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## FIRST PARENTS: RECONCEPTUALIZING NEWBORN ADOPTION

JAMES G. DWYER\*

A small but significant percentage of newborn babies have biological parents who are unwilling or unfit to raise them.<sup>1</sup> Some such birth parents relinquish their legal rights to the baby so that other adults can adopt the baby soon after birth.<sup>2</sup> In some other cases, a child protection agency assumes custody of a baby at or soon after birth because the birth parents abandon the baby or because the agency determines that the birth parents are unfit to raise a child,<sup>3</sup> and in a subset of these cases, a court terminates the birth parents' rights and approves adoption of the babies by other adults.<sup>4</sup> In these two sets of cases involving newborns—what are now called “parental placement adoptions” and “agency adoptions”<sup>5</sup>—the adoptive parents are the only caretaking parents the children ever have and for all intents and purposes raise the children just as do biological parents who become legal parents.

Yet these lifetime caretakers forever bear the label “adoptive parents,” a status with connotations different from “natural parent” or simply “parent,” terms used in state statutes to designate birth parents.<sup>6</sup> In part, the connotations are positive. We might suppose adoptive parents must be more competent and motivated to raise children, because they had to go through an arduous qualification process to become parents.<sup>7</sup> Or we might

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<sup>1</sup> See James G. Dwyer, *The Child Protection Pretense: States' Continued Consignment of Babies to Unfit Parents*, 93 MINN. L. REV. 407, 424–27 (2008).

<sup>2</sup> See James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 884 (2003).

<sup>3</sup> *Id.*

<sup>4</sup> See *id.* at 888.

<sup>5</sup> *Id.* at 884 (citation omitted).

<sup>6</sup> See, e.g., OHIO REV. CODE ANN. § 3111.01(A) (LexisNexis 2003) (defining “parent and child relationship” as “the legal relationship that exists between a child and the child’s natural or adoptive parents”).

<sup>7</sup> Dwyer, *supra* note 2, at 882–83; see also Karen March, *Perception of Adoption as Social Stigma: Motivation for Search and Reunion*, 57 J. MARRIAGE & FAM. 653, 656 (continued)

view them as especially altruistic, because they give their love, attention, and resources to a child who is not “their own.”<sup>8</sup> But the cultural connotations are predominantly negative. Adoptive parents are widely viewed as artificial rather than “real” parents, because “the dominant North American family ideology defines a *real* family as the ‘nuclear family unit of a heterosexual couple and their biological children.’”<sup>9</sup> Implicit in the view that adoptive parents are altruistic is the assumption that the adopted child is not the adoptive parents’ “own child,” but rather always remains the child of the biological parents.<sup>10</sup> As such, they are only a second best alternative for a child, incapable of being ideal parents no matter how devoted they are.<sup>11</sup> And most people harbor doubt as to adoptive parents’ love of or connection to the children they raise because the children are not their biological offspring.<sup>12</sup> In addition, because of the starkly different legal treatment of biological parents and adoption applicants, “adopters tend to experience the adoption process itself as problematic, intrusive, and

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(1995) (noting survey result showing how some adoptees believed adoptive parents “are more loving and dedicated because, unlike most parents, they choose to have children”).

<sup>8</sup> Cf. Charlene E. Miall, *The Stigma of Adoptive Parent Status: Perceptions of Community Attitudes Toward Adoption and the Experience of Informal Social Sanctioning*, 36 FAM. REL. 34, 37 (1987) (noting that adoptive parents are often told how kind it was of them to take in someone else’s child).

<sup>9</sup> Miall, *supra* note 8, at 35 (“As defined in North American society, the biological or blood relationship among individuals forms the basis for kinship ties. Indeed, the blood tie is conceptualized as indissoluble [sic] and of a mystical nature that transcends legal or other kinship arrangements.”); *id.* at 37; Katarina Wegar, *Adoption, Family Ideology, and Social Stigma: Bias in Community Attitudes, Adoption Research, and Practice*, 49 FAM. REL. 363, 363 (2000) (citation omitted); *see also id.* at 364 (noting “the dominant societal belief that adoptive motherhood is inferior”).

<sup>10</sup> *See* Miall, *supra* note 8, at 37.

<sup>11</sup> *See* Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1153 (2003); Wegar, *supra* note 9, at 364.

<sup>12</sup> Cahn, *supra* note 11, at 1153 (citing a survey showing “only [seventy-five] percent believed that adoptive parents love their children as much as they would have loved their biological children”); March, *supra* note 7, at 654, 656–67; Miall, *supra* note 8, at 35 (stating that “a biological tie is often presented as a prerequisite to a loving relationship with a child”); *id.* at 36 (noting adopters’ perception that the public believes “bonding and love in adoption are second best”); *id.* at 37; Wegar, *supra* note 9, at 364 (providing that “because a biological tie is assumed to be important for bonding and love, adoptive families are considered second best”).

humiliating.”<sup>13</sup> That adoption applicants must undergo rigorous scrutiny,<sup>14</sup> whereas there is no examination of biological parents before they become legal parents,<sup>15</sup> can convey the impression that adoptive parenting is inherently suspect.

Correspondingly, being an adopted child carries a stigma.<sup>16</sup> This stigma might today include some positive connotations. Some might think an adopted child must have especially good caretakers, as noted above, because adoptive parents are virtuous people whom an adoption agency has investigated and interviewed.<sup>17</sup> Or some might think that the adopted children must be especially charming or talented for people other than their birth parents to choose them and commit to caring for them for many years.<sup>18</sup>

However, historically to a large degree, and perhaps more subtly today, the adopted child stigma has carried negative connotations. Adopted children are seen as coming from a defective biological line; their birth parents either did not want them or were immoral and dysfunctional.<sup>19</sup> Adopted children are seen as damaged goods, presumed to have suffered maltreatment after birth before being rescued and processed by the child protective system, and therefore, likely to have lifelong struggles.<sup>20</sup> This presumption is accurate as to a substantial percentage of adoptees, because the reality is that proactive child protective service (CPS) intervention at birth to protect babies at high risk of maltreatment is rare,<sup>21</sup> so children

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<sup>13</sup> Wegar, *supra* note 9, at 364; *see also id.* 366–67 (describing research showing that adoption workers also stigmatize adoptive parents).

<sup>14</sup> Cahn, *supra* note 11, at 1150; Dwyer, *supra* note 2, at 882–83.

<sup>15</sup> Cahn, *supra* note 11, at 1150.

<sup>16</sup> *See* Karen March, *The Dilemma of Adoption Reunion: Establishing Open Communication Between Adoptees and Their Birth Mothers*, 46 FAM. REL. 99, 104 (1997).

<sup>17</sup> *See* Cahn, *supra* note 11, at 1150; Dwyer, *supra* note 2, at 882–83.

<sup>18</sup> *Cf.* Paul Sachdev, *Adoption Reunion and After: A Study of the Search Process and Experience of Adoptees*, 71 CHILD WELFARE 53, 60 (1992) (relating comments by adoptees that “they were made to feel that they were ‘chosen’ and ‘special’”).

<sup>19</sup> *See* March, *supra* note 7, at 656; Miall *supra* note 8, at 36 (referring to “the bad blood theory”); *id.* at 37–38; Wegar, *supra* note 9, at 364.

<sup>20</sup> *See* Cahn, *supra* note 11, at 1153; Miall, *supra* note 8, at 38; Wegar, *supra* note 9, at 363 (noting a study finding widespread doubt about the mental health of adoptees and expectation that adoptees will have developmental and social problems).

<sup>21</sup> Dwyer, *supra* note 1, at 441–52.

who come into CPS custody for the most part do so only after already having experienced abuse or neglect.<sup>22</sup> Adopted children also appear atomistic, because they are disconnected from their extended biological family and because we suspect their extended adoptive family keeps them at arms length, never treating them as full or equal members of the family.<sup>23</sup> They are persons with no real family.<sup>24</sup> Because of this perception, adopted children are often uncomfortable revealing that they were adopted.<sup>25</sup> This perception is a major reason why many adoptees undertake a search for their birth parents: we communicate to them that they are deficient, lacking something of great importance, and as a result, they go to great lengths to try to become complete.<sup>26</sup>

Thus, there are many families in our society in which the legal parents are the only caretaking parents an adopted child has ever known, functioning the same way and having the same needs as any other family, and which are viewed by adoptees as their true family,<sup>27</sup> yet which the law and society label as not “real” or “natural,” solely because the legal, permanent, caretaking parents are not the adults who biologically produced

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<sup>22</sup> *Id.*

<sup>23</sup> Apparently many in fact do. See March, *supra* note 7, at 657. But cf. Miall, *supra* note 8, at 36 (reporting that two-thirds of adopters interviewed said that close friends and family viewed their adoptive parent-child relationships “as basically the same as biological parenthood,” while others said that family members tried to discourage them from adopting).

<sup>24</sup> See, e.g., March, *supra* note 7, at 657; Sachdev, *supra* note 18, at 59 (relating one adoptee’s experience of having spent her “whole life living a lie” and another’s experience of feeling she was not a “full person” until she knew her “roots”).

<sup>25</sup> See March, *supra* note 7, at 656.

<sup>26</sup> See March, *supra* note 7, at 657–58; Wegar, *supra* note 9, at 364 (noting study finding that “a main motivating factor for adoptees who search for unknown family members was the wish to neutralize the stigma of adoption”). I emphasize that it is only a partial explanation because I do not want to be mistaken for denying that connection to biological parents is significant for children even in ways that are not socially constructed. Evolution might well have hardwired humans to recognize and bond with biological relatives, especially parents. Cf. Sachdev, *supra* note 18, at 59 (“[T]he motivation behind search is largely the adoptee’s intense identity and genealogical needs.”).

<sup>27</sup> See March, *supra* note 7, at 656; March, *supra* note 16, at 102; Sachdev, *supra* note 18, at 63; Wegar, *supra* note 9, at 364 (citing research showing that adoptees perceived no difference between their families and families based on biology).

the child.<sup>28</sup> This labeling is detrimental for such children, as it undermines their sense of self-worth,<sup>29</sup> diminishes their parents' satisfaction and confidence in child rearing,<sup>30</sup> and produces a pall of secrecy within adoptive families concerning the child's biological origins that generates "needless grief, pain, and fear" within those families.<sup>31</sup> All parents need social support to carry out their responsibilities most effectively, and the stigmatizing of adoptive families as deviant can make adoptive parents feel they are doing something bad rather than supremely commendable.<sup>32</sup> In addition, the stigmatizing might diminish the attractiveness of raising children who are not one's biological offspring. Though there is no shortage of adults in the United States today wanting to adopt newborns,<sup>33</sup> there would likely be an even larger surplus of applicants if the role were treated and viewed as normal parenthood. This could have spillover benefits for older children awaiting adoption, as to whom there is a shortage of applicants in some communities.<sup>34</sup>

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<sup>28</sup> See Miall, *supra* note 8, at 37; Wegar, *supra* note 9, at 367.

<sup>29</sup> See March, *supra* note 7, at 656.

<sup>30</sup> Wegar, *supra* note 9, at 366.

<sup>31</sup> Sachdev, *supra* note 18, at 66.

<sup>32</sup> See Miall, *supra* note 8, at 38; Wegar, *supra* note 9, at 368.

<sup>33</sup> See, e.g., ELIZABETH BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* 181 (1999) ("The potential pool of adoptive parents is enormous—it dwarfs the pool of waiting children. About 1.2 million women are infertile and 7.1 percent of married couples, or 2.1 million.") (footnote omitted); Brian H. Bix, *Perfectionist Policies in Family Law*, 2007 U. ILL. L. REV. 1055, 1061 (2007) (book review) ("[G]iven the current supply and demand for children for adoption, there is every reason to believe that a baby given up immediately after birth would have no trouble finding a loving home.").

<sup>34</sup> Libby S. Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV. J. ON LEGIS. 1, 11; see also U.S. GEN. ACCOUNTING OFFICE, *FOSTER CARE: RECENT LEGISLATION HELPS STATES FOCUS ON FINDING PERMANENT HOMES FOR CHILDREN, BUT LONG-STANDING BARRIERS REMAIN*, GAO-02-585 38 (2002) (noting that states are increasingly finding it difficult to find adoptive homes for older children in foster care); Martin Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1745 (2000) (book review) ("By the time the foster children are eligible for adoption—the time it will take to exhaust reunification efforts and the time it will take for the courts to order termination—children will almost certainly be older than two years, and often considerably older. These simply are not the children that these couples want to adopt."); Mark F. Testa, *When* (continued)

Therefore, whatever one might think about the moral correctness or policy wisdom of birth parents' relinquishing their babies, or of the state's taking custody of newborns against the birth parents' wishes, one could accept that if these things are going to continue to occur, and if some children are going to be raised from the outset by people other than their biological parents, we might be able and obligated to do something to avoid or ameliorate the detriment to these children from the stigmatizing of non-biological parenting and families. Notably, there are cultures in the world in which there is little or no stigmatizing of adoptive families, where child rearing by non-biological parents is generally viewed as no different from child rearing by biological parents.<sup>35</sup> This suggests that the valorizing of biology and the subtle denigration of adoptive families is not inevitable.

In two recent articles, I have advanced two types of arguments for changing the way states make decisions about parentage at birth, in ways that would result in many more children entering immediately after birth into families with parents who are not their birth parents. First, I have argued that the state should make a greater effort to identify at birth babies whose birth parents are presumptively unfit, and as to those babies the state should (a) immediately determine whether the parents are in fact fit or can be made fit within six months, and, if not, then (b) immediately terminate the birth parents legal relationship to the baby and place the baby with adoptive parents.<sup>36</sup> That argument is aimed at securing better practical outcomes within the existing basic statutory framework, under which the state places newborns into legal relationships with birth parents without regard to fitness,<sup>37</sup> and then, in cases of unfitness, later effects a termination of parental rights and adoption if necessary to protect the child's developmental interests.<sup>38</sup> Children then have two sets of legal parents in succession, even if they only have one set of social or permanent

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*Children Cannot Return Home: Adoption and Guardianship*, 14 FUTURE CHILD. 115, 119 (2004).

<sup>35</sup> See Wegar, *supra* note 9, at 368 (discussing research showing non-stigmatizing perceptions of informal adoptive families in African-American communities in the United States and adoptive families in non-western countries).

<sup>36</sup> Dwyer, *supra* note 1, at 467-91.

<sup>37</sup> See Dwyer, *supra* note 2, at 859 & n.28, 869.

<sup>38</sup> See *id.* at 954.

caregiving parents. My proposal reflects the urgency to act immediately after birth to get babies into permanent families, an urgency that stems from the extreme vulnerability of newborns and from the crucial importance for a child's development of forming a secure attachment within the first year of life to a permanent, competent caregiver.<sup>39</sup>

Second, I have advanced moral and constitutional arguments for changing the statutory parentage framework to establish a new basic approach. I have argued that newborn babies have a moral right,<sup>40</sup> and a constitutional right under the Due Process Clause of the Fourteenth Amendment,<sup>41</sup> against the state's placing them in the first instance into a legal relationship with birth parents the state knows to be unfit. Thus, for example, if the state terminates an adult's parental rights today as to one child, because the adult severely abused the child and failed to respond to rehabilitative efforts, and if the same adult gives birth to another child next week, the state violates that new baby's fundamental rights by forcing him or her ever to be the legal child of that adult, just as it would violate an adult's fundamental rights by forcing her to marry a man known to be an unrehabilitated spousal abuser.

Both arguments advocate reforms that would result in many more newborn babies being available for legal family relationships with adults other than their birth parents. The demand for newborns among adoption applicants is high,<sup>42</sup> and the babies are likely to have a much better life if raised by adoptive parents rather than unfit birth parents.<sup>43</sup> Newborn children have a right to the state choosing that better life for them, just as adults have a right to choose for themselves a spouse, from among all those willing and available, with whom they think they can have the best possible life.<sup>44</sup>

In this article, I propose reconceptualizing the legal process for creating legal parent-child relationships at the time of birth, so that a child's first permanent caretaking parents receive the same treatment and

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<sup>39</sup> See Dwyer, *supra* note 1, at 416–19.

<sup>40</sup> JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* 205–06 (2006).

<sup>41</sup> James G. Dwyer, *A Constitutional Birthright: The State, Parentage, and Newborn Persons*, 56 UCLA L. REV. 755 (forthcoming 2009).

<sup>42</sup> See *supra* note 33 and accompanying text.

<sup>43</sup> See Dwyer, *supra* note 1, at 415–34.

<sup>44</sup> See DWYER, *supra* note 40, at chs. 3–7.

status regardless of whether they are also the child's biological parents. I propose that parentage laws be reformed to eradicate terms and concepts such as "natural parent" and "adoptive parent" that embody dubious normative assumptions and cultural biases that are detrimental to the welfare of children and to the family life of biologically unrelated parents and children.<sup>45</sup> What we today know as rules of maternity and paternity—terms that to many people connote precisely "legal parenthood based on biological parenthood"—would be incorporated into a Law of First Parents that confers initial legal parenthood on a child's first long-term caregivers, whether or not those caregivers are biologically related. What we today know as adoption rules would become the Law of New Parents, and they would never apply to biologically unrelated parents who are a child's first "real" parents in the sense of being caretakers who intend to be permanent social parents (as opposed to foster parents or temporary guardians). In Part I, I elaborate on the normative motivation for reconceptualizing parentage. In Part II, I explain in some detail how a Law of First Parents would operate and how it might differ, in its application to biologically-unrelated caregivers, from current adoption laws.

#### I. THE FLAWED FOUNDATION OF THE CURRENT CONCEPTION

Two mistaken beliefs underwrite conventional attitudes and legal rules relating to parentage. One is that the state is not involved in family formation when biological parents become a newborn baby's legal parents.<sup>46</sup> In that typical case, it is thought, the parent-child relationship arises by nature pure and simple. After the fact, parents ask the state for documentation of their parenthood, to facilitate school attendance, travel, and so forth, but otherwise the state is just a bystander to child rearing by "natural parents." For the state to examine the fitness of individual birth parents and to deny some the freedom to take or keep a child in their home constitutes "intervention," whereas no state intervention in private life exists when the state refrains from inquiring whether birth parents are minimally fit to take a child home and raise the child. The second

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<sup>45</sup> See Wegar, *supra* note 9, at 363.

<sup>46</sup> See Dwyer, *supra* note 1, at 410 (stating that the state's "role and responsibility in family formation and custodial placement of children" is generally overlooked).

mistaken belief is that adults have a moral right to possession of their biological offspring regardless of whether that is good for a child.<sup>47</sup>

The first belief is mistaken because social parent-child relationships in fact depend on legal parent-child relationships,<sup>48</sup> and obviously the state creates legal parent-child relationships.<sup>49</sup> Birth parents take their offspring home from the hospital because a state law confers parental status and rights of custody on them.<sup>50</sup> Absent that legal conferral of status and rights, birth parents would have no legal basis for objecting to any other adult, such as a nurse at the hospital, walking off with the baby at any time.<sup>51</sup> State laws emanate, of course, from conscious decisions of

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<sup>47</sup> Cf. Denise A. Skinner & Julie K. Kohler, *Parental Rights in Diverse Family Contexts: Current Legal Developments*, 51 FAM. REL. 293, 293 (2002) (“[T]he premise of the fundamental rights of biological parents continues to be a basic tenet of family law.”); Laura Beresh Taylor, Note, *C.R.B. v. C.C. and B.C.: Protecting Children’s Need for Stability in Custody Modification Disputes Between Biological Parents and Third Parties*, 32 AKRON L. REV. 371, 373 (1999) (“[T]he view that biological parents have a natural right to the custody of their children has endured.”).

<sup>48</sup> See Dwyer, *supra* note 1, at 411–12.

<sup>49</sup> *Id.*

<sup>50</sup> See, e.g., GA. CODE ANN. § 16-5-45(a)(3) (2007) (“‘Lawful custody’ means that custody inherent in the natural parents, that custody awarded by proper authority as provided in Code Section 15-11-45, or that custody awarded to a parent, guardian, or other person by a court of competent jurisdiction.”); OHIO REV. CODE ANN. § 2111.08 (LexisNexis 2007) (“[W]ife and husband are the joint natural guardians of their minor children and . . . have equal powers, rights, and duties . . .”).

<sup>51</sup> Cf. ARIZ. REV. STAT. ANN. § 13-1302(A)(1) (2001) (“A person commits custodial interference if, knowing or having reason to know that the person has no legal right to do so, the person . . . [t]akes, entices or keeps from lawful custody any child . . . who is entrusted by authority of law to the custody of another person . . .”); COLO. REV. STAT. ANN. § 18-3-302(2) (West 2008) (“Any person who takes, entices, or decoys away any child not his own under the age of eighteen years with intent to keep or conceal the child from his parent or guardian . . . commits second degree kidnapping.”); GA. CODE ANN. § 16-5-45(b)(1)(A) (2007) (“A person commits the offense of interference with custody when without lawful authority to do so the person: . . . [k]nowingly or recklessly takes or entices any child . . . away from the individual who has lawful custody of such child . . .”); IDAHO CODE ANN. § 18-4501(2) (2004) (“Every person who willfully: . . . [l]eads, takes, entices away or detains a child under the age of sixteen (16) years, with intent to keep or conceal it from its custodial parent, guardian or other person having lawful care or control thereof . . . is guilty of kidnapping.”); LA. REV. STAT. ANN. § 14:45(a)(2) (2007) (“Simple  
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government officials. In every U.S. state, as it happens, such officials have chosen to confer initial legal parenthood in nearly all cases solely on the basis of biological parenthood.<sup>52</sup> They do so even though they must be aware that a significant percentage of birth parents are unfit to parent, as evidenced by prior adjudications of serious maltreatment of other children and/or by incapacitation from drug abuse or mental illness.<sup>53</sup> They might do so because they adhere to some belief about natural rights of biological parents, but that does not obviate the fact that they are acting and are making the determinative decisions as to the family life of newborn babies. That many state legislatures do make one or more narrow exceptions to the general approach of predicated legal parenthood on biology demonstrates that they can do otherwise. Examples include denial of legal parent status to biological fathers of children who are conceived through artificial

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kidnapping is . . . [t]he intentional taking, enticing or decoying away, for an unlawful purpose, of any child not his own and under the age of fourteen years, without the consent of its parent or the person charged with its custody.”); MD. CODE ANN., CRIM. LAW § 3-503(a) (LexisNexis 2002) (“A person may not, without color of right: (i) forcibly abduct, take, or carry away a child under the age of [twelve] years from: 1. the home or usual place of abode of the child; or 2. the custody and control of the child’s parent or legal guardian; . . . or (iii) with the intent of depriving the child’s parent or legal guardian, or any person lawfully possessing the child, of the custody, care, and control of the child, knowingly secrete or harbor a child under the age of [twelve] years. (2) In addition to the prohibitions provided under paragraph (1) of this subsection, a person may not, by force or fraud, kidnap, steal, take, or carry away a child under the age of [sixteen] years.”).

<sup>52</sup> Dwyer, *supra* note 2, at 859 & n.28.

<sup>53</sup> See OHIO ADMIN. CODE 5101:2-35 (Supp. 2007–2008) (listing Ohio regulations concerning central child abuse registry); 2006 Ohio Legis. Serv. Ann. L-1128 (West) (Ohio legislation mandating creation of sex abuse registry); Ohio Attorney General, Sexual Civil Child Abuse Registry, <http://www.ag.state.oh.us/citizen/sccar.asp> (last visited Oct. 27, 2008); see also HAW. REV. STAT. §§ 587–589 (2008) (requiring birth facility personnel to report to the local child protection agency a positive drug test in newborns); LA. CHILD. CODE ANN. art. 610(G) (Supp. 2008) (requiring physicians to order toxicology tests upon infants if there is cause to believe that the mother used a controlled substance during pregnancy and to report positive results); ME. REV. STAT. ANN. tit. 22, § 4011-B(1) (Supp. 2007) (requiring health care providers involved in the delivery or care of an infant to report when they know or reasonably suspect that the infant has been born affected by illegal substance abuse or suffering from withdrawal symptoms resulting from prenatal drug exposure); 23 PA. CONS. STAT. ANN. § 6386 (West Supp. 2008) (same); VA. CODE ANN. § 63.2-1509(B) (2007) (same).

insemination of donated sperm<sup>54</sup> or through a married woman's extra-marital affair.<sup>55</sup>

Legislators actually have great freedom in deciding on whom they will confer legal parenthood. The U.S. Supreme Court has never held as a constitutional matter that states must always confer initial parentage on biological parents.<sup>56</sup> At most, the Court has hinted obliquely in dictum that biological parenthood might constitutionally entitle a person to an opportunity to demonstrate preparedness to parent.<sup>57</sup> In several cases, the Court has implied that adults whom the state has found to be unfit to raise children have no constitutional rights with respect to parentage,<sup>58</sup> and the Court has thus far left states entirely free to define fitness.<sup>59</sup> State governments have simply chosen to make fitness irrelevant to initial parentage.

Thus, the current parentage regime reflects an unnecessary, uncompelled, contingent choice by state actors to force newborn babies into legal family relationships with birth parents even when the state

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<sup>54</sup> See, e.g., OHIO REV. CODE ANN. § 3111.95(A)–(B) (LexisNexis 2003) (“If a married woman is the subject of a non-spousal artificial insemination and if her husband consented to the artificial insemination, the husband shall be treated in law and regarded as the natural father of a child conceived as a result of the artificial insemination, and a child so conceived shall be treated in law and regarded as the natural child of the husband. . . . If a woman is the subject of a non-spousal artificial insemination, the donor shall not be treated in law or regarded as the natural father of a child conceived as a result of the artificial insemination, and a child so conceived shall not be treated in law or regarded as the natural child of the donor.”).

<sup>55</sup> See, e.g., CAL. FAM. CODE § 7540 (West 2004) (“Except as provided in Section 7541, the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.”); N.D. CENT. CODE, § 31-11-02(4) (1996) (“The following presumptions, and no others, are conclusive: . . . The issue of a wife cohabiting with her husband who is not impotent is presumed indisputably to be legitimate.”).

<sup>56</sup> Dwyer, *supra* note 41 (manuscript at 51).

<sup>57</sup> See *Lehr v. Robertson*, 463 U.S. 248, 262 (1983) (“The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring.”).

<sup>58</sup> Dwyer, *supra* note 41 (manuscript at 51–58) (analyzing a series of Supreme Court cases and explaining why unfit birth parents have no constitutional right to become legal parents).

<sup>59</sup> See *id.* (manuscript at 57).

knows that the birth parents are unfit and even when there are other adults available whom the state has found to be fit to parent and who wish to raise those babies. This suggests both that things could be otherwise and that state actors should have good reasons for choosing this regime rather than another, given that the current regime imposes substantial costs on many people—namely, on children consigned to the custody of unfit parents and on adults who wish to raise children not their biological offspring (i.e., adoption applicants) but who are denied the opportunity.<sup>60</sup> Once we recognize that the current regime is contingent, rather than inevitable, and requires justification, we should feel freer to imagine things being different.

The second belief—that is, that adults have a moral right to possession of their biological offspring regardless of whether that is, on the whole and in the long run, good for a child—is also mistaken or untenable. It is inconsistent with more general principles concerning the rights that human beings have in formation of intimate relationships.<sup>61</sup> Common law, statutory law, and constitutional law governing the formation of every other type of intimate relationship reflect a principle that neither the state nor any private party may force a human individual to enter into an intimate relationship that is contrary to that individual's welfare.<sup>62</sup> In the case of competent adults forming relationships with each other, the law instantiates that principle by giving all of them a choice-protecting right to refuse association with anyone they wish to avoid.<sup>63</sup> In the case of incompetent adults entering into relationships analogous to the parent-child relationship—that is, into guardian-ward relationships—the law instantiates this principle in rules requiring courts to choose a guardian either in accordance with an advance directive or on the basis of the best interests of the ward.<sup>64</sup> In the case of parent-child relationships by adoption, the law instantiates this principle by requiring a court to confer legal parenthood on a particular adoption applicant based on the child's

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<sup>60</sup> On the life-long damage that results from abuse and neglect in infancy, see Dwyer, *supra* note 1, at 415–28.

<sup>61</sup> See generally DWYER, *supra* note 40, at ch. 4 (discussing popular moral attitudes and political philosophies supporting the plenary rights adults enjoy for intimate relationships).

<sup>62</sup> See *id.* at chs. 3–4.

<sup>63</sup> See *id.* at 70–79.

<sup>64</sup> *Id.* at 82–85.

best interests.<sup>65</sup> This general principle governing state creation of all legal intimate relationships other than parent-child relationships based on biology rests on the empirical fact that intimate relationships substantially impact persons' fundamental interests<sup>66</sup> and on the moral belief that the state should have equal concern for every person's fundamental interests and should not treat any persons instrumentally, as mere means to serve the welfare or desires of others.<sup>67</sup>

One would actually be hard pressed to find any scholar or morally serious person who explicitly insists that biological parents have a moral right to be the legal parents of their offspring even if that is on the whole bad for the child. Most people likely assume, without giving the matter much thought, that making biological parents legal parents is always best.<sup>68</sup> Many people seem simply oblivious to, or unmindful of, the plain fact that some biological parents are demonstrably unfit at the time a child is born. Those who are aware might think parents are always entitled to prove themselves redeemed, to be given a new chance with each new child they produce, regardless of how dysfunctional they have been found in the past.<sup>69</sup> Such people are likely unaware of how crucially important to a person's lifelong well being it is to have a positive, nurturing experience in the first year of life, free from trauma, and to form a secure attachment and bond with a permanent caregiver.<sup>70</sup> They are, therefore, unaware that the state harms newborns by sending them, with fingers crossed, to live with

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<sup>65</sup> See Dwyer, *supra* note 2, at 882.

<sup>66</sup> See Dwyer, *supra* note 41 (manuscript at 63–64).

<sup>67</sup> See DWYER, *supra* note 40, at ch. 4.

<sup>68</sup> See, e.g., MARY PARKE, CTR. L. & SOC. POL'Y, ARE MARRIED PARENTS REALLY BETTER FOR CHILDREN? WHAT RESEARCH SAYS ABOUT THE EFFECTS OF FAMILY STRUCTURE ON CHILD WELL-BEING 1 (2003), [http://www.clasp.org/publications/marriage\\_brief3\\_annotated.pdf](http://www.clasp.org/publications/marriage_brief3_annotated.pdf).

<sup>69</sup> See, e.g., Anne S. McIntyre, Comment, *Isolating Past Unfitness: The Obstacle of In re Gwynne P. for Incarcerated Parents in Illinois*, 27 N. ILL. U. L. REV. 281, 300–01 (2006) (“[T]erminating parental rights based exclusively on repeated incarceration undermines the state's interest in rehabilitating its citizens . . . [because it] discourages thousands of incarcerated mothers who are trying to reform their lives in order to regain custody of their children.” (citing Brief for Chicago Legal Advocacy for Incarcerated Mothers et al. as Amici Curiae at 18, *In re Gwynne P.*, 830 N.E.2d 508 (Ill. 2005) (No. 98131), 2004 WL 3550557)).

<sup>70</sup> See Dwyer, *supra* note 1, at 415–28.

deeply dysfunctional parents or by placing them in foster care during the crucial first year of life while the state attempts (rarely successfully with seriously dysfunctional parents) to rehabilitate the parent.<sup>71</sup> In short, those who believe existing parentage laws reflect a moral entitlement of biological parents likely also believe, wrongly, that those laws do not harm babies.

For someone to claim that birth parents do have such a moral right—even at the expense of a baby’s welfare—would be flatly inconsistent with the general principle just discussed. By way of justification, then, they would have to argue that the principle does not apply in the case of biological parents seeking a legal relationship with babies. That might be so if there is something morally different about state creation of a legal parent-child relationship between a newborn and birth parents. Perhaps the interests birth parents have in becoming legal and social parents are greater than the interests people generally have in forming any other kind of relationship, such as a marriage, guardianship, or adoptive parenthood. Or perhaps the interests babies have at stake in avoiding consignment to unfit parents are less weighty than the interests people generally have in avoiding bad, harmful relationships. Or perhaps the babies’ interests, regardless of how weighty as an empirical matter relative to those of biological parents, simply do not matter as much morally.

An empirical supposition that birth parents’ interests are factually weightier than those of babies is utterly implausible. Becoming a parent is a profound experience for many, but it is likely less so for deeply dysfunctional people (e.g., people whose lives are dominated by drug addiction), and even in the best case it is not a fundamental interest in an objective sense.<sup>72</sup> It is a higher aspiration people have in life, not a need they have in order to function and pursue any other goals. It is not clearly a stronger interest than what adults generally have in forming an intimate partnership. Being a parent or a spouse can be very rewarding, but most adults can function normally without being either, and many choose not to become a parent or a spouse.<sup>73</sup> In contrast, babies have the most

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<sup>71</sup> See *id.* at 419–24 (explaining how for newborns, maltreatment, foster care, and disruptions in attachment relationships can cause lifelong difficulties).

<sup>72</sup> See JAMES G. DWYER, *RELIGIOUS SCHOOLS V. CHILDREN’S RIGHTS* 90–91 (1998).

<sup>73</sup> See Dwyer, *supra* note 41 (manuscript at 63–64) (discussing how raising a child is not fundamental or basic to anyone’s welfare).

fundamental, basic, and profound interests at stake in the state's selection of the adults who will take custody of them, determine the environment in which they grow up, and control their lives for roughly eighteen years.<sup>74</sup>

A moral supposition that babies' interests simply matter less would amount to saying that babies are of lesser moral status than adults. Some philosophers have taken this view, maintaining that only "persons" have "full" moral status, and that human beings are not persons unless and until they mature into autonomous, rational moral agents.<sup>75</sup> They have generally not bit the bullet and embraced the unattractive practical implications such a view might have. I recently completed a book analyzing in great depth the relative moral status of children and adults, taking into account all the current general theories about, and criteria of, moral status. I conclude, to the contrary, that children are of *higher* moral status than adults, making their interests *more* important than like interests of adults.<sup>76</sup> I cannot rehearse the analysis here, so I will simply point out that the prevailing view today, in philosophy, law, and popular morality, is that children are "persons" at least from the moment of birth and are of moral status equal to that of adults, meaning that their interests count for just as much as like interests of adults.<sup>77</sup> Thus, if babies have factually weightier interests at stake in the parentage decision than adults have, the state should be more concerned to protect the babies than to gratify the adults. A view that birth parents have a moral right to gratification of their desire to occupy the role of legal parent, even when this would entail sacrificing fundamental interests of babies, is thus indefensible.

In sum, the current parentage law regime, under which the state makes biological parents the first legal parents and (with rare exception) custodians of the child with no regard for fitness,<sup>78</sup> and which supports the common cultural view of biological parents as "natural parents" and "real

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<sup>74</sup> See Dwyer, *supra* note 1, at 415–19.

<sup>75</sup> See JAMES G. DWYER, *THE SUPERIORITY OF YOUTH: MORAL STATUS AND HOW WE TREAT CHILDREN* (forthcoming 2009) (manuscript at 1, on file with Capital University Law Review).

<sup>76</sup> *Id.* (manuscript at 3).

<sup>77</sup> See, e.g., PETER SINGER, *PRACTICAL ETHICS* 16 (2d ed. 1993) ("The principle that all humans are equal is now part of the prevailing political and ethical orthodoxy.").

<sup>78</sup> Dwyer, *supra* note 2, at 859 & n.28, 869.

parents,”<sup>79</sup> amounts to the state’s creating families based on a contingent rather than inevitable choice. This choice cannot be justified on the grounds that biological parents are morally entitled to it. It is also incompatible with a general moral and legal principle that governs formation of every other type of intimate relationship and violates the moral right of newborn babies to treatment as moral equals.

It is also extremely unwise from a social policy standpoint. Although there is administrative simplicity up front in attaching legal parenthood almost always to biological parenthood, doing so generates enormous social costs down the road when the state must undertake a lengthy and cumbersome child protection process and provide remedial services as to those children whom the state should never have placed into relationships with birth parents.<sup>80</sup> For these reasons, we should reconsider how we as a society go about assigning initial legal parenthood and how we understand the role of adults who raise children who are not their biological offspring.

## II. REFORMED PARENTAGE LAWS

In *The Relationship Rights of Children*, I present an extended normative argument for the position that, in any situation where the state is making decisions about the basic structure of children’s family lives, children have a moral right to the state’s acting solely as an agent or surrogate for the child.<sup>81</sup> This means that state decision-makers should strive solely to make for the child the decision that the child would most likely make if able to choose for himself or herself. Typically this would amount to choosing on the basis of a comprehensive assessment of the child’s interests. This would make children’s legal relationship rights equivalent to the legal rights that competent adults demand for themselves—that is, our right to choose for ourselves the relationships that we believe are best for us. We are not forced to sacrifice our basic welfare in order to gratify the wishes of other adults who want to be in a

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<sup>79</sup> See, e.g., OHIO REV. CODE. § 3111.01(A) (LexisNexis 2003).

<sup>80</sup> See CHING-TUNG WANG & JOHN HOLTON, PREVENT CHILD ABUSE AM., TOTAL ESTIMATED COST OF CHILD ABUSE AND NEGLECT IN THE UNITED STATES 4–5 (2007), [http://member.preventchildabuse.org/site/DocServer/cost\\_analysis.pdf?docID=144](http://member.preventchildabuse.org/site/DocServer/cost_analysis.pdf?docID=144) (estimating annual national spending of \$33.1 billion on direct costs and \$70.6 billion on indirect costs of child abuse and neglect).

<sup>81</sup> See DWYER, *supra* note 40, at 205–06.

relationship with us. Likewise, the state has no business forcing children to sacrifice their basic welfare in order to gratify the wishes of adults who want to be in a relationship with them.

In other words, the state, acting through a legislature, a court, or an executive agency, should act in a fiduciary or proxy role, with a singular focus on the welfare of the child. The sole reason why it is at all legitimate for the state to make such momentous decisions for private persons as who their family members will be is that babies cannot decide for themselves, yet they need to have families.<sup>82</sup> The state's authority should extend no further than satisfying that need. The law reflects such an understanding in the analogous context of guardian appointment for incompetent adults;<sup>83</sup> state laws dictate selection of a guardian solely on the basis of the ward's best interests, while giving no protection to the desires of any particular applicant for the guardian position.<sup>84</sup> It should likewise aim to always create for children the best family arrangement possible, taking into account all of a child's needs and the practical limits of government administration.

With this basic orientation in mind, we can think in a new way about parentage laws—that is, about the regime state legislatures create for placing newborn babies into families. Let us imagine that we are legislators pondering what we can do to make it most likely that each newborn will have the best possible family relationships. Immediately we recognize that it is not possible to predict how every potential parent, whether a birth parent or an adoptive parent, will fare in child rearing. There is a great deal of uncertainty in most cases about how particular individuals will be in raising particular children. There is also some indefiniteness to the concept of “best possible family relationships,” because there are likely many different sorts of parent-child relationships that are equally conducive to a child's well being. Moreover, we do not know everything about children's well being, and there can be reasonable disagreement about how to measure well being or what constitutes well being. In addition, individualized decision making for all parent-child relationships is probably not administratively feasible and it is certainly not politically realistic.

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<sup>82</sup> Dwyer, *supra* note 41 (manuscript at 9).

<sup>83</sup> See DWYER, *supra* note 40, at 82–85.

<sup>84</sup> See *id.*

Complicating considerations such as these cause some people to throw up their hands and say it is pointless, perhaps even illegitimate, for the state to aim for optimal family relationships in choosing for babies.<sup>85</sup> But that goes too far. Such people do not advocate for complete elimination of state child protective efforts—for example, intervention to prevent parents from breaking their children's bones in anger.<sup>86</sup> This suggests that even they recognize that we do have sufficient confidence as to some aspects of child welfare and that we do have sufficient confidence in predicting in some cases that particular individuals will act contrary to a child's welfare (e.g., if a parent broke a child's leg with a baseball bat yesterday, he or she is likely to do something harmful again in the future).<sup>87</sup> Humility regarding our ability to predict the future, our knowledge of children's welfare, and our practical ability to effectuate our ideals through government agencies might justifiably lead us to adopt more modest aims in reformulating parentage laws than we might otherwise. It cannot, however, justify the state's altogether washing its hands of the consequences of its selection of legal parents. Some intermediate approach

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<sup>85</sup> See, e.g., Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 1037 (1975).

<sup>86</sup> See *id.* at 1008–09.

<sup>87</sup> See Dwyer, *supra* note 1, at 426; see also Douglas J. Besharov et al., *How We Can Better Protect Children from Abuse and Neglect*, 8 FUTURE CHILD. 120, 120 (1998) ("Fully 48% of the child abuse deaths in 1995 involved children previously known to the authorities."); *id.* at 124 ("Data from records reviewed in three cities show that in Milwaukee, 48% of families investigated for abuse had prior involvement with the child welfare system; in Washington, D.C., 32% of such families had been previously reported to protective services; and in New York City, in 43% of families that had been the subject of an abuse/maltreatment complaint, children were abused or maltreated again while under city supervision.") (footnotes omitted); Mary B. Larner et al., *Protecting Children from Abuse and Neglect: Analysis and Recommendations*, 8 FUTURE CHILD. 4, 10 (1998) ("A review of case records from one California county found that 71% of families with unsubstantiated reports had prior or subsequent reports for child maltreatment."); *id.* at 11 ("[R]ecent efforts suggest that these tools [including records of parents' past child maltreatment] can help sort cases into low-, medium-, and high-risk groups, which can be assigned different priority for investigation, services, and CPS oversight. For instance, one study in Oklahoma found that 57% of families assessed as 'high risk' had another substantiated incident of abuse or neglect within [eighteen] months, compared with only 15% of those assessed as low risk and 4% of those rated very low risk.").

is called for, one that aims at least to avoid placing newborn babies in the care of manifestly unfit parents, and one that gives as much support and respect to parent-child relationships between biologically unrelated persons as it does to parent-child relationships between birth parents and offspring.

Such an intermediate approach could allow for a default rule or presumption that biological parents will become a child's first legal parents, but allow for deviation from the default and rebuttal of the presumption by a showing that a biological parent is not fit at the time of birth and is not likely to become fit within six months. That sort of showing is precisely what child protection agencies are now routinely called on to make in termination of parental rights proceedings.<sup>88</sup> Today such proceedings can be based entirely on risk of future maltreatment, even before the child at issue has experienced maltreatment, a risk that might be evidenced by a parent's having previously severely abused or neglected another child,<sup>89</sup> or in some states by a parent's drug addiction, mental illness, or imprisonment.<sup>90</sup> What I propose is that the laws facilitate an agency's making such a showing at the time of birth, before a baby has been damaged by abuse or neglect, and that the legal action in which an agency makes such a showing be reconceptualized as one to deny first parenthood rather than to terminate a parent-child relationship. Rather than placing a baby into a legal relationship with someone who cannot assume caretaking responsibilities and then initiating lengthy procedures for terminating that legal relationship,<sup>91</sup> forever stigmatizing the baby as a hand-me-down even when the baby has always been in the home of alternative caregivers,<sup>92</sup> the law should withhold legal parent status in the first instance from adults who are unfit to raise a child. The state should instead award initial legal parenthood to adults who can and will be the child's permanent, nurturing caregivers. It should put those first and permanent "real parents" on an equal footing with biological parents who raise their offspring, and it should treat and characterize a child's "real family" as his or her first and only family. The change would be principally symbolic, but that symbolic change might go some way toward

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<sup>88</sup> See Dwyer, *supra* note 2, at 952–66.

<sup>89</sup> See Dwyer, *supra* note 1, at 461–62.

<sup>90</sup> See *id.* at 463–64.

<sup>91</sup> See Dwyer, *supra* note 41 (manuscript at 10); Dwyer, *supra* note 2, 952–66.

<sup>92</sup> See *supra* notes 19–22 and accompanying text.

eliminating the negative stigma that currently attaches to non-biological parent-child relationships.

To illustrate how this proposal would operate, I offer below a bare-bones version of a model law of initial parenthood. I have elsewhere advanced a much more elaborate, ideal-world model.<sup>93</sup> Here I just want to give some concrete sense of the alternative I have in mind for treatment of newborn “adoption.” I do not endeavor to account here for the various assisted reproduction scenarios that can arise,<sup>94</sup> nor for co-parenting by same-sex couples,<sup>95</sup> but by ignoring these issues I do not mean to stake out any position as to how the law should deal with them. I also leave out many necessary subsidiary rules, such as how a court is to identify biological fathers.

CODE OF EVERystate  
TITLE I – FAMILY FORMATION  
CHAPTER 1: THE PARENT-CHILD RELATIONSHIP  
SUBCHAPTER A: FIRST PARENTS  
§ 1001 State Selection of First Parents  
Following a child’s birth, the state shall register  
persons as the first parents of the child, and place the

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<sup>93</sup> See DWYER, *supra* note 40, at ch. 8. In my book on children’s relationship rights, I considered from a theoretical perspective what an ideal parentage regime might be. See *id.* at 4. At least one critic has dismissed that proposal out of hand as being too impractical or unfamiliar. See Catherine J. Ross, Book Review, 16 L. & POL. BOOK REV. 975 (2006), available at <http://www.bsos.umd.edu/gvpt/lpbr/reviews/previous/2006/12/relationship-rights-of-children.html>. Professor Ross says little to challenge the assumptions or reasoning of the theory I painstakingly developed; she simply does not like the conclusions that the theory generates. See *id.* This misses the point of theoretical normative work, which I stated in the introduction of the book—namely, to develop an account of what real world actors should be striving toward even if they cannot fully realize it and/or a standard against which to measure what is lost morally by making concessions to real world exigencies and human imperfections. See DWYER, *supra* note 40, at 1–10.

<sup>94</sup> See, e.g., Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 597 (2002) (discussing various assisted reproduction methods used to achieve pregnancy other than coitus).

<sup>95</sup> See, e.g., Michael T. Morley et al., *Developments in Law and Policy: Emerging Issues in Family Law*, 21 YALE L. & POL’Y REV. 169, 198–208 (2003) (discussing developments concerning gay and lesbian parent rights and adoption).

names of those persons on the child's birth certificate, as follows:

(1) A birth mother who is able and willing to assume the full responsibilities of raising a child after recovery from the birth shall be the child's first legal mother.

(2) A biological father who is able and willing immediately after the birth to assume the full responsibilities of raising a child shall be the child's first legal father.

(3) A birth mother is presumptively unable to assume the full responsibilities of raising a child if the baby tests positive at birth for exposure to illegal drugs or alcohol. A birth mother or biological father is presumptively unable to assume the full responsibilities of raising a child if she or he has been found to have abused or neglected a child within two years preceding the birth; has been involuntarily committed to a psychiatric facility within two years preceding the birth, is in or about to enter prison, has been convicted within the year preceding the child's birth of any felony or any drug offense, or is below the age of seventeen.

(4) As to any baby whose birth mother does not satisfy the requirements of paragraph (1) or whose biological father does not satisfy the requirements of paragraph (2), the local child protection agency shall assess whether that birth mother or biological father is more likely than not to satisfy those requirements within six months of the baby's birth. If so, legal motherhood or fatherhood, as appropriate, shall be held in abeyance, and shall vest in that birth mother or biological father if and when she or he does satisfy those requirements, but if parenthood has not vested in that person within six months of the baby's birth, it shall never vest in that person absent a judicial determination that this would be in the child's best interests, in light of other available potential parents. If not, other persons may petition for first parent status at any time, and a court shall vest first parent status in such persons when that is in the best interests of the child, in light of all available alternatives.

Additional statutory provisions would be needed to spell out who can initiate agency or court review of a birth mother's or biological father's ability to assume responsibilities, what responsibilities are relevant and important (e.g., assumption of custody or provision of co-parenting support to a custodial parent), what factors are to be considered in determining likelihood of becoming willing and able to assume responsibilities, and what factors courts should consider in deciding whose parentage would be in a given child's best interests. Furthermore, the child protection title of the code would need an amendment to spell out what a child protection agency should do if one or both of the biological parents does not become a legal parent at birth, and in particular what is to happen when neither biological parent can take custody of the newborn. Ideally, when denial of legal parentage to both biological parents is likely, the agency should place the baby in the care and custody of other persons who would like to be the baby's permanent legal parents—that is, in, what today would be called a “pre-adoptive placement.”<sup>96</sup>

I emphasize that the above model is meant to be merely suggestive and that it leaves out many necessary details in the hope that readers will not dismiss the idea out of hand because of some detail included or left out, but will instead respond to the basic idea itself and, if amenable to the basic idea, suggest refinements of the statutory scheme for effecting it. I would also emphasize that I have developed extensive theoretical arguments for the basic idea in other writings,<sup>97</sup> arguments that take into account a vast empirical literature on child development and parental dysfunction, and I encourage readers to digest those arguments before reaching a conclusion as to whether the basic idea is morally defensible.

The proposal offered here is consistent with other currents in legal scholarship relating to parent-child relationships. One such current is the strong support among scholars for recognition of social parenting—that is, hands-on, daily care of a child, as constitutive of “real” parenting and as deserving of legal protection.<sup>98</sup> Such support is often coupled with the

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<sup>96</sup> See Dwyer, *supra* note 1, at 438, 487.

<sup>97</sup> See generally DWYER, *supra* note 40; Dwyer, *supra* note 1; Dwyer, *supra* note 41.

<sup>98</sup> See, e.g., Gilbert Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships With Parent-Like Individuals*, 53 MD. L. REV. 358 (1994); Nancy D. 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 (continued)

rejection of biological relation as a sole or dominant basis for creating legal relationships and conferring legal protection on adults' desires as to custody of, contact with, or control over children.<sup>99</sup> My proposal here likewise diminishes the importance of biology, but still makes it presumptively determinative of legal parenthood. It retains some emphasis on biological parenthood because (a) all else being equal, children in our society are better off if raised by their biological parents;<sup>100</sup> (b) it is much more feasible administratively to deploy a default rule in favor of biological parents and to aim for different parentage only as to babies whose biological parents are manifestly unfit, rather than attempting a best-interests assessment among all applicants in every case;<sup>101</sup> and (c) it is

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(1990). But see Gregory A. Loken, *The New "Extended Family"—"De Facto" Parenthood and Standing Under Chapter 2*, 2001 BYU L. REV. 1045 (2001).

<sup>99</sup> See, e.g., Philip F. Schuster II, *Constitutional and Family Law Implications of the Sleeper and Troxel Cases: A Denouement for Oregon's Psychological Parent Statute?*, 36 WILLAMETTE L. REV. 549, 572–73 (2000) ("With the emergence of the 'psychological parent' concept in American jurisprudence has come the realization that caretaker relatives and others charged with the protection of children are much more than 'colonial'-type appropriators, trainers, or mere custodial caretakers charged by the regulatory state, as *parens patriae*, to care for and discipline the child. . . . Legal scholars and others began recognizing that, while the genetic bond of parenthood remains paramount, forfeiture of this preference may occur where the natural parent abrogates his or her parental responsibility. When this occurs, the child's best interests may be served by the continuance of a genuine emotional bond with the primary, nonbiological caretaker."); *id.* at 576 ("The attributes of a family relationship, which are constitutionally protected, are present even when the person acting as 'parent' is not in fact the biological parent. This reality has been given explicit recognition by the Supreme Court: '[B]iological relationships are not exclusive determination of the existence of a family. . . . [T]he importance of the familial relationship, to the individuals involved and to the society stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children . . . as well as from the fact of blood relationship.' . . . The stronger the emotional bond between the child and the nonbiological parent, the more compelling the reasons for protecting the substantial and fundamental liberty interest, or 'opportunity interest,' which is implicated by the reality of relationships within the marriage family unit." (quoting *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 843–44 (1977))) (footnotes omitted).

<sup>100</sup> See, e.g., PARKE, *supra* note 68, at 1.

<sup>101</sup> Cf. DWYER, *supra* note 40, at ch. 8 (laying out the intricate structure needed in order to assess the best interests of the child among all applicants from birth).

less dramatic a departure from existing practices and therefore more likely to receive substantial public support.<sup>102</sup> Significantly, the legal system has increasingly conferred legal protection on “de facto parents” and “psychological parents” in custody and visitation cases,<sup>103</sup> departing from the traditional rule of recognizing custody and visitation claims only by legal parents (and sometimes grandparents).

Another such current is emphasis on the symbolic significance and psychological impact of legal terminology and conceptual frameworks. The most prominent example in recent years has been the argument that same-sex couples must have the opportunity for legal “marriage” rather than functionally equivalent civil unions in order to realize true social equality.<sup>104</sup> In the child welfare arena, a significant example is advocacy for eliminating “custody” terminology in post-divorce decision making about parents’ relationships with children, in favor of “parenting plans.”<sup>105</sup> The concept of “custody award” is thought to entail the idea of winner and

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<sup>102</sup> See, e.g., Loken, *supra* note 98, at 1047 (urging rejection of a “de facto” parentage regime); Ross, *supra* note 93 (criticizing an approach that requires a change from the present state of the law).

<sup>103</sup> See, e.g., IND. CODE ANN. § 31-14-13-2.5(d) (West 2008) (authorizing courts to confer custody on a non-parent who has been a de facto custodian when that is in a child’s best interests); Lawrence Schlam, *Standing in Third-Party Custody Disputes in Arizona: Best Interests to Parental Rights—And Shifting the Balance Back Again*, 47 ARIZ. L. REV. 719 (2005) (discussing numerous court decisions relating to non-parents’ right to seek custody of children).

<sup>104</sup> See, e.g., William N. Eskridge, Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Union*, 64 ALB. L. REV. 853, 859–60 (2001) (“[M]arriage is a matter of status, as well as rights and duties. Socially, the married couple has long had a special, and generally privileged, status in American society. That privileged status remains reserved for different-sex—presumptively heterosexual—couples; same-sex couples, who are acknowledged to form similar commitments and families, get another institution which is presented as marriage without the name. The historically excluded group can easily view this as second-class citizenship . . . .”); Toni Lester, *Adam and Steve vs. Adam and Eve: Will the New Supreme Court Grant Gays the Right to Marry?*, 14 AM. U. J. GENDER SOC. POL’Y & L. 253, 265 (2006) (“[P]erhaps the most important reason that gay couples prefer same sex marriage is the symbolic societal recognition that married couples enjoy as they embark on what they hope will be a journey of mutual emotional and financial interdependence.”).

<sup>105</sup> See, e.g., Margaret F. Brinig, *Penalty Defaults in Family Law: The Case of Child Custody*, 33 FLA. ST. U. L. REV. 779, 797 n.92 (2006).

loser, so using it fosters litigation and a focus on parental rights and interests rather than on the welfare of the child in question.<sup>106</sup> A few states have recently adopted this approach, dispensing with the traditional “custody” language in their statutes and requiring parents to submit or courts to impose a “parenting plan.”<sup>107</sup>

Attendant to the change in parentage law that I propose, legislators would also need to revise what is now called adoption law. Legislators would need to eliminate remnants of the traditional way of thinking that biological parents are always a child’s first parents and any other persons who raise a child are, at best, adoptive parents.<sup>108</sup> Some changes would be substantive. For example, adoption laws now generally refer to the right of biological parents to consent to or veto an adoption, having in mind situations where biological parents have not previously had their rights terminated.<sup>109</sup> Under current law, this encompasses both newborn adoptions and adoptions of older children.<sup>110</sup> Consistent with the revision of parentage laws to enable other persons to become a child’s first parents, legislators should amend consent provisions in adoption law to refer to consent or veto by a child’s “existing legal parents,” who might be the birth parents but who might instead be biologically unrelated first legal parents. Biological parents *per se* would have no statutory power to authorize or block an adoption; only those who are legal parents at the time of the adoption petition would have that power. Birth parents who wish to have others raise their offspring would no longer relinquish parental rights,

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<sup>106</sup> See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATION 7 (2000).

<sup>107</sup> See Brinig, *supra* note 105, at 797 n.92; see also March, *supra* note 16, at 104 (urging elimination of the term “adoption reunion” and substitution of “adoptee-birth mother contact” or “adoptee-birth father contact”).

<sup>108</sup> See, e.g., OHIO REV. CODE ANN. § 3111.02(A) (LexisNexis 2003 & Supp. 2008) (stating that there are only three types of parent child relationships: birth mother, birth father, and adoptive parent).

<sup>109</sup> See, e.g., *id.* § 3107.06(A)–(B) (stating that an adoption petition may be granted only if the minor’s mother and father consent in writing); *id.* § 3107.07(D) (stating that if parental rights have been terminated, the terminated parent’s consent to adoption is not required).

<sup>110</sup> See, e.g., *id.* § 3107.02(A)–(B) (allowing adoptions for any minor without condition or for an adult upon meeting certain conditions).

but rather would simply inform a child welfare agency that they do not wish to become legal parents.

Other changes might be merely superficial. For example, if any state's adoption laws refer to terminating the parental rights of "natural parents" or "biological parents" in order to free a child for adoption,<sup>111</sup> that state's legislature should amend the laws to refer instead to terminating the rights of "existing legal parents." That is the current reality today anyway; "natural parents" have no rights that can be terminated if they never received legal parent status (e.g., in the case of sperm donors)<sup>112</sup> or if they have already had their legal rights terminated (e.g., through a child protective proceeding).<sup>113</sup> Conversely, even under current law, existing parents whose rights need to be terminated before an adoption can proceed might themselves be adoptive parents; a very small number of children go through more than one new family adoption.<sup>114</sup>

On the other hand, this proposal would not entail any change with respect to the ability of persons raised by non-biological parents to learn about and make contact with their birth mother or birth father.<sup>115</sup> The urge to undertake a search for biological parents<sup>116</sup> would likely diminish, but at the same time, the search might become easier if de-stigmatizing non-biological parent-child relationships results in greater openness about the biological origins of children in those relationships.

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<sup>111</sup> See, e.g., CONN. GEN. STAT. ANN. § 45a-743(1) (2004) (defining an "adoptable person" as "a person who has not yet been adopted but whose biological parents had their parental rights terminated").

<sup>112</sup> See, e.g., *Lamaritata v. Lucas*, 823 So. 2d 316, 317 (Fla. Dist. Ct. App. 2002).

<sup>113</sup> See Dwyer, *supra* note 2, at 954.

<sup>114</sup> Cf. Pat Wingert & Anna Nemtsova, *When Adoption Goes Wrong*, NEWSWEEK, Dec. 17, 2007, at 58, 58 ("Reports that a growing number of foreign adoptees were being turned over to the U.S. foster-care system prompted the Department of Health and Human Services to order its first national count: [eighty-one] children adopted overseas were relinquished to officials in [fourteen] states in 2006.").

<sup>115</sup> See James Gladstone & Anne Westhues, *Adoption Reunions: A New Side to Intergenerational Family Relationships*, 47 FAM. REL. 177, 177-79, 183 (1998) (providing an analysis and study on the possible results and benefits of adopted persons establishing contact with birth parents); March, *supra* note 16, at 99, 103-104 (presenting studies and suggestions for "adoption reunions").

<sup>116</sup> See Sachdev, *supra* note 18, at 54.

Though I emphasized, in motivating consideration of a revised parentage law, the social effects for adoptive parent and child of the adoption stigma, the model law set forth above would likely have immediate and substantial practical consequences as well. Though the proposal still embodies a presumption in favor of biological parents, the substantive basis and procedures for excluding them from legal parenthood are much simpler than in the current regime, which should allow for much quicker permanence for babies born to unfit birth parents. Current law vests in birth parents legal parenthood<sup>117</sup> and substantial legal protections against severance of the parent-child relationship. So-called “child protective” agencies are very protective of biological parents’ supposed rights to keep “their children.”<sup>118</sup> So long as unfit birth parents express some desire to raise a child, CPS agencies will generally give them at least a year to try to make themselves minimally capable of caring for a child because CPS agencies are in most cases legally required to do this.<sup>119</sup> If states did not make unfit birth parents legal parents in the first place, however, the substantive and legal protections of a state’s child protection laws simply would not apply to them. CPS would not need to try to rehabilitate them and then petition for TPR, for it is required to do that only with persons who are a child’s legal parents.<sup>120</sup> Under my proposal, CPS would initially just assess the prognosis for birth parents who are unfit at the time of a child’s birth, and if its prognosis is negative, its involvement would end. Then the matter of a child’s parentage would be in the hands of a court deciding among private petitioners for the role (which could include the birth parents).

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<sup>117</sup> Dwyer, *supra* note 2, 859 & n.28, 869.

<sup>118</sup> See Dwyer, *supra* note 1, at 452–57 (explaining that states almost never place children in adoptive homes until after the children have been permanently damaged by maltreatment).

<sup>119</sup> 42 U.S.C. § 675(5)(C) (2000) (requiring that states hold permanency hearings no later than twelve months after a child enters foster care to determine whether the child should be returned to the parent, or after a state agency provides compelling reasons, whether it is in the best interests of the child to terminate parental rights); see also Dwyer, *supra* note 1, at 435–36.

<sup>120</sup> See, e.g., WYO. STAT. ANN. § 14-2-309(a)(iii) (2007) (stating that reasonable efforts must be used to rehabilitate the parent who is responsible for the abuse or neglect).

### III. CONCLUSION

Reconceptualizing non-biological parent-child relationships that begin at or soon after birth as a child's first family and real family, rather than as a second-best substitute family, and shifting legal focus in connection with legal parenthood from the biological connection to whoever a child's first real caregivers are, would likely help to eliminate the harmful stigmatizing of what are now called "adoptive parents," "adoptive families," and "adopted children."<sup>121</sup> Engendering greater respect for adoptive family should in turn help to remove the shroud of secrecy as to birth parents that often causes children to suffer.<sup>122</sup> It will never be a good thing to know that one's birth mother was a drug addict or that one's father was a violent felon. However, life should be significantly better for children raised by non-biological parents when society deems those parents their true parents because it signals to them that their family is equal to any other. These children will be treated as if birth parent absence from a child's life is simply an interesting fact about them, like a child's being unusually tall, having been born overseas, or being allergic to cats. It does no one any good to make birth parent absence a dominant trope in a child's life.

Further policy questions that warrant consideration include: What effect would it have on children adopted later in life, after termination of their legal relationship with "First Parents," to put them in a separate category from children who enter non-biological parent-child relationships as newborns? Do later-adopted children now benefit from being in the same conceptual category as children adopted at birth, such that calling their adoptive parents "New Parents" rather than "First Parents" would exacerbate the stigma that attaches to them? What effect would it have on birth parents' willingness to "relinquish" a child, when they recognize that they are not prepared to raise the child, if we change their status from "Terminated Parents" to "Never Parents"? This paper does not present a comprehensive policy analysis. My aim is just to induce consideration of the possibility that children raised by non-biological parents, in general, might be better off if the legal system conceptualized newborn adoption in a different way, so as to eliminate the widely-recognized problem of adoption stigma.

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<sup>121</sup> See Wegar, *supra* note 9, at 363–64, 366–67.

<sup>122</sup> See Sachdev, *supra* note 18, at 66.