status to the five children and had successfully petitioned for legal and partial physical custody of the children).

136. LESLIE JOAN HARRIS, JUNE CARBONE & LEE E. TEITELBAUM, FAMILY LAW 941 (4th ed. 2010) ("Even though . . . most stepparents who live with their stepchildren support them, stepparents have no common law child support duty.").

137. *Id.*

138. *See* Miller v. Miller, 478 A.2d 351, 357–59 (N.J. 1984) (holding that equitable estoppel applies where future support of a stepchild is undermined by previous reliance on support of the stepparent); Monmouth County Div. of Soc. Servs. v. R.K., 757 A.2d 319, 327 (N.J. Super. Ct. Ch. Div. 2000) (applying holding in *Miller* to paternity action and holding that boyfriend of mother is regarded as akin to stepparent); Lewis v. Lewis, 382 N.Y.S.2d 631, 633 (Sup. Ct. 1976) (attaching legal responsibility for stepchild to stepparent due to stepparent's conduct in holding the child out as his own and providing support).

139. Mary Ann Mason & Nicole Zayac, *Rethinking Stepparent Rights: Has the ALI Found a Better Definition?*, 36 FAM. L.Q. 227, 230 (2002).

140. Mahoney, *supra* note 129, at 107. A residential stepparent lives with the child and the custodial parent, as compared to a nonresidential stepparent who visits (along with the noncustodial parent).

141. *See supra* note 135.

142. *See* David B. Sweet, Annotation, *Stepparent's Postdivorce Duty to Support*

In observing the manner in which parental status is achieved for stepparents, it is apparent that conjugality does the lion's share of the work of ascribing parental identity, creating obligations and parental rights that would not otherwise attach to this caregiving figure. The dyadic model alone does not explain why the dissolution of the marriage between a stepparent and legal parent would also dissolve the stepparent's parental rights and responsibilities, as even after a divorce there remain two persons who had occupied the parental class. At the same time, the dyadic model does not explain why courts would use equitable doctrines to impose parental obligations on third parties simply because they were, at one time, the conjugal partner of the legal parent. The imposition of obligations, and perhaps corresponding rights, doesn't appear to be based on the *number* of caregiving adults, but rather on the *kind,* privileging those connected to a legal parent, even if only formerly so, through a conjugal tie. Conjugality appears to be the driving force behind courts' decision-making in the case of stepparents.

B. Same-Sex Partners of Parents

Among both married and unmarried same-sex couples, parental status issues typically revolve around the unsettled question of the rights, privileges, and obligations that attach to the same-sex partner of a biological parent. As in the case of stepparents, the assessment of parental claims in the context of same-sex partners is accompanied, or even *preceded,* by an assessment of the status of the adult relationship. However, in light of the varied landscape of legal options, including marriage, for same-sex partners, laws pertaining to the extension of parental prerogatives to the same-sex partners of biological parents are complicated, confusing, and, as some scholars contend, too often counter to the best interests of the child.[143] The controversy pertaining to parental

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Stepchild, 44 A.L.R. 4th 520 § 2[a] (1986) ("At common law, the relationship of stepparent and stepchild did not, of itself, confer any rights or impose any duties, but, in circumstances varying among the states, a stepparent who voluntarily received a stepchild into his or her family and treated the stepchild as a member thereof could place himself or herself *in loco parentis* and assume an obligation to maintain and support the child.").

143. In Massachusetts, for example, where same-sex couples can marry, same-sex spouses can use stepparent adoption procedures. *See* MASS. GEN. LAWS ch. 210, § 1 (2007) (providing that any "person of full age may petition the probate court in the county where he resides for leave to adopt as his child another person younger than himself, unless such other person is his or her wife or husband, or brother, sister, uncle or aunt, of the whole or half blood"); Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993) (holding that Massachusetts adoption statute did not preclude same-sex partner of biological mother of child from petitioning for adoption of the child where the adoption was in best interest of the child). By contrast, Nancy Polikoff has expressed frustration with a New York court decision finding that nonbiological mothers do not have to pay child support because the state only recognizes *paternity* suits and not *maternity* suits. Nancy Polikoff, New York Court Again Hurts Children of Lesbian Parents (May 29, 2009),

claims in this context arises from the framing of parenthood through the lens of marriage, which, in most instances, is still unavailable to same-sex partners. Even in states where same-sex marriage is now legal,[144] or in those states where quasi-marital relationships like domestic partnerships and civil unions are allowed,[145] questions pertaining to the resulting parental status are neither clearly nor uniformly resolved.[146]

The form of parental rights for partners of parents in same-sex relationships—and also the subsequent confusion over their parental status—comes from the application of default rules based on heterosexual marital norms. That is, the more that same-sex couples can look like a traditional heterosexual married couple or stepfamily, the more likely that a same-sex partner will obtain parental rights. The need for resemblance to a heterosexual marital norm reveals that the law defines parenthood, in significant part, through whether an affectional, marital, or quasi-marital bond exists between the caregiving adults. This conjugal orientation of parental status recognition is evident in the two primary ways in which

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http://beyondstraightandgaymarriage.blogspot.com/2009/05/new-york-court-again-hurts-children-of.html.

144. As of the time of writing, five states (Massachussetts, Connecticut, Iowa, Vermont, and New Hampshire) and the District of Columbia had established legalized same-sex marriage either by judicial or legislative decision. HUMAN RIGHTS CAMPAIGN, MARRIAGE EQUALITY & OTHER RELATIONSHIP RECOGNITION LAWS, *available at* http://www.hrc.org/documents/ Relationship_Recognition_Laws_Map.pdf. Maryland and New York officially recognize same-sex marriages performed outside of the state. *Id.* The status of out-of-state same-sex marriages in Rhode Island is unclear: while the Rhode Island Attorney General issued an advisory opinion declaring that the state could recognize out-of-jurisdiction marriages, the Rhode Island Supreme Court subsequently refused to grant a divorce to a same-sex couple legally married in Massachusetts. *Id.* Approximately 18,000 same-sex marriages performed in California during the period of time in which same-sex marriage was legal are valid as per the California Supreme Court decision of May 26, 2009. Strauss v. Horton, 46 Cal. 4th 364, 384 (Cal. 2009). Proposition 8, the ballot measure banning same-sex marriage in California, was declared unconstitutional in August 2010 and, at the time of this writing, is currently on appeal. Perry v. Schwarzenegger, 704 F. Supp. 2d 904, 1003–04 (N.D. Cal. 2010).

145. States in which domestic partnerships, or the equivalent (civil unions), provide a panoply of spousal-equivalent rights include California, Connecticut, Hawaii, Maine, Nevada, New Hampshire, New Jersey, Oregon, Vermont, Wisconsin, and Washington State, as well as the District of Columbia. Note that in Connecticut, Vermont, and New Hampshire, same-sex marriage has replaced civil unions and domestic partnerships. National Conference of State Legislatures, Same Sex Marriage, Civil Unions and Domestic Partnerships, http://www.ncsl.org/default.aspx?tabid=16430 (last visited Sept. 24, 2010).

146. *See, e.g.*, Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. CIV. RTS. & CIV. LIB. 201, 215–25 (2009) [hereinafter Polikoff, *A Mother Should Not Have to Adopt Her Own Child*] (describing various ways in which lesbian mothers can become legal parents, including presumptions of parentage granted to formalized couples and obtaining an order of parentage or parental rights under state law). Part of the confusion may stem from the fact that, unlike stepparents who are fairly uniformly regarded, partners in same-sex relationships can be regarded by courts as falling into a varying array of categories, including stepparent, second-parent, or co-parent.

same-sex partners of parents have been able to acquire rights as parents: the extension of some iteration of a marital presumption and a form of second-parent adoption.[147]

As noted above, the traditional marital presumption was based on an assumption that biological and social paternity arose in tandem.[148] Yet the marital presumption also serves as a reward for marriage by allowing those within the conjugal dyad to assert parental privilege. Some states have extended the marital presumption that heterosexual married parents have long enjoyed to same-sex married couples—i.e., the presumption that the spouse of a married woman is also the parent, usually the father, of the newborn child.[149] Even in states where same-sex marriage is not legal but the near equivalent exists, marital presumptions have been successful in facilitating the acquisition of parental rights by partners of biological parents.[150]

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147. *Id.* Some states have also relied on equitable principles to support the imposition of parental obligations—a form of parental recognition—on same-sex partners of biological parents. *See* L.S.K. v. H.A.N., 813 A.2d 872, 877 (Pa. Super. 2002) (holding that same-sex partner of biological parent is estopped from disclaiming responsibility for emotional and financial needs of children born into the adult relationship).

148. *See infra* Part III(B).

149. Appleton, *Presuming Women, supra* note 113, at 228. I use the term "marital presumption" in place of the term "presumption of paternity" in light of the gendered nature of the term. As noted above, the "marital presumption," which the U.S. Supreme Court upheld in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), regards a woman's husband as the father of the child born during the marriage. *See* Meyer, *supra* note 106, at 127–28. The presumption can only be overcome in limited circumstances where the husband does not have access to his wife during the probable time of conception. *Id.* at 127.

150. *See* Appleton, *Presuming Women, supra* note 113, at 240–42. California and Vermont's domestic partnership and civil union statutes permit same-sex partners to enjoy all of the legal protections that exist in heterosexual marriage, presumably including presumptions of parentage for spouses. *See* CAL. FAM. CODE § 297.5(a), (d) (West 2004) ("egistered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law" and that "[t]he rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses"); VT. STAT. ANN. tit. 15, § 1204(a), (f) (2002 & Supp. 2010) (stating that "[p]arties to a civil union shall have all the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage" and "[t]he rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage"). The District of Columbia has extended the presumption to same-sex partners of parents utilizing artificial insemination in relationships analogous to marriage. *See* Domestic Partnership Judicial Determination of Parentage Amendment Act of 2009, D.C. Law No. 18-33 (codified as amended in scattered sections of the D.C. CODE), *available at* http://newsroom.dc.gov/show.aspx/agency/csed/section/2/release/17851 (granting a presumption of parenthood to both the birth mother and a person who has consented, in writing, to parent a child born of artificial insemination). Marital presumptions have also been extended through caselaw to same-sex couples in states where marriage was not legal at the time. *See, e.g.*, Elisa B. v. Superior Court, 117 P.3d 660, 666–67 (Cal. 2005) (holding that, under the marital presumption, the domestic partner of the woman who gave birth to a child was also legally the mother of that child).

Although the existence of a marital presumption should create a presumptive parental claim for same-sex partners of biological parents, these claims are uncertain. Such a presumption created within a jurisdiction may not extend outside of the jurisdiction, particularly to states that do not recognize same-sex marriages or quasi-marriages. In addition, even in states where same-sex marriage is legal, same-sex partners of parents may not be granted the full panoply of rights traditionally granted to spouses.[151]

Consequently, even in those states where same-sex marriage, domestic partnerships, or the equivalent, are legal, and where by statute or caselaw presumptive parentage attaches, same-sex partners of parents are advised to petition for parental rights through either stepparent or second-parent adoption.[152] In states that allow for comprehensive domestic partnerships or civil unions, same-sex couples may petition for parental privileges, usually using the same method as stepparents. Other states provide for a process known as second-parent adoption.[153] Second-parent adoption applies to same-sex married or domestic partners who have a child who is legally or biologically related to only one partner.[154] Through second-

151. A married lesbian couple in Iowa is suing to have both mothers listed on the child's birth certificate after the state refused to extend the marital presumption to the nonbiological mother. Lynda Waddington, *Same-sex Couples Sues State for Right to Appear on Daughter's Birth Certificate*, IOWA INDEP., May 13, 2010, *available at* http://iowaindependent.com/33946/same-sex-couple-sues-state-for-right-to-appear-on-daughters-birth-certificate.

152. Polikoff, *A Mother Should Not Have to Adopt Her Own Child*, *supra* note 146, at 217. Same-sex partners of parents may also rely on co-parenting agreements, which, although not as legally secure as adoption, establish an understanding of legal rights and responsibilities of each co-parent. Margaret S. Osborne, *Legalizing Families: Solutions to Adjudicate Parentage for Lesbian Co-Parents*, 49 VILL. L. REV. 363, 370–71 (2004).

153. NAT'L CTR. FOR LESBIAN RIGHTS, LEGAL RECOGNITION OF LGBT FAMILIES 2 (2010), *available at* http://www.nclrights.org/site/DocServer/Legal_Recognition_of_LGBT_Families_04_2008 .pdf?docID=2861. Sources do not agree on the number of states in which second-parent adoptions are permitted. According to the National Center for Lesbian Rights, sixteen states and the District of Columbia have a statute or appellate court decision allowing same-sex couples to get a second-parent adoption, domestic partner adoption, or civil union adoption. *Id.* Some individual counties within at least twelve other states have granted second-parent adoption. *Id.* at 3. However, other reports suggest that second-parent adoption is available in twenty-five states and the District of Columbia. Marissa Wiley, *Redefining the Legal Family: Protecting the Rights of Coparents and the Best Interests of Their Children*, 38 HOFSTRA L. REV. 319, 324 (2009). The legality of second-parent adoption under state statutes is unclear in twenty-one states and appellate decisions in three other states have ruled that second-parent adoptions are barred. *Id.* This confusion is the result of the widely different treatment of same-sex couples.

154. *Id.* Second-parent adoption is available to same-sex couples in California, Colorado, Connecticut, District of Columbia, Illinois, Massachusetts, New Jersey, New York, Pennsylvania, and Vermont, as well as in some jurisdictions in Alabama, Alaska, Delaware, Hawaii, Iowa, Louisiana, Maryland, Minnesota, Nevada, New Hampshire, New Mexico, North Carolina, Oregon, Rhode Island, Texas, and Washington. HUMAN RIGHTS CAMPAIGN, PARENTING LAWS 2 (2010), *available at* http://www.hrc.org/documents/parenting_laws_maps.pdf.

parent adoption, the same-sex partner of a parent may assume full parental rights on a par with the biological parent, due primarily to the presumed committed and ongoing intimate relationship between the adult partners.[155] In most cases, the second-parent can be merely added as an additional parent, rather than substituted for an existing legal parent, presuming the child only has one other legal parent. In this manner, second-parent adoption resembles stepparent adoption to the degree that conjugal or quasi-conjugal partners may assume corresponding parental roles *vis à vis* the legal children of one adult.[156]

Even though issues of parental status do not directly implicate marriage, the discussion of parental status for same-sex partners often focuses on underlying tensions between bans on same-sex marriage and support for same-sex or second-parent adoption.[157] Essentially, this is a concern over whether the state can support an individual's parental interests apart from support for the underlying marital or quasi-marital relationship, something with which both foes and supporters of same-sex marriage have difficulty keeping separate.[158] In a telling example of the

155. For example, Vermont's second-parent adoption statute provides that "[i]f a family unit consists of a parent and the parent's partner, and adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent." VT. STAT. ANN. 15, § 1-102(b) (2002). California similarly permits domestic partners to adopt in the same manner as stepparents. CAL. FAM. CODE § 9000(b) (West 2002) ("A domestic partner, as defined in Section 297, desiring to adopt a child of his or her domestic partner may for that purpose file a[n adoption] petition . . . ."). The quasi-conjugal dimension of second-parent adoption is evident in the seminal New York appellate case, In re *Jacob*, which interpreted the state's adoption statute to permit an unmarried person "in a relationship" with another unmarried person to adopt. 660 N.E.2d 397, 405–06 (N.Y. 1995). Although expanding the adoption statute beyond technical marriage, the court's decision merely substitutes "two adult lifetime partners" for a married couple. *Id.*

156. *See* Polikoff, *A Mother Should Not Have to Adopt Her Own Child*, *supra* note 146, at 205 (noting that second-parent adoption is modeled on stepparent adoption). As in traditional stepparent adoption, second-parent adoptions "permit the homosexual partner of an adoptive or biological parent to adopt [the child] without terminating the existing partner's rights." ABBY LYN BUSHLOW, NAT'L RES. CTR. FOR FOSTER CARE & PERMANENCY PLANNING, INFORMATION PACKET: GAY AND LESBIAN SECOND PARENT ADOPTIONS 2 (2004), *available at* http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/information_packets/gay_lesbian_second_parent_adoption.pdf. Second-parent adoption is distinct from joint adoption, where same-sex couples seek to adopt children to whom *neither* adult has a legal or biological relationship and both partners together petition as co-parents to adopt the child. Joint adoption is permitted in California, Colorado, Connecticut, District of Columbia, Illinois, Indiana, Iowa, Maine, Massachusetts, New Jersey, New York, Oregon, Vermont, and Washington, as well as some jurisdictions within Minnesota, Nevada, and New Hampshire. HUMAN RIGHTS CAMPAIGN, *supra* note 154, at 1.

157. *See generally* Vanessa A. Lavely, *The Path to Recognition of Same-Sex Marriage: Reconciling the Inconsistencies Between Marriage and Adoption Cases*, 55 UCLA L. REV. 247 (2007) (highlighting inconsistent treatment of same-sex marriage and same-sex adoption by state courts and arguing that state courts should reconcile these inconsistencies).

158. This issue was the central focus of the recent Florida case *Embry v. Ryan*. 11 So.

omnipresence of marriage, both proponents of and opponents to the extension of parental claims to same-sex partners of parents ground their claims in the degree to which their relationships approximate or differ from traditional legal marriage and the resulting entitlement to parental claims based on stepparent status or its equivalent. In one example, actress Cynthia Nixon expressed her desire to marry her partner, in part, to provide legal protection for the relationship that her partner, "the stay-at-home mommy," had developed with Nixon's two children from a previous relationship.[159] Similarly, opponents of same-sex marriage like Liberty Counsel founder Mathew Staver argue, "You can't have three parents [for a] child, or you create something like polygamy,"[160] conflating multiple parentage with plural marriage. In the same vein, Elizabeth Marquardt of the American Values Institute cautions that "slippage" in the meaning of parenthood has been brought on by new developments in the marriage debate and expanding conceptions of marriage.[161] These statements illustrate that the spectre of a traditional marriage norm, in addition to its centrality in the legal analysis pertaining to parental status and rights, haunts the surrounding discourse concerning the degree to which parental claims and the legitimacy of same-sex romantic relationships are invariably linked. The deeply intertwined discourse of both marriage and parenthood means that resistance to revision of one norm is invariably, if not inappropriately, accompanied by resistance to revision of the other.

3d 408 (Fla. Dist. Ct. App. 2009). Lara Embry and Kimberly Ryan were living together in the state of Washington and were engaged in a romantic relationship. *Id.* at 409. In 2000, Ryan gave birth to a child, whom Embry adopted through second-parent adoption procedure available in Washington State. *See id.* The couple moved to Florida and ended their relationship in 2004, at which point they entered into a child custody, visitation and property settlement agreement. *Id.* In October 2007, when Ryan refused to allow Embry to continue visits with Embry's adopted daughter, Embry petitioned the court for a declaration of her parental status as well as her right to contact. *Id.* The trial court ruled that Florida was not required to give full faith and credit to the Washington adoption decree, since same-sex couple adoption is contrary to Florida public policy. *Id.* In doing so, the trial court nonetheless cast parenthood as *inseparable from the underlying romantic relationship.* The Florida Court of Appeals overturned the trial court's ruling and upheld Embry's parental status. *Id.* at 410.

159. *Larry King Live* (CNN television broadcast Nov. 14, 2008), *available at* http://www.youtube.com/watch?v=PtRFerTqGww.

160. Drew Zahn, *Lesbian Mommies, Why Not Wives?*, WORLDNETDAILY, May 16, 2009, http://www.worldnetdaily.com/?pageId=98267.

161. Elizabeth Marquardt, How Redefining Marriage Redefines Parenthood, Talk at the Iona Institute 14–17 (Jan. 30, 2008) (noting the alleged impact of polyamory and polygamy on expansions of parentage), *available at* www.ionainstitute.ie/pdfs/Marquardt_talk.pdf.

C. Claimants to Parental Status through Assisted Reproductive Technology

As with stepparents and partners of same-sex parents, acquiring parental status in the context of ART is made more challenging by the degree to which this model of family creation is measured against a heterosexual marital norm. At the same time, the complicated web of interrelatedness that links individuals participating in ART makes the ascription of parental claims in this context far more complex than in the case of stepparents or same-sex partners with existing children. ART has the potential to create the greatest number of persons with possible parental claims, including genetic donors of eggs and sperm, gestational surrogates, and intended parents, as well as the marital or quasi-marital partners of one or more of these individuals[162]—at the very least, a total of three individuals with some arguably reasonabable claim to parental status.

Although ART is increasingly popular,[163] the legal landscape regarding the parentage of children conceived through ART remains an incredibly varied patchwork of statutes and rules, many of which intersect with disciplines as diverse as criminal and contract law.[164] The number of individuals involved in the process of ART can also complicate the resulting legal disputes over parental claims to and obligations for children born through these procedures, especially where the law is silent or

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162. ART can include a variety of interventions distinct from heterosexual mating through intercourse, such as artificial insemination, where semen is introduced into the vagina through a means other than intercourse; traditional surrogacy, in which a surrogate's own egg is fertilized with a sperm donor; gestational surrogacy, where eggs are extracted from the intended mother or egg donor and mixed with sperm from the intended father or sperm donor *in vitro* and implanted into the surrogate; and *in vitro* fertilization, in which a fertilized egg is implanted into the mother's womb. A broad definition might include "all treatments or procedures which include the handling of human oocytes or embryos, including in vitro fertilization, gamete intrafallopian transfer, [or] zygote intrafallopian transfer." 42 U.S.C. § 263a-7 (2006) (defining ART under federal law).

163. *See* SASWATI SUNDERAM, JEANI CHANG, LISA FLOWERS, ANIKET KULKARNI, GLENDA SENTELLE, GARY JENG & MAURIZIO MACALUSO, CTRS. FOR DISEASE CONTROL & PREVENTION, ASSISTED REPRODUCTIVE TECHNOLOGY SURVEILLANCE—UNITED STATES, 2006 1 (2009), *available at* http://www.cdc.gov/mmwr/pdf/ss/ss5805.pdf. According to a recent CDC report on Assisted Reproductive Technology, there were 41,343 live-birth deliveries through ART in the U.S. in 2006. *Id.*

164. Approximately eleven states and the District of Columbia ban surrogacy completely, and several of these states criminalize it. Human Rights Campaign, Surrogacy Laws: State by State, http://www.hrc.org/issues/2486.htm (last visited Dec. 2, 2010). Michigan, for example, has very strict laws prohibiting surrogacy contracts that not only hold these agreements unenforceable, but also impose fines (up to $50,000) and jail time (up to five years) on anyone who enters into such a contract. *See* MICH. COMP. LAWS §§ 722.851–861 (2009). Conversely, six states have explicitly approved surrogacy contracts through their legislatures or common law, and the remaining states have yet to take a position on the legality of surrogacy. Human Rights Campaign, Surrogacy Laws: State by State, http://www.hrc.org/issues/2486.htm (last visited Oct. 22, 2010).

prohibits certain ART practices. For example, couples who elect to pursue surrogacy in states where it is not sanctioned may find their parental status challenged by a traditional or gestational surrogate.[165]

For other prospective parents, imprecisions in the law pertaining to ART collide with uncertainties pertaining to the legal status of same-sex relationships, producing a nebulous set of parental interests to be protected.[166] There is a significant overlap in the categories of persons seeking parental status through same-sex parenting and parenting through ART, as ART is the only means of bringing new children into already existing relationships other than adoption. As described in the preceding section, same-sex couples, whose legal status as a couple may not be sanctioned in law, face unique obstacles when trying to gain parental rights.[167] Rather than expanding the law to support the ways in which ART facilitates family formation beyond the traditional dyad, "[c]ourts and legislatures are straining to squeeze these technologically-formed families into the traditional pattern."[168] Where abrogations of the traditional rules for ascribing parental status in the context of ART have been upheld, it is usually in the context of same-sex adults in a relationship resembling marriage, or at the very least intimate partnerships that suggest something "marriage-like."[169]

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165. Stephanie Saul, *Building a Baby with Few Ground Rules*, N.Y. TIMES, Dec. 12, 2009, at A1 (describing uncertainty of surrogacy agreements in various states), *available at* http://www.nytimes.com/2009/12/13/us/13surrogacy.html?ref=stephanie_saul.

166. For example, the only law in Illinois on ART, aside from contract law, protects only the parental interests of heterosexual married couples who participate in ART, leaving undefined the scope of rights that other individuals participating in ART would enjoy. 750 ILL. COMP. STAT. 40/2 (2010) ("Any child or children born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived legitimate child of the *husband and wife* so requesting and consenting to the use of such technique.") (emphasis added). In addition, the Illinois statute provides for parental status for husbands consenting to the procedure when performed by a licensed physician, but not for unmarried or same-sex partners. 750 ILL. COMP. STAT. 40/3(a) (2010). Dorothy Roberts notes in her critique of ART and its conformity with, rather than subversion of, the traditional nuclear family norm, "Laws regulating artificial insemination contemplate use by a *married* woman and recognition of her *husband* as the child's father, and recent state legislation requiring insurance coverage of IVF [*in vitro* fertilization] procedures applies only when a *wife's* eggs are fertilized using her *husband's* sperm." Dorothy E. Roberts, *Race and the New Reproduction*, 47 HASTINGS L.J. 935, 936 (1996) (emphasis added). *See also* Linda S. Anderson, *Protecting Parent-Child Relationships: Determining Parental Rights of Same-Sex Parents Despite Varying Recognition of Their Relationship*, 5 PIERCE L. REV. 1, 7–10 (2006) (discussing significance of marriage within Uniform Parentage Act of 2002).

167. *Supra* Part IV(B).

168. Radhika Rao, *Assisted Reproductive Technology and the Threat to the Traditional Family*, 47 HASTINGS L.J. 951, 952 (1996).

169. This focus on intimate, 'marriage-like' partnership is reflected in the District of Columbia's Domestic Partnership Judicial Determination of Parentage Act of 2009 which supports parentage claims of domestic partners but specifically *excludes* from the list of domestic partners a parent or grandparent of the biological mother. Domestic Partnership

D. Conclusion

Married heterosexual couples, who bring children into the world through heterosexual reproduction, continue to define the archetypal parents. At the other end of the spectrum are adults whose function appears wholly parental, but whose form—both as to quantity and quality—violates our operative rules for ascribing parenthood. Recently, courts have occasionally expanded beyond the traditional heterosexual and dyadic model of parenthood in cases involving stepparents, same-sex partners of parents, and individuals who consent to the creation of children through ART. In each of these instances, the expansion has rested on an underlying conjugal or quasi-conjugal relationship, thus privileging those who can, or choose to, orient their relationships accordingly. Little attention has been paid to other adult caregivers parenting children outside of any marital bond, particularly kinship caregivers. Courts' expanded definitions of parent thus fail to address the needs of nonconjugal adult caregivers, particularly those who seek to complement, not supplant, legal parents.

V.
ADAPTING 'HORIZONTAL' CLAIMS TO 'VERTICAL' PARENTAGE

Courts' expansion of parenthood beyond the marital or quasi-marital dyad rests on rationales that can logically be, but have not yet been, applied outside of the scope of marriage. Grafting these horizontal claims onto a vertical parentage model requires thinking through how each rationale can be successfully adapted to the context of kinship caregiving. This grafting exercise is made more complex by the recognition that ascribing parental status to kin would be best achieved by creating an *additive*, rather than a *substitutive*, model of parenthood. In other words, relative caregivers should be permitted to attain recognition as parents alongside and together with legal parents, thus abrogating the "rule of two."

Judicial Determination of Parentage Amendment Act of 2009, D.C. Law No. 18-33 § 4(a)(2), D.C. CODE § 7-201(4A)–(4B) (2008 & Supp. 2010). Courtney Joslin critiques what she describes as "marriage-only ART rules," noting that the vast majority of states extend parentage only to children born to heterosexual married couples. Courtney G. Joslin, Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology, 83 S. CAL. L. REV. 1177, 1184–86 (2010). She observes that only the District of Columbia and New Mexico have removed gendered terminology, permitting same-sex couples to benefit from the parentage presumption. *Id.* at 1187. Although true, only New Mexico's statute removes the element of an intimate *couple* relationship, referencing instead a person who "consents" to assisted reproduction. N.M. STAT. § 40-11A-703 (2004 & Supp. 2009) ("A person who provides eggs, sperm or embryos for or consents to assisted reproduction as provided in Section 7-704 [40-11A-704 NMSA 1978] of the New Mexico Uniform Parentage Act with the intent to be the parent of a child is a parent of the resulting child."). Although highly unlikely, such a person could presumably include a nonpartner, such as a relative.

In the exceptionally few cases in which multiple parentage has been formally recognized, courts have relied on the functional parent approach and the "best interests of the child" standard to justify the extension of parental rights beyond the "rule of two." Using these cases as a basis of comparison, this section explores the way in which the rationales offered by courts for expanding parenthood beyond the "rule of two" apply equally to nonconjugal kinship caregivers. In addition, I propose an expressive basis for extending parenthood to encompass vertically arranged parenting claims such as those within kinship caregiving families—a cultural framework that would give meaning to family law's professed embrace of pluralist ideals.[170]

A. The Functional Parent Approach

Recent scholarship and case law on the expansion of parenthood beyond the "rule of two" has notably relied on underlying functional standards that "accord legal recognition to those who perform a family relationship, regardless of the absence of formal or biological connections."[171] These "[f]unctional family claims [in which functional parent claims are grounded] hold that those who function as a committed interdependent relationship require—and implicitly deserve—legal protections, regardless of their sex, or restrictive formal indicia of status such as marriage, or ability to marry."[172]

Functional parent claims have been particularly effective in achieving recognition of stepparents, same-sex partners of parents, and known and involved donors in ART, whose claims can collectively be regarded as "horizontally" aligned or radiating directly from a parallel relationship with the legal and natural parent.[173] Yet the functional theory is also

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170. Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. 540, 541 (observing that "a pluralistic approach to family law . . . is based on a commitment to inclusion and respect for difference, grounded in our political and constitutional values of equality, nondiscrimination, and religious freedom"); Rosenbury, *supra* note 117, at 208 (noting that family law has as one of its goals "to foster pluralism by permitting individuals to explore diverse ways of living in our society").

171. *See* Appleton, *Parents by the Numbers, supra* note 63, at 16–17.

172. Jenni Millbank, *The Role of 'Functional Family' in Same-Sex Family Recognition Trends*, 20 CHILD & FAM. L.Q. 1, 1 (2008) [hereinafter Millbank, *The Role of 'Functional Family'*].

173. *See In re* Jacob, 660 N.E.2d 397, 399 (N.Y. 1995) (granting same-sex partner of child's biological mother the right to adopt that child and noting that "[t]h[e] policy [of construing adoption law in favor of the child's best interests] would certainly be advanced . . . by allowing the two adults who actually *function* as a child's parents to become the child's legal parents") (emphasis added); Nancy Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 464, 468-73 (1990); Sarah H. Ramsey, *Constructing Parenthood for Stepparents: Parents by Estoppel and De Facto Parents under the American Law Institute's Principles of the Law of Family Dissolution*, 8 DUKE J.

particularly suited to vertical parentage claims, such as those that might be asserted by kinship caregivers. In promoting an "understanding of parentage as fundamentally a social, rather than a biological, construct,"[174] the functional parent theory holds that those acting as a parent, and understood by children to be such, should be accorded parental status irrespective of the nature of the connection to the child.[175] Indeed, "[f]unctional family claims rest on a performative aspect, that is, the parties are granted rights because of what they do in relation to one another, not because of the *status* of who they are or what manner of legal formality they have undertaken."[176] The functional theory offers kin many opportunities for recognition as parents coextensive with biological parents, as there is nothing inherent in the theory that compels either a fixed number of legal parents or specific relationship to a legal parent. More importantly, because functional parent theory does not ground parenting within a marital or quasi-marital relationship between caregiving adults, it is more amenable to a broader model of parenthood.[177] While in many circumstances a nonparent's caregiving role derives from an intimate relationship with a biological or legal parent, the functional parent theory does not focus on the relatedness of the caregiving adults.

Several courts have applied the functional approach to extend parental rights in cases involving conjugal caregivers. In 1993, for example, the Supreme Court of Canada held that a lower court was not unreasonable in defining "family" to include same-sex partners in a quasi-marital relationship.[178] It found that the functional approach offered distinct advantages over the formalistic nuclear family model precisely because the latter "excludes all but a specific form of relationship."[179] In adopting the functional theory, the court noted that the "objective yet flexible [functional] standard . . . allows for a more accurate recognition of a greater number of family groupings," making it the most adaptive to society's evolving understanding of family relationships and the reality of families' lived experiences.[180]

GENDER L. & POL'Y 285, 286 (2001).

174. Millbank, *The Role of 'Functional Family', supra* note 172, at 8.

175. *Id.* at 1.

176. Jenni Millbank, *The Limits of Functional Family: Lesbian Mother Litigation in the Era of the Eternal Biological Family*, 22 INT'L J.L., POL'Y & FAM. 149, 150 (2008) [hereinafter Millbank, *The Limits of Functional Family*].

177. Millbank, *The Role of 'Functional Family,' supra* note 172, at 1 ("The functional family model . . . grows out of wider social and legal movements that afford recognition to a broad range of nonnormative (nonnuclear, nonmarital) family structures . . . .").

178. Canada v. Mossop, [1993] 1 S.C.R. 554 ¶ 135 (Can.). In doing so, the court arguably laid the foundation for a lower Canadian court to pronounce fourteen years later that a child could have three legal parents. *See infra* note 179 and accompanying text.

179. Mossop, 1 S.C.R. ¶ 140.

180. *Id.*

The persuasive power of the functional theory is further demonstrated by a now famous Canadian case, *A.A. v. B.B*, in which the Ontario Court of Appeals specifically held that a child could have three legal parents.[181] In that case, A.A., the lesbian partner of the biological mother of D.D., applied to the court to be declared the legal parent of D.D.[182] D.D. already had two other legal parents, the biological father and the biological mother.[183] Although the lower court found that it lacked jurisdiction to declare that D.D. had three legal parents,[184] it specifically noted the performative aspects of A.A.'s parental claim, finding that "[the lesbian partner] is fully committed to a parental role" and "has fulfilled the role of a parent in every way imaginable."[185] The court of appeals reversed, focusing primarily on the child's best interests as the basis of the court's jurisdiction and the declaration of multiple parentage.[186]

Similarly, in a 2007 case involving two lesbian mothers and a sperm donor father, a Pennsylvania court applied a version of the functional parent theory to hold that the biological, sperm donor father was estopped from denying financial responsibility towards his children.[187] The court came to this conclusion even though such a finding meant that three parents would be formally liable for support of the children for the first time in a United States domestic relations decision. The court found that the biological father was, in many respects, similarly situated to the lesbian partner of the biological mother who bore responsibility for the children.[188] In holding the biological father financially responsible, the court focused on his parental involvement, which went "far beyond the merely biological."[189] The biological father had "been involved in the children's lives since their birth" and previously had paid substantial child support, borrowed money to provide the mothers with a vehicle to facilitate visitation, expressed an interest in relocating close to the children's home,

181. A.A. v. B.B., [2007] 220 O.A.C. 115 ¶ 41 (Can.), *rev'g* [2003] 225 D.L.R. (4th) 371 (Can.) (issuing declaration granting parental rights to same-sex partner of child's biological mother without revoking parental rights of child's biological father), *available at* www.samesexmarriage.ca/docs/abc030107.pdf.

182. A.A. v. B.B., [2007] 220 O.A.C. 115 ¶ 1 (Can.).

183. *Id.* ¶ 2.

184. A.A. v. B.B., [2003] 225 D.L.R. (4th) 371, ¶ 38, 39, 44 (Can.).

185. *Id.* ¶ 5, 8.

186. A.A. v. B.B., [2007] 220 O.A.C. 115 ¶ 35–41 (Can.) (holding that legislative gap in statutory scheme governing adoption permitted court to exercise its inherent *parens patriae* jurisdiction and that granting parental rights to A.A. in addition to child's other two parents was in best interests of the child).

187. Jacob v. Shultz-Jacob, 923 A.2d 473, 475–76 (Pa. Super. Ct. 2007).

188. *See id.* at 480–81 (holding that, because biological father was involved in the care of his children, he bore the same financial obligation toward them as the biological mother's partner).

189. *Id.* at 481.

and encouraged the children to call him "papa."[190] In the face of resistance to creating three legal parents each liable for support of the children, the court found that the situation was not as untenable as the lower court had concluded. Instead, the court pronounced that it was "not convinced that the calculus of support arrangements cannot be reformulated, for instance, applying to the guidelines amount set for [the partner's] fractional shares to incorporate the contribution of another obligee."[191]

Despite its clear applicability to kinship caregiving, however, the functional parent theory has failed to facilitate attribution of parental status to relatives, even in states that have applied the theory to other cases involving nonparents. Courts' resistance to applying the functional theory in the context of petitions for parental status by relatives is evident in In re *Garrett*.[192] In that case, a New York state court expressed hostility to a petition filed by a maternal uncle to adopt his nephew and join his sister in a co-parenting relationship of the child.[193] While acknowledging that "[i]t is undeniable that the area of adoption law has undergone a significant transformation in recent years," the court summarily rejected the uncle's petition without examination of the merits.[194] The court distinguished the uncle's petition from those filed by other nonparents seeking parental status. It explained that those prior expansions of parenthood by the court, which had involved members of same-sex or unmarried heterosexual couples, were all "predicated on the rationale that the relationship between the proposed adoptive parents is the *functional equivalent* of the traditional husband-wife relationship, albeit between same-sex couples or unmarried partners."[195] The court thus conflated parenthood and marriage without meaningful exploration of the degree to which such conflation is appropriate or relevant to the best interests of the child.

Although it is unclear the degree to which the maternal uncle had actually assumed a caregiving or parental role in his nephew's life, In re *Garrett* reveals how categories of caregiving adults can be excluded from parental status. The court claimed that recognition of the parental claim involved in In re *Garrett* would expand parenthood "to virtually unlimited boundaries," a statement likely meant to suggest, incorrectly, that there

190. *Id.* at 476.

191. *Id.* at 482.

192. *In re* Garrett, 841 N.Y.S.2d 731 (N.Y. Sup. Ct. 2007).

193. The petition for adoption was filed by both the biological mother and the maternal uncle, who resided together. *Id.* at 414. The biological father in this case had previously agreed in the divorce decree to relinquish all of his parental rights in exchange for the ending of his future child support obligations and a favorable settlement of the past due amount. *Id.* at 732.

194. *Id.*

195. *Id.* (emphasis added).

are no logical rules that could be applied to vet parental claims.[196] In doing so, the court justified its conclusion by stating that the prior decisions expanding the right to adopt or to assert parental status in New York state were "simply inapplicable" to the case.[197] Relatives, with or without merit, are categorically excluded. The court's holding ultimately reflects the narrow and marriage-centered terms of the debate over expansions of parenthood.

Admittedly, the functional parent theory is not without criticism. As Susan Appleton cautions, the theory of functional parenthood merits additional development to shore up lingering "uncertainties, shortcomings, and unarticulated assumptions that remain unaddressed," all of which become particularly problematic when applied to the issue of multiple parentage.[198] Because functional parent claims are focused on the specific performance of parenting conduct, their recognition imbues the functioning caregiver with the privileges and obligations corresponding to his or her role in the child's life. Several fundamental questions need further refinement, including *which* functions are valued, when performed by *whom*, and for what *duration*. Jenni Millbank raises an additional note of concern regarding misuse of the functional theory on account of its derivative nature, arguing that, "because it rests on the functions or roles that members play in relationship to each other, [the functional theory] . . . grants only *temporary* status to nonbiological parents."[199] A birth parent may claim that, although the co-parent functioned as a parent in the past, the absence of the co-parent following dissolution of the underlying relationship means that they are no longer part of the functional household. The birth parent may even prevent the co-parent from having regular contact with the child. At that point, the functional co-parent will cease to function as a parent. Courts have denied parental rights to co-parents on these grounds in multiple instances.[200]

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196. *Id.* at 732–33.

197. *Id.*

198. Appleton, *Parents by the Numbers*, *supra* note 63, at 15.

199. Millbank, *The Limits of Functional Family*, *supra* note 176, at 152.

200. *See, e.g.*, Guardianship of Z.C.W., 84 Cal. Rptr. 2d 48, 50 (Cal. Ct. App. 1999) (noting that trial court had found that although the plaintiff was entitled to status of de facto and psychological parent during time she lived with legal parent, she subsequently lost that status when the relationship terminated and she moved out of the home); V.C. v. M.J.B., 725 A.2d 13, 18 (N.J. Super. Ct. App. Div. 1999) (noting that trial court had denied lesbian plaintiff visitation rights on grounds that her *in loco parentis* relationship with children at issue in the case "terminated once the relationship between the adults is ended"). The trial court's decision in the *V.C. v. M.J.B.* case to deny the lesbian plaintiff visitation rights to the children was reversed on appeal on the grounds that, given the close bonds that had developed between the plaintiff and the child, denying visitation was not in the best interests of the children. *Id.* Nonetheless, the trial court's decision to deny the plaintiff any custodial rights was affirmed. V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000). One of the reasons the New Jersey Supreme Court cited for doing so was the long period of time

Despite these shortcomings, the functional parent theory is flexible enough to accommodate the wide array of modern family arrangements. Because functional parent claims are focused on the specific performance of parenting conduct, the recognition of these claims imbues the functioning caregiver with the privileges and obligations that correspond with her role in the child's life. At the same time, the recognition of functional parent claims likely entails an examination of the specific function(s) a parental candidate has assumed and may require the disaggregation of the collective bundle of parental rights. Although the practice of disaggregating rights has been widely critiqued, the parenting plans used in many states to resolve child custody disputes frequently distinguish between various, potentially severable "incidents of parenthood" when allocating rights and responsibilities.[201] One parent might be allocated responsibility for the day-to-day care of the child, while another is given responsibility for making decisions about the child's education. Such disaggregation not only better reflects the reality of the caregiving relationships, it enables families to preserve all relevant parental relationships.[202] More importantly, in reference to kinship caregivers as parents, disaggregation allows for the distribution of parental claims across a greater number of persons without respect to the underlying nature of the relationship between the adult caregivers.

B. In the Best Interests of the Child

A child's best interests are the paramount concern in almost every decision concerning the care, custody, and control of children.[203] The best

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in which the plaintiff had not been involved in decision-making for the children, given the termination of her relationship with the legal parent. 748 A.2d at 555 (arguing that because the plaintiff "has not been involved in the decision-making for the twins for nearly four years . . . [t]o interject her into the decisional realm at this point would be unnecessarily disruptive for all involved"). Thus, despite acknowledging that a "bonded relationship . . . that is parental in nature" had developed between the plaintiff and the children, the New Jersey Supreme Court nonetheless found the dissolution of the relationship between the two parents sufficient grounds to deny the plaintiff not only joint physical custody over the children (which she did not demand) but joint legal custody for decision-making as well. *Id.* *See also* Jones v. Barlow, 154 P.3d 808, 816 (Utah 2007) (holding that "legal parent . . . by removing her child from the relationship [may] thereby extinguish all parent-like rights and responsibilities vested in the former surrogate parent").

201. Appleton, *Parents by the Numbers*, *supra* note 63, at 23. Appleton also points out that "almost every state has well-established rules for a division of the 'parenthood pie' after dissolution of marriage, with courts routinely making separate decisions about the child's legal custody . . . and the child's physical custody." *Id.*

202. Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J. L. & FAM. STUD. 309, 312–13 (2007).

203. Lynn Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J. L. & FAM. STUD. 337 (2008) ("The best interests of the child doctrine is at once the most heralded, derided and relied upon standard in

interests standard has been interpreted to refer "primarily [to children's] best psychological interests (as opposed to other possibilities such as their economic, educational, or medical interests)" or a set of factors relied upon to derive an outcome that best promotes the child's overall welfare.[204] The range of factors that comprise the best interests standards used in the U.S. have roots in psychological science, particularly developmental psychology and psychiatry.[205] These factors are reflected in the Uniform Marriage and Divorce Act, which defines best interests to include the wishes of the parent, wishes of the child, interaction and interrelationship between child and parent, the child's adjustment to home and school, and mental and physical health of all individuals involved.[206] However, individual states may use other or additional factors to evaluate a child's best interests. This variability has been criticized by practitioners and scholars who regard the standard as both exceedingly broad and frustratingly vague.[207]

Although no universal definition of best interests exists, courts typically regard several factors as central to the concept, including: (1) the attachment relationship between the caregiver and child, and (2) the child's perspective or directly stated wishes about her best interests.[208] As I will explore below, while both of these dimensions of best interests have been used primarily to support the claims of nonparent third parties within the context of marriage or quasi-marriage, in principle neither of these factors would exclude those outside of the scope of conjugality from relying upon them to assert parental claims.

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family law today. . . . The doctrine affects the placement and disposition of children in divorce, custody, visitation, adoption, the death of a parent, illegitimacy proceedings, abuse proceedings, neglect proceedings, crime, economics, and all forms of child protective services.").

204. Robert E. Emery, Randy K. Otto & William T. O'Donohue, *A Critical Assessment of Child Custody Evaluations*, 6 PSYCH. SCI. PUB. INT. 1, 6 (2005).

205. Joan Kelly, *The Best Interests of the Child: A Concept in Search of Meaning*, 35 FAM. CT. REV. 377, 385 (1997) (highlighting benefit of best interests standard due to its consideration of the individual child's developmental and psychological needs).

206. Emery, Otto & O'Donahue, *supra* note 204, at 6 (citing UNIF. MARRIAGE & DIVORCE ACT §316, 9A U.L.A. (1979).

207. Katharine T. Bartlett, *Preference, Presumption, Predisposition, and Common Sense: From Traditional Custody Doctrines to the American Law Institute's Family Dissolution Project,* 36 FAM. L. Q. 11, 13 (2002) (noting that critiques of the best interests test "focus on the indeterminacy of the rule, especially in closely contested cases in which . . . a clear standard is most necessary").

208. Kelly, *supra* note 205, at 379. Kelly notes that general guidelines for the determination of best interests also include the parents' wishes; the relationship of the child with his or her siblings, and other important figures; the child's adjustment to home, school, and community; and the mental and physical health of all individuals concerned.

1. Attachment Relationships

The best interests standard represents the law's attempt to take into account the core factors psychiatrists and other researchers have found necessary for a child's optimal growth and development.[209] One of the most important factors bearing on overall well-being, particularly for young children, is healthy attachment relationships.[210] Indeed, the original definition of permanence is "rooted in the psychology of attachment, defin[ing] permanence as . . . an enduring relationship that arises out of feelings of belongingness" or connectedness to a caregiver.[211] The theory of attachment, developed by British psychiatrist John Bowlby, is a descriptive and explanatory framework for understanding interpersonal relationships and the "lasting psychological connectedness between humans."[212] Bowlby defines an attachment relationship as any relationship between a child and an attachment figure as "any person perceived [by the child] as stronger and better able to cope with the world and someone who provides protection and care."[213] Attachment theory has obvious conceptual relevance in the child custody context and has contributed significantly to the conceptualization of child custody evaluations.

Although the number of individuals with whom a child can develop primary attachment relationships is not yet known, current research suggests that children can have multiple attachments. In the past, some theorists assumed that young infants have a single preferred attachment figure, while others argued that children develop a hierarchy of attachment relationships in which mothers occupy a primary role and all other attachment figures occupy a secondary position.[214] Cross-cultural data, however, provides little support for the existence of such a hierarchy. Instead, multiple studies suggest that "the attachment network appears to function in an integrated or interactive fashion, such that the combination of multiple attachment relationships considerably increases the power to predict children's later cognitive and emotional functioning."[215]

Researchers have suggested that alternative attachment figures can be identified by "(a) [their] provision of physical and emotional care [for the child], (b) the quality of care provided, (c) time spent with the child, (d)

209. *See id.* at 380–84 (describing how best interests standard incorporates psychological concepts).

210. *Id.* at 380.

211. Testa, *supra* note 51, at 499.

212. JOHN BOWLBY, ATTACHMENT AND LOSS 194 (1969).

213. Shelley A. Riggs, *Is the Approximation Rule in the Child's Best Interests? A Critique from the Perspective of Attachment Theory*, 43 FAM. CT. REV. 481, 487 (2005).

214. Shelley A. Riggs, *Response to* Troxel v. Granville*: The Implications of Attachment Theory for Judicial Decisions Regarding Custody and Third-Party Visitation*, 41 FAM. CT. REV. 39, 44 (2003) [hereinafter Riggs, *Response to* Troxel v. Granville].

215. *Id.*

continuity or consistency in a child's life, and (e) [their] emotional investment in the child."[216] As Shelley Riggs has noted, "these theoretically and empirically grounded criteria for identifying attachment figures are utterly blind to gender, race, religion, sexual orientation, and even biological relatedness."[217] For children, an attachment figure exists by virtue of conduct, not labels. Indeed, Riggs points out that all that matters to a child is "the presence of a sensitive, loving caregiver, who provides him or her with a sense of security, stability, and physical and psychological well-being"—not that caregiver's genetic heritage.[218]

In two recent cases, courts relied on attachment as the basis for upholding the creation of three legal parents. In *A.A. v. B.B.*, the Court of Appeals for Ontario was persuaded that the lesbian partner of the biological mother had developed a sufficiently close relationship to the child to warrant a declaration of parentage,[219] even though such a declaration abrogated the "rule of two." As noted above, although the nature of the underlying adult relationship formed the backdrop against which parental rights were assessed, the decision principally focused on the best interests of the child.[220] Ultimately, the court held that it was contrary to the child's best interests for him to be deprived of legal recognition of his enduring attachment relationship with one of his mothers.[221]

The strength of the attachment relationship between caregiver and child was also persuasive in breaking open the "rule of two" in a 2008 family court decision in Great Britain.[222] In In re *A*, the Court of Appeals affirmed the lower court's decision to recognize the parental status of the estranged husband of the child's biological mother because of the strong attachment relationship it found existed between the estranged husband and the child.[223] In supporting the preservation of an established parent-child relationship, even in the context of two legal and biological parents, the court found that the "parental responsibility order was necessary in order to secure the position of [the functional father] as well as to recognize the nature of his beneficial influence and relationship as a social and psychological parent to [the child]."[224]

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216. *Id.* at 43.

217. *Id.*

218. *Id.* at 45.

219. *See* A.A. v. B.B., [2007] 220 O.A.C. 115 ¶ 41 (Can.), *available at* www.samesexmarriage.ca/docs/abc030107.pdf.

220. *Id.* at ¶ 39.

221. *Id.*

222. *In re* A [2008] EWCA Civ. 867, 2008 WL 2872488 (Fam. U.K.).

223. *Id.* ¶ 65.

224. *Id.* ¶ 84. The court clarified that the functional father is not a father or parent, explaining, "He is not a father by biological paternity or adoption, nor a stepfather by marriage. He is a person entitled, by reason of the role he has played and should continue to play in [the child's] life, to an order conferring parental responsibility upon him. He is thus a

The psychological theory of attachment thus provides strong support for expanding the definition of "parent" to include caregivers outside the traditional conjugal context. Attachment theory explains how relationships to nonparent caregivers can complement—or, in some cases, supplant—relationships with biological parents. Like the functional theory, attachment theory does not presuppose that caregiving adults have a marital or quasi-marital relationship to each other. A caregiver's marital status impacts the formation of an attachment relationship between the caregiver and the child only to the extent that it allows, or precludes, access to the child. While marriage might create a favorable setting in which bonding can occur on a daily basis, alternative attachment figures can, and do, develop similar relationships with children outside of any marital tie. The capacity for strong attachment relationships to develop outside of a marital context is particularly evident when nonparents rear children for substantial lengths of time, as occurs in most kinship households. Kinship caregiving fulfills children's need for permanency because it is often a "lasting" relationship, even in the absence of enduring legal obligations.[225] Given the increasing phenomenon of relatives as primary caregivers and custodians of relative minors, it is particularly important to acknowledge the benefits of these attachment relationships,[226] especially for those who are not raised exclusively by biological parents, and to model the legal relationships between caregiver and child on these relationships.

2. The Child's Perspective

The child's perspective provides a similarly persuasive basis for extending parental status to those individuals whom the child regards as parents. A theory of parenthood that meaningfully considers the child's perspective would likely not be concerned with attributes of the adult caregivers—such as gender, race, religion, sexual orientation, biological relatedness, or marriage—that do not impact the caregiving relationship.

Several courts have recognized that a child's understanding of who their caregivers are can be a persuasive justification for abrogating

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person who, jointly with the mother, enjoys the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to that child (see s.3 (1) of the *Children Act 1989*) but he does not thereby become the father of that child." *Id.* ¶ 96.

225. Testa, *supra* note 51, at 499–534. *See also,* Robert S. Marvin, *Quality of Permanence Lasting or Binding: Legal Status v. Relationships*, 12 VA. J. SOC. POL'Y & LAW 535, 536–37 (2005) (noting that Testa's "'gift relationship' theory is, at a formal level, intriguingly parallel to the ethological and sociobiological theories that provided John Bowlby . . . much of the basis for attachment theory.")

226. Riggs, *Response to* Troxel v. Granville, *supra* note 214, at 48–49 (arguing that it is important to consider the role those attachment relationships play in the promotion of healthy psychological development and resiliency in children).

traditional parentage norms. The British Court of Appeals' opinion in In re *A* focused heavily on the subject child's perspective. In granting parental rights to a third adult, the Court found the benefit the child gained from the positive, loving, and supportive relationship the child had developed with the petitioner was more important than the legal mother's vehement resistance to the functional father's claim.[227] Similarly, although the Ontario Court of Appeals found that the child in *A.A. v. B.B.* was too young to provide direct input, the court considered the child's perspective to be sufficiently important that it used a statement by another child in a previous case to represent the child's view.[228] The court quoted from the affidavit of a similarly situated twelve year-old child in an earlier case in which the child's biological mother's lesbian partner had sought recognition of her parental rights.[229] The affidavit made clear how important the recognition of the partner's parental status could be "from the *child's* point of view":

> I just want both my moms recognized as my moms. Most of my friends have not had to think about things like this—they take for granted that their parents are legally recognized as their parents. I would like my family recognized the same way as any other family, not treated differently because both my parents are women.
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> . . . .
>
> It would help if the government and the law recognized that I have two moms. It would help more people to understand. It would make my life easier. I want my family to be accepted and included, just like everybody else's family.[230]

Such sentiments are surprisingly similar to those expressed by children residing in kinship caregiving families. Although relatively few studies have captured children's perspectives directly, those that have suggest that children frequently normalize these caregiving arrangements and often regard relative caregivers as *parents.* One small-scale study that examined the perspectives of children residing in kinship caregiving families found that "[m]ore children than not said that living with a caregiver is 'just the same' as living with a parent."[231] In fact, some of the children surveyed

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227. *In re* A [2008] EWCA Civ. 867, 2008 WL 2872488, at ¶ 97 (Fam. U.K.) (stating that mother was not justified in seeking to "ignore or belittle Mr A's role as the father figure in [the child's] life, which the judgment and order of the [lower court] rightly require her to recognize without erosion or denigration in the eyes of [the child] who enjoys and derives such benefit from it").

228. A.A. v. B.B., [2007] 220 O.A.C. 115 ¶ 15 (Can.), *available at* www.samesexmarriage.ca/docs/abc030107.pdf.

229. *Id.*

230. *Id.*

231. Jill T. Messing, *From the Child's Perspective: A Qualitative Analysis of Kinship*

appeared not to understand the difference between the terms "relative" and "parent." When the facilitator of the discussion group for children told them that she did not know what it was like to live with a relative, one child raised her hand and asked if the facilitator had ever lived with her parents. According to the researcher, "[t]here was a moment of confusion until the facilitator realized that this child was saying that the facilitator had also lived with relatives while growing up—her parents!"[232] Although in subsequent groups, researchers were more careful to distinguish between these living arrangements, the anecdote reveals the extent to which children in these households conceive of "living with a relative" and "living with parents" to be one and the same.[233]

As explored above, courts have used attachment theory and the child's perspective to grant parental rights to adults outside of a traditional dyad *within* the scope of conjugality. These rationales are equally well-suited to support the claims of nonparents, like kinship caregivers, *outside* of conjugal relationships. A further benefit of these approaches is that neither concept limits the number of parents nor requires a specific relationship between parents. Indeed, both concepts place the child at the center of the discourse on parentage and regard as largely irrelevant the nature of the relationship between the caregiving adults seeking parental status.

C. Emic versus Etic Perspectives on "Parenthood"—Why Culture Matters

Family law professes to embrace a pluralistic concept of the family.[234] This belief is reflected, in part, in the use of flexible norms like the functional parent theory and the best interests of the child standard, rather than proscriptive descriptions of family composition and structure, to determine parental rights. While pluralistic norms might underlie expansions in the domain of parenthood and parental rights, such expansions remain limited to the context of conjugality or quasi-conjugality—some adult pairing in which the parties resemble, to varying degrees, a married couple. The marriage-centeredness of the parenthood debate undermines this pluralistic ideal. In order to better embrace this ideal, courts should adopt an emic perspective on parenthood, which would judge parental claims based on the internal norms of a community.

Care Placements, 28 CHILD. & YOUTH SERVS. REV. 1415, 1428 (2006).

232. *Id.* at 1417.

233. *Id.* at 1418.

234. Rosenbury, *supra* note 117, at 208. *See also, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1977) ("Ours is by no means a tradition limited to respect for the bonds uniting the members of the *nuclear* family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.").

Such an emic perspective ultimately argues for the extension of parental rights to nonconjugal kinship caregivers, especially in communities in which such family formation and functioning is the norm.

As discussed previously, the marriage-centeredness of the parenthood debate reveals the extent to which cultural norms influence the definition of parenting and parenthood. Because "[p]arenthood as understood by law . . . is always a constructed or attributed status . . . which results from prescriptive choices and normative imaginings about family life," it is impossible for such choices about family not to be highly influenced by culture.[235] As such, conceptions of parenting, parenthood, and the family itself have an institutional and cultural history from which they cannot be easily disaggregated.[236] These biases inevitably restrict what kinds of families can be recognized, and thus prevent many from having "equal opportunity to take advantage of the wider range of options"[237] regarding their own choices about family life.

Even as the composition of the American populace is rapidly changing,[238] law and policy continue to reflect only the values, beliefs, and principles of Anglo-American culture and "the gap between the law and the beliefs and practices of American [families]" only widens.[239] Simply put, enthusiasm for innovation within the scope of "family," including expansions of parentage and parenthood, continues to be selectively expressed.[240]

This selective expression undermines family law's professed embrace of familial pluralism and further supports concerns over pluralism's waning influence in family law.[241] As noted earlier, cultural norms in black, as well as other minority, communities recognize "care relationships [which]

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235. Angela Campbell, *Conceiving Parents Through Law*, 21 INT'L J. L. POL'Y & FAM. 242, 243–44 (2007).

236. FINEMAN, *supra* note 81, at 112.

237. Perry, *Race Matters*, supra note 31, at 461.

238. "Minorities, now roughly one-third of the U.S. population, are expected to become the majority in 2042, with the nation projected to be 54 percent nonwhite in 2050. By 2023, minorities will comprise more than half of all children." Press Release, U.S. Census Bureau News, An Older and More Diverse Nation by Midcentury (Aug. 14, 2008), *available at* http://www.census.gov/Press-Release/www/releases/archives/population/012496.html.

239. Chiu, *supra* note 13, at 1796–97.

240. Amy L. Wax, *Engines of Inequality: Class, Race and Family Structure*, 41 FAM. L.Q. 567, 599 (2007).

241. Troxel v. Granville, 530 U.S. 57, 90 (2000) (Kennedy, J., dissenting) (expressing concern for waning pluralism in family law and acknowledging varied household structure and prevailing conditions that continue to shape contemporary American family life). *See also* Rosenbury, *supra* note 117, at 200 (noting "how the boundaries of family law can maintain hierarchies and inequality, even as the substance of family law attempts to embrace a norm of equality").

extend well beyond the sexual family as a matter of course."[242] Anthropologist Carol Stack referred to the practice of caring for the child of kin or close friends and corporately shared parental responsibilities and rights as "childkeeping."[243] By vesting parental rights and responsibilities for children in the community, rather than in the biological parents alone, childkeeping reflects a multiple parentage model in which parental responsibilities can be shared or transferred to others.[244] In sharp contrast to the heterosexual, conjugal, dyadic model of parentage, parental rights in these communities do not depend upon blood but are determined by a variety of factors, including the length of time the relative has kept the child and the conduct of the biological parent.[245] In light of this tradition, the marriage-centeredness of the parentage debate reflects a cultural hegemony in which only certain ordered pairs are valued and protected. In doing so, it ignores the reality that, just as parenting and parentage are cultural constructs, so too are the laws that govern each.[246]

Courts should acknowledge the salience of culture in parenting and parentage by adopting an emic, rather than an etic, perspective, on the family. An emic perspective regards cultural institutions like the family from the vantage point of someone *within* a particular culture.[247] In contrast, an etic perspective views cultural institutions, like the family, from the vantage point of one *outside* of that culture.[248] An emic, as opposed to an etic, perspective on the family would conceive of family life from the perspective of those within a particular culture or community.

Applying an emic perspective thus would make room for a more diverse set of views on the family than those commonly acknowledged in contemporary debates. An emic model of parenting would take these norms into account in allocating parental rights and responsibilities. Viewed from within a cultural and community context, kinship caregiving relationships are not only beneficial, but increasingly normal. Acknowledging this fact through the extension of legal parent status to kinship caregivers would help move family law further toward its

242. Kessler, *supra* note 4, at 57.

243. STACK, *supra* note 38, at 62.

244. *Id.* at 63.

245. *Id.* at 62. As Stack observed, "There is no specific time period after which childkeeping becomes a permanent transfer of rights in the eyes of the community. The intentions which the jural mother makes public, the frequency of her visits, the extent to which she continues to provide for the child, and the extent to which she continues to occupy all of the social positions of parenthood are all factors in sanctions over rights in children." *Id.* at 88.

246. Chui, *supra* note 13, at 1793. *See also id.* at 1795 (observing how nuclear family itself is a construct of Anglo-American culture and how minority cultures may differ in their definition of family).

247. *Id.* at 1821.

248. *Id.*

pluralistic ideal.

D. Conclusion

The rationales that have driven the creation of multiple parentage arrangements can be used to extend parental status to kinship caregivers through such an additive model of parenthood. Were the discourse on expansions of parenthood not so marriage-focused, wouldn't we be asking whether Carla, Amanda's father *and* Pam could together hold claims as three legal parents? If functional parenthood, Shawn's best interests, and a cultural history of intergenerational caregiving were the driving rationale, would we find that Tina, her child's father, *and* her parents are all deserving of recognition as co-parents?

VI
FROM CAREGIVERS TO PARENTS: HOW KINSHIP CAREGIVERS CAN ACHIEVE PARENTAL STATUS

This article is limited to an exploration of the dynamics that shape how relative caregivers may be conceived as legitimate co-parents and where their claims to parental status fall relative to those of other nonparents with conjugal or quasi-conjugal ties to biological parents. Nonetheless, it is useful to examine briefly why other options, like traditional adoption and guardianship, do not meet the needs of kinship caregivers. This section presents a brief exploration of possible parental claims with varying degrees of application to kinship caregiving families. For most kinship caregivers, a multiple parentage model, such as de facto parenthood and kinship adoption, would offer the best solution. Rather than divesting one significant caregiver in order to make room for another or temporarily vesting an individual with a limited schedule of rights and responsibilities, such as through a guardianship, full multiple parentage would permit all individuals involved in the care of the child to share an exclusive, collective, and equal parental status.

A. Traditional Adoption and Guardianship

Both adoption and guardianship statutes have been utilized to provide legal status, of varying degrees of permanence, to relative caregivers. Yet neither traditional adoption nor guardianship are suitable for families with ongoing relationships and a shared caregiving or co-parenting arrangement in which biological parents will continue to play a meaningful role in the lives of their children. Modern adoption law was "developed primarily to provide permanent care to young children by persons formerly unknown

to the child's family of birth," not care within extended families.[249] Similarly, traditional guardianship laws were developed primarily to address cases in which the loss of parental care was due to the death of one or both parents and was typically conceived as temporary in nature. Permanent guardianship statutes typically require that at least one parent be incapable or unwilling to provide adequate care to the child, and often that the child be first adjudicated dependent.[250]

B. De Facto Parenthood

Both de facto parent status and parent-by-estoppel status are particularly inclusive quasi-parental claims proposed by the American Law Institute's Principles of Family Dissolution to support the claims of nonparent caregivers.[251] The term "de facto parent" is used to describe a party who claims custody rights based on the party's relationship with a nonbiological, nonadopted child. In a consensual de facto parent relationship, "[t]he *de facto* parent has the status to assert his or her desire to have a role in the child's life because the legal parent has effectively already consented to that person's parental or quasi-parental role and enlarged the family circle accordingly."[252] In a nonconsensual de facto

249. Marianne Takas & Rebecca L. Hegar, *The Case for Kinship Adoption Laws*, *in* KINSHIP FOSTER CARE: POLICY, PRACTICE, AND RESEARCH, *supra* note 14, at 54, 59.

250. Permanent guardianships do not exist in all jurisdictions. Where they do exist, such statutes typically require a guardian to substitute for an incompetent parent. For example, in Arizona and Tennessee, permanent guardianship statutes exist providing for the permanent care, custody, and control of children who are adjudicated dependent. ARIZ. REV. STAT. ANN. § 8-871 (2007); TENN. CODE ANN. § 37-1-801-807 (2010). Permanent guardianships, in effect, create a multiple parentage arrangement by transferring *almost* all of the rights and responsibilities of a parent to a third party caregiver, irrespective of the relationship of the guardian to the biological parent. Some permanent guardianship statutes, like that in Oregon, require that the court make a finding that "[i]t is in the best interest of the [child] that the parent never have physical custody of the [child] but that other parental rights and duties should not be terminated." OR. REV. STAT. § 419B.365 (2009). While such limitations may be appropriate for parents who are found to be neglectful and/or abusive towards their children, they are inappropriate in those kinship caregiving cases where there are no allegations of abuse or harm, and where continued parental involvement, including custody of children, is actually beneficial to children.

251. *See* AM. LAW INSTIT., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(b)–(c) (2003) (extending parental rights to four categories of individuals who are considered parents by estoppel, including individuals who have "lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as parent, as part of a prior co-parenting agreement with the child's legal parent," and extending de facto parent status to adults who live with the child and who regularly perform at least half of the caretaking functions with respect to the child). It is worth noting that since they were published, the Principles have not been formally adopted by any state. *See* ROBIN F. WILSON, RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 94, 123 (2006).

252. Appell, *supra* note 77, at 762.

parent relationship, "any psychological parent [can] assert that the child's interests include contact or custody with the psychological parents . . . regardless of the [biological] parent's consent to the formation of the relationship."[253]

De facto parent status has been recognized through common law in a few jurisdictions and enshrined in state law in one state. In July 2009, Delaware became the first state to enact a de facto parent statute when it amended its Uniform Parentage Act.[254] The amended statute was passed in response to a 2001 Delaware court case in which the same-sex partner of an adoptive parent sought recognition of his parental status.[255] Before 2009, the Delaware statute did not permit second-parent adoption. Nevertheless, a Delaware court held that the same-sex partner had standing to seek adoption, which the court found to be in the best interests of the children.[256] In amending the Uniform Parentage Act in 2009, the Delaware legislature "intended to continue the rights and responsibilities of a *de facto* parent as set forth in" that case.[257] To do so, the Delaware legislature created a statutory definition of parent that appears to be decoupled from a conjugal or quasi-conjugal adult relationship. Under the statute, a de facto parent is defined as a person who the Family Court determines:

> (1) Has had the support and consent of the child's parent or parents who fostered the formation and establishment of a parent-like relationship between the child and the de facto parent;
>
> (2) Has exercised parental responsibility for the child . . . ; and
>
> (3) Has acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature.[258]

While the model for de facto parent status here was derived from claims arising within a quasi-conjugal relationship,[259] by its plain language, it is not solely limited to cases in which a conjugality or quasi-conjugality nexus is

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253. *Id.*

254. DEL. CODE tit. 13, § 8-201(a)(4), (b)(6), (c) (2009). *available at* http://legis.delaware.gov/LIS/lis145.nsf/vwLegislation/SB+84/$file/legis.html?open

255. *In re* Hart, 806 A.2d 1179, 1182–83 (Del. Fam. Ct. 2001).

256. *Id.* at 1185–86.

257. Delaware State General Assembly, An Act to Amend Title 13 of the Delaware Code Relating to Parents, http://legis.delaware.gov/LIS/lis145.nsf/vwLegislation/SB+84/$file/legis.html?open (last visited Dec. 3, 2010) (summarizing S. 145-84, 1st Sess. (Del. 2009) (enacted)).

258. DEL. CODE tit. 13, § 8-201(c)(1)–(3) (2009).

259. *See In re* Hart, 806 A.2d at 1182 (noting that petitioner, Burke Shiri, "lived together in a committed relationship" with Gene Hart, legal parent of the two children Shiri sought to adopt, "since the summer of 1979").

present. Similarly important to the claims of kinship caregivers, a de facto parent statute such as that enacted in Delaware authorizes a multiple parentage scheme, leaving open the possibility of three legal parents.[260]

At present, the limited adoption of the de facto parent doctrine means that this option is available to very few kinship caregivers, and so far of limited utility. Moreover, there are limitations to a de facto parent statutory scheme. De facto parental status may only receive limited recognition outside of the state in which it is granted. At the same time, where the status is created solely by common law, state courts adopt varying interpretations that may frustrate the efforts of parental candidates who are seeking to complement, not to supplant, the parenting efforts of a legal parent.[261] Nonetheless, de facto parental status holds tremendous promise as an avenue for kinship caregivers seeking parental recognition.[262]

C. Kinship Adoption

Multiple parentage arrangements also could be facilitated through creation of a new legal category, "kinship adoption," which would permit kinship caregivers to formalize their relationships without extinguishing existing relationships between biological parents and their children. Unlike traditional adoption, which is restricted by the "rule of two," kinship adoption would be an *additive* model that would distribute parental status among any reasonable number of caregiving adults in a manner that approximates their caregiving relationship towards the child. Because it would not require termination of a biological parent's legal rights in order to permit a kinship caregiver to assume formal parental status, kinship adoption would avoid the "stigma, conflict and potential loss entailed in termination of all parental rights" associated with

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260. Polikoff, *A Mother Should Not Have to Adopt Her Own Child*, *supra* note 146, at 224–25.

261. *See* Dorothy R. Fait, Jillian L. DiLaura & Michelle M. Botek, *Who is a Parent?* 42 MD. B.J. 4, 7 (2009) (noting that, in Maryland, even when de facto parent status is accepted, de facto parent must still establish that legal parent is either unfit or that exceptional circumstances exist to place both parents on equal legal footing).

262. Of slightly less utility is the parent-by-estoppel doctrine, which applies to individuals with a good faith belief in their status as legal parent. This status would typically be available to men who mistakenly believe they are biological fathers, but can be adapted to fit the claims of some kinship caregivers provided they meet the relevant criteria. By definition, the status is available to individuals who,

> lived with the child for at least two years, holding out and accepting full and permanent responsibilities as a parent, pursuant to an agreement with the child's parent (or if there are two legal parents, both parents), when the court finds that recognition as a parent is in the child's best interests.

AM. LAW INSTIT., *supra* note 251, at §2.03(1)(b)(iv). In many respects, parent-by-estoppel is similar to the de facto parent doctrine, as both rely on the actions of the legal parent in consenting to the involvement of the nonparent caregiver. However, the factual circumstances that give rise to kinship caregiving are less likely to meet this definition.

traditional adoption.[263] A biological parent in such cases would retain some residual rights, while a caregiver would be granted the protections, privileges, and responsibilities that accompany parental status. Kinship caregivers might prefer this model of co-parenting over other quasi-parental claims that fail to provide both the broad assurances for caregiving relatives and the underlying legitimacy that typically attaches to "real" parenthood.

Of course, kinship adoption is not without its own challenges. The most vexing challenge is how to define what is a "reasonable" number of persons who may be vested with parental status. Domestic relations provisions increasingly provide for "division of the 'parenthood pie'" along many dimensions related to parental decision-making.[264] In addition to elements of access to and custody of the child, parental status might include responsibility for decision-making as it relates to a child's medical, educational, or spiritual upbringing, all of which can be divided, in some measure, among a number of persons. Yet domestic relations judges have long been vested with the responsibility of resolving disputes concerning children's upbringing when unmarried or divorced parents disagree. Similarly, the degree to which one parent's decision-making authority might trump another is an additional area of possible disagreement. Such disputes are likely to occur with greater frequency the greater the number of "parents" involved. Courts also are well-prepared to address such challenges, having already developed sufficiently effective rules and practices for disaggregating and assigning parental responsibilities between custodial and noncustodial parents.

D. Presumptions for Kinship Caregivers

For kinship caregivers who do not seek declarations of parentage, the law could provide other avenues for protecting their parental interests. One promising option would be statutory presumptions of parental status that would "expand the definition of parent and, thus, the application of the parental preference to anyone who has a parental relationship with the child."[265] Such presumptions could be created by a statute providing parental status to caregivers based on certain criteria, such as the quality of the relationship with the relative minor and the length of time that the adult has performed a primary caregiving role. As such, the "parental presumption would not apply to a third party who had not functioned as a parent toward the child but, nevertheless, sought custody as against a natural parent."[266] Kinship caregivers with a presumption of parental

263. Takas & Hegar, *supra* note 249, at 62.

264. Appleton, *Parents By Numbers*, *supra* note 63, at 23.

265. Richards, *supra* note 12, at 760.

266. *Id.* at 735.

status would, like biological or legal parents, enjoy a superior parental privilege relative to other third parties. This privilege "would protect [the child in their care] from being uprooted from a stable, loving relationship with a third party who has been acting as a parent, simply because a natural parent, who is not unfit, decides to claim [exclusive] custody."[267] Each person designated as parent through a presumption of parental status,

> would enjoy a rebuttable presumption that granting custody to them would be in the best interest of the child. If more than one person meets the definition of parent, the preference would not be determinative, and the court would then award custody based on the best interest of the child, as between the two *or more* "parents."[268]

Such an expansion more appropriately shifts the focus from adults' rights to children's interests.[269]

VII.
CONCLUSION

Kinship caregiving, which may encompass a range of caregiving practices from "othermothering" to shared co-parenting alongside biological parent(s), is both an historical and growing phenonmenon. Increasing rates of kinship caregiving, particularly within communities of color, suggest that the practice of relative caregiving will affect an even greater number of children in the decades to come. Although in many respects kinship caregivers assume the very same parental caregiving roles as other third-party nonparents, they currently have fewer options for securing their parental status. They are forced to choose between entirely

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267. *Id.* at 736.

268. *Id.* at 761 (emphasis added).

269. Some scholars, such as Nancy Polikoff, suggest an iteration of legal presumptions for kinship caregivers called a "designated family relationship" registration system. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE, *supra* note 119, at 130. Such a system would permit people who register to publicly declare that their relationship should count as family, namely in the context of parent and child. *Id.* Since the law, at present, now lists family members, including parents, as defined only by marriage, biology, or adoption, there remain limited avenues for decision-makers to be made aware of the participation and presence of kinship caregivers. *Id.* Criticism of parental presumptions for kinship caregivers, as well as designated family relationship registration, suggests that resistance derives from the complexity posed by including additional parties with rights, which is consistent with criticism leveled against multiple parentage arrangements overall. This arithmetically based rejection of the proposed model argues that the division of rights and responsibilities as between two adults is sufficiently less complicated than as between more than two to warrant adherence to the "rule of two." Although this argument is relevant to the discussion at hand, it is beyond the scope of this piece, which is intended primarily to ask the question of "why not" as it relates to the inclusion of kinship caregivers among the growing population of persons the law comes to regard as eligible co-parents.

replacing a biological parent through traditional adoption or settling for a legally subordinate status of guardian. Their limited options are due primarily to the marriage-centeredness that frames the debate over expansions of parenthood. The central role assumed by marriage or marriage proxies excludes those outside of the conjugal orbit, including kin, who seek parental status. Indeed, to the degree that marriage creates, protects, and privileges families—and inevitably defines parenthood—kinship caregiving families who depart from the marital norm continue to suffer from marginalization, exclusion, and stigma.[270]

The limited discourse on expansions of parenthood implicitly suggests that parenthood in its most revered form—as a quest for personal transcendence[271]—is limited only to parenthood through marriage, quasi-marriage, prescribed mating, or assisted reproduction. Kinship caregivers, who become parents through conduct and commitment, occupy only the fringes of the debate. These families are at once invisible and threatening. Their limited "voice" in the broader family values debate is hard to reconcile with the central democratic ideal that "the function of value formation must be served by families who are at liberty to make their own important value choices."[272] For the many kinship caregiving families upon whom the perceived values of the majority are imposed, such vaunted liberty is simply illusory.

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270. *See* FINEMAN, *supra* note 81, at 110 ("The *legitimate* family—the one entitled to privacy and protection . . . was defined in the first instance through marriage.") (emphasis added). Note that expansions of parenthood that include the claims of relatives as parents are consistent with arguments raised by Fineman, Polikoff, and others advocating a replacement of sexual and reproductive affiliation as the core ties defining family with a focus instead on caretaking as the core connection.

271. Parenthood as a means of personal transcendence refers to the centrality of parental identity in the context of family life. Family life "provides the primary means for the achievement of social, legal, moral, political, and economic benefits and rights of each individual in the family . . . [and] is a critical way to enhance the authenticity of the self and achieve full social citizenship." Scott Weber, *Parenting, Family Life, and Well-Being Among Sexual Minorities: Nursing Policy and Practice Implications*, 29 ISSUES MENTAL HEALTH NURSING 601, 613 (2008).

272. PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 11 (1997).