

## FATHERS AND THE SUPREME COURT: FOUNDING FATHERS AND NURTURING FATHERS

*Nancy E. Dowd\**

Fathers have not fared well recently in the Supreme Court.<sup>1</sup> Despite the predominance of men on the Court, fathers, especially unmarried fathers, largely have been treated as insignificant, irrelevant, and marginal parents. Their relational interests have gone unrecognized and unsupported.<sup>2</sup> While marriage may confer greater legal solicitude, that support of fathers recognizes their marital vows, not their parenting.<sup>3</sup> Yet this negative view of fathers is not entirely characteristic of the Court's recent decisions. The broad concepts of shared parenting and gender-neutral support of parents, as well as a consciousness and support of the range of families in contemporary society, are also a part of the Court's recent jurisprudence.<sup>4</sup> This inconsistency and confusion suggests that stereotypes of fathers run deep despite changing constitutional norms. It also suggests that the Court falls back on those stereotypes when it is in need of a basis on which to render a decision in a difficult case. Fathers can easily be used as scapegoats or simply ignored as irrelevant. But the Court should not use the fig leaf of fatherhood to cover an underlying concern that is difficult to articulate as coherent doctrine.<sup>5</sup> Rather, it is time to carefully examine and challenge the assumptions of the Court's view of fathers and recast constitutional norms. The constitutional norm of fatherhood should be nurture.

Many fathers who have sought recognition or support from the legal system would not be surprised by the negative outcomes in these recent cases.

---

\* Chesterfield Smith Professor of Law and Co-Director, Center for Children and Families, University of Florida Levin College of Law. I am honored to have been invited to be part of the 2005 Thrower Symposium, which presented a stimulating and challenging look at family law. My colleague, Barbara Bennett Woodhouse, provided an invaluable critical perspective on this piece, and I am grateful for her insights and suggestions.

<sup>1</sup> See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct 2301 (2004); *Nguyen v. INS*, 533 U.S. 53 (2001); *Miller v. Albright*, 523 U.S. 420 (1998).

<sup>2</sup> See *infra* discussion of cases in Part I.

<sup>3</sup> See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

<sup>4</sup> See, e.g., *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

<sup>5</sup> For example, the plaintiff's standing in *Newdow* permitted the Court to avoid the underlying controversial First Amendment issue. See *infra* discussion of *Newdow* in Part I.

According to the view of many fathers, the family law system is deeply biased against them.<sup>6</sup> Fathers express a range of opinions as to why this is so, some of which are strongly antifeminist,<sup>7</sup> even woman-hating.<sup>8</sup> Nevertheless, bias against fathers represents a highly visible sign of a deep negative societal bias about men's caregiving that belies the supposed legal preference for gender neutrality and shared parenting.<sup>9</sup> This perception may seem especially ironic given the continued dominance of male judges; the systemic bias comes from predominantly male decisionmakers.<sup>10</sup> Fathers perceive that either they have

---

<sup>6</sup> See, e.g., Alliance for Non-Custodial Parent Rights (ANCPR), <http://www.ancpr.org> (last visited May 24, 2005); CPF/The Fatherhood Condition, <http://www.fatherhoodcoalition.org> (last visited June 9, 2005); National Congress for Fathers & Children (NCFC), <http://www.ncfc.net> (last visited June 9, 2005); Separated Parenting Access and Resource Center (SPARC), <http://www.deltabravo.net> (last visited June 9, 2005); see also Susan Dominus, *The Fathers' Crusade*, N.Y. TIMES, May 8, 2005, at 26; Alison S. Pally, *Father by Newspaper Ad: The Impact of In Re Adoption of a Minor Child on the Definition of Fatherhood*, 13 COLUM. J. GENDER & L. 169, 188 (2004).

<sup>7</sup> For the antifeminist claim that father rage is a reaction to feminists pushing men out of their proper role as breadwinners and heads of household, see DAVID BLANKENHORN, *FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM* 16 (1995). See also Travis Ballard, President, Nat'l Cong. for Fathers and Children, Statement at the Meeting on Supporting the Role of Fathers in Families at the White House (Nov. 27, 1995), <http://www.ncfc.net/travwhit.html> (arguing that feminist and women's rights reforms in antidiscrimination in employment and family law carried an antifamily, antimale consequence); Equal Justice Found., Families and Marriage, <http://www.ejfi.org/family/family.htm> (last visited June 10, 2005) (discussion of effect of feminists on marriage and family).

<sup>8</sup> See, e.g., Father's Rights Activists: In Their Own Words, <http://www.gate.net/~liz/fathers/free.htm> (last visited June 10, 2005) (commentary after father shot his son and himself when N.J. Supreme Court held father not entitled by law to change son's last name to father's last name); Quest Genetics, Paternity Fraud—Child Support Fraud—Infidelity Threatens Your Financial Future, [http://infidelitycheck.us/paternity\\_fraud.html](http://infidelitycheck.us/paternity_fraud.html) (last visited May 24, 2005) (commentaries on “duped fathers” including “cheating wife story”).

<sup>9</sup> It remains the common assumption that women are advantaged in custody proceedings even when men are equal or more involved caregivers. Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 967–76 (2005) (exploring gender bias data and role of attorneys in advising fathers they cannot win custody). One of the ways in which men's care is consistently ignored is in the collection of data about childcare, which continues to focus on mothers. See, e.g., THE URBAN INST., *FAST FACTS ON WELFARE POLICY*, <http://www.urban.org/uploadedpdf/900706.pdf> (last visited June 10, 2005) (“Nearly 3 Out of 4 Young Children with Employed Mothers Are Regularly in Child Care”); U.S. Census Bureau, *Who's Minding the Kids? Child Care Arrangements: Spring 1999, Detailed Tables (PPL-168)*, <http://www.census.gov/population/www/socdemo/child/ppl-168.html>; Heather Boushey, *Who Cares? The Child Care Choices of Working Mothers*, CEPR Data Brief No. 1 (May 6, 2003), [http://www.cepr.net/Data\\_Brief\\_Child\\_Care.htm](http://www.cepr.net/Data_Brief_Child_Care.htm). Even when fathers are the focus, it is with respect to their increasing provision of care while mothers work. See LYNNE M. CASPER, U.S. CENSUS BUREAU, *MY DADDY TAKES CARE OF ME! FATHERS AS CARE PROVIDERS*, P70–59, at 1 (1997), available at <http://www.census.gov/prod/3/97pubs/p-70-59.pdf>.

<sup>10</sup> The percentage of female judges on the federal bench was nearly twenty percent in 2001. Max Schanzenbach, *Racial and Sex Disparities in Prison Sentences: The Effect of District-Level Judicial Demographics*, 34 J. LEGAL STUD. 57, 71 (2005). Roughly the same proportion sit on the bench at the state court level. See, e.g., Tom McCann, *Cook County Makes Real Strides in Diversifying Bench*, CHI. LAW., July 2003, at 14.

no rights (such as with respect to reproductive decisionmaking),<sup>11</sup> or that their formal rights are not respected in application (such as rights to share in the parenting of their children),<sup>12</sup> and at the same time, that obligations, particularly financial obligations, are unfairly placed upon them.<sup>13</sup> Some fathers argue for a genetically-based status definition of fatherhood to correct the bias; that is, that fathers *as biological fathers* have inherent parental rights that must be respected.<sup>14</sup> Rather than a status-based definition, I argue that fathers' caretaking should be strongly supported by using a functional or relational definition grounded in actions. The actions that are the basis of rights should be acts of nurture, primarily in relation to children but also in relation to other caretakers.<sup>15</sup>

The disparagement of fathers is especially evident in two cases: *Elk Grove Unified School District v. Newdow*,<sup>16</sup> and *Nguyen v. Immigration and Naturalization Service (INS)*.<sup>17</sup> In *Newdow*, the Court decided that a father lacked standing, literally lacked a right to be heard, on the issue of whether requiring his daughter to recite the Pledge of Allegiance with the words "under God" in the pledge constituted an infringement of First Amendment rights.<sup>18</sup> The Court grounded *Newdow's* lack of standing in his status as a noncustodial father, despite his shared parenting of his daughter with her mother.<sup>19</sup> In *Nguyen*, the Court held that a differential standard for conferral of citizenship by fathers as opposed to mothers was justified based on inherent differences in the presumed parenting of mothers and fathers coupled with an argument of biological difference between fathers and mothers.<sup>20</sup> Joseph Boulais' actual

---

<sup>11</sup> See discussion *infra* Part II.B (on reproductive rights).

<sup>12</sup> There is highly controverted data of both bias in favor and bias against fathers in custody awards. NANCY E. DOWD, REDEFINING FATHERHOOD 141–42 (2000); see also Maldonado, *supra* note 9, at 967–75.

<sup>13</sup> See, e.g., Quest Genetics, *supra* note 8; Separated Parenting Access and Resource Center, *supra* note 6.

<sup>14</sup> Michael Newdow, the plaintiff in the Pledge of Allegiance case, for example, takes this view. He advocates for a presumption in favor of joint physical custody for nonmarital or divorced fathers based on genetic parenthood, and claims this is a constitutional entitlement. Michael Newdow, *Resolved, The Current Family Law System Is an Unconstitutional System That Is Far More Detrimental Than Beneficial* (on file with the *Emory Law Journal*). For a sampling of efforts to encourage stronger norms of shared parenting, see *supra* note 6. The related biological based "right" would be the right to disprove paternity so as not to be liable for child support. See Quest Genetics, *supra* note 8.

<sup>15</sup> For an extended treatment of the concept of fatherhood and the argument for a nurture-based definition, see DOWD, *supra* note 12.

<sup>16</sup> 124 S. Ct. 2301 (2004).

<sup>17</sup> 533 U.S. 53 (2001).

<sup>18</sup> 124 S. Ct. at 2311–2312.

<sup>19</sup> *Id.* at 2308–2312.

<sup>20</sup> 533 U.S. at 70–73.

parenting of his son was totally ignored; instead, assumptions about men's assumed desertion of their nonmarital children, particularly when born to a noncitizen mother, justified a higher evidentiary requirement for children claiming citizenship through their fathers.<sup>21</sup>

These negative, stereotypic views of fathers seem especially out of place given the Court's position in other cases supporting a more progressive, pluralistic, contemporary view of parents and families. The Court has recently decided two other cases that seem to recognize a quite different view of fatherhood. In a case decided between *Newdow* and *Nguyen, Nevada Department of Human Resources v. Hibbs*,<sup>22</sup> the Court upheld against constitutional challenge the Family and Medical Leave Act<sup>23</sup> as a proper exercise of congressional power to remedy violations of equal protection. In *Hibbs*, the Court noted not only the pattern of discrimination against mothers in the workplace, but also the denigration of fathers.<sup>24</sup> The Court was very sympathetic to how the stereotypes mutually reinforce each other to the detriment of both mothers and fathers.<sup>25</sup> *Hibbs*, then, is a virtual paean to fatherhood and gender-neutral co-equal parenting.

The second case that suggests a more positive view of fatherhood is *Troxel v. Granville*.<sup>26</sup> In *Troxel*, a plurality of the Court upheld an unmarried parent's right to make decisions about the extent of contact and relationship between her children and their paternal grandparents, striking down the application of a broad third-party visitation statute.<sup>27</sup> In the lead opinion, the Court acknowledged the broad range of family forms in contemporary society. The Court strongly defended the rights of single parents. At the same time, by the time the case was heard, the single mother had remarried and a blended family had been formed. A stepfather was now present, who adopted the two girls who were the focus of the litigation, perhaps making it easier to reject the argument by the grandparents that they were asserting the rights of their dead son.<sup>28</sup> *Troxel* can be read as a case strongly supporting nurturing parents as

---

<sup>21</sup> *Id.* at 60–70.

<sup>22</sup> 538 U.S. 721 (2003).

<sup>23</sup> 29 U.S.C. §§ 2601–2654 (2000).

<sup>24</sup> 538 U.S. at 727–31.

<sup>25</sup> *Id.* at 730. *Hibbs* was a surprising turn given the Court's federalism decisions and also its rejection of gender discrimination arguments in striking down the Violence Against Women Act in *Morrison*. *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>26</sup> 530 U.S. 57 (2000).

<sup>27</sup> *Id.* at 75.

<sup>28</sup> Transcript of Oral Argument, *Troxel*, 530 U.S. 57, available at [http://parentsrights.com/troxel\\_oral\\_](http://parentsrights.com/troxel_oral_)

well as appreciating the range of families in our society. The careful consideration of the rights of the grandparents, linked to the children through the father, also supports a more positive view of fatherhood.

Finally, the Court's recent decision in *Lawrence v. Texas*<sup>29</sup> is another decision that suggests an understanding of relational ties and a range of privacy rights that honors the intimate relationships at the core of parenting. In *Lawrence*, the Court spoke in broad terms of the right of the individual to engage in meaningful relationships, based on the principles of autonomy, dignity, and liberty.<sup>30</sup> Personal decisions relating to family relationships were included among those fundamental matters that the Court viewed as demanding respect by the state, as well as constitutional support:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>31</sup>

This article critiques the Court's negative, stereotypic views of fatherhood, especially unmarried fatherhood, and argues that the Court should reconsider and refine its definition of fatherhood around nurture. The corrective for the Court's current view is not to revert to a status-based definition of fatherhood, but rather to reinforce and recast its prior fathers' rights decisions to establish a definition grounded on relationship and care.<sup>32</sup> What should be discarded are outdated stereotypes about men as incapable, incompetent caregivers, as well as patriarchal norms of status and ownership based in genetic and economic fatherhood recognized exclusively within marriage.<sup>33</sup> Instead, fatherhood must be grounded in nurture, a relational concept rather than a status definition. Incorporated into this standard should be the necessity of positive interrelationship with other caregivers rather than an articulation of fatherhood

---

arguments.htm (last visited June 15, 2005) (rebuttal argument of Mark Olson, on behalf of petitioners).

<sup>29</sup> 539 U.S. 558 (2003).

<sup>30</sup> *Id.* at 562.

<sup>31</sup> *Id.* at 574 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

<sup>32</sup> See *infra* discussion of fathers' rights cases in Part II.

<sup>33</sup> See *infra* Part II for discussion regarding illegitimacy, and the argument that illegitimacy should no longer be constitutionally acceptable as a legal category.

in isolation from mothers or other caregivers. It is essential to define fatherhood in egalitarian, cooperative terms—otherwise we risk recasting patriarchy into our constitutional standards. It is critical to recognize the gender challenges of recasting fatherhood without demeaning motherhood, as well as redefining fatherhood in ways that challenge traditional masculine norms averse to care and nurture. Finally, as part of the removal of patriarchal norms, the Court should rethink illegitimacy as a constitutionally valid category to divide and stigmatize children.<sup>34</sup>

Part I of this article reviews the Court's recent decisions, with particular emphasis on *Newdow* and *Nguyen*. Part II explores the constitutional context of the Court's decisions with respect to fathers' rights, gender discrimination, and illegitimacy. Part III articulates the standard of nurturing fatherhood and justifies that standard based on the relational interests of fathers and children. Finally, Part IV discusses some of the implications of this standard and some arguments that might be raised in opposition to this standard.

## I. RECENT DECISIONS

### A. *Elk Grove Unified School District v. Newdow* (2004)

*Newdow* was a lightning rod for the Court because the case involved a challenge to the wording of the Pledge of Allegiance.<sup>35</sup> The Pledge originated in 1892 in conjunction with the 400th anniversary of Columbus' discovery of America.<sup>36</sup> The first legalization of the Pledge occurred in 1942, when Congress codified the wording and other rules and customs.<sup>37</sup> In 1954, the "under God" language was added in response to the rise of "godless" communism.<sup>38</sup> Rather than determine whether the history and intent in adding the words violated the First Amendment, the majority of the Court ducked the issue by concluding that Michael Newdow, the father, lacked standing to raise the constitutional claim.

---

<sup>34</sup> The Uniform Parentage Act does this but does not, in my view, go far enough. See Uniform Parentage Act (2002), available at <http://www.law.upenn.edu/bll/ulc/ulc.htm#upa>; Uniform Law Commissioners, The National Conference of Commissioners on Uniform State Laws, <http://www.nccusl.org> (last visited June 15, 2005). It nevertheless is a model from which to begin crafting a concept that *all* children are legitimate and valued.

<sup>35</sup> 124 S. Ct. 2301 (2004).

<sup>36</sup> *Id.* at 2305.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 2306.

Although Michael Newdow never married the mother of his daughter, he became a very engaged father. An emergency room physician who returned to school to earn his law degree from the University of Michigan, he and his daughter's mother co-parented their daughter, sharing physical custody and living in close proximity. Approximately thirty percent of his daughter's time was spent with Newdow, and Newdow frequently pressed for fifty percent. The parents' disagreement over the Pledge litigation, and the larger issue of religious upbringing, clearly stressed their joint parenting relationship. During the struggle over custody, the formal custodial framework shifted from joint legal to sole custody and ultimately back to joint legal custody, but with the mother retaining tie-breaking authority in the custodial framework.<sup>39</sup> Irrespective of the formal custodial structure, under California law, each parent was entitled to expose the child to his or her religious perspective.<sup>40</sup>

Justice Stevens, writing for the Court, concluded that Newdow did not have an interest in his own right to challenge the Pledge, nor could he claim to sue on behalf of his daughter as her "next friend."<sup>41</sup> In reaching this conclusion, Justice Stevens refused to follow the interpretation of the lower federal courts of California law, while at the same time declaring that the Court's aversion to resolving matters of family law justified its decision.<sup>42</sup> The controversial nature of the case suggests the Court was eager to avoid deciding the substantive issue by any means possible. The Court chose fatherhood as its cover, apparently finding that rationale convenient and easy. In the process, the Court ratified an outmoded view of fathers. Other analyses, particularly deference to state constitutions and/or children's best interests, might have permitted the same outcome without the body blow to fathers.

When Michael Newdow filed his lawsuit, the District Court held that there was no violation of the Establishment Clause.<sup>43</sup> The Court of Appeals reversed, revisiting the case three times.<sup>44</sup> In the first decision, the court held Newdow had standing in his own right as a parent to bring the challenge, and held the Pledge unconstitutional.<sup>45</sup> After the first decision, the child's mother,

---

<sup>39</sup> The facts of Newdow's relationship are drawn from Maura Dolan, *They Pray for Judicial Restraint*, L.A. TIMES, Mar. 23, 2004, at A1, Dominus, *supra* note 6, and Richard Willing, *Custody Case Colors Pledge Battle*, USA TODAY, Mar. 16, 2004, at 3A.

<sup>40</sup> Newdow v. U.S. Cong., 313 F.3d 500, 504–05 (9th Cir. 2002).

<sup>41</sup> Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2311 (2004).

<sup>42</sup> *Id.* at 2307.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* (citing Newdow v. U.S. Cong., 292 F.3d 597, 602, 612 (9th Cir. 2002)).

Sandra Benning, asked to intervene in the case and requested dismissal of the complaint. She argued that because a state court had given her sole *legal* custody of her daughter, although she and Newdow shared joint *physical* custody, she was entitled to make final decisions about her daughter's upbringing, and she objected to the case being brought in her daughter's name.<sup>46</sup> After this motion was brought, the state court enjoined Newdow, based on the mother's status and right as the ultimate legal decisionmaker, from suing as the daughter's next friend.<sup>47</sup> The court said nothing about Newdow's standing as a parent. In the second federal decision, the court returned to standing and held Newdow retained his standing based on his status as a parent: "[U]nder California law Newdow retains the right to expose his child to his particular religious views even if those views contradict the mother's, and . . . Banning's objections as sole legal custodian do not defeat Newdow's right to seek redress for an alleged injury to his own parental interests."<sup>48</sup> In its third opinion, the Court of Appeals denied rehearing en banc and amended its initial order, omitting the discussion of standing.<sup>49</sup>

During the course of the litigation, custody shifted from joint physical/sole legal custody to joint legal custody but with Banning having the power to break a tie if the parties disagreed.<sup>50</sup> Justice Stevens saw no difference between these two custody structures because the child's mother, Banning, retained the power to decide issues upon which the parties disagreed. The key, according to Justice Stevens, was that Newdow was not the final decisionmaker; because of that, he not only lacked standing on behalf of his daughter, he also had no standing of his own as a parent.<sup>51</sup> Justice Stevens' rejection of Newdow's parental standing required rejecting the decision of the lower federal court, a court usually entitled to considerable deference based on principles of federalism. Ironically, this rejection was grounded on keeping the federal government out of family law decisionmaking: "When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law."<sup>52</sup>

---

<sup>46</sup> *Id.* at 2307.

<sup>47</sup> *Id.* at 2307–08.

<sup>48</sup> *Id.* at 2308 (citing *Newdow v. U.S. Cong.*, 313 F.3d 500, 504–05 (9th Cir. 2002)).

<sup>49</sup> *Id.* (citing *Newdow v. U.S. Cong.*, 328 F.3d 466, 468 (9th Cir. 2003)).

<sup>50</sup> *Id.* at 2310.

<sup>51</sup> *Id.* at 2307.

<sup>52</sup> *Id.*

Justice Rehnquist's concurrence took issue with this application of standing doctrine, and reached the constitutional issue, finding the Pledge constitutional.<sup>53</sup> Justice Rehnquist argued the domestic relations exception is a narrow one, intended only to prohibit federal courts from deciding divorce, alimony, or child support in cases that otherwise satisfy the standards for diversity jurisdiction.<sup>54</sup> It therefore was inapplicable here. He also pointed out that California law allows a noncustodial father to retain the right to expose his child to his religion, even if it is in conflict with the religious training of the custodial parent.<sup>55</sup> Justice Rehnquist also noted that Michael Newdow did not consider himself a noncustodial father; he was a father, *simpliciter*.<sup>56</sup> Therefore, it was this relational interest that formed the basis for his claim of standing: "[T]he daughter *is not the source* of respondent's standing; instead it is their relationship that provides respondent his standing."<sup>57</sup> Justice O'Connor agreed with this standing analysis, particularly with respect to the necessary deference to the interpretation of state law by the local federal court. She agreed the Pledge is constitutional.<sup>58</sup> Justice Thomas suggested yet another constitutional analysis, one that takes issue with earlier doctrine stemming from *Lee v. Weisman*.<sup>59</sup> In the absence of revisiting that case, he would find the Pledge unconstitutional.<sup>60</sup>

In the end, Newdow is a father without a voice. This results not from an examination of his presence and conduct in the life of his child, but rather from a formalistic analysis of legal categories devised to regulate the nonmarital family, whether never married or divorced. This view makes constitutional standing rest on the designation of whether a parent is either the sole, primary, or joint custodial parent. One could perhaps argue that these labels of status may match actual patterns of nurture. It is only in that sense that the decision might be justified if the designation represents a decision by a trial court closer to the facts of family life that the nurturing parent gets to be the tie breaker, and thus elevates this relation over pure status. Such an outcome would justify the result on entirely different grounds. The damage otherwise done by the

---

<sup>53</sup> *Id.* at 2320 (Rehnquist, C.J., concurring).

<sup>54</sup> *Id.* at 2313–15 (majority opinion).

<sup>55</sup> *Id.* at 2315.

<sup>56</sup> *Id.* at 2315 n.1.

<sup>57</sup> *Id.* at 2316.

<sup>58</sup> *Id.* at 2321 (O'Connor, J., concurring).

<sup>59</sup> 505 U.S. 577 (1992).

<sup>60</sup> *Newdow*, 124 S. Ct. at 2330 (Thomas, J., concurring).

Court's standing analysis feeds negative, counter-productive stereotypes of fatherhood.<sup>61</sup>

*B. Nguyen v. INS (2001)*

An explicitly negative view of men, and fathers, pervades *Nguyen*.<sup>62</sup> *Nguyen* involved the statutory differentiation between citizen mothers and citizen fathers in unmarried relationships, and the capability of each to confer U.S. citizenship on their children born outside the United States.<sup>63</sup> The challenge arose in the context of a deportation proceeding that would have been aborted had the deportee been a U.S. citizen.

Nguyen was born in Saigon in 1969, the son of a Vietnamese mother and Joseph Boulais, an American who settled in Vietnam after discharge from the Army in 1963. Nguyen was abandoned by his mother shortly after birth, and then lived with his father and his father's wife Mai and her extended family. As South Vietnam crumbled, father and son became separated. Joseph and Mai were out of the country on a business trip when Saigon fell, so Nguyen and his grandmother fled on a refugee ship. Joseph and Mai returned to the United States; Nguyen was reunited with his father three months later, in Florida, entering the country as a refugee at age six.<sup>64</sup> Boulais took his son back to Texas, where he owned a mobile home park, and raised his son there.<sup>65</sup> A picture from one news story shows a smiling Nguyen astride a pony, a typical Texas kid.<sup>66</sup> There are few additional details about Nguyen's upbringing other than the fact that his father was his sole legal parent and by all accounts, was actively engaged in raising his son. In 1992 when he was twenty-two, Nguyen pled guilty to two counts of sexual assault on a child;

---

<sup>61</sup> In a system where what the Court says is important, the language used to justify its decision is significant. On Supreme Court discourse, see Mitchel Lasser, "*Lit. Theory*" Put to the Test: A Comparative Literary Analysis of American Judicial Tests and French Judicial Discourse, 111 HARV. L. REV. 689 (1998).

<sup>62</sup> 533 U.S. 53 (2001).

<sup>63</sup> 8 U.S.C. § 1409 (2000).

<sup>64</sup> Nguyen entered the country under the Indochinese Refugee Act. *Nguyen v. INS*, 208 F.3d 528, 530 (5th Cir. 2000).

<sup>65</sup> For this factual background, see Steve Lash, *Do the Requirements for Transmission of Citizenship Imposed on U.S. Fathers Violate Equal Protection?*, 2000-2001 PREVIEW U.S. SUP. CT. CAS. 185, 185-86; Raju Chebium, *U.S. Supreme Court Hears Constitutional Challenge to Portion of Citizenship Law*, CNN.com, Jan. 9, 2001, <http://archives.cnn.com/2001/LAW/01/09/scotus.ins.arguments/index>; Elodie Mailliet, *Nguyen Tuan et al. v. Immigration & Naturalization Service*, ON DOCKET, June 23, 2004, <http://docket.medill.northwestern.edu/archives/000497.php>.

<sup>66</sup> Chebium, *supra* note 65.

three years later in 1995, deportation proceedings were initiated.<sup>67</sup> While the deportation proceeding was pending, his father obtained an order of parentage based on conclusive DNA tests in 1998, when Nguyen was twenty-eight years old.<sup>68</sup>

Under the immigration statute applicable to Nguyen, children of citizen mothers became citizens at birth, as long as their mothers met certain requirements.<sup>69</sup> Children of citizen fathers, on the other hand, had to be legally acknowledged by their fathers before the child reached age eighteen, or they could not qualify for citizenship through their father. The father had to legitimate the child; declare paternity under oath; or a court must have established paternity.<sup>70</sup>

The Court treated this difference between fathers and mothers as justified because of the “different relationships” of mothers and fathers at the time of birth.<sup>71</sup> One important governmental interest served by the statute is “assuring that a biological parent-child relationship exists.”<sup>72</sup> If establishing biological parenthood is indeed the interest, then although the parents are not similarly situated in the sense that the mother gives birth and generally is the biological mother, while the biological father is not certain, mothers and fathers nevertheless could easily be equalized by the use of modern DNA testing.<sup>73</sup> The majority rejected this equalizer as a step that is not constitutionally mandated.<sup>74</sup> Given the value of citizenship and the importance of eliminating biological differences where they need not make a difference, this case was wrongly decided.<sup>75</sup> But even more questionable than this analysis is the acceptance of biology alone, a genetic link, as important. Presumably it is important as a basis to link a child to a U.S. citizen, but if genes alone will do,

---

<sup>67</sup> *Nguyen*, 208 F.3d at 530.

<sup>68</sup> *Id.* at 531.

<sup>69</sup> 8 U.S.C. § 1409 (2000).

<sup>70</sup> *Id.*

<sup>71</sup> *Nguyen v. INS*, 533 U.S. 53, 68 (2000). Justice Kennedy wrote the majority opinion in this closely divided 5–4 case, with Justice O’Connor writing the dissent. *Id.* at 56, 74. Justice Ginsburg joined the dissent. *Id.* at 74. From a gender perspective, then, five men voted against two men and two women.

<sup>72</sup> *Id.* at 61.

<sup>73</sup> On DNA testing and its reliability, see generally *GENETIC TIES AND THE FAMILY* (Mark Rothstein et al. eds., 2005).

<sup>74</sup> *Nguyen*, 533 U.S. at 63.

<sup>75</sup> For the Court’s narrow justification of differentiation based on biological differences, see, for example, *United States v. Virginia*, 518 U.S. 515, 533 (1996); *Cal. Fed. Sav. & Loan Ass’n. v. Guerra*, 479 U.S. 272, 289–90 (1987).

what is the importance of this link? Implicitly, it is believed to lead to nurture—“naturally” for mothers, but not so for fathers.<sup>76</sup>

But the Court did not stop there. Rather, it recognized a second important governmental interest:

[T]he determination to ensure that the child and the citizen parent have some demonstrated opportunity or potential to develop not just a relationship that is recognized, as a formal matter, by the law, but one that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States.<sup>77</sup>

The Court found that interest satisfied at birth by mothers, because of their knowledge, derived from the process of giving birth, that their child exists. The opportunity for relationship therefore is present and the statutory interest is satisfied. Although pregnancy could be viewed as actual parenting that would satisfy a nurture standard, the Court instead viewed the mother bond as created by “knowledge.”<sup>78</sup>

For fathers, on the other hand, the Court assumed lack of presence and lack of interest. “[I]t is not always certain that a father will know that a child was conceived, nor is it always clear that even the mother will be sure of the father’s identity.”<sup>79</sup> The Court notes that it is of particular concern with men who serve in the military.<sup>80</sup> The picture here is of the sexually charged young male soldier who has a short-term liaison or may even be used by a woman to gain entry in the United States. To this picture the Court added one other concern: the consequences of greater travel outside the country, again predominantly by men.<sup>81</sup> The implication is of short-term sexual liaisons resulting in children who men ignore and abandon. The picture of men as unemotional, unattached sexual beings with no connection to the children they father is astounding and troubling. The Court not only suggested that men will often not know of the children they conceive, but also that if they do know, they will not be present at the birth nor present in the lives of their children.<sup>82</sup> Even knowledge of the child does not provide the equal opportunity for a

---

<sup>76</sup> See language in *Nguyen v. INS* to this effect. 533 U.S. at 63.

<sup>77</sup> *Id.* at 64–65.

<sup>78</sup> *Id.* at 65.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 65–66.

<sup>82</sup> *Id.* at 66.

relationship like that of the mother; rather, the Court required some contact in order for constitutional opportunity to be satisfied.

[A]t the moment of birth—a critical event in the statutory scheme and in the whole tradition of citizenship law—the mother’s knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father. This is not a stereotype.<sup>83</sup>

To the contrary, two stereotypes are operating here. One is the characterization of motherhood, which focuses on the birth and ignores the connection between mother and child during pregnancy, as if knowledge and opportunity exist only at the moment of birth.<sup>84</sup> At the same time, the unwed father is conjured as a nonchalant, uncaring sperm donor who cares nothing about the mother, the pregnancy, or the child, whether before or after the birth, whether the father has knowledge or not.<sup>85</sup>

Justice O’Connor in her dissent criticized the Court’s failure to apply heightened scrutiny under the rationale of real, physical differences.<sup>86</sup> She pointed out that the availability of less discriminatory means should serve to strike the statute as failing to meet the standard of intermediate scrutiny.<sup>87</sup> She noted that the INS does not articulate the importance of biological parenthood, but if that was the goal, then age should not be a cutoff; biological parenthood at any time would be sufficient if the government’s sole interest is to establish

---

<sup>83</sup> *Id.* at 68.

<sup>84</sup> Stereotypes of motherhood have persistently bedeviled legal analysis and gender equality. *See generally* MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 7 (1995); Scott Coltrane, *Elite Careers and Family Commitment: It’s (Still) About Gender*, 596 ANNALS AM. ACAD. POL. & SOC. SCI. 214, 214 (2004) (discussing how professional men and women have different experiences in career advancement); Lisa Ikemoto, *The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of Law*, 53 OHIO ST. L.J. 1205, 1207–08 (1992); Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare “Reform,” Family, and Criminal Law*, 83 CORNELL L. REV. 688, 689 (1998); Dana Page, *D.C.F.D.: An Equal Opportunity Employer—As Long as You Are Not Pregnant*, 24 WOMEN’S RTS. L. REP. 9 (2002); Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN’S L.J. 77, 78 (2003).

<sup>85</sup> Elizabeth Bartholet calls such fathers “sperm fathers” to note their lack of any attachment other than genes. ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING* 218 (1993); Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN’S L.J. 323, 343 (2004).

<sup>86</sup> *Nguyen*, 533 U.S. at 74–75 (O’Connor, J., dissenting).

<sup>87</sup> *Id.* at 78–80.

a genetic link.<sup>88</sup> Alternatively, she argued that DNA tests provide a gender-neutral way to establish parentage.<sup>89</sup>

Justice O'Connor also criticized the second governmental interest as lacking in congressional endorsement.<sup>90</sup> In addition, she disputed the Court's articulation of the interest as an opportunity, rather than a reality, which weakens the interest. She pointed out that fathers present at birth are treated differently than mothers: "There is no reason, other than stereotype, to say that fathers who are present at birth lack an opportunity for a relationship on similar terms."<sup>91</sup> She argued the differential is in fact based on the generalization that mothers are more likely to raise their children than fathers.<sup>92</sup> This is particularly ironic in this case because Nguyen's mother abandoned him and he was raised by his father, as Justice O'Connor pointed out. This idea is grounded in a stereotype that men, or most men, will not nurture children.

Justice O'Connor also criticized the majority's failure to consider the history of the provision, which reeks of paternalism and sex stereotypes.<sup>93</sup> When proposed, the section reflected then-current beliefs that nonmarital children were solely the responsibility of the mother, promoting "a historic regime that left women with responsibility, and freed men from responsibility, for nonmarital children . . . [where] the mother is the only recognized parent, and the father is put safely in the background."<sup>94</sup> Since family law no longer takes this view, the statute should similarly not be permitted to ground its differences on presumptions of care.<sup>95</sup> Nor, as Justice O'Connor pointed out, should it be based on stereotypes of "male irresponsibility."<sup>96</sup>

*Nguyen* comes at the end of several Supreme Court decisions regarding the treatment of fathers in the context of immigration. Those cases are particularly

---

<sup>88</sup> *Id.* at 85.

<sup>89</sup> *Id.* Alternatively, one could use the common law recognition that a man who takes responsibility is the father, as in the man who holds out a child as his own.

<sup>90</sup> *Id.* at 78–83.

<sup>91</sup> *Id.* at 87.

<sup>92</sup> *Id.* at 83–85.

<sup>93</sup> *Id.* at 91–92.

<sup>94</sup> *Id.* at 92 (citing *Naturalization and Citizenship Status of Certain Children of Mothers Who Are Citizens of the United States, Hearing on H.R. 5409 Before the H. Comm. on Immigration and Nationalization, 72d Cong., 1st Sess. 3 (1932)* (statement of Burnita Sheton Matthews)).

<sup>95</sup> Nonmarital children are the responsibility of both parents, not just the mother, who historically was the responsible parent for the "child of no one," the illegitimate child. DOWD, *supra* note 12; Uniform Parentage Act, *supra* note 34.

<sup>96</sup> *Nguyen*, 533 U.S. at 94.

remarkable for their facially discriminatory treatment of fathers both in the construction of immigration rules and in the Court's justifications for upholding the rules. Three years prior to *Nguyen*, the Court considered substantially the same issue in *Miller v. Albright*.<sup>97</sup> Badly splintered over whether issues of standing or remedy should resolve the case, as opposed to consideration of the construction of immigration categories and the facial discrimination against fathers, the Court rejected the appeal of Lorena Penero and her father, Charlie Miller. Penero and Miller challenged the decisions of the lower federal courts as having unconstitutionally denied her right to become a U.S. citizen by virtue of birthright citizenship through her American father.<sup>98</sup> In contrast to *Nguyen*, where the father raised his son from birth, in *Miller* father and daughter had no apparent relationship other than a blood tie.<sup>99</sup> The father had not provided any financial support to his daughter, who was raised by her mother in the Philippines. Lorena applied to become a U.S. citizen after she turned twenty-one, and after the government's initial denial, her father petitioned to establish paternity in state court. Lorena then reapplied, and again was denied citizenship, because her father had failed to establish paternity before she turned twenty-one.<sup>100</sup> As with *Nguyen*, if Lorena's mother had been a U.S. citizen, Lorena would have become a U.S. citizen at birth.<sup>101</sup> Lorena and her father brought suit challenging the denial of citizenship; her father was dismissed as lacking standing, but Lorena continued to press her case for citizenship. The absence of her father from the case and

---

<sup>97</sup> 523 U.S. 420 (1998).

<sup>98</sup> *Id.* at 425. Justice Stevens' opinion for the Court, joined only by Justice Rehnquist, upheld the differential classification of nonmarital citizen fathers as compared to nonmarital citizen mothers. *Id.* at 444–45. Justice O'Connor and Justice Kennedy concurred in the result, but on the basis of standing. *Id.* at 453. Justice Scalia also concurred in the result, but on the basis that the Court lacked authority to issue the remedy of citizenship. *Id.* at 459. Justice Thomas joined this opinion. *Id.* at 452. Justices Souter, Ginsburg, and Breyer dissented, with two opinions by Ginsburg and Breyer. *Id.* at 460. In *Nguyen*, a 5–4 opinion, Justice O'Connor joined the *Miller* dissenters who also dissented in *Nguyen*, while Justice Kennedy wrote the majority opinion in *Nguyen*. 533 U.S. at 53.

<sup>99</sup> *Miller*, 523 U.S. at 425. The tone of the lead opinion is plainly negative toward this father, who on the facts as presented did nothing for the child until she reached adulthood. In a post-*Miller* case involving an uninvolved father who attempted to claim from the estate of the child he never acknowledged or supported, Justice Thomas wrote a dissent from the denial of certiorari that similarly exposed a critical attitude toward such fathers. *Rainey v. Chever*, 527 U.S. 1044, 1044 (1999). In addition, Justice Thomas would uphold differential treatment of fathers based on an analysis grounded in biological difference. *Id.* at 1047.

<sup>100</sup> *Miller*, 523 U.S. at 425.

<sup>101</sup> The citizen mother would also have to meet a residency requirement, but even that requirement was easier to meet for mothers (one year) than for fathers (five years, at least two of which were after age fourteen). *Id.* at 428.

her effort to establish citizenship while resident outside the United States raised standing and remedy issues that complicated the case.<sup>102</sup>

Justice Stevens' opinion on the equal protection issue framed the treatment of mothers and fathers as equal, rather than different. Starting from the view that mothers and fathers at birth are differently situated, Justice Stevens constructed mothers as "acting" to confer citizenship by deciding to carry the pregnancy to term and giving birth: "Section 1409(c) rewards that choice and that labor by conferring citizenship on her child."<sup>103</sup> Since fathers cannot do either of these things, different actions are required of them, according to Justice Stevens. All that is required is acknowledgment of paternity, and even that can be established without any action by the father, if the action is brought by the mother or child. Thus, Justice Stevens argued, the burden on fathers is so slight that if any argument can be made of inequality, it would be by mothers, not fathers.

If the citizen is the unmarried male, he need not participate in the decision to give birth rather than to choose an abortion; he need not be present at the birth; and for at least 17 years thereafter he need not provide any parental support, either moral or financial, to either the mother or the child, in order to preserve his right to confer citizenship on the child . . . .

. . . It seems obvious that the burdens imposed on the female citizen<sup>104</sup> are more severe than those imposed on the male citizen . . . .

Justice Stevens further accepted that the statutory requirements serve the important purposes of insuring the establishment of parent-child relationships and creating a link with the U.S. citizen.<sup>105</sup> While those links are assumed for mothers, the Court found it reasonable to require more of fathers. The underlying facts in this case, involving a parental relationship while the father was a soldier stationed in the Philippines, reinforced this rationale. In addition, the failure of father or daughter to establish any relationship for twenty-two years also makes this request for citizenship suspect and the demands of the category more justified.<sup>106</sup>

---

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 433–34.

<sup>104</sup> *Id.* at 434.

<sup>105</sup> *Id.* at 438.

<sup>106</sup> *Id.* at 439. "Whereas the putative father in *Lehr* was deprived of certain rights because he failed to take some affirmative step within about two years of the child's birth (when the adoption proceeding took

Justice Ginsberg's dissent in *Miller* set forth the history of the citizenship of children born abroad, noting the gender disadvantage of women and corresponding advantage of men into the early twentieth century.<sup>107</sup> The shift to provide greater rights to mothers was followed by the imposition of greater demands upon fathers.<sup>108</sup> Her review of the history counseled, she argued, skepticism about the justification for differentiation based on equality arguments or valuing of mothers: "For most of our Nation's past, Congress demonstrated no high regard or respect for the mother-child affiliation."<sup>109</sup> Justice Breyer's dissent underscored the grounding of the statutory distinction that disadvantages fathers through the most commonplace stereotypes about mothers and fathers: "[The statutory distinctions] depend for their validity upon the generalization that mothers are significantly more likely than fathers to care for their children, or to develop caring relationships with their children."<sup>110</sup>

In the litigation over the citizenship provisions in *Miller* and *Nguyen*, the litigants and the Court considered, but ultimately left unresolved, whether differential treatment of fathers in the immigration statutes would be decided under its 1977 decision in *Fiallo v. Bell*.<sup>111</sup> *Fiallo* similarly involved the disadvantaging of unmarried fathers and their children, but in the context of eligibility for special preferences to override immigration quotas, rather than to establish citizenship.<sup>112</sup> A "child" of a U.S. citizen or a "parent" of a U.S. citizen could enter the United States without complying with numerical limits and labor certification requirements, based on a policy of supporting the reunification of families.<sup>113</sup> The definition of "child" and "parent" excluded, however, nonmarital fathers and their children.<sup>114</sup>

---

place), here the unfavorable gender-based treatment was attributable to Mr. Miller's failure to take appropriate action within 21 years of petitioner's birth and petitioner's own failure to obtain a paternity adjudication by a 'competent court' before she turned 18." *Id.* at 441.

<sup>107</sup> *Id.* at 464 (Ginsberg, J., dissenting).

<sup>108</sup> *See id.* at 466.

<sup>109</sup> *Id.* at 468.

<sup>110</sup> *Id.* at 482–83 (Breyer, J., dissenting). Justice Breyer further analyzed the distinctions between Male Caretaker Parent and Female Caretaker Parent and argued that the distinctions find no basis in real differences, but rather reflect stereotypes. *Id.* at 483.

<sup>111</sup> 430 U.S. 787 (1977).

<sup>112</sup> *Id.* at 789–90.

<sup>113</sup> Brief of Appellees at 16–17, *Fiallo v. Levi*, 430 U.S. 787 (1977) (No. 75-6297) (summary of argument). These are provisions of the Immigration and Nationality Act of 1952. 66 Stat. 163 (codified as amended at 8 U.S.C. § 1101 *et seq.* (2000)). The definitions provision of the statute, giving the meaning of "parent" and "child," is Section 101(b) of the Act. 8 U.S.C. § 1101(b).

<sup>114</sup> An illegitimate child could claim the preference only through the child's mother; a parent could only

The fathers and children who challenged this blatant discrimination exemplified strong parent-child relationships. Ramon Fiallo-Sone, who sought a preference through his son, was the primary caretaker of his five-year-old son Ramon Martin Fiallo, a U.S. citizen by birth. The father and his son's mother, a permanent resident alien, lived together but did not want to marry. The second father in the *Fiallo* case, Cleophus Warner, was a naturalized U.S. citizen who sought a preference for his sixteen-year-old son Serge. His son came to the United States in 1969, when he was nine, to visit his father. During his visit his mother remarried, and asked that Serge remain in the United States with his father. Because she moved and failed to provide her address, effectively she abandoned her son. Cleophus filed for an immigration preference, which was denied in 1972 when Serge was twelve. The third father, Arthur Wilson, was the father of Trevor and Earl Wilson, who were permanent resident aliens. The children lived with their father in Jamaica from birth until age eleven and nine, respectively, and then came to the United States with their mother. Their father continued to maintain a relationship with them over the next six years, including visits and financial support. Their mother died in 1974 when the boys were seventeen and fifteen, and they then sought to obtain a preference for their father so that he could join them in the United States. What is especially remarkable about each of these family stories is the strong nurturing relationships of these fathers and their children, belying the stereotype of uncaring, uninvolved nonmarital fathers.<sup>115</sup>

Nevertheless, the Court in *Fiallo* was unpersuaded by evidence of the fathers' nurture or the application of its recently-decided intermediate standard of review in cases involving sex-based classifications, particularly in cases involving the suspect category of illegitimate children. Justice Powell, in the majority opinion, viewed the case as triggering the most deferential standard of review based on his analysis that the distinctions were within the plenary power of Congress to regulate aliens.<sup>116</sup> The Court upheld the exclusion of fathers and their children from the immigration preference based on a

---

claim the preference through an illegitimate child if the parent was the mother. Immigration and Nationality Act of 1952, 66 Stat. 171 (codified as amended at 8 U.S.C. §§ 1011(b)(1), 1011(b)(2)).

In 1986, the statute was amended to permit a nonmarital child to take advantage of the preference "if the father has or had a bona fide parent-child relationship with the person." Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 315(a), 100 Stat. 3439 (codified as amended by 8 U.S.C. § 1101(b)(1)(d) (2000)).

<sup>115</sup> The facts regarding the three fathers and their children are drawn from Brief for the Appellees at 5, *Fiallo*, 430 U.S. 787 (No. 75-6297).

<sup>116</sup> *Fiallo*, 430 U.S. at 792.

presumption of rationality and acceptance of gender differences.<sup>117</sup> In the words of the Court, “Congress obviously has determined that preferential status is not warranted for illegitimate children and their natural fathers, perhaps because of a perceived absence in most cases of close family ties as well as a concern with the serious problems of proof that usually lurk in paternity determinations.”<sup>118</sup>

Justice Marshall’s ringing dissent criticized the Court’s standard of review as “toothless” and wrong.<sup>119</sup> As he pointed out, this involved discrimination among citizens, and the basis for the discrimination is gender and illegitimacy, two categories that merit heightened scrutiny.<sup>120</sup> In addition, the relational rights here were those of parent and child, rights traditionally accorded great value by the Court:

The right to live together as a family belongs to both the child who seeks the entrance of his or her father and the father who seeks to bring his child in. “It is no less important for a child to be cared for by its . . . parent when that parent is male rather than female. And a father, no less than a mother, has a constitutionally protected right to the ‘companionship, care, custody, and management’ of ‘the children he has sired and raised . . . .’”<sup>121</sup>

The suggestion that mothers exclusively have close ties to their children and fathers do not, as Justice Marshall pointed out, is belied by the facts of the case and constitutes classic overbreadth.<sup>122</sup>

*Fiallo* may perhaps be distinguished as involving a fundamentally different part of the immigration statutes and a highly deferential standard of review, or even explained as a case reflecting social norms more firmly embedded in the 1970s. Yet *Nguyen*, nearly thirty years later, followed the same path. The earlier cases might be regarded as the byproduct of a time when gender roles were essentialist and patriarchal, gender analysis was deferential and ridden with accepted stereotypes, and only newly subject to greater scrutiny. However, *Nguyen* was decided in an era when genetic testing can establish paternity with ease, and when heightened scrutiny (nearly strict scrutiny)

---

<sup>117</sup> *Id.* at 799–800.

<sup>118</sup> *Id.* at 799 (emphasis added).

<sup>119</sup> *Id.* at 805 (Marshall, J., dissenting).

<sup>120</sup> *Id.* at 809.

<sup>121</sup> *Id.* at 810 (1977) (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 652 (1975), quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

<sup>122</sup> *Id.* at 815.

gender analysis is firmly rooted in the Court's jurisprudence. Even more significantly, the father in *Nguyen*, like the fathers in *Fiallo*, was a nurturing parent, indeed, the sole parent for his son. The importance of the parent-child tie to citizenship is a core principle of immigration policy; that principle is utterly at odds with the outcome in *Nguyen* and lacks the factual distinctions of *Miller* or the historical contextual explanation of *Fiallo*.<sup>123</sup>

C. *Nevada Department of Human Resources v. Hibbs* (2003)

While *Newdow* and *Nguyen* are the primary cases for exploring the treatment of constitutional fatherhood, three other decisions are important to a balanced view of the Court's recent opinions: *Nevada Department of Human Resources v. Hibbs*,<sup>124</sup> *Troxel v. Granville*,<sup>125</sup> and *Lawrence v. Texas*.<sup>126</sup>

In *Hibbs*, the Court considered the constitutionality of the Family and Medical Leave Act<sup>127</sup> under an Eleventh Amendment challenge alleging that Congress lacked the power to enact the statute as against the states because it exceeded Congressional power under the Commerce Clause.<sup>128</sup> The underlying case in *Hibbs* involved a husband who was caring for his ailing wife, but much of the Court's opinion, written by Chief Justice Rehnquist, justified the Act because of its impact on parental care by mothers and fathers. The Court concluded that because of the evidence collected in congressional hearings on persistent and undisputed gender inequality that may violate constitutional equality standards, Congress' response was congruent and proportionate to those potential constitutional violations, and thus passed muster according to Eleventh Amendment standards.<sup>129</sup> The Court cited the statistics presented to Congress on the dearth of paternity leave, reinforcing the

---

<sup>123</sup> One other troubling pattern in these cases is that the children are all children of color. Given the history of racism embedded in our immigration policy, one could also legitimately suggest that the outcome of these cases is driven by racism. Discrimination against Asians has been especially virulent, and thus must be considered in *Nguyen*. See generally IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 4 (1996); Gabriel J. Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 HARV. C.R.-C.L. L. REV. 1, 2-3 (2002); Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to Is There a Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 289 (2000); Michael A. Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, 34 ST. LOUIS U. L.J. 425, 433-34 (1990); Leti Volpp, "Obnoxious to Their Very Nature": *Asian Americans and Constitutional Citizenship*, 8 ASIAN L.J. 71, 71-72 (2001).

<sup>124</sup> 538 U.S. 721 (2003).

<sup>125</sup> 530 U.S. 57 (2000).

<sup>126</sup> 539 U.S. 558 (2003).

<sup>127</sup> 18 U.S.C. §§ 2611-54 (2000).

<sup>128</sup> *Nev. Dep't. of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

<sup>129</sup> *Id.* at 737.

stereotype of maternal care as well as the lack of caregiving by fathers.<sup>130</sup> Thus, the Court concluded, Congress acted within the scope of its power to correct discrimination: “Congress sought to adjust family-leave policies in order to eliminate [employers’] reliance on, and perpetuation of, invalid stereotypes, and thereby dismantle persisting gender-based barriers to the hiring, retention, and promotion of women in the workplace.”<sup>131</sup> But it was not only discrimination against mothers that was the goal of the statute:

Stereotypes about women’s domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman’s domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination . . . .<sup>132</sup>

Thus, the statute was valid because of its defined scope in reaching a defined problem: “[T]he FMLA is narrowly targeted at the faultline between work and family—precisely where sex-based overgeneralization has been and remains strongest . . . .”<sup>133</sup>

The Court’s decision upholding *Hibbs* was based on its perception of the statute as a necessary corrective to employer stereotypes preventing men, as well as women, from engaging in coequal, caring parenting.<sup>134</sup> It resounds as a strong support of men’s nurture contrary to social and employer stereotypes. The case defines and supports fathers as nurturers. *Hibbs* therefore stands as a powerful corrective to the negative stereotypes in *Newdow* and *Nguyen*, and links redefined fatherhood with women’s equality.

#### *D. Troxel v. Granville (2000)*

A second decision that contradicts the narrow stereotypes in *Newdow* and *Nguyen* is the Court’s decision in *Troxel*.<sup>135</sup> *Troxel* represents a recognition of the range of family forms in contemporary families and the valuing of families

---

<sup>130</sup> *Id.* at 730.

<sup>131</sup> *Id.* at 734 n.10.

<sup>132</sup> *Id.* at 736.

<sup>133</sup> *Id.* at 737.

<sup>134</sup> The concurrences and dissents in *Hibbs* relate to the Court’s continuing debate about federalism, without much further discussion about fathers. *Id.* at 740 (Souter, J., concurring); *id.* at 740 (Stevens, J., concurring); *id.* at 741 (Scalia, J., dissenting); *id.* at 744 (Kennedy, J., dissenting).

<sup>135</sup> 530 U.S. 57 (2000) (plurality).

regardless of structure.<sup>136</sup> The Court in *Troxel* strongly supported the rights of parents as paramount over the care and upbringing of their children, including disputes over visitation with grandparents.<sup>137</sup> There, the plurality wrote in favor of the rights of a single-parent mother against the demands of the paternal grandparents.

On the other hand, there are two contrary dialogues, one explicit, one implicit, that would not give *Troxel* such a positive reading for the rights of fathers, especially single parent fathers. First, there is language in the opinion that is somewhat patronizing and diminishing of single-parent families, as if such families deserve special solicitude but also potentially justifying greater state regulation of such families.<sup>138</sup> This view of single parents parallels the traditional disdain for unmarried fathers as compared to married fathers. Those outside of the nuclear marital family norm are not treated as valued families. Secondly, the implicit reason that the grandparents failed to be recognized in this case, even though the parent was a single parent, is that their claim derived from their son, a father who was never married to the mother.<sup>139</sup> We again have the disdained unmarried father.

In *Troxel*, an unmarried couple had two children and lived together briefly. After separating, the couple worked out a plan for visitation by the father at his parents' house.<sup>140</sup> It is unclear how much of the caretaking during the father's visitation time was done by the grandparents and other extended family members versus the father. This arrangement continued for about two years, and then the father committed suicide.<sup>141</sup> For a time, the children continued to visit with their grandparents. When the mother and grandparents disagreed over the schedule for visitation, the grandparents filed for visitation rights under a broad third party visitation statute in Washington.<sup>142</sup>

---

<sup>136</sup> See also Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 683 (2001) (noting the value of using traditional parental rights doctrine to support parents in nontraditional families). See generally Nancy E. Dowd, *2001 Annual International Survey of Family Law: United States*, 16 INT'L J.L. SOC'Y & FAM. 439 (2002).

<sup>137</sup> 530 U.S. at 65–72.

<sup>138</sup> See *id.* at 64.

<sup>139</sup> See *id.* at 60.

<sup>140</sup> *Id.*; see also Dowd, *supra* note 136.

<sup>141</sup> *Troxel*, 530 U.S. at 60.

<sup>142</sup> *Id.* The trial court found in favor of the grandparents. *Id.* at 61. The Court of Appeals reversed, finding no standing. *Id.* at 62. The Washington Supreme Court upheld the Court of Appeals, but on the different ground that the state statute was unconstitutional under the federal Constitution. *Id.*

A plurality of the U.S. Supreme Court ruled in favor of the mother in a badly split set of opinions as to why, essentially finding the application of the state statute unconstitutional as applied in this case rather than declaring the statute facially invalid.<sup>143</sup> The plurality did so based on a ringing endorsement of parental rights. The plurality's decision favoring parental rights reaffirmed the rights of parents irrespective of family form.<sup>144</sup> At the same time, it acknowledged the range of family forms and the sometimes difficult task of applying the "best interests" standard.<sup>145</sup>

Justice O'Connor's plurality opinion acknowledged the diversity of American families. She opened her analysis with an acknowledgment of family complexity: "The demographic changes of the past century make it difficult to speak of an average American family."<sup>146</sup> She proceeded to focus especially on the prevalence of single-parent families, nearly thirty percent of the families in which children under eighteen are raised,<sup>147</sup> and the greater

---

<sup>143</sup> *Id.* at 73–74. Justice O'Connor's plurality opinion was joined by Chief Justice Rehnquist, Justice Ginsberg, and Justice Breyer. *Id.* at 59. Justices Souter and Thomas concurred separately. *Id.* The dissenters, each of whom separately filed an opinion, were Justices Stevens, Scalia, and Kennedy. *Id.* Justice O'Connor took the view that parental power, short of unfitness, should be respected and free from state interference, and constructed the case as an unwarranted power struggle between a parent and a judge. *Id.* at 68–69. Justice Souter, concurring in the result, found the statute facially invalid on the basis suggested by the O'Connor opinion. *Id.* at 79 (Souter, J., concurring). Justice Thomas also agreed that parental autonomy should prevail in this case. *Id.* at 80 (Thomas, J., concurring). His concurrence underscored the view that strict scrutiny should be the standard for evaluating an infringement of fundamental rights, while also reserving the larger issue of whether the entire area of substantive due process merits review. *Id.* at 80.

The dissenters took quite different positions. *See id.* at 80 (Stevens, J., dissenting). Justice Stevens argued that the case should not have been reviewed at all, but that once accepted, a grant of review requires that the Court address facial invalidity issues. *Id.* at 80–81. He concluded that the statute was not facially unconstitutional. According to Justice Stevens, a finding of harm is not constitutionally necessary for the state to exercise its *parens patriae* power because the right of parental autonomy must be balanced against the needs of children. The statute also was not unconstitutionally broad, in his view, because the range of persons and circumstances under which a petition may be filed is limited by the best interests principle. *Id.* at 84–91. In contrast, Justice Scalia focused on the broader substantive due process issue noted by Justice Thomas, and concluded that parental rights are not constitutional rights. *Id.* at 92 (Scalia, J., dissenting). Finally, Justice Kennedy would have vacated and remanded the case to the Washington Supreme Court rather than reverse. In his view, one of the grounds for unconstitutionality below, that harm to the child is required before the state can intervene, rests on a misinterpretation of constitutional precedents. Based on his view that the "best interests" standard is constitutionally sound, Justice Kennedy argued that the Court should have reversed and remanded the case for further consideration after clarification of the state court's error in its reading of the constitutional precedents. *Id.* at 94 (Kennedy, J., dissenting).

<sup>144</sup> Dowd, *supra* note 136.

<sup>145</sup> *Id.*

<sup>146</sup> *Troxel*, 530 U.S. at 63.

<sup>147</sup> *Id.* at 64; *see also* NANCY E. DOWD, IN DEFENSE OF SINGLE-PARENT FAMILIES xiii (1997). The most recent demographics indicate continued growth of single parent families based on the 2000 Census. In the 1990s, the number of households with single-mother head of households increased twenty-five percent, as

likelihood that children's care and relationships in those families include nonparents, especially grandparents.

Justice O'Connor rested her analysis in favor of the mother on the strength of parental rights. Citing the Court's prior precedents in *Meyer v. Nebraska*,<sup>148</sup> *Pierce v. Society of Sisters*,<sup>149</sup> and *Prince v. Massachusetts*,<sup>150</sup> she described the rights of parents as a liberty interest that is "perhaps the oldest of the fundamental liberty interests recognized by this Court."<sup>151</sup> More specifically, she described it as a "fundamental right of parents to make decisions concerning the care, custody, and control of their children."<sup>152</sup>

*Troxel's* strong endorsement of parental rights irrespective of family forms would support the rights of fathers just as much as mothers, including nonmarital fathers. It is a second decision that runs contrary to the limited views expressed in *Newdow* and *Nguyen*.

#### E. *Lawrence v. Texas* (2003)

One final case in the recent decisions of the Court that is relevant to the definition of fatherhood, although in a more tangential way, is *Lawrence*.<sup>153</sup> In *Lawrence*, the Court held that a state sodomy statute unconstitutionally infringed on substantive due process rights of privacy with respect to intimate relationships, and overruled its contrary holding in *Bowers v. Hardwick*.<sup>154</sup> While the direct holding in *Lawrence* may seem remote from the definition of fatherhood, the rationale and substance of the due process rights recognized in *Lawrence* are extremely important.

---

compared to an increase of six percent of married couple households. Eric Schmitt, *For First Time, Nuclear Families Drop Below 25% of Households*, N.Y. TIMES, May 15, 2001, at A1.

<sup>148</sup> 262 U.S. 390 (1923).

<sup>149</sup> 268 U.S. 510 (1925).

<sup>150</sup> 321 U.S. 158 (1944).

<sup>151</sup> *Troxel*, 530 U.S. at 65.

<sup>152</sup> *Id.* at 66. The recognition of this fundamental right is further confirmed by subsequent cases; parental rights as fundamental rights is thus a strong and honored constitutional principle. *Id.* (citing *Stanley v. Illinois*, 405 U.S. 645 (1972); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Parham v. J.R.*, 442 U.S. 584 (1979); *Stankosky v. Kramer*, 455 U.S. 745 (1982); *Washington v. Glucksberg*, 521 U.S. 702 (1997)).

<sup>153</sup> 539 U.S. 558 (2003).

<sup>154</sup> *Id.* at 578 (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

*Lawrence* is grounded in a conception of liberty encompassing both individual autonomy and relational ties. At the outset of the *Lawrence* opinion, Justice Kennedy declared, “Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”<sup>155</sup> Moreover, the majority opinion strongly relied on critical language from *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>156</sup> that underscores personal dignity and choice in relational contexts. As the Court explicitly stated, “[t]he *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”<sup>157</sup> The Court further quoted the core language of *Casey*: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>158</sup>

Fatherhood is clearly one of those core decisions of self-definition and meaning when fatherhood is defined as nurture. Just as the Court in *Lawrence* concluded that the relationships of homosexuals are entitled to respect and should be protected against diminishment by the state, so too should the relationships of fathers and their children be entitled to constitutional protection. The powerful definition of liberty in *Lawrence* embraces constitutional protection of relationships.

#### F. Summary

What is the pattern, then of these recent decisions? Although *Lawrence*, *Hibbs*, and *Troxel* suggest a pluralistic, egalitarian, relational view of fathers and families, *Newdow* and *Nguyen* represent a highly negative view of fathers and fatherhood. One might read these cases collectively as indicative of confusion reflecting the realities of social change. But these decisions operate in a larger context of constitutional doctrine. The potential exists for reinforcing negative views of fathers, especially nonmarital and divorced fathers, that are embedded in the Court’s earlier jurisprudence, bypassing the progressive views of gender and families that would be supportive of involved, nurturing fatherhood. In the next section, I discuss this earlier caselaw and the

---

<sup>155</sup> *Id.* at 562.

<sup>156</sup> 505 U.S. 833 (1992).

<sup>157</sup> *Lawrence*, 539 U.S. at 573–74.

<sup>158</sup> *Id.* at 574 (quoting *Casey*, 505 U.S. at 851).

implications of the recent cases for existing doctrine, and suggest that a reorientation is necessary to redefine fatherhood as the nurture of children.

## II. CONSTITUTIONAL CONTEXT

The Court's recent cases on fathers must be seen in the context of several lines of cases that together represent existing constitutional doctrines about fathers. First, in a core set of cases decided in the 1970s and 1980s involving unmarried fathers, the Court established when the constitutional rights of fathers are triggered, and to some extent, the scope of those rights, primarily in the context of adoption. The lead cases are *Stanley v. Illinois* (1972),<sup>159</sup> *Quilloin v. Walcott* (1978),<sup>160</sup> *Caban v. Mohammed* (1979),<sup>161</sup> *Lehr v. Robertson* (1983),<sup>162</sup> and *Michael H. v. Gerald D.* (1989).<sup>163</sup> These cases are worth examining in some detail because of the Court's definition of constitutional fatherhood as well its application, which exposes the Court's view of nonmarital fathers. Second, the Court has dealt with fathers in the context of its illegitimacy cases, which commentators have decried as failing to have a coherent doctrinal framework.<sup>164</sup> More important for our purposes, however, is how the Court has characterized fathers in these cases, and its continued willingness to accept a patriarchal structure of parenthood. Third, the Court's reproductive rights jurisprudence has included cases where the right of fathers to object to or to be informed of abortion decisions have been at issue, and the Court's rationale for refusing to permit a paternal veto or even paternal notice is worth examining.<sup>165</sup> Finally, the Court's gender equality decisions and related rules of analysis suggest an ongoing assumption of difference, along with a view of gender neutrality and equality with respect to parenting.<sup>166</sup> These principles are particularly relevant given the evolution in family law in virtually all jurisdictions toward an ideal of shared parenting and gender neutrality with respect to the care and custody of children, as well as

---

<sup>159</sup> 405 U.S. 645 (1972).

<sup>160</sup> 434 U.S. 246 (1978).

<sup>161</sup> 441 U.S. 380 (1979).

<sup>162</sup> 463 U.S. 248 (1983).

<sup>163</sup> 491 U.S. 110 (1989). For a recent comparison of these cases and the paternity illegitimacy cases, espousing the inconsistency between biology plus in some cases and biology alone in others, see Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology 'Plus' Defines Relationships; Biology Alone Safeguards the Public Fisc*, 11 WM. & MARY J. WOMEN & L. 47 (2004).

<sup>164</sup> See *infra* note 231.

<sup>165</sup> See *infra* notes 229–230.

<sup>166</sup> See *infra* note 227 and accompanying text.

the blurring or outright elimination of differentiation between the rights and obligations of nonmarital and marital fathers.

This constitutional context of older cases suggests the deeply ingrained nature of a patriarchal model of parenting in constitutional jurisprudence, along with an emerging egalitarian, pluralistic view of parents and families that supports an entirely different view of fathers. The most recent cases can be seen as consistent with the movement toward a redefinition of fatherhood away from a patriarchal model, toward a model consistent with egalitarian norms embedded in the equal protection clause and the valuing of relational ties embedded in substantive due process in a host of decisions about privacy, parental rights, and the value of families. I contend in the second half of this article that the Court should move more strongly toward a redefinition of fatherhood centered around nurture.

#### A. *The Core Fatherhood Cases*

The core fatherhood cases were decided in the 1970s and 1980s. They reflect a social disdain for unmarried fathers and broader assumptions about fathers as breadwinners, not nurturers. The principles that emerge from the core cases are that (1) biology plus something more, in the nature of intention or demonstration of nurture, even if minimalistic, is necessary to be recognized as a legal father; and (2) marriage, or maybe legitimacy plus marriage, trumps biological and social fatherhood. The cases provide both a basis for a standard of nurture as well as a troubling demonstration of the presence of unacceptable and unjustified stereotypes about fathers.

In *Stanley v. Illinois*,<sup>167</sup> the first of these cases, the Court held that a conclusive presumption by the State of Illinois that an unwed father was unfit violated his due process rights under the Fourteenth Amendment Due Process Clause.<sup>168</sup> In *Stanley*, the biological father of three children lived with the mother of the children intermittently for eighteen years, but never married her.<sup>169</sup> After she died, he sought to be heard on the issue of the custody of his three children, but the state denied him a hearing based on a conclusive presumption that an unmarried father was presumptively an unfit caretaker for children.<sup>170</sup> Stanley was described as “impecunious,” and had turned the care

---

<sup>167</sup> 405 U.S. 645 (1972).

<sup>168</sup> *Id.* at 658.

<sup>169</sup> *Id.* at 646.

<sup>170</sup> *Id.* at 646–47.

of the children over to nonfamily members. The state eventually commenced dependency proceedings when it became clear that no adult was legally responsible for the children. Stanley was concerned during those proceedings with the loss of welfare payments if others were declared guardians of the children,<sup>171</sup> and a footnote in the opinion also indicated that at one point during the mother's life, when it was assumed that she and Stanley were husband and wife, a neglect petition was proved against him with respect to the oldest of the children.<sup>172</sup>

Nevertheless, the relevant facts for the majority were Stanley's biological relationship and long running, even if inadequate, presence in the household.<sup>173</sup> These established a constitutional interest deserving of protection. *Stanley* might be viewed as an initial instinct toward recognizing the essential place of nurture in a definition of fatherhood. At the same time, it is blatant in its acceptance of stereotypes about unwed fathers. Both the majority and dissent exhibit a negative opinion of unwed fathers and characterize them as unlikely to be interested in their children and by nature less connected to their children.<sup>174</sup> Thus, the Court does not seem to dispute a generally low societal

---

<sup>171</sup> *Id.* at 667 (Burger, C.J., dissenting).

<sup>172</sup> *Id.* at 653–54 n.5 (majority opinion).

<sup>173</sup> *Id.* at 650 n.4, 653–54 n.5.

<sup>174</sup> "It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents . . . . But all unmarried fathers are not in this category; some are wholly suited to have custody of their children." *Id.* at 654 (emphasis added). The dissenting opinion provides a lengthier view of this set of assumptions:

Unwed fathers, as a class, are not traditionally quite so easy to identify and locate. Many of them either deny all responsibility or exhibit no interest in the child or its welfare; and, of course, many unwed fathers are simply not aware of their parenthood.

Furthermore, I believe that a State is fully justified in concluding, on the basis of common human experience, that the biological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male's often casual encounter. This view is reinforced by the observable fact that most unwed mothers exhibit a concern for their offspring either permanently or at least until they are safely placed for adoption, while unwed fathers rarely burden either the mother or the child with their attentions or loyalties. Centuries of human experience buttress this view of the realities of human conditions and suggest that unwed mothers of illegitimate children are generally more dependable protectors of their children than are unwed fathers. While these, like most generalizations, are not without exceptions, they nevertheless provide a sufficient basis to sustain a statutory classification whose objective is not to penalize unwed parents but to further the welfare of illegitimate children in fulfillment of the State's obligations as *parens patriae*.

Stanley depicts himself as a somewhat unusual unwed father, namely, as one who has always acknowledged and never doubted his fatherhood of these children. He alleges that he loved, cared for, and supported these children from the time of their birth until the death of their mother. He contends that he consequently must be treated the same as a married father of legitimate children.

opinion of unwed fathers as likely unfit; it simply would provide them the opportunity to prove otherwise.<sup>175</sup> Given the record in *Stanley*, the opinion could also be read as requiring only minimal care to trigger constitutional fatherhood.

Six years later, in *Quilloin v. Walcott*,<sup>176</sup> the Court considered the rights of an unwed father in a stepparent adoption. The Court unanimously upheld the adoption and the state court's use of the "best interests of the child" standard.<sup>177</sup> The biological father was listed on the child's birth certificate in 1964. The parents never lived together nor married. In 1967, the mother married another man, and the child went to live with his maternal grandmother. In 1969, the child returned to live with his mother, stepfather, and half-brother.<sup>178</sup>

During his childhood, the boy's biological father irregularly provided economic support, despite the fact that the mother never brought an action to enforce his statutory duty of support. The father also did not legitimate his son. Nevertheless, he regularly visited with the child and had given him gifts. In 1974, when the child was eleven years old, the mother's husband filed a petition to adopt the child, with the mother's consent.<sup>179</sup> The mother had apparently decided the contacts of the biological father with his son were disruptive to the family. In the adoption proceeding, the child expressed a desire to be adopted by his stepfather and take his name, but also expressed a wish to continue to have contact with his biological father.<sup>180</sup> Under Georgia law at the time, the child could not have two fathers; he could have only one or the other.<sup>181</sup> The biological father objected to the adoption, petitioned for legitimization, and sought visitation rights. A colloquy from the trial indicated that the biological father did not understand the legitimization process, and therefore his failure to legitimate his child appears to have been due to

---

Even assuming the truth of Stanley's allegations, I am unable to construe the Equal Protection Clause as requiring Illinois to tailor its statutory definition of 'parents' so meticulously as to include such unusual unwed fathers, while at the same time excluding those unwed, and generally unidentified, biological fathers who in no way share Stanley's professed desires.

*Id.* at 665–66 (Burger, C.J., dissenting) (footnote omitted).

<sup>175</sup> *Id.* at 654–55 (majority opinion).

<sup>176</sup> 434 U.S. 246 (1978).

<sup>177</sup> *Id.* at 255–56.

<sup>178</sup> *Id.* at 247 n.1.

<sup>179</sup> *Id.* at 249, 251.

<sup>180</sup> *Id.* at 251 n.11.

<sup>181</sup> *Id.*

ignorance, not neglect.<sup>182</sup> The adoption nevertheless was approved over his objection.

Under the Georgia statute, adoption procedures differentiated between children of unmarried and married parents.<sup>183</sup> Children of married parents could not be adopted without the consent of both parents; children of unmarried parents could be adopted solely with the consent of the mother.<sup>184</sup> Thus a mother could block an adoption, but not a father. The Supreme Court considered this case under a due process challenge. Since the biological father had been afforded notice and an opportunity to be heard, the procedural issue was framed as whether deciding this issue under the “best interests of the child” standard was constitutional (versus the absolute bar to an adoption that could have been exercised by a married father).<sup>185</sup> The Court acknowledged the strong protection of the parent-child relationship, but found it persuasive that the father never sought custody of the child, and the adoption was for the purpose of legally recognizing a de facto family unit.<sup>186</sup> Because of these factors, the use of the best interests test was deemed appropriate. The Court also rejected an equal protection argument comparing unmarried and married fathers, emphasizing again the lack of custody of the child and therefore the biological father’s failure to provide “daily supervision, education, protection, or care of the child.”<sup>187</sup> The Court’s decision was unanimous.

*Quilloin* might be applauded as establishing a more demanding standard of nurture than the low level that triggered constitutional protection in *Stanley*. Yet ultimately *Quilloin* is a troubling and difficult case. It is a case that thirty years later is laced with gender stereotypes and statutory structures grounded in cultural, not biological, differences. On the facts of the case, the father provided some nurture to the child. If his presence was legally insufficient, that might be a basis to reject his challenge. Alternatively, the facts suggest his inability to parent cooperatively with the mother and stepfather. What is most telling, and heartbreaking, in this case is the solution to the issues suggested by the child: keeping two fathers in his life, by taking the name of his stepfather and creating the public form of a cohesive nuclear family, while continuing the bond with his biological father by permitting continued visitation.

---

<sup>182</sup> *Id.* at 254 n.14.

<sup>183</sup> *Id.* at 248.

<sup>184</sup> *Id.* Divorced parents are treated like married parents for purposes of the Georgia law. *Id.*

<sup>185</sup> *Id.* at 254.

<sup>186</sup> *Id.* at 255–56.

<sup>187</sup> *Id.* at 256.

Instead, the Court rested its decision on the formalities of status, the failure of the father to declare the biological connection through the process of legitimation and acceptance of “best interests” of the child in denial of legitimation, which would have permitted blocking the adoption.<sup>188</sup> It accepted differentiation between fathers based on marital status, rather than examining their actions as fathers. “Best interests” was used as an ultimate justification to hide preferences for certain family forms and assumptions about unwed fathers.

A year after *Quilloin*, in *Caban v. Mohammed*,<sup>189</sup> the Court again confronted the issue of fathers’ rights in the context of a stepparent adoption, but reached the opposite conclusion, holding that the Equal Protection Clause is violated when mothers and fathers are treated differently in the context of adoption.<sup>190</sup> As in *Stanley*, where the couple had two children and lived together for eighteen years, the biological father and mother in *Caban* had lived together for five years, and had two children together. During that time, the father was still married to, but separated from, another woman. He was listed on the birth certificate of each child and contributed to their support. At the end of this period, the mother left to live with another man, and shortly thereafter she married him. The father maintained contact with the children after the relationship ended, and he had access to the children every weekend when their mother brought them to visit her mother, who lived in the same building as the father.<sup>191</sup>

The children then moved with their grandmother to Puerto Rico. On a visit with them, the father kept the children and returned with them to New York, to live with him and his second wife. When the mother learned of this, she initiated custody proceedings and the father responded with cross-proceedings for custody.<sup>192</sup> In this scenario, then, there were two married couples seeking to establish custody of and to adopt the children. The children, however, were not the biological children of both parents in either couple. Nevertheless, given the Court’s solicitude for a family unit that mirrors a nuclear family norm, either formally or de facto, this may explain the difference in outcome from *Quilloin*. Under the New York statute that controlled the adoption, the

---

<sup>188</sup> *Id.* at 254.

<sup>189</sup> 441 U.S. 380 (1979).

<sup>190</sup> *Id.* at 394.

<sup>191</sup> *Id.* at 382.

<sup>192</sup> *Id.* at 383.

mother could block the adoption by refusing to provide consent, but the father's consent was not necessary.<sup>193</sup>

The Court rejected treating the biological parents, unwed at the time the children were born, the same as divorced parents, whom they presumed would have a substantive due process right after divorce to maintain the parental relationship.<sup>194</sup> Thus, the petition for adoption was appropriate. The question then was whether the parents could be treated differently. The Court found that a potential for different treatment at birth based on biological difference could not extend beyond birth when, as in this case, both parents had cared for the children *and* the parents had lived as a “natural family” for several years.<sup>195</sup> The father's participation in the rearing of the children plus biology triggered his entitlement to equal treatment with the mother.<sup>196</sup> It also seemed critical that the father's nurture occurred within a *de facto* marital unit.

Much of the disagreement among members of the Court in this case was over the appropriate weight to be given to the importance of removing the children's illegitimacy by enabling them to be adopted. The majority rejected the legitimacy of a gender distinction in the process of adoption in this case, even though it acknowledged the value of placing children in “normal, two-parent” homes and, by virtue of adoption, erasing the stigma of illegitimacy.<sup>197</sup> The dissenting opinion of Justice Stevens focused not only on legitimacy issues, but also on the differences between fathers and mothers—differences rooted in different social roles and responsibilities, although tied to their biological differences through childbirth.<sup>198</sup>

In *Lehr v. Robertson*,<sup>199</sup> the Court again addressed stepparent adoption. The distinguishing factor in this case was that the father neither married the mother nor maintained a relationship with the child after she was born.<sup>200</sup> Eight months after the child was born, the mother married, and when the child was two, filed an adoption petition so that the child could be adopted by her stepfather. Her biological father was given no notice of the adoption, and he had not registered on the state's putative fathers' registry. However, prior to

---

<sup>193</sup> *Id.* at 384.

<sup>194</sup> *Id.* at 397 (Stewart, J. dissenting).

<sup>195</sup> *Caban v. Mohammed*, 441 U.S. 380, 389 (1979).

<sup>196</sup> *Id.* at 393.

<sup>197</sup> *Id.* at 391.

<sup>198</sup> *Id.* at 405 (Stevens, J., dissenting).

<sup>199</sup> 463 U.S. 248 (1983).

<sup>200</sup> *Id.* at 249.

the completion of the adoption proceeding, he filed a paternity action, requesting a paternity determination, order of support and visitation privileges.<sup>201</sup> In this case, the Court made it clear that biology alone is not a sufficient basis to trigger constitutional protection. This is the language most frequently cited as the measure of constitutional fatherhood:

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. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.<sup>202</sup>

Equally as important as this language is the Court's reasoning leading up to this biology-plus standard of constitutional fatherhood. First, the Court noted the diversity of family relationships: "The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility."<sup>203</sup> The Court cited its prior decisions upholding the protection of relationships between natural parents and their nonmarital children.<sup>204</sup> The Court then quoted approvingly the language of two prior cases which emphasized that it is the "actual relationship of parental responsibility" that is at the heart of constitutional protection: "*Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring . . . . In a similar vein . . . if and when one develops, the relationship between a father and his natural child is entitled to protection . . . .*"<sup>205</sup> The Court described this relationship in terms signifying a meaningful relationship: "[Coming] forward to participate in the rearing of his child"<sup>206</sup> and establishing critical family bonds. "[T]he importance of the familial relationship . . . stems from the emotional attachments that derive from the

---

<sup>201</sup> *Id.* at 252.

<sup>202</sup> *Id.* at 262 (footnote omitted).

<sup>203</sup> *Id.* at 256.

<sup>204</sup> *Id.* at 258.

<sup>205</sup> *Id.* at 260 (quoting *Caban v. Mohammed*, 441 U.S. 380, 397, 414) (1979) (footnote omitted). The Court also noted that a father could establish a constitutionally protected relationship either through marriage or an "actual relationship between father and child." *Id.* at 260 n.16 (citing Justice Stewart's opinion in *Caban*, 441 U.S. at 414).

<sup>206</sup> *Id.* at 261 (quoting *Caban*, 441 U.S. at 392).

intimacy of daily association, and from the role it plays in ‘promot[ing] a way of life’ through the instruction of children.”<sup>207</sup>

The Court clearly saw marriage as the best protection of the father’s interest, and the failure to marry as significant, although not conclusive. While the nature of the relationship to be established was described as “custodial, personal *or* financial,” the Court’s analysis suggests the Court most strongly recognizes and values the social, nurturing relationship.<sup>208</sup> The dissenters, on the other hand, argued for the trigger to be simply the biological link.<sup>209</sup> *Lehr* is a critical case because its language is the basis for a nurture standard and the debate between the majority and dissent pits fatherhood defined by relationship against fatherhood defined by mere biology. Furthermore, the language and rationale of the case may be subject to either a minimalistic or more demanding standard of nurture. Finally, it is a case where the Court adopts father-friendly language but ignores the actual facts of the case.

In the last of these cases, *Michael H. v. Gerald D.*,<sup>210</sup> the Court was faced with determining whether a biological father who had lived with the mother for some time and maintained a relationship with the child could claim visitation rights when the mother reconciled with her husband. The biological father appeared to meet and exceed the Court’s standard as applied in the prior fatherhood cases for constitutional fatherhood. The issue became whether marriage trumped biology plus nurture. Thus the issue was framed as one of status, not nurture.

The facts of this case actually involved three potential fathers. The mother had an affair with a neighbor and the child, Victoria, was born. The husband was listed on the birth certificate and held Victoria out as his daughter. The mother continued a relationship with the biological father and lived with him briefly, and then lived with a third man. The mother moved between these three relationships while the biological father filed a filiation action to establish paternity and his right to visitation.<sup>211</sup> Nearly two years after that action began, the mother finally and permanently reconciled with her husband. The husband intervened in the paternity suit and asked for dismissal based on the statutory

---

<sup>207</sup> *Id.* (quoting *Smith v. Org. of Foster Families for Equal. and Reform*, 431 U.S. 816, 844 (1977) (internal citations omitted)).

<sup>208</sup> *Id.* at 267 (emphasis added).

<sup>209</sup> *Id.* at 272 (White, J., dissenting).

<sup>210</sup> 491 U.S. 110 (1989).

<sup>211</sup> *Id.* at 114.

presumption which would establish him as the father and bar a paternity action unless filed by the husband or the wife.<sup>212</sup>

In this case, fatherhood sufficient under the *Stanley/Caban* standard was contra-posed to marital fatherhood. California had a marital presumption that permitted the marital couple to control the establishment of paternity, and paternity to be presumed during the existence of the marriage.<sup>213</sup> The presumption blocked the biological father from proving paternity, even though paternity tests in this case had established a 98.07% probability that he was the father.<sup>214</sup> The Court upheld the presumption, based on the value of the marital relationship.<sup>215</sup> The Court rested its opinion on veneration for the marital family: “The family unit accorded traditional respect in our society, which we have referred to as the ‘unitary family,’ is typified, of course, by the marital family, but also includes the household of unmarried parents and their children.”<sup>216</sup> The Court also cited to the long tradition of concern over legitimacy.<sup>217</sup> Biological parenthood is valued but only if linked to legitimacy.

The status of marriage confers strong rights, and invokes the Court’s decisions that protect and value the privacy of the “family,” in particular the traditional, marital, intact, two-parent, heterosexual family.<sup>218</sup> The value attached to marital fatherhood is so strong that the Court sided with the marital father against the man called “Daddy” by the child.<sup>219</sup> The effect of that analysis was also to make it irrelevant whether the marital father in fact was a social, nurturing father.

In all but one of the prior fathers’ rights’ cases, the facts involved stepparent adoption by the biological mother’s new husband. Marital fatherhood, even when nonbiological, is clearly preferred by the Court, because it provides the child with what appears to be an intact nuclear family. These are cases in which multiple parental figures are present, sometimes standing with both of the biological pair who conceived the child. None of the adoption scenarios represents adoption by “strangers.” The fathers in these cases were seeking to protect ongoing contact with their children, but not

---

<sup>212</sup> *Id.* at 115.

<sup>213</sup> *Id.* at 117.

<sup>214</sup> *Id.* at 113.

<sup>215</sup> *Id.* at 119–28.

<sup>216</sup> *Id.* at 123 n.3.

<sup>217</sup> *Id.* at 125–26.

<sup>218</sup> *Id.* at 123 n.3.

<sup>219</sup> *Id.* at 144 (Brennan, J., dissenting).

seeking custody. It is not entirely clear whether they were also seeking to protect their right to the opportunity to connection, or perhaps even blocking the assertion of what is deemed an exclusive status by another man.

The Court clearly does not think much of nonmarital fathers. Lacking the status of marriage, they are seen as reprehensible. When the countervailing option is the mother now situated within a marital unit, providing the appearance of the “natural” family, the Court sees a strong state interest in supporting such a family. Thus, where parent-child and marital family interests conflict, the Court tips the balance toward the marital family. In none of these opinions is the nature of the relationship between the stepfather and the child examined. And, most tellingly, in two cases (*Michael H.*<sup>220</sup> and *Quilloin*<sup>221</sup>) the Court ignored the wishes of the child to maintain a relationship with the biological father. By the time the Court decided *Lehr*, the relationship in *Quilloin* was all but erased; it became only a potential relationship, one where the father had never seized his opportunity to be a “real” father.<sup>222</sup> On the other hand, these fathers did not have a strong relationship with their children. While they had maintained contact with their children, and had some relationship with them, in virtually all of these cases apart from *Stanley* and *Caban*, the children had never lived with their biological fathers, nor spent appreciable time with them. Their fathers were present only at the margins in their lives.

The Court’s cases reflect a definition of fatherhood that operates along several axes—marriage, biology, legitimization, and nurture. In addition, even if nonmarital fathers are recognized as having parental status, they do not necessarily have equivalent rights attached to their status. So, for example, a nonmarital father may be heard at an adoption proceeding, but he would not automatically prevail on custody, since that might be decided on the basis of the best interests of the child. Similarly, a nonmarital father could be ordered to pay child support but would not be guaranteed liberal visitation equivalent to that of a marital father, even if technically the movement is toward treating unmarried and married fathers the same. And the Court’s cases arguably require that unwed fathers cannot trigger constitutional protection unless they share a household for a considerable period of time with the mother and child, either because the Court is more comfortable with a marital-type relationship

---

<sup>220</sup> 491 U.S. 110 (1989).

<sup>221</sup> 434 U.S. 246 (1978).

<sup>222</sup> 463 U.S. 248 (1983).

between the parents, or requires the opportunity for presumed conduct of parental nurture of the children.<sup>223</sup> Although the Court recognizes family forms beyond the marital nuclear family, it accords the marital family the highest protection, as a natural right that precedes the Constitution itself.

Marital fathers have garnered little explicit attention other than in *Michael H.*<sup>224</sup> The Court has upheld the right of a father to remarry, even if he has not paid his child support for his children of a previous marriage,<sup>225</sup> holding the right to a new family more important than support for his children. The Court also has recognized the due process rights of divorced fathers, in a stepparent adoption case, in an opinion with markedly little discussion compared to the unwed fathers' cases.<sup>226</sup> The strong protection of marital fathers seems presumed within decisions protecting family privacy that especially accord a high value to marriage, as well as decisions upholding parental rights against state intrusion.

*B. Other Doctrinal Threads: Illegitimacy, Reproductive Rights, Gender Discrimination, Support of Nontraditional Families*

While the core fatherhood cases are the most critical doctrinal framework within which the recent cases must be read, there are several other lines of cases that are important to consider, particularly in the ways in which they feed into the negative stereotype of fatherhood. First, the most positive thread is the general framework of gender analysis, with its emphasis on rejecting outmoded stereotypes, subjecting gender categories to demanding scrutiny, fostering freedom from limiting gender roles and norms, favoring gender neutrality, and recognizing that gender difference should not be translated into gender dominance.<sup>227</sup> A second positive thread is the support of families on the basis of function rather than form, thus including nontraditional families and nontraditional parents.<sup>228</sup> A third positive line of cases are those concerning

---

<sup>223</sup> See generally JANET L. DOLGIN, *DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE* (1997).

<sup>224</sup> 491 U.S. 110 (1989).

<sup>225</sup> *Zablocki v. Redhail*, 434 U.S. 374 (1978).

<sup>226</sup> *Armstrong v. Manzo*, 380 U.S. 545 (1965).

<sup>227</sup> This analysis was perhaps most strongly articulated in the Virginia Military Institute (VMI) case, *United States v. Virginia*, 518 U.S. 515 (1996). See also *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127 (1994); *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Califano v. Westcott*, 443 U.S. 76 (1979); *Califano v. Webster*, 430 U.S. 313 (1977); *Craig v. Boren*, 429 U.S. 190 (1976).

<sup>228</sup> *Troxel v. Granville*, 530 U.S. 57 (2000) (determining that single-parent family must be accorded same respect as other families, and that sweeping third party visitation statute violated parental rights); *Moore v.*

reproductive rights, both for their general conception of privacy, dignity, and liberty, but also for their specific treatment of fathers, their handling of gender difference in the reproductive context, and their imposition of a requirement of paternal responsibility rather than paternal power. Certainly one could argue that the reproductive rights cases pull negatively as well, because they refuse to recognize coequal rights in the abortion context. But that outcome might be viewed as positive as well, limiting the influence of biological differences to a narrow range, but recognizing it where it is relevant.<sup>229</sup> The Court's language and reasoning in those cases, however, while recognizing the value of fatherhood, more dominantly speaks of the importance of marriage and the status of being a good husband.<sup>230</sup>

---

City of E. Cleveland, 431 U.S. 494 (1977) (holding that respect and valuing of family includes extended families); *Smith v. Org. of Foster Families for Equal. and Reform*, 431 U.S. 816, 844 (1977) (finding that "[n]o one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of a blood relationship").

<sup>229</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (holding a requirement that no abortion could be performed on a married woman without a signed statement from the woman that she had notified her spouse unconstitutional); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) (holding that spousal consent may not be required for abortion).

<sup>230</sup> In *Danforth*, the Court analyzed whether spousal consent is constitutional primarily by evaluating it in the context of marriage:

We are not unaware of the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying. Neither has this Court failed to appreciate the importance of the marital relationship in our society. Moreover, we recognize that the decision whether to undergo or to forego an abortion may have profound effects on the future of any marriage . . . .

It seems manifest that, ideally, the decision to terminate a pregnancy should be one concurred in by both the wife and her husband. No marriage may be viewed as harmonious or successful if the marriage partners are fundamentally divided on so important and vital an issue.

428 U.S. at 69–71 (citations omitted). In *Casey* as well, the focus was on the marital relationship, and the Court similarly rejected a notice requirement because most wives communicated with their husbands unless domestic violence was a factor or the pregnancy was the result of an extramarital affair.

We recognize that a husband has a "deep and proper concern and interest . . . in his wife's pregnancy . . . ." With regard to the children he has fathered and raised, the Court has recognized his "cognizable and substantial" interest in their custody . . . . Before birth, however, the issue takes on a very different cast. It is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother's liberty than on the father's.

505 U.S. at 895–96 (1992) (citing *Danforth* and *Stanley*). The Court stressed that marriage does not create a single entity, but is the union of two individuals, who each retain the rights of privacy that are constitutionally protected. *Id.* at 893.

On the other hand, the doctrinal area that pulls most in a negative direction, rife with negative stereotypes, is the Court's illegitimacy cases.<sup>231</sup> The very concept of illegitimacy is a patriarchal norm, infused with notions of fatherhood as something that can be accepted or rejected. It is about defense of property, linking fatherhood solely to marriage and money. Whether concerned with rights or responsibilities, it is a doctrinal area that reinforces all the wrong definitions of fatherhood. To say that a child is illegitimate is also to say that his father is "illegitimate"—the label not only stigmatizes the child but also the father. In an era of genetic testing and parity in the responsibilities and rights at least formally imposed on nonmarital fathers, retaining the concept of illegitimacy seems anachronistic. Illegitimacy reinforces the status-based norm of marital fatherhood rather than the relational norm of nurture.

The weight of constitutional doctrine leads away from the disparagement of nonmarital fathers and the remains of patriarchal parenthood toward the model of nurturing fatherhood. Starting from the base in the core fatherhood cases, there is a nurture model that can be strengthened to include all social fathers, whether biological, adoptive, or stepfathers. It is a standard that would focus on doing rather than being, requiring a well-defined relationship with the child as well as a cooperative relationship with other parents. This would involve not so much the adoption of a new standard but recasting the existing standard, as well as vigorous patrolling to keep the courts from falling back on bad old stereotypes. In the next section, I present the arguments for a standard centered around nurture instead of either biology or marriage.

### III. REDEFINING FATHERHOOD AROUND NURTURE

The existing definition of constitutional fatherhood in the fatherhood cases is "biology plus," meaning a genetic link plus some act of parenting that indicates the "opportunity" to parent has been seized. It is rooted, then, in a

---

<sup>231</sup> See, e.g., *Clark v. Jeter*, 486 U.S. 456 (1988); *Lalli v. Lalli*, 439 U.S. 259 (1978); *Trimble v. Gordon*, 430 U.S. 762 (1977); *Mathews v. Lucas*, 427 U.S. 495 (1976); *Gomez v. Perez*, 409 U.S. 535 (1973); *N.J. Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); *Labine v. Vincent*, 401 U.S. 532 (1971); *Glonn v. Am. Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968); *Levy v. Louisiana*, 391 U.S. 68 (1968). Professor Erwin Chemerinsky concludes that these cases, which have been critiqued as lacking a consistent analysis, can be characterized as falling within three categories. First, laws that bar all nonmarital children from a benefit provided to all marital children are unconstitutional; second, laws that distinguish among nonmarital children (e.g., those who were acknowledged in the father's lifetime versus those who were not) may survive on a case by case basis; and third, laws limiting the ability to establish paternity generally will not survive if the limitations period is too short. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES* 748–53 (2d ed. 2002).

genetic definition of fatherhood, plus the requirement of some action of actually *being* a father. It is an ambiguous standard that may not require that men do much in order for courts to recognize men's legal, constitutional status. At the same time, the discourse in these cases suggests that the Court does not expect that most men will do anything, based on a deeply negative stereotype of men as parents. The existing standard, then, is grounded in gender assumptions that women naturally parent, while men, outside of marriage, choose to parent or not, and nearly always choose not to do so. It assumes men do not have links to their children, or only do so within the structure of marriage. The Court's most recent opinions show some positive movement away from these assumptions in several respects. Most notably, the Court has recognized the critical role men play in nurturing their children and has acknowledged the difficulties men face in a world that erects barriers based on stereotypes about men as fathers.<sup>232</sup>

We should build on the positive aspects of the existing standard of constitutional fatherhood that recognize nurture as the essence of fatherhood by (1) articulating a clearer standard of nurture and (2) explicitly identifying and rejecting the reasoning of the older cases grounded in unjustified stereotypes. In this section I set out a redefinition of fatherhood around nurture. This redefinition includes both a substantive due process component and an equal protection component. The substantive due process and equal protection components operate together to establish a constitutional definition of fatherhood. The substantive due process component would trigger entitlement to protection from state interference or infringement in order to protect the relational rights of fathers and children, and the value of nurture to children. It requires defining the qualitative characteristics of nurture. It also should include within the definition of nurture the positive relationship of fathers to other caregivers.

The equal protection component of fatherhood emphasizes the equality of fathers and mothers in most instances other than in the area of reproductive rights, and emphasizes the quantitative characteristic of nurture. Nurture is not only what is done, but also that those who nurture should do so in a roughly equivalent manner to what has been traditionally expected and practiced by mothers. Fatherhood includes this egalitarian norm of an equal commitment to nurture when practiced within either a two-parent heterosexual marital norm or within other family forms with other caregivers, including families that no

---

<sup>232</sup> See *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003).

longer share a household. Fatherhood demands an equal, cooperative commitment of care. The cooperative norm includes within the egalitarian quantitative norm, as in the substantive due process component, a principle of positive interrelationship with other caregivers.

Marriage has already been rejected as an exclusive framework for fatherhood, as seen in the structure of family law at the state level.<sup>233</sup> The issue at a constitutional level is whether to refine the existing core fatherhood definition toward a definition centered around genetics only, in an era where genetics can be determined for virtually all children.<sup>234</sup> We would then link genetics to responsibility, and responsibility to rights, but then separate the two to encourage nurture. That is close to where we are now.<sup>235</sup>

The alternative is to emphasize that nurture is the key to constitutional status. It requires removing the stereotypes that put the standard in place, recasting the definition, and ensuring that the application of the standard is sensitive to claims of gender bias, by both fathers and mothers.<sup>236</sup> Genetics may provide the opportunity for fatherhood, but it would not be the sole trigger. So this means taking the existing standard and reworking it, based on the acknowledgement that men and women are *not* differently situated with respect to genetic identity, because DNA analysis removes that difference. The remaining difference is that women have acted, prebirth, to nurture; men's nurture in that time frame must be differently measured. But postbirth, the period that I focus on here, that difference disappears and permits a gender neutral standard.<sup>237</sup>

The place of constitutional analysis in a definition of fatherhood based on nurture would be to ensure that laws, their application, and institutional structures of the state, do not impinge on the fundamental role of fathers to nurture children. Implementing support for fathers would not, under existing

---

<sup>233</sup> State laws now use the framework of support, custody, and visitation for both marital and nonmarital fathers. The common law regime of fatherhood is largely over. DOWD, *supra* note 12, at 114–20; *see also* The Uniform Parentage Act, *supra* note 34.

<sup>234</sup> *See generally* GENETIC TIES AND THE FAMILY, *supra* note 73.

<sup>235</sup> DOWD, *supra* note 12, at 130–31.

<sup>236</sup> For an analysis of the competing gender bias claims of mothers and fathers, *see* DOWD, *supra* note 12, at 66–69.

<sup>237</sup> Even prebirth, the differences between fathers and mothers do not mean fathers' care cannot be measured. *See* Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993) (arguing the difference is an illusion because men can act positively or negatively during pregnancy).

concepts of state obligations, be an affirmative constitutional obligation.<sup>238</sup> Affirmative support is critical, but most likely comes at the state level. One of the places where a constitutional definition might make a significant difference would be the use of that substantive right to confront the claims of gender bias in the structure of custody in nonmarital and divorced families.

Several justifications exist for adopting nurture as the definition of fatherhood. First, and most importantly, it is to the benefit of children. Second, it is to the benefit of men. Third, it is essential to gender equality. Finally, it is important to ensure equality among different forms of family, and for the children raised within them. These justifications are explored in greater detail below.

A. *A New Constitutional Standard: Nurturing Fatherhood*<sup>239</sup>

Redefining the constitutional standard of fatherhood around nurture would mean focusing on what fathers do, on function and action, rather than on genetic markers of fatherhood. Social fatherhood is the core of the definition, and I would state the standard as follows:

Social fatherhood is the practice of nurture, either alone or in combination with other caretakers, as the sole or primary parent, or contributing as closely as possible to an equal amount of care giving in partnership with the other primary parent or parents. It is nonexclusive, cooperative parenting.

Nurture is the core of this definition, and must be defined in a very rich way that describes its components as well as the critical cooperative interaction of nurture with other caregivers. Nurture includes the psychological, physical, intellectual, and spiritual care of children.<sup>240</sup> It is fluid, not fixed, based on the developmental context of children and their particular needs.<sup>241</sup> It includes not only children's well being but also the well being of other caretakers.<sup>242</sup> It is

---

<sup>238</sup> See, e.g., *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

<sup>239</sup> In *Redefining Fatherhood*, I present a detailed argument for the redefinition of fatherhood. DOWD, *supra* note 12. In this section, I present a summary of that more extended treatment.

<sup>240</sup> *Id.* at 157.

<sup>241</sup> For the developmental stages of children, see Dorothy Singer, *Developmental Differences Among Children and Adolescents: An Overview of the Research and Policy Implications*, in A HANDBOOK OF CHILDREN, CULTURE AND VIOLENCE (Nancy E. Dowd et al. eds., forthcoming 2006). For the example of teenagers, as having different needs than infants, see Nancy E. Dowd, *Bringing the Margin to the Center: Comprehensive Strategies for Work/Family Policies*, 73 U. CIN. L. REV. 433 (2004).

<sup>242</sup> It includes both the inevitable dependency of children and the derivative dependency of caretakers, as

therefore interconnected with other household work and the balance of wage and family work.<sup>243</sup> It presumes shared responsibility, as close to 50–50 as possible, or proportionate to the presence of other caretakers.

Nurture as I have defined it has both a quantitative and a qualitative component. By using “nurture” instead of “father,” we incorporate what we know of men’s ability to care for children.<sup>244</sup> A nongendered word is appropriate here, to counter the cultural and historic tendency to essentialize and naturalize fatherhood, and to associate it with genetic and economic connections.<sup>245</sup> Yet the content of nurture is unavoidably woman connected.<sup>246</sup>

*Qualitatively*, nurture is a woman-defined concept that is gender neutral in scope. The qualitative component is easiest to define by those who have traditionally and still predominantly do care: mothers.<sup>247</sup> This does not mean an essentialist assumption of women as natural mothers.<sup>248</sup> Rather, it means

named and articulated by Martha Fineman. See her most recent work, MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 35 (2004).

<sup>243</sup> On work-family issues, see Symposium, *Feminist Theories of Relation in the Shadow of the Law*, 17 WIS. WOMEN’S L.J. 1 (2002); Symposium, *Gender, Work & Family Project Inaugural Feminist Legal Theory*, 8 AM. U. J. GENDER SOC. POL’Y & L. 1 (2000); Symposium, *Still Hostile After All These Years? Gender, Work & Family Revisited*, 44 VILL. L. REV. 297 (1999); Symposium, *The Structures of Care Work*, 76 CHI.–KENT L. REV. 1387 (2001); Symposium, *Unbending Gender: Why Family and Work Conflict and What to Do About It*, 49 AM. U. L. REV. 823 (2000); Symposium, *Women’s Work Is Never Done: Employment, Family and Activism*, 73 U. CIN. L. REV. 361 (2004). Existing leave and childcare policies are minimal. See, e.g., Marc Mory & Lia Pistilli, Note, *The Failure of the Family and Medical Leave Act: Alternative Proposals for Contemporary American Families*, 18 HOFSTRA LAB. & EMPL. L.J. 689, 698 (2001); see also Nancy E. Dowd, *Family Values and Valuing Family: A Blueprint for Family Leave*, 30 HARV. J. ON LEGIS. 335 (1993); Michael Selmi, *The Limited Vision of the Family and Medical Leave Act*, 44 VILL. L. REV. 395 (1999); Thomas R. Marton, Comment, *Child-Centered Child Care: An Argument for a Class Integrated Approach*, 1993 U. CHI. L. SCH. ROUNDTABLE 313 (1993); CHILDREN’S DEFENSE FUND, *CHILD CARE BASICS: CHILDREN’S DEFENSE FUND ISSUE BASICS* (2005), [http://www.childrensdefense.org/earlychildhood/childcare/child\\_care\\_basics\\_2005.pdf](http://www.childrensdefense.org/earlychildhood/childcare/child_care_basics_2005.pdf); U.S. Census Bureau, *supra* note 9; *infra* notes 251 and 252.

<sup>244</sup> DOWD, *supra* note 12, at 39–48 (discussing the actualities of fatherhood as currently practiced).

<sup>245</sup> *Id.* at 33–38 (presenting a historical perspective of fatherhood); see also Louise B. Silverstein & Carl F. Auerbach, *Deconstructing the Essential Father*, 54 AM. PSYCHOLOGIST 6 (1999).

<sup>246</sup> Some would argue “mothering” is more appropriate to honor and accurately reflect women’s dominance in caregiving, versus the more neutral “nurture” which arguably hides that reality. See generally FINEMAN, *supra* note 242, at 183; JOAN WILLIAMS, *UNBENDING GENDER: MARKET WORK AND FAMILY WORK IN THE TWENTY-FIRST CENTURY* (1999); Mary Becker, *Care and Feminists*, 17 WIS. WOMEN’S L.J. 57 (2002) (reviewing the care debate); Symposium, *The Structures of Care Work*, 76 CHI.–KENT L. REV. 1387 (2001).

<sup>247</sup> See Naomi Cahn, *The Power of Caretaking*, 12 YALE J.L. & FEMINISM 177 (2000) (reviewing data on women’s predominance in caregiving); Peggie R. Smith, *Elder Care, Gender, and Work: The Work-Family Issue of the 21st Century*, 25 BERKELEY J. EMP. & LAB. L. 351 (2004) (examining the gendered pattern of elder care).

<sup>248</sup> On the dangers of maternalizing women, see Joan Williams, *From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition*, 76 CHI.–KENT L. REV. 1441 (2001).

examining what women do, as the primary caretakers of children, and how they are socialized as parents. It includes the range of mothering practices that encompass differences among women.<sup>249</sup> It also must include the critique of mothering when it becomes a practice that limits women or harms children.<sup>250</sup>

Nurture also must be seen in connection to the other work of the household, and its interconnection to wage work. Household work should not be separated from childcare, and includes the care given to other adults as well as children.<sup>251</sup> The interconnection of family work and wage work is essential, both in the short-term, daily sense, and with respect to its impact on long-term opportunities and economic security.<sup>252</sup>

Nurture must also be defined and understood *quantitatively*, in relationship to the child and in relationship to other caregivers.<sup>253</sup> It must be as close to equal care as is possible, a model of 50–50 or at most 60–40, or otherwise equally shared if there are more caregivers. We operate within a context strongly modeled on a primary caretaker.<sup>254</sup> Those fathers most involved in nurture, other than the small number who themselves are sole or primary

<sup>249</sup> On anti-essentialism, see generally FEMINIST LEGAL THEORY: AN ANTI ESSENTIALIST READER (Nancy E. Dowd & Michelle S. Jacobs eds., 2003).

<sup>250</sup> On the concept of motherhood versus its practice, see, for example, ADRIENNE RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* (1976); Becker, *supra* note 246. On “bad mothers,” see generally Marie Ashe & Naomi R. Cahn, *Child Abuse, A Problem for Feminist Theory*, 2 TEX. J. WOMEN & L. 75 (1993); Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375 (1996).

<sup>251</sup> On housework, see ARLIE HOETHSCHILD, *THE SECOND SHIFT 2* (rev. ed. 2003); Coltrane, *supra* note 84; Katharine Silbaugh, *Commodification and Women’s Household Labor*, 9 YALE J.L. & FEMINISM 81 (1997); Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996). On elder care, see Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1, 21 n.82 (2005); Michael Selmi, *Care, Work and the Road to Equality: A Commentary on Fineman and Williams*, 76 CHI.-KENT L. REV. 1557, 1561 n.15 (2001).

<sup>252</sup> Nancy E. Dowd, *Race, Gender, and Work/Family Policy*, 15 WASH. U. J.L. & POL’Y 219, 227–31 (2004); see also *supra* note 229. See generally Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707 (2000); Peggie R. Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations*, 2001 WIS. L. REV. 1443 (2001); Peggie R. Smith, *Parental-Status Employment Discrimination: A Wrong in Need of a Right?*, 35 U. MICH. J.L. REFORM 569 (2002); Katherine Elizabeth Ulrich, *Insuring Family Risks: Suggestions for a National Family Policy and Wage Replacement*, 14 YALE J.L. & FEMINISM 1 (2002); Williams & Segal, *supra* note 84; Donna E. Young, *Working Across Borders: Global Restructuring and Women’s Work*, 2001 UTAH L. REV. 1 (2001); Kathryn Branch, Note, *Are Women Worth as Much as Men?: Employment Inequities, Gender Roles, and Public Policy*, 1 DUKE J. GENDER L. & POL’Y 119 (1994); P.K. Runkles-Pearson, Note, *The Changing Relations of Family and the Workplace: Extending Antidiscrimination Laws to Parents and Nonparents Alike*, 77 N.Y.U. L. REV. 833 (2002).

<sup>253</sup> Our caretaking patterns for children remain strongly a single or primary caretaker supported by secondary caretakers. DOWD, *supra* note 12, at 46; FINEMAN, *supra* note 242.

<sup>254</sup> See DOWD, *supra* note 12, at 39–48.

parents, do so in a way characterized by distinctly unequal direct parenting, in addition to indirect parenting.<sup>255</sup> If we understand fathering under this existing model to be a legitimate model of nurture, then the task would be to de-genderize the model, so that either mothers or fathers could be the primary or secondary parent. If, on the other hand, the model is one of co-equal parenting, including both direct and indirect parenting, then the quantitative component would translate into a 50–50, or at most 60–40 distribution of the responsibilities of care. Consistent with an egalitarian model of parenting, I would argue that nurture must be defined in this second, more meaningful sense. As a pragmatic matter, however, it might be necessary to consider the constraints against practicing fatherhood in this way under existing work/family structures, and work incrementally toward a 50–50 model.<sup>256</sup>

If the nurture expected is defined qualitatively and quantitatively as I have described, then nurture imposes a further essential requirement of cooperative parenting with other nurturers (but not with other nonnurturing, simply formal, or status parents or caregivers). The obligation of cooperation is mutual, and does not require the sharing of a household, but rather is meant to encourage cooperation even beyond a household structure or shared familial structure.<sup>257</sup> A relationship can develop outside of intimacy and outside of shared living, but requires cooperation, respect, and nonviolence.<sup>258</sup> In this model, mutuality

---

<sup>255</sup> See *id.* at 40–41. Solangel Maldonado has recently pointed out the contradiction between more involved fatherhood as documented among marital couples, and the disengagement of fathers postdivorce. Maldonado, *supra* note 9, at 947. He proposes a rule of presumptive joint *legal* custody with responsibilities (instead of rights) of involvement in parenting. *Id.* at 984–85. This is a significant effort to recast legal norms to achieve a backup parenting model, instead of a 50–50 model.

<sup>256</sup> The constraints would be significant, given the differential that remains in men's and women's salaries as well as the differential in jobs that men and women work, and therefore the pattern of flexibility, or lack of it, that they have. For a recent analysis of the very limited issue of making family leave paid leave, see Lester, *supra* note 251. Confronting the barriers of larger structural and economic issues would raise substantial problems which must be addressed. Wage inequity and ongoing gender segregation are significant barriers. Racial wage inequity and job segregation compound these issues for men and women of color. The ability to balance work with parenthood is a particularly significant challenge for men because the reinforcement of their breadwinner role confounds efforts to be involved, nurturing fathers. These barriers require detailed treatment that is not included in this article but that is essential to resolution if nurturing fatherhood is to be mean real conduct rather than only formal equality. See Selmi, *supra* note 251; see also EDWARD J. MCCAFFERY, *TAXING WOMEN* (1997).

<sup>257</sup> The cooperative model envisioned here may pose different challenges for women and men. Women would have to give up their dominance in caretaking. See Cahn, *supra* note 247 (regarding challenges of giving up women's limited power). Men would have to learn nurture but give up their general social dominance and hierarchical gender relations. See Peggy MacIntosh, *White Privilege: Unpacking the Invisible Knapsack* (Wellesley College Center for Research on Women, Working Paper No. 1891988) (describing the challenges of identifying unearned privilege).

<sup>258</sup> The challenge of nonviolence is significant given the data regarding the prevalence of domestic

is valued, and no particular structure is privileged. This also means a nonexclusive concept of parenthood, so that cooperation would be supported among multiple parenting figures who function in the best interests of the child.<sup>259</sup>

Adopting nurture as the core concept of fatherhood is more difficult conceptually, and involves more balanced understanding, than does a biological or economic model of fatherhood. In that respect, it is less certain than those models or definitions, which can rely on genetic testing or setting some level of economic contribution as a standard, which seem clearer and easier to apply. The challenge is to articulate an inclusive, diverse standard that focuses on the needs of children and emphasizes the presumed ability of men to nurture and their capability of learning how to do so. The benefit to describing and defining what nurture means is that we make the work of taking care of children more visible and more valued.<sup>260</sup> The focus on the ability and capability of men to nurture will also expose the development of women's ability and capability, which are so differently supported by women's socialization and by the presence of support networks when they become parents.

Redefining fatherhood around nurture, and a model of social fatherhood, means that we should work within existing patterns of fatherhood rather than resisting them. Those patterns indicate that most men parent as social fathers within particular relational contexts. It is to these patterns that I now turn.

---

violence. DOWD, *supra* note 12, at 194–202.

<sup>259</sup> Thus, the model of one mother, one father would be rejected in favor of multiple parents. Thinking through the implications of multiple parents is beyond the scope of this article but is essential given the demographics of children's caregiving patterns. See Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984); see also David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753 (1999) (suggesting a framework to accommodate would-be adoptive parents and faultless fathers when adoption fails).

<sup>260</sup> Our tendency is to mystify and not study parenting. Motherhood is romanticized as mysterious. We tend to not want to know the realities. In contrast, some research provides concrete knowledge. For example, a recent article estimated the cost of replacing a stay-at-home mother at just over \$130,000 annually. "Working Mother"—A Redundant Expression, JERUSALEM POST, May 6, 2005, at 14, available at <http://www.besr.org/ethicist/jpost/5.6.2005.html>. Another article demonstrated how motherhood expands the brain. Katherine Ellison, *This Is Your Brain on Motherhood*, N.Y. TIMES, May 8, 2005, at 4–12 (Week in Review sect.).

### B. *The Context of Fatherhood*

There are two components to the context of fatherhood: the demographics of fatherhood, and the content of fathering. The most striking pattern of the demographics is that *men parent in patterns that are quite different from the patterns of women.*<sup>261</sup> The most critical fact that emerges about how men parent is that *when men do nurture children as a primary parent, men parent essentially like mothers. Men parent as well as women do, and their way of parenting is not unique.*<sup>262</sup>

The demographic patterns of fathers indicate that most men become fathers at some point in their lifetimes, but most frequently they become biological fathers in their twenties and thirties. Rather than being linear fathers, e.g., fathering for life, many men engage in serial fathering, parenting a series of children or families as they cohabit, marry, divorce, and remarry, as biological, adopted, or stepfathers (formal or informal). Their fathering tends to be linked to the presence of women as partners and the presence of children in their household.<sup>263</sup>

An increasing proportion of men are the sole or primary parent of children, filling the role that women have traditionally played in childrearing.<sup>264</sup> Some enter that role via the death of a spouse, some by divorce, and others are in that role within a committed cohabiting relationship or a marriage.<sup>265</sup> A larger group of fathers parent with a partner but are the secondary parent to the primary parenting of their partner. The range of secondary parents is quite broad, from nearly co-equal parents to fathers who nurture but only on a very irregular basis, e.g., very little during the workweek and only a limited stint on weekends.<sup>266</sup> A third category of fathers are what might be thought of as disengaged fathers, fathers who are only rarely a part of the lives of their children, or even totally absent from their lives.<sup>267</sup> The care patterns of fathers

---

<sup>261</sup> DOWD, *supra* note 12, at 39–40, 44–45.

<sup>262</sup> *Id.* at 83.

<sup>263</sup> *Id.* at 81–83.

<sup>264</sup> *Id.* at 22–23. From 1970 to 2003, the proportion of single-father family groups increased from one percent to six percent; for single-mother families, the change was from twelve percent to twenty-six percent. For recent data on men's increased caregiving, see U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2003, at 8 (2004), available at [www.census.gov/prod/2004pubs/p20-553.pdf](http://www.census.gov/prod/2004pubs/p20-553.pdf). For further data on fathers, see Gender Issues Research Center, *Men and Fatherhood*, <http://www.gendercenter.org/fathering.htm> (last visited May 25, 2005).

<sup>265</sup> DOWD, *supra* note 12, at 8–9.

<sup>266</sup> *Id.* at 22–24.

<sup>267</sup> *Id.* at 23; see also Maldonado, *supra* note 9, at 946–48 (providing data on paternal disengagement at

are very dissimilar to mothers, creating a highly asymmetrical gender pattern.<sup>268</sup>

There are significant race and class differentiations among the patterns of fatherhood. As income rises, fathers tend to do less care of children.<sup>269</sup> Working class fathers, for example, sometimes care for their children in tandem with their wives, with spouses working opposite shifts to provide care for their children.<sup>270</sup> Across race lines, nonmarital fathering is far more common for black and hispanic fathers than for white fathers.<sup>271</sup>

There is no unique style of parenting for fathers. Fathers who parent alone parent like mothers—they nurture. Good parenting is neither sex-specific nor sex-related. The connection is cultural, not biological. When men are primary parents, by choice or by circumstances, they parent as well as and similarly to women.<sup>272</sup> Men are not essential to healthy child development based on their uniqueness; rather, they contribute to healthy child development because of the benefit of even indirect support of the primary caretaker. Father presence correlates with more income or child support, and sufficient economic resources correlate with greater childhood success.<sup>273</sup>

This is not to say that fathers do not behave differently, but rather links differences to cultural norms and models, not hard wiring.<sup>274</sup> For example, less than half a century ago, men were not present at the birth of their children. In the mid-1970s, the American College of Obstetricians and Gynecologists endorsed father presence during labor, and men rapidly seized that opportunity, with father presence now the norm.<sup>275</sup> Similarly, men were excluded from family planning strategies.<sup>276</sup> Involved, nurturing fathers are a new norm,

---

divorce).

<sup>268</sup> DOWD, *supra* note 12, at 83. On men's caregiving patterns, see also CASPER, *supra* note 9; TAMARA HALLE, CHARTING PARENTHOOD: A STATISTICAL PORTRAIT OF FATHERS AND MOTHERS IN AMERICA (2002), available at <http://fatherhood.hhs.gov/charting02>.

<sup>269</sup> See DOWD, *supra* note 12, at 84.

<sup>270</sup> *Id.* at 48–57.

<sup>271</sup> *Id.* at 83–84.

<sup>272</sup> *Id.* at 46.

<sup>273</sup> *Id.* at 84.

<sup>274</sup> See, for example, on fathers and child development, BRENDA GEIGER, FATHERS AS PRIMARY CAREGIVERS (1996); ROSS D. PARKE, FATHERHOOD (1996); Michael Lamb & Catherine S. Tamis-LeMonda, *The Role of the Father*, in *THE ROLE OF THE FATHER IN CHILD DEVELOPMENT 1* (Michael E. Lamb ed., 4th ed. 2003).

<sup>275</sup> JOHN SNAREY, HOW FATHERS CARE FOR THE NEXT GENERATION: A FOUR-DECADE STUDY 33 (1993).

<sup>276</sup> WILLIAM MARSIGLIO, PROCREATIVE MAN 64 (1998).

frequently still an ideology not yet fully fleshed out or reflected in conduct.<sup>277</sup> As one researcher has noted, critical factors in fathers' involvement include motivation, skills, self-confidence, social support, and institutional supports.<sup>278</sup> Furthermore, men's dedication to nurture can occur either because of role models in their own families of origin or in opposition to those roles—in other words, being the fathers they had, or the fathers they wished they had.<sup>279</sup> Cultural support is still lacking, and economic factors hinder men's capability to parent if they are still expected to be the primary breadwinner.

There is no doubt that the greater likelihood of economic resources linked to men's superior wage work position has positive implications for children.<sup>280</sup> The presence of men in the household also is correlated with psychological and intellectual benefits for children.<sup>281</sup> It is important to note, however, that mere presence is not sufficient. The example of stepfathers illustrates this important point. The mere presence of a man, a father in the household is not enough. The dynamic of stepparenting is different for children and parents. The children of stepparents face the same challenges and exhibit almost the same outcomes and problems as do children in single-parent families, without strong family, community, or social support.<sup>282</sup>

The strongest patterns of fatherhood are social, connected to relationships and households. Those parenting relationships that exist outside of these patterns would not be disadvantaged by a definition of fatherhood centered on nurture, while those that currently are ignored would be better supported. In addition, we would more strongly recognize other sources of stability and care,

---

<sup>277</sup> See Michael A. Messner, "Changing Men" and Feminist Politics in the United States, in THE POLITICS OF MANHOOD: PROFEMINIST MEN RESPOND TO THE MYTHOPOETIC MEN'S MOVEMENT (AND THE MYTHOPOETIC LEADERS ANSWER) 97–98 (Michael S. Kimmel ed., 1995) [hereinafter THE POLITICS OF MANHOOD] (noting that the "New Man," who is very involved in parenting, is still often viewed as "more style than substance").

<sup>278</sup> Michael E. Lamb, *Introduction: The Emergent American Father*, in THE FATHER'S ROLE: CROSS-CULTURAL PERSPECTIVES 3, 22 (Michael E. Lamb ed., 1987).

<sup>279</sup> SNAREY, *supra* note 275, at 323; see also GENERATIVE FATHERING: BEYOND DEFICIT PERSPECTIVES (Alan J. Hawkins & David C. Dollahite eds., 1997).

<sup>280</sup> DOWD, *supra* note 12, at 84.

<sup>281</sup> *Id.* at 44.

<sup>282</sup> *Id.* at 64; see also Mary Ann Mason & David W. Simon, *The Ambiguous Stepparent: Federal Legislation in Search of a Model*, 29 FAM. L.Q. 445 (1995) (addressing the inconsistent law related to stepfamilies and calling for a consistent legal framework); Mary Ann Mason & Nicole Zayac, *Rethinking Stepparent Rights: Has the ALI Found a Better Definition?*, 36 FAM. L.Q. 227 (2002) (discussing the ALI's attempt to define legal rights and obligations for nonbiological parents); The Stepfamily Foundation, <http://www.stepfamily.org> (last visited June 3, 2005) (providing counseling and support services to stepfamilies).

including extended family and networks of friends. Second, a definition focused on nurture would not privilege marriage, but there is room within the definition for recognizing the value of actual conduct within marriage or other committed relationships. Third, social fatherhood most beneficially resolves the issue of supporting fatherhood without undermining motherhood. The focus is on relationships, between father and child and father and other caretakers. Social fatherhood more strongly values the nonmarital patterns more dominant in nonwhite communities, and perhaps makes more visible alternative cultural conceptions of fatherhood. Finally, social fatherhood best responds to the need for flexibility in the context of significant family fluidity and change.

### *C. Challenges*

It is important to recognize the challenges posed by reorienting fatherhood around nurture, instead of economics, biology, or marriage. Even if economic barriers are addressed, the most difficult challenges are cultural. There are two gender intersections critical to nurturing fatherhood: the relationship of fatherhood to masculinity, and the relationship of fatherhood to motherhood. Those barriers must be recognized and addressed if we are to practice a redefined fatherhood. It is therefore essential to recognize these issues and incorporate them into our understanding of nurturing fatherhood. Most importantly, these issues are recognized by the relational part of the definition and the requirement of positive cooperation.

#### *1. Fatherhood and Masculinity*

The relationship of fatherhood to masculinity is the challenge of redefining what it means to be a man to encompass nurturing fatherhood. It is axiomatic that in order to redefine fatherhood, we must redefine what it means to be a man. Masculinity traditionally has been defined by characteristics antithetical to nurture. Masculinity and femininity have been framed not only as different but as opposites.<sup>283</sup> Gender policing of the boundaries ranges from teasing and harassment to violent attack.<sup>284</sup> Misogyny and homophobia are twin markers of the strength of societal protection of male identity, but also indicate the size

---

<sup>283</sup> LYNNE SEGAL, *SLOW MOTION: CHANGING MASCULINITIES, CHANGING MEN* 129 (1990).

<sup>284</sup> On bullying, gender policing of men by men using particularly gay bashing and violence, see generally Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 *UCLA L. REV.* 1037, 1054–78 (1996).

of the challenge to reconstruct male norms in ways that transgress traditional boundaries.

The identification of care and nurture with women has historically meant actions of care and nurture are unmanly.<sup>285</sup> Masculinity has been characterized by a persistent need to “prove” one’s manliness, which as one researcher has described it, is defined by four basic rules: “No Sissy Stuff,” “Be a Big Wheel,” “Be a Sturdy Oak,” and “Give ‘em Hell.”<sup>286</sup> Fathering or parenting is noticeably absent in this list. If parenting is present at all in manliness, it is only as a demonstration of the virility associated with fathering a child, not as the practice of care.<sup>287</sup> Interestingly, the men’s movement has decried men’s loss of their fathers but not converted that grief into a new model of fathering men’s own sons and daughters.<sup>288</sup>

One of the strongest traditional characteristics of masculinity is dominance, both in relation to other men and in relation to women.<sup>289</sup> Certainly, modern principles of equality challenge patriarchal dominance, but they provide a less clear articulation of manhood. One easy outlet is economic dominance, but the price of that dominance is usually a sacrifice of any meaningful nurturing role.<sup>290</sup> One of the most enduring fatherhood roles is the father as breadwinner, but that role fails to incorporate nurture, sacrificing nurture for gender-defined economic responsibility.

Changing culture is certainly beyond the law to accomplish.<sup>291</sup> The role of the law, however, is important in examining the ways in which particular norms of fatherhood are reinforced or projected. The law is also significant in devising the implementation of strategies that support men’s nurture of their children. Examples of the first phenomenon, the role of law in supporting

---

<sup>285</sup> See generally R.W. CONNELL, *MASCULINITIES* (1995); RONALD F. LEVANT, *MASCULINITY RECONSTRUCTED: CHANGING THE RULES OF MANHOOD—AT WORK, IN RELATIONSHIPS, AND IN FAMILY LIFE* 236–37 (1995); Stephen J. Bergman, *Men’s Psychological Development: A Relational Perspective*, in *A NEW PSYCHOLOGY OF MEN* 74 (Ronald F. Levant & William S. Pollack eds., 1995) (commenting on socialization of boys to disconnect from their mothers); Steven Krugman, *Male Development and the Transformation of Shame*, in *A NEW PSYCHOLOGY OF MEN*, *supra*, at 94 (discussing male socialization to control feelings).

<sup>286</sup> MICHAEL KIMMEL, *MANHOOD IN AMERICA: A CULTURAL HISTORY* 282 (1996).

<sup>287</sup> DOWD, *supra* note 12, at 183.

<sup>288</sup> See generally ROBERT BLY, *IRON JOHN: A BOOK ABOUT MEN* (1990); THE POLITICS OF MANHOOD, *supra* note 277.

<sup>289</sup> See SEGAL, *supra* note 283, at 103.

<sup>290</sup> See ANDREW KIMBRELL, *THE MASCULINE MYSTIQUE: THE POLITICS OF MASCULINITY* 109 (1995).

<sup>291</sup> See generally Nancy E. Dowd, *Law, Culture, and Family: The Transformative Power of Culture and the Limits of Law*, 78 *CHI.-KENT L. REV.* 785 (2003) (arguing that without cultural support the law is an inadequate instrument of social change).

gender norms of fatherhood, include the gender neutral provision of parental leave in the FMLA,<sup>292</sup> and the recognition of parental rights of nonmarital fathers on par with divorced fathers. Both of these areas could be cited as examples of legal rules fostering men's nurture. At the same time, the concept of "responsible fatherhood,"<sup>293</sup> used to encourage payment of child support and also linked to efforts to increase marriage rates, makes fatherhood synonymous with the traditional breadwinner economic role rather than supporting social fatherhood.

The role of the law in making redefined fatherhood a reality also is demonstrated by several examples. Implementing gender neutral rules in a highly gendered context leads to a predictable gendered outcome. For example, providing parental leave with no pay leads to the disproportionate use of leave by women.<sup>294</sup> Providing leave with pay without addressing the cultural and work environment constraints on men that deter them from taking leave also leads to predictable continuing lower leave use by men.<sup>295</sup> Another example is efforts to increase identification of fathers at birth through voluntary paternity programs. Treating fathers as valued caregivers and supporting their presence and ongoing care is an entirely different implementation strategy than one devised to "catch" fathers for child support but not support them as nurturing fathers.<sup>296</sup>

Concepts of masculinity pervade the law in a variety of ways that are harmful to men in their relationship to each other, to women, and to the state.<sup>297</sup> The negative or, at best, conflicted view of nurture under current masculinity norms affects both men's socialization and behavior, and the application of legal rules, particularly with respect to men's caregiving.<sup>298</sup> The

---

<sup>292</sup> See Family and Medical Leave Act, *supra* note 23.

<sup>293</sup> "Responsible fatherhood" is the term used to promote child support payment. See Dowd, *supra* note 241, at 445–46 (discussing promarriage efforts).

<sup>294</sup> On leave patterns under the FMLA, which covers only fifty percent of workers, see Dowd, *supra* note 252, at 238 n.84.

<sup>295</sup> Data on a variety of work-family policies that would be considered quite generous from a U.S. perspective continue to show gendered patterns of use. Rachel Henneck, Council on Contemporary Families, *Family Policy in the US, Japan, Germany, Italy and France: Parental Leave, Child Benefits/Family Allowances, Child Care, Marriage/Cohabitation, and Divorce* (May 2003), <http://www.contemporaryfamilies.org/public/articles/Int'l%20Family%20Policy.htm>.

<sup>296</sup> See, e.g., William D. Allen & William J. Doherty, *The Responsibilities of Fatherhood as Perceived by African American Teenage Fathers*, 77 FAM. SOCIETY 142 (1996) (presenting a study on African-American males' views of fatherhood and obstacles to meeting fatherhood goals).

<sup>297</sup> See generally Levit, *supra* note 284, at 1054–1078 (evaluating the ways that men are harmed by gender stereotypes).

<sup>298</sup> *Id.* at 1073.

challenge for the law, and more broadly for society, is to reframe masculinity norms to embrace nurture.

## 2. *Fatherhood and Motherhood*

The second challenge to reorienting the definition of fatherhood is to recast the relationship of fatherhood to motherhood. Fathers must be freed of their traditional economic obligations to mothers and children, in the sense of not imposing a sole or primary breadwinner responsibility by gender. This does not mean that fatherhood equates to no duty of economic support of children; rather, it would incorporate a duty of financial care but not of sole responsibility. This shift of economic responsibility requires workplace equality for women, the sharing of family responsibilities, and likely some income supports for at least some families.<sup>299</sup> Real income for two-parent families has at best remained stable over the past decade, particularly due to a decline in men's earnings.<sup>300</sup> Single-parent families continue to be characterized by high rates of poverty.<sup>301</sup>

Beyond removing the economic challenge that links fathers to mothers' equality is the need to support shared power and cooperation in joint parenting. Fatherhood is rarely practiced in isolation. To the contrary, fatherhood is strongly mediated at present by men's relationships with mothers.<sup>302</sup> Redefining fatherhood must draw on that relational reality and ensure it is a positive one for children and mothers. Nurturing fatherhood requires recasting that relationship in egalitarian terms. Two critical tasks are diminishing substantially domestic violence and increasing substantially the equal distribution of family and household work.

Domestic violence is certainly not the exclusive province of men. Nevertheless, it is a pattern more characteristic of men, with devastating effects for women and children.<sup>303</sup> Child abuse and child sexual abuse are other forms of violence that men engage in that, while less disproportionately male-identified, are still significant.<sup>304</sup> Violence remains a core piece of masculinity, toxic to men in many respects but most clearly totally

---

<sup>299</sup> On needed policies, see generally Dowd, *supra* note 252, at 231.

<sup>300</sup> On men's declining incomes, see Dowd, *supra* note 241, at 323 n.28.

<sup>301</sup> For family income patterns, see Dowd, *supra* note 252, at 221 n.8.

<sup>302</sup> DOWD, *supra* note 12, at 182.

<sup>303</sup> *Id.* at 195–197.

<sup>304</sup> *Id.* at 194.

contradictory to the practice of nurture.<sup>305</sup> Significant progress has been made to address domestic violence, including its reflection in custody and visitation rules in family law.<sup>306</sup> It is necessary to continue to refine and strengthen those standards and their application, as well as devise better practice strategies to prevent battering.<sup>307</sup>

Addressing work-family roles and their distribution similarly requires proactive strategies as well as institutional, structural change. While men's share of household and family tasks has increased, the distribution nevertheless remains unequal, still imposing a "second shift" on mothers that is not imposed on fathers.<sup>308</sup> That distribution is grounded in embedded patriarchal, hierarchical norms that have proved incredibly resistant to egalitarian ideals, as well as structural constraints that continue to support (and sometimes limit) women as mothers while ignoring men as fathers. Changing the context of work-family balance to include more extensive, paid family leave; high quality universal child care; sick leave for care of family members; universal health care; and financial supports for families would dramatically change the potential for egalitarian work-family balance.<sup>309</sup> But even within existing constraints, more balance between mothers and fathers is possible. That balance is essential to redefining fatherhood in a way that does not empower fathers at the expense of mothers.

Both gender challenges, the challenge of masculinity and the challenge of the relationship of fatherhood to motherhood, make the redefinition of fatherhood more difficult, but not impossible. It is essential, however, that these challenges be reflected in the definition of nurture by including as a core part of nurture the positive cooperative relationship of fathers to other caregivers.

#### *D. Justifications*

Why adopt the nurture standard? The most important reason is to foster the best interests of children, who benefit most from greater nurture in their lives. This self-evident proposition is substantiated by a broad range of social science data establishing that parental nurture is incredibly important to children's

---

<sup>305</sup> Levit, *supra* note 284, at 1054–56 (male aggression).

<sup>306</sup> DOWD, *supra* note 12, at 200.

<sup>307</sup> For proactive strategies, see *id.* at 201–02.

<sup>308</sup> *Id.* at 210; see also *supra* note 243 (work/family literature).

<sup>309</sup> Dowd, *supra* note 252, at 243–50.

development, in every respect.<sup>310</sup> Not only is parents' physical care important, but also their intellectual and emotional care.<sup>311</sup> Children thrive when nurture is present, irrespective of family form or number or gender of parents in their household.<sup>312</sup> It is care, pure and simple, which is vital to childrens' growth and development into adults.

Nurture also creates relationships between parent and child and between all members of the family. The protection of children's relationships is a liberty interest that merits high constitutional protection.<sup>313</sup> It is the security and stability of the relationship, not simply the provision of care, that is implicit in our constitutional norms.<sup>314</sup> Those relationships are particularly important for children because of their inevitable dependency,<sup>315</sup> and because positive family relationships are the best context for children to develop their own sense of healthy relationships critical to both their personal and civic lives.<sup>316</sup>

The importance of nurture is the basis for the high constitutional value attached to parents and families.<sup>317</sup> The positive, critical role of parents and

<sup>310</sup> See, e.g., KRISTIN ANDERSON MOORE & ZAKIA REDD, CHILD TRENDS, CHILDREN IN POVERTY: TRENDS, CONSEQUENCES, AND POLICY OPTIONS 5 (2002), available at <http://www.childtrends.org/Files/PovertyRB.pdf>.

<sup>311</sup> *Id.*

<sup>312</sup> DOWD, *supra* note 147; Motion of the Child Welfare League of America for Leave to File Brief Amicus Curiae in Support of Petitioners and Brief Amicus Curiae at 12–13, *Lofton v. Sec'y of Fla. Dep't of Children & Families* (Dec. 2004), available at [www.lethimstay.com/pdfs/CWLA.pdf](http://www.lethimstay.com/pdfs/CWLA.pdf).

<sup>313</sup> The children's rights arguments are best articulated by Barbara Bennett Woodhouse, who most recently has framed them in an ecogenerist perspective. See generally Barbara Bennett Woodhouse, *The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights into Constitutional Doctrine*, 2 U. PENN. J. CONST. L. 1 (1999) (discussing difficulties in creating "new" constitutional rights for children); Barbara Bennett Woodhouse, *Ecogenerism: An Environmental Approach to Protecting Endangered Children*, VA. J. SOC. POL'Y & L. (forthcoming 2005); Barbara Bennett Woodhouse, *Enhancing Children's Participation in Policy Formation*, 45 ARIZ. L. REV. 751 (2003) (arguing that a child-centered approach to policy benefits all of society); Woodhouse, *supra* note 237; Barbara Bennett Woodhouse, *Reframing the Debate about the Socialization of Children: An Environmentalist Paradigm*, 2004 U. CHI. LEGAL FORUM 85 (using environmental law and theory to examine issues affecting child development); Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992) (commenting that *Meyer & Pierce* reflected a vision of the child as private property).

<sup>314</sup> See *supra* notes 202–207 and accompanying text (quoting language in *Lehr* on the nature of parent-child relationships). This point was poignantly brought home in the litigation in the *Lofton* case concerning Florida's exclusion of homosexuals from being adoptive parents. *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004) (agreeing with the state that "homosexual households . . . lack the stability that comes with marriage"). As the amicus brief filed by the Child Welfare League of America noted, stability and permanency is critical for children. Brief of Amicus Curiae, *supra* note 312, at 7–8.

<sup>315</sup> FINEMAN, *supra* note 242, at 35.

<sup>316</sup> Woodhouse, *supra* note 237.

<sup>317</sup> See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("custody, care and nurture of the child reside first in the parents"); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (nurture role lies with the parents);

families entitles them to the strongest protection because ultimately families are the core building blocks of community and society. Certainly not all families and parents operate in this way, justifying state intrusion to protect children when families are hurtful and abusive, and to prevent such harm when possible. But conversely, it is the presence of care and nurture that legitimately triggers the strong societal valuing of those who engage in nurture.

In addition to justifying a definition centered around nurture based on its value to children, the standard also has value for fathers. Engaging in nurture of one's children is a core adult action that has critical personal and societal value for those who engage in nurture.<sup>318</sup> I do not mean to suggest by this that those who do not nurture children lack some fundamental personal characteristic; care for and caring about others can take place in other ways. But it is a core part of adult development that one move beyond a focus on self to a focus on others. The nurture of children is a primary way that many adults experience and grow in this fundamental adult stage of learning. In fact, psychologists see parents' childrearing stage as critical to adult growth toward social caring, or input into the community, that typically follows parents' childrearing stage.<sup>319</sup> The learning and development as a result of parenting, in other words, translates into an orientation toward giving, caring, and nurturing of one's community and broader social context.<sup>320</sup> Again, the fundamental, critical adult value of nurturing is part of what we recognize in the high value we attach to family and its recognition in our constitutional jurisprudence. What amounts to judicial notice of these moral and social givens is supported by social science data on the importance of nurture to individual and social development.

A second way in which nurture is of value to fathers, and perhaps more generally to men even if they are not nurturing fathers, is that the acts of nurture not only contribute to men's adult development but also open their range of choices of how to be men. Masculine norms and stereotypes have typically devalued nurture, cast it as unmanly, "acting like a girl," and

---

*Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) ("those who nurture [the child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (liberty interest includes the right to marry and bring up children).

<sup>318</sup> This point is eloquently made by advocates of the concept of generative fathering. See generally GENERATIVE FATHERING, *supra* note 279, at ix-x; Woodhouse, *supra* note 237, at 1755 (describing a generist view of fatherhood, which values collective stewardship of children).

<sup>319</sup> See *supra* note 318.

<sup>320</sup> *Id.*

therefore made the practice of nurturing fatherhood atypical and difficult.<sup>321</sup> The rejection of nurture as unmanly also feeds the opposite masculine norms that are harmful to men and boys: not expressing emotion, failing to communicate with others, and most negatively, the norm of violence.<sup>322</sup> Legal standards cannot alone undermine social roles or gender norms, nor can they establish new standards.<sup>323</sup> But we are committed to ensuring that the law does not foster gender stereotypes, and particularly not ones that harm both men and women.<sup>324</sup> Our standards should encourage greater liberty, freedom, and personal dignity.<sup>325</sup> Valuing nurture is a definition that works in that direction.

Certainly contrary values hurt. For example, we would no longer express as a constitutional value the notion that children are property, or that fathers as patriarchs have ultimate control over their spouses and children.<sup>326</sup> Yet vestiges of that view of children remain. One example is struggles over the naming of children, when fathers fight for their children to have their last name as a sign of “ownership” or control.<sup>327</sup> A second example is the common reasoning that, if child support is paid, fathers are “entitled” by that payment to have a voice in the lives of their children or to insist on a certain amount and structure of visitation.<sup>328</sup> The perpetuation of a view of children as property and fathers as economic beings whose rights are linked to money, or genetic beings whose rights are tied to genes, is a value structure that hurts children and hurts fathers. Our norms and values matter, and nurture is a value that is essential to the well being of both children and fathers.

Third, because nurture has such critical value for children and for men, it also has critical value for those that men most typically partner with in caretaking, women. Support for men’s nurture is inextricably intertwined with support for women’s nurture as well as their freedom and opportunity to engage in activities typically dominated by men, for example wage work and political/governmental leadership.<sup>329</sup> Support for the derivative dependency<sup>330</sup>

---

<sup>321</sup> DOWD, *supra* note 12, at 187.

<sup>322</sup> *Id.* at 184–87.

<sup>323</sup> Dowd, *supra* note 291.

<sup>324</sup> *See supra* note 227.

<sup>325</sup> *See supra* notes 153–158 and accompanying text.

<sup>326</sup> DOWD, *supra* note 12, at 33–34.

<sup>327</sup> *See, e.g.*, *Gubernat v. Deremer*, 140 N.J. 120 (1995) (father brought an action to change surname given by mother at birth).

<sup>328</sup> On the relationship between child support and masculinity, see KIMBRELL, *supra* note 290. On disconnecting visitation and support, see Ira Mark Ellman, *Should Visitation Denial Affect the Obligation to Pay Support?*, 36 ARIZ. ST. L.J. 661 (2004).

<sup>329</sup> This is a position that I am not alone in taking. *See* DOWD, *supra* note 12, at 162; *see also* CHANGING

of those who engage in care work will more likely follow from the active, significant engagement of men in nurture. Valuing nurture within the definition of fatherhood, as I have defined it, would recognize and value women's nurture more strongly as well as redistribute nurturing work to create greater opportunity and equality for women.

Finally, a nurture standard supports the care of children in the families in which they find themselves. Children are best served by this relational standard as opposed to a definition based on form or status. This standard would benefit single-parent fathers, whose families are strongly marginalized by current norms. It would also assist other nontraditional families—for example, nonmarital families, gay and lesbian single-parent or dual-parent families, blended families, multigenerational extended families, and foster families.<sup>331</sup> The nurture standard thus links with the movement toward including and supporting, rather than stigmatizing, nontraditional families. It reinforces a focus on function over form. Most importantly, a nurture standard best serves children.

#### IV. IMPLICATIONS

Nurture is justified, then, because of its inherent worth and necessity for children, fathers, mothers, and families. One of the implications of this standard would be to reject the alternative of a purely genetic definition of fatherhood, or some combination of genetic and economic fatherhood. This standard would counter the movement of family law toward a genetic and/or economic definition. The traditional family law regime recognized fatherhood primarily within the framework of marriage.<sup>332</sup> Indeed, the strength of the fatherhood norm within marriage was reflected in the marital presumption that all children born during marriage were the children of the husband, thus trumping genetics with marriage, a value structure upheld in *Michael H. v.*

---

MEN: NEW DIRECTIONS IN RESEARCH ON MEN AND MASCULINITY, 115–50 (Michael S. Kimmel ed., 1987); BARBARA EHRENREICH, THE HEARTS OF MEN: AMERICAN DREAMS AND THE FLIGHT FROM COMMITMENT 170 (1983).

<sup>330</sup> This is Martha Fineman's term, whose naming and analysis exposed the existence and implications of dependency so hidden by concepts of equality. See FINEMAN, *supra* note 242, at 34.

<sup>331</sup> DOWD, *supra* note 147, at 51–52; Dowd, *supra* note 291, at 789–93.

<sup>332</sup> *Michael H. v. Gerald D.*, 491 U.S. 110, 113 (1989); RICHARD COLLIER, MASCULINITY, LAW AND THE FAMILY 51 (1995); Richard Collier, 'Waiting Till Father Gets Home': *The Reconstruction of Fatherhood in Family Law*, 4 SOC. & LEGAL STUD. 5, 6 (1995) (addressing the "family man" ideal); Nancy E. Dowd, *From Genes, Marriage and Money to Nurture: Redefining Fatherhood*, 10 CARDOZO WOMEN'S L.J. 132, 132 (2003).

*Gerald D.*<sup>333</sup> Under the traditional norm, children born outside of marriage were not the responsibility of the father unless paternity was established, and even then the norm of support was very weak.<sup>334</sup> Under constitutional norms that establish the equal right of support of nonmarital and marital children, and under legislative requirements seeking to establish economic support of children in order to lessen the burden on the welfare system, the economic obligations of nonmarital fathers now mirror those of marital fathers.<sup>335</sup> With this regime of economic obligation has also come equality in entitlement to rights of visitation, custody, and legal decisionmaking. Such new developments have virtually eliminated the formal legal line between marital and nonmarital parents, and between never married and divorced parents.<sup>336</sup> In addition, a strong formal commitment to gender equality, as well as concerns about the consequences of father absence for children in single parent households, have driven a commitment to keeping fathers involved in the lives of children even if the children and father no longer share a household. However, this commitment seems particularly shallow for poor fathers, where obligations are not matched by economic opportunities.<sup>337</sup> Economic fatherhood thus disproportionately burdens poor fathers and poor children.

The development of DNA technology is moving us ever closer to being able to genetically identify the father of every child.<sup>338</sup> In conjunction with the

---

<sup>333</sup> 491 U.S. at 119.

<sup>334</sup> DOWD, *supra* note 12, at 33–38.

<sup>335</sup> Dowd, *supra* note 332, at 133.

<sup>336</sup> See generally JYL J. JOSEPHSON, GENDER, FAMILIES AND STATE: CHILD SUPPORT POLICY IN THE UNITED STATES 130 (1997); JANE KNITZER & STANLEY BERNARD, NAT'L CTR. FOR CHILDREN IN POVERTY, MAP AND TRACK: STATE INITIATIVES TO ENCOURAGE RESPONSIBLE FATHERHOOD (1997); SNAREY, *supra* note 275, at 337; David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984) (arguing that the best interest of the child standard is unworkable and should be replaced with a "primary caretaker" standard); Donna L. Cochran, *African American Fathers: A Decade Review of the Literature*, 78 FAM. SOCIETY 340 (1997); Samuel V. Schoonmaker, *Consequences and Validity of Family Law Provisions in the "Welfare Reform Act,"* 14 J. AM. ACAD. MATRIMONIAL L. 1 (1997) (discussing the history and focus of reform to collect from both marital and nonmarital fathers).

<sup>337</sup> See generally Center for Family Policy and Practice, <http://www.cffpp.org> (last visited May 25, 2005) (public policy organization focused on low income fathers and families). Men's poverty and their inability to pay is a leading cause for lack of a legal child support arrangement. U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2001, at 6 (2003), available at <http://www.census.gov/prod/2003pubs/p60-225.pdf>.

<sup>338</sup> Jean E. McEwen, *Genetic Information, Ethics, and Information Relating to Biological Parenthood*, in 1 ENCYCLOPEDIA OF ETHICAL, LEGAL, AND POLICY ISSUES IN BIOTECHNOLOGY 200, 356 (Thomas H. Murray & Maxwell J. Mehlman eds., 2000); Mary R. Anderlik & Mark A. Rothstein, *DNA-Based Identity Testing and the Future of the Family: A Research Agenda*, 28 AM. J.L. & MED. 215, 215 (2002); Janet L. Dolgin, *Choice, Tradition, and the New Genetics: The Fragmentation of the Ideology of Family*, 32 CONN. L. REV. 523, 529 (2001); Diane S. Kaplan, *Why Truth Is Not a Defense in Paternity Actions*, 10 TEX. J. WOMEN & L. 69, 72

movement away from marital fatherhood and the imposition of responsibilities on genetic fathers, one might argue that genetic fatherhood should define constitutional fatherhood, and serve as the trigger for both constitutional and statutory rights. No longer would we have “deadbeat dads,” since genetic fatherhood would be established and better collection mechanisms would insure greater economic support for children. Similarly, we would no longer have “duped dads,” men who thought their children were theirs, but who subsequently discover they have no genetic connection, but nevertheless have legal obligations linked to the birth of these children during marriage and the operation of legal rules that presume fatherhood. DNA technology can serve as the basis to argue for an end to the marital presumption, whereby the children of a marriage are presumed to be the children of the married couple. Genetic ties also would link fathers to children, forming the basis of legal obligation and, by implication, legal rights.

Genes should not define fatherhood.<sup>339</sup> Genes should define identity, and might be a basis to impose some obligation of support upon fathers and provide essential genetic information to children, but it should be separated from constitutionally protected rights of parenthood.<sup>340</sup> In other words, we should separate rights and responsibilities rather than seeing one as the automatic corollary of the other. Rights should be tied to meaningful nurture. It might be that biological fatherhood would still impose responsibilities, such as financial responsibilities. Economic support, however, would be an obligation linked to bringing a child into the world. Economic support would not buy rights.<sup>341</sup> Given the failure to serve children under existing economic models, this is not a viable way to improve children’s economic well-being. Rather, this proposed model would move toward social support of children rather than individual responsibility.<sup>342</sup>

---

(2000); Battle Robinson & Susan Paikin, *Who Is Daddy? A Case for the Uniform Parentage Act (2000)*, 19 DEL. LAW. 23, 24 (2001); E. Donald Shapiro et al., *The DNA Paternity Test: Legislating the Future Paternity Action*, 7 J.L. & HEALTH 1, 41 (1992–93).

<sup>339</sup> See generally Dowd, *supra* note 332.

<sup>340</sup> For an overview of identity testing and rights, see Anderlik & Rothstein, *supra* note 338, at 215–16. One could analogize genetic identity to the rights arguments made by adoptees under more open adoption frameworks.

<sup>341</sup> This principle already exists in a slightly different form in child support and custody statutes. Failure to pay child support does not bar custody or visitation. See, e.g., FLA. STAT. § 61.13(4)(a) & (b) (2002) (reciprocal provisions providing that failure to pay child support does not undermine visitation, and if custodial parent prevents visitation, child support still must be paid).

<sup>342</sup> For an extended discussion of the need for greater family support, see Dowd, *supra* note 241. See also Dowd, *supra* note 252 (advocating for a more cohesive and comprehensive national work/family policy).

A second obvious implication of adopting a nurture standard is that it is more ambiguous and subject to interpretation than a definition based on genetics or economic fatherhood. It might be argued that difficulties with the “best interests of the child” standard, and claims of gender bias by both mothers and fathers, should warn us away from a standard that involves the state in evaluating parental care of children.<sup>343</sup> This is a legitimate complaint, but it requires not that we shy away from an essential need of children, but rather that we devote resources to eliminating bias from the system and articulating more clearly what nurture is. The care of children remains one of the most undervalued, unknown and unacknowledged jobs of adults. Further, the nurture definition is no more incapable of application than other open-ended terms used daily in the legal system.<sup>344</sup>

Finally, if fatherhood is defined in this way, as social fatherhood centered around nurture as I have defined it, then what would the content of rights be, either in general or by application in recent court cases? If the definition is applied as this Article suggests, then the content of the right to be a nurturing presence in the child’s life would be a stronger right than at present, subject only to limits imposed by the best interests of the child and irresolvable conflicts between the parents.<sup>345</sup> Where this would have the greatest impact might be on custody structures, both in theory and in application. If this standard is used as described, it would eliminate the bias against men as caretakers, and support their nurture of their children. At the same time, it would not threaten mothers, since the standard includes the essential characteristic of cooperative, mutual parenting. On the other hand, where fathers have no demonstrated pattern of nurture or have gradually relinquished the nurture of their children, they would not be entitled to be treatment as parenting equals. Exceptions to the roughly equal quantitative standard would

---

<sup>343</sup> “Best interests” has been a much-debated standard. For a classic critique, see Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children’s Perspectives and the Law*, 36 ARIZ. L. REV. 11, 53–64 (1994). See also *Troxel v. Granville*, 530 U.S. 57 (2000) (analyzing Washington statute granting any person visitation rights if found to be in the best interest of the child); Chambers, *supra* note 336; Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA’s Best-Interest Standard*, 89 MICH. L. REV. 2215 (1991) (analyzing the best interest standard).

<sup>344</sup> For example, courts routinely must interpret and apply terms like “good faith” and “negligence” and calculate damages for dignity and emotional harms.

<sup>345</sup> Nurture would guide decisions rather than presumptive joint custody rules. See generally Margaret F. Brinig, *Feminism and Child Custody Under Chapter Two of the American Law Institute’s Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL’Y 301, 313–19 (2001) (discussing problems associated with joint custody, including father depression); David L. Chambers, *The “Legalization” of the Family: Toward a Policy of Supportive Neutrality*, 18 U. MICH. J.L. REFORM 805, 814–18 (1985) (arguing for less intrusion by government into family life).

be permissible if, but only if, they are unavoidable. Given existing structures, it may be a challenge to meet the standard especially for very young children.

Some of the most difficult cases to resolve, however, would be cases involving two co-equal nurturing parents and requests to move by one parent that implicate the nurture of the other parent.<sup>346</sup> The collaborative, mutual parenting model would hopefully resolve many of these under a reoriented family law practice of collaborative instead of adversarial lawyering, a model more appropriate for the issues in many family law cases.<sup>347</sup>

## CONCLUSION

If constitutional norms of fatherhood were centered around nurture, the Court's most recent cases likely would have come out very differently, assuming that both *Newdow* and *Boulais* would have met this rearticulated constitutional standard of nurturing fatherhood. *Newdow* would have had standing to bring his constitutional challenge to the Pledge, and the resolution of that case would not be based on formalistic custody categories.<sup>348</sup> Under a redefined standard, if the Court had wanted to duck this case, it would simply deny review. Or the Court could have taken the case and reached the same result, but would have grounded its opinion in the best interests of the child if they were adverse to the parent. Similarly, *Boulais* would have been able to transfer citizenship to his son, ideally based on a statute setting a uniform standard of care and nurture as the trigger for citizenship. If genetic ties formed a sufficient link, the statute would presume that either a father or a

---

<sup>346</sup> See Christine A. Coates et al., *Parenting Coordination for High-Conflict Families*, 42 FAM. CT. REV. 246 (2004); William V. Fabricius & Sanford L. Braver, *Non-Child Support Expenditures on Children by Nonresidential Divorced Fathers: Results of a Study*, 41 FAM. CT. REV. 321 (2003); Lucy S. McGough, *Starting Over: The Heuristics of Family Relocation Decision Making*, 77 ST. JOHN'S L. REV. 291 (2003) (arguing that relocation issues should be resolved by the parents rather than the courts); Christopher P. Carrington, Note, *Family Law—Relocation Disputes—From Parent to Paycheck: The Demotion of the Noncustodial Parent with the Creation of the Custodial Parent's Presumptive Right to Relocate*, 26 U. ARK. LITTLE ROCK L. REV. 615 (2004) (analyzing *Hollandsworth v. Knyzewski*, which clarified relocation standards in Arkansas); Sarah L. Gottfried, Note, *Virtual Visitation: The New Wave of Communication Between Children and Non-Custodial Parents in Relocation Cases*, 9 CARDOZO WOMEN'S L.J. 567 (2003) (proposing that virtual visitation will become a common court tool); Barry Scholl, Case Note, *A Matter the Court Should Consider?: The Risk of Relocation and the Custody Conundrum*, 6 J.L. FAM. STUD. 353 (2004) (reviewing *Larson v. Larson*, a Utah relocation decision).

<sup>347</sup> On collaborative law, see generally PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* (2001).

<sup>348</sup> Ironically, *Newdow* has refiled his case with several parents who have clear standing. *Briefly Noted*, CHRISTIAN CENTURY, Jan. 25, 2005, at 17.

mother with a genetic link could care for a child and raise them in basic citizenship values. And in a more general and more significant way, the cases would have been decided based on the premise of nurture as the core definition of fatherhood. We would value men as caregivers of children, and value children as deserving of their fathers' care.

