

Article

Psychological Parenthood

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INTRODUCTION

Family law in the United States is governed by an assortment of familiar yet highly inadequate legal standards and assumptions. The failings of current family law have been well canvassed, but one critical failure stands out. Today, the law undermines, and sometimes severs, the relationship between children and their closest caregivers. These disruptions inflict developmental harms on children, with disproportionate effects on Black, LGBTQ, and low-income families, and result in potentially lifelong damage to children's physical and mental health.¹

Examples abound, but consider just three. The best interests of the child standard is one of the most pervasive principles in family law² and functions as a decision rule for child custody disputes be-

1. See *infra* Part I.A.

2. A Maryland high court recently declared: "It is without doubt that the best interest of the child standard governs all determinations with respect to children."

tween parents in every state.³ Yet scholars, judges, lawyers, and activists have criticized the best interests standard for decades, largely on the ground that the standard is without content—an empty vessel to be filled with the normative commitments of those applying it.⁴ The indeterminate standard, they argue, vests judges with broad discretion to act on their own views about what is best and what factors are relevant to a child’s wellbeing.⁵ Even when legislators specify the parameters of “best interests,” they typically endorse a range of plausible factors, leaving judges to pick and choose for themselves.⁶ Unsurprisingly, then, the vague best interests standard has allowed prejudice and bias—based on race,⁷ class,⁸ gender,⁹ marital status,¹⁰

E.N. v. T.R., 255 A.3d 1, 18 (Md. 2021). This is an overstatement but illustrates how much allegiance courts pay to best interests. In addition to custody disputes, judges are asked to determine best interests at several critical points in decision-making about parent-child relationships. *See, e.g.*, DOUGLAS NEJAIME, RALPH RICHARD BANKS, JOANNA L. GROSSMAN & SUZANNE A. KIM, *FAMILY LAW IN A CHANGING AMERICA* 644 (2021) (explaining that, for parental rights termination, “most states require two separate determinations: first, that the parent is unfit; and second, that termination is in the child’s best interests”); *id.* at 677 (describing “the best interests of the child” as “the animating principle of the adoption statutes”); UNIF. PARENTAGE ACT § 612 (UNIF. LAW COMM’N 2017) (including best interests requirement to adjudicate a person to be a de facto parent); *In re Jesusa V.*, 85 P.3d 2 (Cal. 2004) (deciding competing parentage claims based on best interests); *Ban v. Quigley*, 812 P.2d 1014 (Ariz. Ct. App. 1990) (holding that it is an abuse of discretion for trial court not to consider best interests before allowing genetic testing in parentage dispute).

3. *See Determining the Best Interests of the Child*, CHILD WELFARE INFO. GATEWAY 1 (2020), https://www.childwelfare.gov/pubpdfs/best_interest.pdf [<https://perma.cc/4PKW-QGLG>].

4. *See* Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 *LAW & CONTEMP. PROBS.* 226, 263 (1975); Hillary Rodham, *Children Under the Law*, 43 *HARV. EDUC. REV.* 487, 513 (1973); Carl E. Schneider, *Discretion, Rules and Law: Child Custody and the UMDA’s Best-Interest Standard*, 89 *MICH. L. REV.* 2215, 2219 (1991).

5. *See* Mnookin, *supra* note 4, at 260; *see also* Martin Guggenheim, *Ratify the U.N. Convention on the Rights of the Child, But Don’t Expect Any Miracles*, 20 *EMORY INT’L L. REV.* 43, 63 (2006) (asserting that the best interests “inquiry fails to inform the judge about even the most basic matters”). In 1977, the Supreme Court explained that “judges too may find it difficult, in utilizing vague standards like ‘the best interests of the child,’ to avoid decisions resting on subjective values.” *Smith v. Org. of Foster Fams.*, 431 U.S. 816, 835 n.36 (1977). Congress echoed this sentiment the following year when it overrode the best interests test in cases involving Native American children. *See* H.R. REP. NO. 95-1386, at 19 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 7530, 7542.

6. *See, e.g.*, CONN. GEN. STAT. § 46b-56 (2022) (the best interests standard for custody includes fifteen nonexclusive factors that the court may—but need not—consult).

7. *See, e.g.*, Tanya Asim Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 *MARQ. L. REV.* 215, 245 (2013) (“Part of the reason for the problem

sexual orientation,¹¹ gender identity,¹² religion,¹³ and disability¹⁴—to influence decision-making processes in ways that undervalue children’s relationships with their close parental caregivers. Despite this chorus of criticism, no clear alternative principle has emerged to guide law and social policy relating to children.¹⁵

of racial disproportionality and disparity that is manifested in foster care is the overarching legal standard, the ‘best interests of the child,’ which is at best vague.”); see also *Palmore v. Sidoti*, 466 U.S. 429 (1984) (overturning trial court decision to transfer custody from mother to father based on best interests determination based on mother’s cohabiting interracial relationship); Melissa Murray, *Loving’s Legacy: Decriminalization and the Regulation of Sex and Sexuality*, 86 *FORDHAM L. REV.* 2671, 2692 (2018) (“[E]ven following *Palmore*, in those circumstances where racial concerns appeared to predominate in determining custody, the capacious best-interests standard continued to provide cover for judicial decision-making.”).

8. See Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 *S.C. L. REV.* 577, 585 (1997); Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 *CLEV. ST. L. REV.* 137, 159 (2013).

9. See Katharine T. Bartlett, *Comparing Race and Sex Discrimination in Custody Cases*, 28 *HOFSTRA L. REV.* 877, 887–89 (2000); Susan B. Jacobs, *The Hidden Gender Bias Behind the “Best Interests of the Child” Standard in Custody Decisions*, 13 *GA. ST. U. L. REV.* 845, 849–50 (1997); see also *Dalin v. Dalin*, 512 N.W.2d 685, 691 (N.D. 1994) (Sandstrom, J., dissenting) (asserting that the trial court “assumed because [the father] is a man, some tasks of child rearing would be inappropriate for him”).

10. See Suzanne A. Kim, *The Neutered Parent*, 24 *YALE J.L. & FEMINISM* 1, 4–5 (2012).

11. See Nan D. Hunter & Nancy D. Polikoff, *Custody Rights of Lesbian Mothers: Legal Theory and Litigation Strategy*, 25 *BUFF. L. REV.* 691, 691 (1976); Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 *YALE J.L. & FEMINISM* 210, 216 (2012); Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 *YALE J.L. & FEMINISM* 257, 270 (2009); see also *Ex Parte J.M.F.*, 730 So. 2d 1190, 1196 (Ala. 1998) (“While the evidence shows that the mother loves the child and has provided her with good care, it also shows that she has chosen to expose the child continuously to a lifestyle that is ‘neither legal in this state, nor moral in the eyes of most of its citizens.’”).

12. See Sonia K. Katyal & Iona M. Turner, *Transparenthood*, 117 *MICH. L. REV.* 1593, 1599 (2019); see also *Magnuson v. Magnuson*, 170 P.3d 65, 68 (Wash. Ct. App. 2007) (Kulik, J., dissenting) (“[T]he trial court found a lack of stability based on [the parent’s] transgender status.”).

13. See, e.g., *Pater v. Pater*, 588 N.E.2d 794, 800–01 (Ohio 1992) (overturning trial court order that awarded custody to father, even though mother was the child’s primary caretaker, because the court “appears to have awarded custody to [the father] because of [the mother’s] religious affiliation” as a Jehovah’s Witness).

14. See Nicole Buonocore Porter, *Mothers with Disabilities*, 33 *BERKELEY J. GENDER L. & JUST.* 75, 90–91 (2018); Robyn M. Powell, *Family Law, Parents with Disabilities, and the Americans with Disabilities Act*, 57 *FAM. CT. REV.* 37, 41 (2019).

15. But see JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 53 (1973) (advocating “the least detrimental available alternative” standard); Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Fami-*

It is not only the best interests standard that undermines the parent-child relationship under existing law. Courts and commentators commonly assume that the federal Constitution provides special protection to biological parent-child relationships, despite the fact that a biological requirement excludes children's bonds with LGBTQ parents and other nonbiological parents.¹⁶ Too often lawmakers and judges grant legal recognition to biological parents, even in the absence of a developed relationship, but withhold such recognition from nonbiological parents, regardless of the strength of the bond between parent and child.¹⁷ Worse yet, courts at times cite the constitutional rights of biological parents to justify severing a child's relationship with a close parental caregiver who has no biological or adoptive tie to the child.¹⁸ While scholars of both law and science have criticized this privileging of biological parenthood,¹⁹ biological ties continue to justify superior legal rights in ways that undermine children's interests.²⁰

To take a third and final example, the United States lacks a national legal commitment to economic support for children and families, despite decades of academic criticism and the demonstrated harms of deprivation for poor children and families.²¹ The U.S. Supreme Court has interpreted the Constitution as protecting the negative liberty of parents—their right to exclude third parties, and the state, from their children's lives.²² At the same time, the Court has consistently rejected efforts to create positive liberties—that is, to grant families any claim on the state for economic support.²³ The re-

ly Law and Succession Law, 60 TUL. L. REV. 1165, 1181–82 (1985–86) (describing West Virginia's adoption of a "primary caretaker" standard that establishes a strong custodial preference for the parent who has provided most of their child's daily care).

16. See Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 265–66 (2020).

17. See Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2268 (2017).

18. See NeJaime, *supra* note 16, at 266–67.

19. See *id.* at 268; NeJaime, *supra* note 17, at 2268–69; GOLDSTEIN ET AL., *supra* note 15, at 17.

20. See NeJaime, *supra* note 16, at 266; NeJaime, *supra* note 17, at 2317–19.

21. See Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 LAW & CONTEMP. PROBS. 25, 38 (2014).

22. See, e.g., *id.* at 27–32 (arguing that federal constitutional law prizes negative liberty, protects laissez-faire market distributions, and envisions a minimal state).

23. See *id.*; see also Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1807–09 (2020) (describing the U.S. Supreme Court's rejection of welfare rights and of challenges to economic inequality).

sult is that the law protects the status quo distribution of resources, and in doing so, protects the interests of the wealthy and privileged while denying a legal foundation for economic claims by marginalized groups, leaving vulnerable families without support to provide the parental caregiving children need.

In this Article, we propose and defend a new guiding principle, which we call the *psychological parent principle* and which provides a unitary directive for reforming these (and other) flawed principles of family law. Our approach would orient legislators and judges toward a concrete, comprehensible guideline: *protecting children's relationships with their psychological parents*. The psychological parent principle would reframe family law in two complementary ways. First, because it does not take as given the existing distribution of resources, the principle has a redistributive dimension. It entails positive steps to ensure the material and psychological conditions necessary for successful parenting, thus requiring the state to distribute resources to families and to regulate working conditions to protect parental time with children. Second, the psychological parent principle has a protective dimension, constraining legal actors from disrupting or severing the relationship between a child and her psychological parent. It directs the state to grant legal recognition to psychological parents, to protect that relationship from rupture, and to prioritize that relationship in disputes over removal, placement, and custody. In contrast to the best interests standard, the psychological parent principle provides a clear guideline that is explicitly grounded in developmental science. Unlike the privileging of biology, it insists on an inclusive vision of family life, one that gives legal priority to preserving and strengthening the parent-child bond. And unlike current legal and political assumptions, it explicitly incorporates a state commitment to ensuring that all families have access to the material foundations of family life.

The psychological parent principle grows out of pioneering work at the intersection of family law and developmental science. The term “psychological parent” emerged from the collaboration of Joseph Goldstein, Anna Freud, and Albert Solnit in the early 1970s.²⁴ Our focus on psychological parenthood builds on our years-long collaboration with clinicians and researchers at the Yale Child Study Center, also the site of the earlier Goldstein, Freud, and Solnit collaboration. Like Goldstein, Freud, and Solnit, we define psychological parent to be an individual “who, on a continuing, day-to-day basis,

24. See GOLDSTEIN ET AL., *supra* note 15, at 17–20.

through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs."²⁵ The psychological parent relationship is not defined by biological or legal relationships but instead emerges from the daily interactions between caregiver and child.²⁶ Critically, what matters is that, *from the child's perspective*, the psychological parent provides consistent, predictable, and emotionally-invested care.²⁷

The psychological parent principle is related to, but also distinct from, the Goldstein, Freud, and Solnit work. Like them, we ground our psychological parent principle in the developmental science showing that close, consistent caregiving is central to a child's healthy development.²⁸ But while Goldstein, Freud, and Solnit derived their insights from psychoanalysis, our approach reflects major changes in both developmental science and society in the last forty years. In recent decades, attachment theory has grown in depth and scope, extending its reach beyond clinical and experimental psychology into neuroscience, biology, trauma studies, and related fields.²⁹

25. *See id.* at 98.

26. *See id.* at 19.

27. *See id.* at 18.

28. We are not alone in our incorporation of developmental science into law. A wave of legal scholarship has turned to the science of child development in an effort to make law more responsive to children's needs in areas including juvenile sentencing, special education, child welfare, and social welfare. *See* ANNE L. ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS (2004); CLARE HUNTINGTON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS 16–20 (2014); MAXINE EICHNER, THE FREE-MARKET FAMILY: HOW THE MARKET CRUSHED THE AMERICAN DREAM (AND HOW IT CAN BE RESTORED) 95–102 (2020); ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 13–16 (2008); THE LAW AND CHILD DEVELOPMENT (Emily Buss & Mavis Maclean eds., 2010); Susan Frelich Appleton, Deanna M. Barch & Anneliese M. Schaefer, *The Developing Brain: New Directions in Science, Policy, and Law*, 57 WASH. U. J.L. & POL'Y 1, 3 (2018); Emily Buss, *Developmental Jurisprudence*, 88 TEMP. L. REV. 741, 751–52 (2016); Emily Buss, *The Gap in Law Between Developmental Expectations and Educational Obligations*, 79 U. CHI. L. REV. 59, 61–63 (2012); Emily Buss, *Allocating Developmental Control Among Parent, Child and the State*, 2004 U. CHI. LEGAL F. 27, 37; Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1484–85 (2018); Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 436 (2006); Nancy E. Dowd, *Black Boys Matter: Developmental Equality*, 45 HOFSTRA L. REV. 47, 50 (2016); Clare Huntington, *The Empirical Turn in Family Law*, 118 COLUM. L. REV. 227, 267–71 (2018); Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1402–03 (2020); Barbara Bennett Woodhouse, *"Out of Children's Needs, Children's Rights": The Child's Voice in Defining the Family*, 8 BYU J. PUB. L. 321, 338–39 (1994); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1765–66 (1993).

29. *See, e.g.*, Clare Huntington, *A Promising Start for Early Childhood Develop-*

As we show in Part I, recent research reinforces and strengthens a longstanding insight: psychological parents fill children's relational needs for close, nurturing care; education, guidance, and mentoring; and safety, support, and protection.³⁰ Recent research has deepened our understanding of the parent-child bond, showing, for instance, the importance of parental care in helping children heal from experiences of violence or other trauma.³¹

Our formulation of the psychological parent principle also is broader than the Goldstein, Freud, and Solnit approach, and it addresses the sweeping changes in society and the economy in the last few decades. Goldstein, Freud, and Solnit deliberately limited their legal prescriptions to problems of child placement and so did not address structural problems of economic inequality. They also worked in a time when the law rarely recognized—let alone remedied—inequalities based on gender, sexual orientation, and family structure. By contrast, we deploy the psychological parent principle to address inequalities based on race, class, gender, and sexual orientation and to advance ideals of equality and inclusion. We show how the psychological parent principle would better protect marginalized families and motivate legal reforms that would improve parents' economic security. And we argue—in contrast to Goldstein, Freud, and Solnit—that when a child has more than one psychological parent, the law should give priority to protecting each of those parent-child relationships.

Although we anchor the psychological parent principle in developmental science, we also emphasize that it is a legal guideline, not a scientific directive. Because law is fundamentally normative, prescriptions for law reform must be rooted in an explicit and cohesive statement of the ideals that should guide law's regulation of families. In Part II, we draw on three values that are central to a liberal egalitarian approach to family justice: equality of life chances, social inclusion, and democratic self-determination.³² These commitments

ment and the Law, 71 FLA. L. REV. F. 70, 71 (2019) (noting attachment theory, neuroscience, economics, and educational theory); HANDBOOK OF ATTACHMENT: THEORY, RESEARCH, AND CLINICAL APPLICATIONS xi (Jude Cassidy & Phillip R. Shaver eds., 3d ed. 2016) (noting the addition of chapters on neuroscience, genetics, and immunology in book's 2008 and 2016 editions).

30. Our work on parental care resonates with the work of relational theorists. See Martha Minow & Mary Lyndon Shanley, *Relational Rights and Responsibilities: Re-visioning the Family in Liberal Political Theory and Law*, 11 HYPATIA 4, 4 (1996).

31. See *infra* Part I.A.

32. Our analysis is grounded in egalitarian liberal political theory, generally Rawlsian in nature. See generally JOHN RAWLS, *POLITICAL LIBERALISM* (1993); JOHN

provide a reasoned and transparent basis for giving priority to the parent-child relationship over competing assertions of value, particularly current legal formulations that ensconce a vision of parental rights that obscures or minimizes the rights and interests of children.

To be clear, the psychological parent principle is not foreign to extant law and policy. Indeed, it finds significant, yet partial, expression in some legal doctrines and law reform projects that we examine in this Article.³³ Nonetheless, the psychological parent principle is not a distillation of existing law, but instead is a trans-substantive principle capable of reorienting various domains of legal regulation implicating the family. In this Article, we give three in-depth examples—drawn from the laws of custody, parentage, and social welfare—to show how the psychological parent principle could unify law reform initiatives across seemingly separate areas of family law, areas now shaped by the problematic premises of best interests, biological parenthood, and negative liberty.

As we show in Part III, the psychological parent principle would direct the government to supply the resources necessary for parents

RAWLS, A THEORY OF JUSTICE (1971). We do not parse Rawls' specific work for pronouncements on the family, which are sparse and somewhat inconsistent. *See, e.g.,* Véronique Munoz-Dardé, *Rawls, Justice in the Family and Justice of the Family*, 48 PHIL. Q. 335, 337 (1998) (noting that the family is "treated as a distinct and fundamental institution" in Rawls' work and "never discussed in any detail"). Instead, we draw from political theory that explores egalitarian justice. *See, e.g.,* HARRY BRIGHOUSE & ADAM SWIFT, FAMILY VALUES: THE ETHICS OF PARENT-CHILD RELATIONSHIPS (2014). For foundational sources, see BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980), and PHILIPPE VAN PARIJS, REAL FREEDOM FOR ALL (1995). For legal scholarship on childrearing informed by egalitarian political theory, see ALSTOTT, *supra* note 28, and Anne L. Alstott, *Is the Family at Odds with Equality? The Legal Implications of Equality for Children*, 82 S. CAL. L. REV. 1 (2008).

33. Recently surveying the legal regulation of children, Clare Huntington and Elizabeth Scott have crystallized existing approaches under the rubric of "child wellbeing"—explaining that "[t]he core principle and goal of the legal regulation of children is the promotion of child wellbeing." *See* Huntington & Scott, *supra* note 28, at 1375. The psychological parent principle aims to give content to the idea of child wellbeing by supplying a clear, concrete standard across a range of legal domains. Notably, scholars and judges have argued for more determinate standards in particular contexts, such as child custody. *See, e.g.,* Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CALIF. L. REV. 615, 617 (1992) (arguing for approximation of past allocation of care for custody); Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168, 180 (1984) (arguing for primary caretaker presumption for custody); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.08 (A.L.I. 2002) (arguing for past allocation of care for custody); *see also* Pamela Laufer-Ukeles, *The Relational Rights of Children*, 48 CONN. L. REV. 741, 808–09 (2016) (arguing for "significant harm to relationships" standard).

to engage in parental care, including family income support, paid parental leave, paid sick leave, and subsidized daycare. And as we elaborate in Part IV, the protective dimension of the psychological parent principle would yield a child-centered approach to parentage and to custody law. In parentage, the law would safeguard the psychological parent-child relationship rather than limit parental recognition to biology, marriage, and adoption. In custody, the law would shift away from the best interests standard and parental prerogatives toward clear legal rules that protect children's relationships with their psychological parents.

The psychological parent principle does not proceed from the legal premise of parental entitlement to control over children but instead supports parents in order to promote children's interests. Further, it is not a broad principle of non-intervention in parental decision-making. For example, rather than allow biological parents broad authority to exclude others from their children's lives, the psychological parent principle would extend legal status to individuals who have entered a child's life after birth and taken on a parental role in the absence of a biological or adoptive parental relationship. The law would recognize, even over the objection of the existing legal parent, the person who has become the child's psychological parent.³⁴

Moreover, the psychological parent principle is a developmental principle oriented toward children's welfare, one that leaves room for legal recognition of children's increasing interests and agency over time. As children grow, their interests in ideas and experiences outside the home grow, too, and the state may rightly recognize and promote those interests.³⁵ Promoting children's interests in personal growth and safety does not necessarily undermine their attachment relationships; for example, parents may oppose schooling, but few would view compulsory education laws as a threat to the parent-child relationship. Of course, where the psychological parent-child bond is actually threatened, as is the case, for example, with child welfare removal, then the psychological parent principle stands solidly against state intervention absent imminent serious physical or emotional harm to the child. In constitutional terms, the highest scrutiny should be applied to any state action that threatens severance of the psychological parent-child bond.³⁶

34. See *infra* Part IV.A.

35. See Dailey & Rosenbury, *supra* note 28, at 1493.

36. See Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75, 81 (2021).

We recognize that reforming a wide array of family law doctrines is a mammoth task, and one that cannot be accomplished in a single article. To implement the psychological parent principle, legal actors must be sensitive to legal and social context. To illustrate the need for reform, we focus on a few principles of existing law that we identify as especially problematic. And to demonstrate the impact of the psychological parent principle, we focus on a few areas of law—specifically, social welfare, parentage, and custody. We hope further work, by us and by others, will explore the utility of the psychological parent principle in other contexts where the law undermines or disrupts the parent-child bond.

I. DEVELOPMENTAL SCIENCE AND THE PARENT-CHILD RELATIONSHIP

The psychological parent principle is grounded in one of the most fundamental and longstanding findings from developmental science: that *children's secure relationship with their psychological parents is the cornerstone of healthy development*. In this Part, we summarize the science of child development, which establishes that a key developmental condition is a close, loving, and stable relationship with at least one psychological parent.³⁷ The science of attachment documents the importance of the child's bond with his or her psychological parents, the harm of disruptions in that relationship, and the capacity of parents and children to build and rebuild the parent-child relationship even after disruption and trauma. These findings are widely accepted and have been replicated over long periods. While they have not been sufficiently explored in the full range of families that courts and legislatures confront, there is no reason to doubt, and in fact emergent research suggests, that they apply with equal force to parents of all genders, different-sex and same-sex couples, biological and nonbiological relations, and so on. In Section A we review the scientific evidence, and in Section B we address several issues raised by the use of scientific evidence in crafting law.

A preliminary note on terminology will clarify our uses of (rough) synonyms—attachment figure, primary caregiver, and psychological parent. When summarizing the scientific literature, we follow the science in speaking of attachment and attachment figures and in referring to primary caregivers, parent figures, and parents

37. For work challenging the relationship in law between caregiver and parent, see Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385 (2008).

interchangeably. But when we turn to elaborating our principle, we adopt the term “psychological parent” to denote the person (or persons) who fulfills the child’s essential attachment needs. We do so to emphasize that psychological parent is a legal, not a scientific, term. Psychological parent helps to distinguish law’s scientifically grounded yet ultimately normative concept of the child’s important caregivers from science’s empirical account of the attachment figure.³⁸

A. THE DEVELOPMENTAL IMPORTANCE OF THE CHILD’S BOND WITH A PSYCHOLOGICAL PARENT

In this Section, we summarize four findings from developmental science that demonstrate the importance of parental care: (1) the child’s bond with a psychological parent is essential for healthy development; (2) disruptions in that relationship can inflict serious developmental harm; (3) the psychological parent-child bond buffers childhood trauma; and (4) the quality of the parent-child relationship can be improved with treatment.

1. The Child’s Bond with a Psychological Parent Is Essential for Healthy Child Development

The importance of the child’s bond with a psychological parent has been established by repeated studies using different methodologies over the last century. As the National Academies summarized in 2019, “[f]or all children, the single most important factor in promoting positive psychosocial, emotional, and behavioral well-being is having a strong, secure attachment to their primary caregivers.”³⁹ Children’s earliest relationships with their parents are foundational, both because infants and young children depend literally on their caregivers for their very lives and because early relationships “constitute a basic structure within which all meaningful development unfolds.”⁴⁰ A child’s secure attachment is critical for developmental

38. We do not mean to suggest that developmental psychology is devoid of normative concerns, but that, in contrast to law, the field attempts to minimize rather than cultivate them.

39. NAT’L ACADS. SCIS. ENG’G & MED., VIBRANT AND HEALTHY KIDS: ALIGNING SCIENCE, PRACTICE, AND POLICY TO ADVANCE HEALTH EQUITY 240 (Jennifer E. DeVoe, Amy Geller & Yamrot Negussie eds., 2019) [hereinafter NAT’L ACADS. 2019] (emphasis omitted).

40. NAT’L RSCH. COUNCIL & INST. MED., FROM NEURONS TO NEIGHBORHOODS: THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT 27–28 (Jack P. Shonkoff & Deborah A. Phillips eds., 2000); *see also* NAT’L ACADS. SCIS. ENG’G & MED., PARENTING MATTERS: SUPPORTING PARENTS OF CHILDREN AGES 0-8, at 1 (Vivan L. Gadsden, Morgan Ford & Heather Breiner eds., 2016) [hereinafter NAT’L ACADS. 2016] (emphasizing how foundational the parent-child relationship and family environment is on children’s well-being and

progress.⁴¹

“Attachment” refers to the relationship between the child and the adults who constitute the child’s primary source of care, and it reflects the quality, not the legal status, of the relationship.⁴² An infant’s caregiver is typically a biological or legal parent, but it could be an adult without a biological or legal tie to the child. A grandparent, a foster parent, or another adult could serve as a child’s primary caregiver. Critically, “[t]he hallmark of this important relationship is the readily observable fact that this special adult is not interchangeable with others.”⁴³

The attachment literature suggests that the dynamics of parent-child attachment function similarly across family types, although “research is sparse on unique issues related to nontraditional caregivers.”⁴⁴ Existing research confirms that secure attachments develop between children and adults outside the marital, heterosexual, biological family.⁴⁵ Studies have shown that children raised by same-sex couples form relationships just as strong as children in different-sex-couple-headed households.⁴⁶ A meta-analysis of peer-reviewed studies of adoptive families concluded that “adopted children were as securely attached as their non-adopted counterparts.”⁴⁷ Further, foster

healthy development).

41. See NAT’L RSCH. COUNCIL & INST. MED., *supra* note 40, at 230–34, 236–38.

42. See Diane Benoit, *Infant-Parent Attachment: Definition, Types, Antecedents, Measurement and Outcome*, 9 PEDIATRIC CHILD HEALTH 541, 541 (2004) (“Attachment is where the child uses the primary caregiver as a secure base from which to explore and, when necessary, as a haven of safety and a source of comfort.”).

43. NAT’L RSCH. COUNCIL & INST. MED., *supra* note 40, at 226. Similarly, the National Academy of Sciences uses the term “parents” to refer “to those individuals who are the primary caregivers of young children in the home.” NAT’L ACADS. 2016, *supra* note 40, at 34. Accordingly, parents may include not only “biolo[g]ical and adoptive parents but also relative/kinship providers (e.g., grandparents), stepparents, foster parents, and other types of caregivers.” *Id.*

44. NAT’L ACADS. 2016, *supra* note 40, at 34.

45. See, e.g., NAT’L ACADS. 2019, *supra* note 39, at 256 (citing Alicia Crowl, Soyeon Ahn & Jean Baker, *A Meta-Analysis of Developmental Outcomes for Children of Same-Sex and Heterosexual Parents*, 4 J. GLBT FAM. STUD. 385 (2008)) (“A meta-analysis of 19 studies confirmed that children raised by same-sex parents have patterns of adjustment that are just as healthy as those of their counterparts raised by heterosexual parents.”).

46. See, e.g., *id.*

47. Linda van den Dries, Femmie Juffer, Marinus H. van IJzendoorn & Marian J. Bakermans-Kranenburg, *Fostering Security? A Meta-Analysis of Attachment in Adopted Children*, 31 CHILD. & YOUTH SERVS. REV. 410, 417 (2009). This conclusion relates primarily to children adopted in the first year of life. *Id.*

children can develop strong attachments to their foster parents.⁴⁸ While further research may shed light on distinctive features of various family forms that affect parenting,⁴⁹ the importance of parent-child attachment across diverse family forms is clear.

Similarly, the attachment literature suggests that children can have more than one attachment figure and confirms the importance of children maintaining close relationships with both parents (in cases in which the child has two parents), whether the parents live in the same household or apart.⁵⁰ Further, “children are placed at risk when their parents experience conflict or when they have very different expectations for the child.”⁵¹ Once again, even as attachment research is largely grounded in the two-parent, heterosexual paradigm, it supplies findings understood to be relatively generalizable.

Attachment relationships typically develop between infants and their caregivers, but psychologists emphasize the importance of a “secure” attachment, which develops if the psychological parent supplies the child with continuous and reliable care.⁵² A secure attachment relationship helps form the foundation for healthy cognitive and social development; over time, the child internalizes the attachment relationship and requires less nurturance and reassurance from the attachment figure.⁵³ Healthy attachment relationships are also critical to emotional growth and social competence.⁵⁴ And the lack of a secure attachment can predict behavioral problems.⁵⁵ The consequences of a secure attachment endure beyond childhood.⁵⁶ Early attachments “set the stage for other relationships, as children move into the broader world beyond the immediate family.”⁵⁷

Research also confirms that the nature of the parental role changes over time as the child develops.⁵⁸ While young toddlers need “constant vigilance and appropriate limit setting” as they explore the

48. See, e.g., *id.* at 416 (“This means that the foster children are as securely attached to their foster parents as children reared in their biological family.”).

49. See Abbie E. Goldberg & Julianna Z. Smith, *Predictors of Parenting Stress in Lesbian, Gay, and Heterosexual Adoptive Parents During Early Parenthood*, 28 J. FAM. PSYCH. 125, 135–36 (2014).

50. NAT’L ACADS. 2016, *supra* note 40, at 12.

51. *Id.*

52. NAT’L RSCH. COUNCIL & INST. MED., *supra* note 40, at 231–36.

53. See *id.* at 27–28, 236–38.

54. See *id.* at 265.

55. See *id.*

56. See *id.* at 265–66.

57. *Id.* at 236.

58. NAT’L ACADS. 2019, *supra* note 39, at 241–43.

physical world, older toddlers and school-age children need increasingly complex language-based interactions with parents.⁵⁹ As children grow, “a new developmental task for the child—and thus for that caregiver—is adjustment to external influences,” including interactions with peers and teachers at school.⁶⁰ Later, parents help with the social and emotional skills needed to process “failures and successes in various areas—academics, peer relations, sports, or other specialized arenas.”⁶¹ While most attachment research focuses on infants and young children, parents continue to occupy a critical place in children’s lives well into adolescence and beyond.⁶²

2. Disruptions in the Psychological Parent-Child Relationship Can Inflict Serious Developmental Harm

Research has documented not only the critical positive effects of the child’s bond with a psychological parent but also the serious adverse consequences of the absence of or disruptions to a parental bond. Studies of children raised in orphanages, for example, reveal “the severe developmental consequences of institutional care that affords neither stimulation nor consistent relationships with caregivers.”⁶³ Even when a child has developed a secure attachment early in childhood, the loss of that attachment relationship can have significant detrimental consequences for the child.⁶⁴

Although more data are needed on parenting in diverse family forms,⁶⁵ a growing body of high-quality, peer-reviewed research suggests that the termination of an attachment relationship is traumatic for a child even where there is no biological or adoptive connection to the parent—including in cases of same-sex parents.⁶⁶

59. *Id.* at 242.

60. *Id.* at 242–43.

61. *Id.* at 243.

62. *See id.*

63. NAT’L RSCH. COUNCIL & INST. MED., *supra* note 40, at 257.

64. *See, e.g.*, Am. Acad. Pediatrics Comm. on Early Childhood, Adoption & Dependent Care, *Developmental Issues for Young Children in Foster Care*, 106 PEDIATRICS 1145, 1145 (2000) (describing children’s “need for continuity with their primary attachment figures” as “paramount”).

65. NAT’L ACADS. 2016, *supra* note 40, at 391–92.

66. *See* NAT’L ACADS. 2019, *supra* note 39, at 256; *see also* A. Brewaeyts, I. Ponjaert, E.V. Van Hall & S. Golombok, *Donor Insemination: Child Development and Family Functioning in Lesbian Mother Families*, 12 HUM. REPROD. 1349, 1356 (1997) (“Both women in the lesbian mother family were actively engaged in child care and a strong mutual attachment had developed between social mother and child.”); Yvon Gauthier, Gilles Fortin & Gloria Jéliu, *Clinical Application of Attachment Theory in Permanency*

Across families, the disruption of an attachment relationship can cause anxiety and grief, and disrupt development.⁶⁷ These effects may be long lasting, increasing the likelihood of problems later in life.⁶⁸

Research also shows that parents' own wellbeing is an important condition for a strong psychological bond: "Chronic exposure to poverty or prolonged periods of limited resources, as well as life events involving high levels of trauma, can lead to maternal depression, anxiety, and other mental health problems, which in turn can greatly compromise the quality of parenting."⁶⁹ Caregiver depression, to take one important example, exposes children to "greater risk of developing socioemotional and behavior problems, which translate into difficulties in school, poor peer relationships, reduced ability for self-control, and aggression."⁷⁰ The parent-child bond can also be disrupted by environmental stressors, "including lack of access to quality health care, child care, economic security, community support programs, transportation, stable housing, and healthy nutritional sources; institutional and individual racism and sexism; and community violence."⁷¹

3. The Child's Relationship with a Psychological Parent Buffers Childhood Trauma and Toxic Stress

More recent findings emphasize the importance of the parent-child bond in buffering the effects of childhood trauma, such as exposure to domestic or neighborhood violence.⁷² Stress, of course, is a normal feature of the human environment, and one task of childhood is to learn to adapt to and recover from stressful situations. But what

Planning for Children in Foster Care: The Importance of Continuity of Care, 25 INFANT MENTAL HEALTH J. 379, 394 (2004) (explaining that children suffer greatly when separated from non-biological parent figures); cf. NAT'L ACADS. 2016, *supra* note 40, at 328 ("[L]esbian and gay parents adjusting to parenthood generally experience levels of stress comparable to those experienced by their heterosexual counterparts.").

67. See Kenneth S. Kendler, M.C. Neale, C.A. Prescott, R.C. Kessler, A.C. Heath, L.A. Corey & L.J. Eaves, *Childhood Parental Loss and Alcoholism in Women: A Causal Analysis Using a Twin-Family Design*, 26 PSYCH. MED. 79, 89-90 (1996); Takeshi Otowa, Timothy P. York, Charles O. Gardner, Kenneth S. Kendler & John H. Hettema, *The Impact of Childhood Parental Loss on Risk for Mood, Anxiety and Substance Use Disorders in a Population-Based Sample of Male Twins*, 220 PSYCHIATRY RSCH. 404, 407-08 (2014).

68. See, e.g., Kendler et al., *supra* note 67; Otowa et al., *supra* note 67.

69. NAT'L ACADS. 2019, *supra* note 39, at 243.

70. NAT'L RSCH. COUNCIL & INST. MED., *supra* note 40, at 251.

71. NAT'L ACADS. 2019, *supra* note 39, at 116.

72. See *id.* at 435-38.

is sometimes called “toxic stress”⁷³ (or “early adversity”) refers to excessive and lasting stress, which can disrupt the normal pathways of development.⁷⁴

Toxic stress is not simply a psychological event. It is also a biological phenomenon: “Severe or chronic activation of the stress response, in the absence of adequate caregivers who serve as buffers to the stress activation, can lead to disruption of homeostatic mechanisms and long-term changes to brain architecture and organ systems (the toxic stress response).”⁷⁵ Put another way, studies have found that “if the stress response is extreme, long-lasting, *and buffering relationships are unavailable to the child*, the result can be toxic stress, leading to damaged, weakened bodily systems and brain architecture, with lifelong repercussions.”⁷⁶ The National Academies have concluded that “the *single most important protective factor* for children facing adversity is a strong, secure relationship with at least one parent; this helps foster positive outcomes across domains ranging from psychological adjustment to positive peer relationships.”⁷⁷

4. The Quality of the Parent-Child Bond Can Improve with Treatment

Research demonstrates that the quality of parental care can be improved by programs that support parents and families.⁷⁸ These include programs that provide economic support for families, as well as programs targeted specifically to parenting, such as visiting nurse initiatives and child-parent psychotherapy programs.⁷⁹ Measures that address maternal depression have also been shown to improve children’s resilience and development.⁸⁰

73. *Id.* at 116.

74. *Id.* at 115–16.

75. *Id.* at 112.

76. *Excessive Stress Disrupts the Architecture of the Developing Brain 1* (Nat’l Sci. Council on the Developing Child, Working Paper No. 3, 2014) (emphasis added), https://developingchild.harvard.edu/wp-content/uploads/2005/05/Stress_Disrupts_Architecture_Developing_Brain-1.pdf [<https://perma.cc/AZ9T-JLLN>].

77. NAT’L ACADS. 2019, *supra* note 39, at 114 (emphasis added).

78. *See id.* at 94.

79. *See id.* at 237–38, 270–83.

80. *See id.* at 237–38, 243–45; NAT’L RSCH. COUNCIL & INST. MED., *supra* note 40, at 251–54.

B. CAVEATS AND SAFEGUARDS ON THE USE OF DEVELOPMENTAL SCIENCE IN LAW

Even as scholars have successfully drawn on robust scientific findings to enrich their work in family law, they have also raised concerns about the use of fringe science in adjudication and the undue influence of mental health professionals in family law cases. For example, many have criticized courts' reliance on "parental alienation syndrome," which has been found not to rest on solid empirical research.⁸¹ Elizabeth Scott and Robert Emery have persuasively argued that judges have awarded undue authority to mental health professionals in applying the best interests standard. Scott and Emery find that some courts have permitted psychologists, psychiatrists, and social workers to offer testimony that stretches beyond their expertise.⁸² In some cases, judges have inappropriately delegated to the experts what should be legal decisions.⁸³

Whether science is sufficiently reliable to be used in law should be a legal determination, and yet it is one that legal scholars and policy makers are not trained to make. Lawyers typically cannot engage at a high level with the details of scientific research, and most scientists are not trained with any sophistication in law. The danger is thus twofold. Opportunistic (or sincere but naïve) legal actors may invoke fringe science to justify legal rules. And opportunistic (or sincere but naïve) scientists may offer scientific findings as the basis for legal innovation without taking into account the values that should shape law.⁸⁴

We propose two safeguards to counter these dangers. The first goes to the quality of scientific evidence used. To ensure that scholars and policy makers meet their obligation to investigate the quality of their evidence, *the specific findings used should be robust across investigators and across time*. This standard can be difficult for legal

81. See Jennifer Hoult, *The Evidentiary Admissibility of Parental Alienation Syndrome: Science, Law, and Policy*, 26 CHILD'S LEGAL RTS. J. 1, 5 (2006).

82. Elizabeth S. Scott & Robert E. Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard*, 77 LAW & CONTEMP. PROBS. 69, 94 (2014).

83. See *id.* at 92. While our principle calls for expert testimony in parentage and custody cases on the question of the child's attachment relationships, this type of testimony falls clearly within the expertise of child psychologists and remains narrowly focused on the parent-child bond rather than broadly encompassing a child's best interests.

84. For a discussion of the pitfalls in using developmental science in family law, see Huntington, *Empirical Turn*, *supra* note 28, at 271-95.

decisionmakers to apply, and so we encourage collaboration with scientists and reliance, as far as possible, on high-quality synthetic sources, such as the National Academies. Collaboration between legal and scientific experts can ensure that science is translated with nuance and that legal and social values remain clear.⁸⁵ Indeed, our own work crafting the psychological parent principle has been informed by a years-long collaboration with researchers and clinicians at the Yale Child Study Center.⁸⁶

Our summary of the relevant science above relies primarily on publications produced by expert bodies that can also help non-experts determine the reliability of science. Our discussion cites, *inter alia*, publications by the National Academies Press in 2000, 2016, and 2019, which in turn cite to the underlying literatures on child development.⁸⁷ Thus, the psychological parent principle rests primarily on scientific findings that meet the criteria we proposed above: they have been verified by leading experts and have withstood scrutiny over time.

Still, obstacles exist to substantiating the importance of the psychological parent-child bond for diverse groups of parents and children. The foundational attachment research in psychology has largely studied biological mothers in heterosexual arrangements.⁸⁸ As an initial matter, there is little reason to question application of the overarching finding on the importance of parental care to parent-child relationships across a diverse range of families. In fact, experts predict that many of the foundational results on attachment will extend to parents and families who have been marginalized by or ex-

85. See Owen D. Jones, Richard J. Bonnie, B.J. Casey, Andre Davis, David L. Faigman, Morris Hoffman, Read Montague, Stephen J. Morse, Marcus E. Raichle, Jennifer A. Richeson, Elizabeth Scott, Laurence Steinberg, Kim Taylor-Thompson, Anthony Wagner & Gideon Yaffe, *Law and Neuroscience: Recommendations Submitted to the President's Bioethics Commission*, 1 J.L. & BIOSCIENCES 224, 226 (2014) (calling for "interdisciplinary work and research—partnering scholars and practitioners within both law and neuroscience" in the context of criminal justice). For other examples of such collaboration, see SCOTT & STEINBERG, *supra* note 28; and Appleton et al., *supra* note 28, at 2–4.

86. This has involved recurring meetings of a small group of legal scholars, psychologists, psychiatrists, and social workers; joint writing; roundtables; and conferences seeking to build bridges between the science of child development and legal and policy work.

87. See NAT'L RSCH. COUNCIL & INST. MED., *supra* note 40; NAT'L ACADS. 2019, *supra* note 39; NAT'L ACADS. 2016, *supra* note 40.

88. See, e.g., NAT'L ACADS. 2016, *supra* note 40, at 390 ("[F]athers continue to be underrepresented in research on parenting and parenting support.").

cluded from major research.⁸⁹

Expert bodies have called for the field to provide more data on fathers, same-sex parents, adoptive and foster parents, stepparents, kinship caregivers, and other “nontraditional” arrangements.⁹⁰ Accordingly, when addressing families that depart from the traditional paradigm that pervades the research, we draw from the brief treatment offered by expert bodies and also look to the broader scientific literature, some of which is cited by expert bodies, if it is of high quality and, if possible, peer-reviewed. We take this step in light of the values of equality and inclusion, which we defend in the next Part, so that the exclusions evident in the scientific literature—exclusions acknowledged and criticized by the very expert bodies on which we rely—do not reproduce themselves in the legal prescriptions we develop.

The second safeguard turns to the problem of values.⁹¹ Developmental science underscores the importance of the parent-child relationship to child development. That finding might seem sufficient to ground the psychological parent principle. But it is unwise to make any simple translation of developmental science into law because the aims and methods of the two disciplines are so different. Science is an empirical discipline: it aims to describe and understand the world. Law, by contrast, is inherently normative: it tells citizens what they ought to do and uses the power of the state to encourage compliance and to punish deviation. To maintain the accountability of policy makers to the public and the transparency of the law to citizens, *legal standards should articulate the values at stake and defend the relevance of science to the implementation of those values*. Facts, standing apart from values, cannot and should not drive the law. We turn to this task now.

II. FROM DEVELOPMENTAL SCIENCE TO LEGAL PRINCIPLE: THE IMPORTANCE OF VALUES

Science tells us that the parent-child bond is foundational to healthy child development, but it cannot tell us how to resolve competing values. Scarce resources pose one challenge: lawmakers must

89. See NAT'L ACADS. 2019, *supra* note 39, at 240–41; *cf.* NAT'L ACADS. 2016, *supra* note 40, at 328 (“Lesbian and gay parents, particularly when new to parenthood, have many of the same concerns as any other new parents and could benefit from the same support structures.”).

90. See NAT'L ACADS. 2016, *supra* note 40, at 3, 12–14, 390–92.

91. See Huntington, *Empirical Turn*, *supra* note 28, at 296.

choose whether to allocate more resources to parents and children, on the one hand, or to competing uses, say, cutting taxes, on the other. Competing assertions of rights pose another test for law: legal decisionmakers must decide whether to give priority to child development or to adult assertions of rights over children when the two come into conflict. Any legal prescription, we argue, should therefore be justified by clear statements about the values that justify state action.

Explicit discussion of values is also important because developmental science, despite its aspirations to neutral empiricism, may smuggle in questionable value judgments. Research in psychology, for example, has often treated white, Western, middle-class subjects as the norm.⁹² Studies of attachment have, for decades, focused on biological mothers in presumably heterosexual arrangements, implicitly undervaluing children's attachment to LGBTQ parents, fathers, and nonbiological parents.⁹³ Similarly, attachment research is often rooted in assumptions of one mother and one father, ignoring the dynamics of attachment with same-sex parents and more than two parents.⁹⁴ Although the field is changing, the result is that we still know relatively little about the dynamics of attachment in families that depart from conventional norms rooted in the biological, gender-differentiated, heterosexual family.⁹⁵

In our view, gaps in scientific research—gaps that reflect some of the precise inequalities law is seeking to repudiate—do not provide a basis on which to perpetuate the exclusion of marginalized groups. For example, a lack of research on transgender parents does not justify the law's failure to protect relationships between such parents and their children. Instead, it simply reflects the implicit judgments embedded in scientific research. Accordingly, values of equality and inclusion become critical to assessing both the rele-

92. See, e.g., NAT'L RSCH. COUNCIL & INST. MED., *supra* note 40, at 232.

93. From the outset, attachment theory focused on mothers who had children in different-sex relationships. See Inge Bretherton, *The Origins of Attachment Theory: John Bowlby and Mary Ainsworth*, 28 DEV. PSYCH. 759, 762 (1992). For an example, see MARY D. SALTER AINSWORTH, MARY C. BLEHAR, EVERETT WATERS & SALLY N. WALL, PATTERNS OF ATTACHMENT: A PSYCHOLOGICAL STUDY OF THE STRANGE SITUATION 6 (Classic ed., Psychology Press 2015) (1978).

94. See AINSWORTH ET AL., *supra* note 93, at 18; Danielle H. Dallaire & Marsha Weinraub, *Infant-Mother Attachment Security and Children's Anxiety and Aggression at First Grade*, 28 J. APPLIED DEV. PSYCH. 477, 480, 486 (2007).

95. Given our inclusion of parents who depart from the gendered, heterosexual, biological paradigm, we rely on the growing body of research on same-sex parenting. See, e.g., Brewaeys et al., *supra* note 66 (studying lesbian mothers and their partners).

vance of scientific research and the legal status of the relationship at stake.

Many ideals might guide the law, and the choice among ideals is itself an important subject for argument and democratic debate. We begin here by providing a normative framework grounded in liberal egalitarian theory to help guide debate. According to liberal egalitarian ideals of justice, a just society should prize, *inter alia*, democratic self-determination, equal life chances, and social inclusion. These values imply that the law should seek to ensure that all children, regardless of their social background, have a healthy childhood full of rich experiences that prepare them to participate in the polity and to shape lives of their own choosing. These values also imply that the law should be as transparent as possible, so that citizens can make meaningful democratic decisions about the commitments of the state.⁹⁶ We then relate these values to the psychological parent principle.

A. THREE IDEAL VALUES FOR FAMILY LAW

The body of literature examining the implications of liberal egalitarian political theory for the family is less voluminous than one might assume.⁹⁷ Yet the principles articulated in this literature are relevant to legal regulation of the family and inform the approach that we take. Theory always invites interpretation, of course, and we offer just one plausible view to illustrate our basic point: that any legal principle must be grounded in an explicit theory of values and priorities.

The liberal egalitarian view does not suppose that the family is an autonomous or extra-legal creation; instead, liberal egalitarian theories take note of the range of ways that the state shapes the family. Through law, the state sets the background conditions for family life, defines family roles, allocates family rights and responsibilities, and adjudicates disputes within or between families.⁹⁸ Very

96. The values we invoke have constitutional counterparts, the contents of which are deeply contested. This Article aims to translate an ideal of justice into prescriptions for law—and not to engage in the very different project of mining constitutional authorities for implicit values.

97. See sources cited *supra* note 32 and accompanying text. For an important exception that focuses on the family, see SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 89–109 (1989).

98. See ALSTOTT, *supra* note 28, at 4–7; Alstott, *supra* note 21, at 26; Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1517–18 (1983).

generally speaking, these theories suggest that three values should guide the design of family law.

First is the value of democratic self-determination (“democracy” for short). In a democratic society, every individual should have an equal right and equal opportunity to participate in decisions of the polity. Democracy has a procedural aspect, which affects family law as it does other realms of law. Democratic procedures seek to give power and voice to the people and to hold government accountable to the governed. The ideal of democracy suggests that the law should ensure the accountability of political leaders to the electorate and the accountability of judges to those who appear before them and to the larger society. Democratic values also include legal transparency, notice, and comprehensibility of the law to the governed.

When it comes to the family and childrearing, democracy also has a substantive dimension. Democratic self-rule is possible only if children are prepared—intellectually, morally, and emotionally—to take up their role as citizens. Thus, children should be prepared not only to make choices about their own lives but also to participate in a polity that requires tolerance of others’ choices and an ongoing commitment to equal respect. Parents play a crucial part in children’s democratic socialization, ensuring that children receive the caregiving and opportunities they need to live full lives and to become full participants in the polity. Our democratic ideal presumes the existence of a strong parent-child caregiving relationship, one successful in meeting children’s developmental needs.⁹⁹ As children age, the value of democracy should move the law toward greater deference to children’s own autonomous decision-making capacities and interests.

Second is the value of equal life chances (“equality” for short). Egalitarian liberal theorists have developed an expansive and substantive ideal of equality, one that requires a just society to create social and economic arrangements that ensure universal access to the primary goods that enable everyone to construct a meaningful life of their own choosing and to participate as equals in social and political life. Critically, the ideal of equality looks beyond formal equality before the law to the structure of the institutions that enable individuals to exercise their autonomy, subject to the equal claims of others.¹⁰⁰ The value of pluralism can be understood as a part of this

99. See Dailey, *supra* note 28, at 434.

100. See, e.g., RAWLS, A THEORY OF JUSTICE, *supra* note 32, at 60 (setting forth the first principle of justice, according to which “each person is to have an equal right to

expansive notion of equality: a just society permits individuals with different moral views to coexist and to act on those views so long as they are consistent with the equality of others.

The ideal of equality applies to all individuals, including both children and parents. Indeed, our account of equality puts children at the center. Even as equality suggests that the law should grant wide latitude to parents to form families and communities of their own choosing, children have their own claim to legal and social arrangements that support their welfare and development. Our ideal of equality, as applied to children, entails legal and social measures to ensure that children can lead full lives in the present as well as become full adult members of society. Accordingly, a just society may fairly override parental efforts that infringe children's equality by limiting a child's education or relationships outside the home.¹⁰¹ More relevant here, children are entitled to parental care informed by their needs and capacities.

Some critics of liberalism contend that its focus on the individual obscures the experience of living in a social group identified by race, gender, sexual orientation, (dis)ability, and other categories. We recognize that not all liberal *theorists* have paid sufficient attention to these status-based inequalities, but we believe that egalitarian liberal *theories* provide strong justification for measures to confront and dismantle unjust discrimination.

Accordingly, we invoke the value of social inclusion ("inclusion" for short), which emphasizes that just arrangements must take due note of social, legal, and economic conditions that can deny equal life chances to members of marginalized groups. One might treat the value of inclusion as implicit in the value of equality, but in our view, it is important, particularly in the family realm, to identify inclusion specifically as a matter of justice. Our law and society have long differentiated among people based on race, ethnicity, religion, gender, and sexual orientation. Against this backdrop, awareness of the burdens borne by groups is critical. Indeed, contemporary conflict over questions of belonging—observable, for example, in mobilizations around racial inequality, policing, health disparities, and work conditions—demonstrate emergent understandings of the relationship between group status and full membership in the polity.

the most extensive basic liberty compatible with a similar liberty for others").

101. See, e.g., ACKERMAN, *supra* note 32, at 150–60 (calling for greater engagement with non-family members as the child reaches secondary school); Dailey & Rosenbury, *supra* note 28, at 1452–53.

The value of inclusion also incorporates an ideal of redress, directing the law to rectify inequalities that affect individuals and groups—even when doing so may sacrifice the expectations and entitlements of those who have benefitted from unequal arrangements. The ideal of redress may thus require major overhauls of legal rules and social institutions that have—intentionally or not—operated to deny equal standing and participation to some groups of people. For example, while a system of parentage designed around biological connection may seem natural and benign to many, it has systematically excluded same-sex couples and their children in ways we reject.

B. ROOTING SCIENCE IN VALUES

These three values of democracy, equality, and inclusion lay the normative foundation for the psychological parent principle. The state should devote resources to support parental care as a matter of justice to all children, and the state should determine questions of parentage and custody from a child-centered perspective that protects children's relationships with their psychological parents. Critically, these values suggest that the psychological parent principle should be transparent and attuned to children's emerging autonomy (to advance the value of democratic self-determination) and should support development for every child, regardless of her social background (to advance the values of equality and inclusion).

A democratic society can function only if legal actors are accountable to the people. And a key component of accountability is transparency: legal standards should be clear to judges and other legal actors and comprehensible to citizens. One important feature of the psychological parent principle is that it is a relatively simple, unitary guideline that is readily communicated to parents and legal decisionmakers. By giving priority to the child's bond with her psychological parent, the principle helps ensure that children have the opportunity to become full members of the democratic polity with the skills and capacities needed to participate in democratic life.

The principles of democracy, equality, and inclusion help justify giving priority to the psychological parent-child bond over competing claims for resources and rights. Not all members of the polity will embrace the ideal of healthy child development. Some would prefer to pay lower taxes; others would set a higher priority on political projects other than child development. But on the liberal, egalitarian view, child development is a foundational commitment, not a luxury. The state's obligation to foster equal life chances and inclusion rep-

resent building blocks of a just society—constitutional essentials with a small “c.”

This does not mean, of course, that the law can or should claim unlimited resources for children and their psychological parents at the expense of every other social project. But it does mean that, consistent with the level of development of the society, the state should take affirmative steps to (re)distribute resources, including time and money, to families in ways that support the parent-child relationship. Put another way, the law has an obligation to scrutinize the background conditions for family life and to take measures to promote the parent-child relationship—and to protect that relationship once it is established.

The psychological parent principle also creates room for considering children’s present experience as well as their future developmental outcomes. Some scholars have sought to frame parental rights as instrumental to the development of children’s autonomy.¹⁰² We are sympathetic to this child-centered view of autonomy; indeed, the development of children’s capacity to create lives of their own choosing is central to the ideals of democracy and equality we sketched above. But a just society must focus on more than children’s future status as autonomous adults. Instead, the principles of equality and inclusion counsel attention to children’s present welfare and experience as well.¹⁰³

Because we ground the law’s commitment to parental care in democratic egalitarian norms, we treat parental authority as properly circumscribed by children’s claims to live a meaningful life both in the present and as future adults. The implications of the psychological parent principle will shift as children mature. For very young children, the parent-child bond is paramount, and parental authority and autonomy generally serve to strengthen that bond. As children grow, however, the state may legitimately seek to widen their social circle beyond the family through education and other means. These widening encounters with the world follow from the values of equality and inclusion—and they may justify limitations on parental authority.¹⁰⁴

102. See Emily Buss, “Parental” Rights, 88 VA. L. REV. 635, 640 (2002); Joel Feinberg, *The Child’s Right to an Open Future*, in WHOSE CHILD? CHILDREN’S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER 124 (William Aiken & Hugh LaFollette eds., 1980).

103. See Dailey & Rosenbury, *supra* note 28, at 1477–84.

104. We do not attempt, in this Article, to delve into the details of how the psychological parent principle would accommodate those goals. Bruce Ackerman, among others, has offered a thoughtful approach to the shape of a liberal education—one

The psychological parent principle is a guideline, not a self-executing rule. Translating the principle into workable legal rules and standards requires careful attention to context. Illustrating just how that might be done is our task in the remainder of this Article. In the Parts that follow, we show how the psychological parent principle has the capacity to integrate parents' and children's interests in matters including social welfare, parentage, and custody. In Part III, we explore the following question: To what social resources should parents be entitled, by reason of their parental role, and how (if at all) should such resources vary with parents' earning power and social position; that is, *how should the law distribute resources and regulate working conditions?* In Part IV, we ask: (1) Which adults should be entitled and obligated to rear children; that is, *how should the law determine parentage?* (2) When parents disagree over childrearing, how should the law determine which parent(s) hold decision-making power and day-to-day authority; that is, *how should the law adjudicate child custody?*

III. SUPPORTING THE CHILD'S BOND WITH A PSYCHOLOGICAL PARENT: SOCIAL WELFARE, EMPLOYMENT, AND CHILDCARE

Today, U.S. family law is inadequate to protect the parent-child bond. The law confers on parents assumed to be "fit" the authority to raise their children, but neither children nor parents have rights to affirmative support from the state.¹⁰⁵ Family law rests on the expectation that parents can and will earn sufficient income in the labor market to support themselves and their children. The law treats parents harshly when they cannot meet that expectation—by subjecting them to the supervision and meager benefits of welfare programs or by removing their children to the child welfare system.¹⁰⁶ These supervisory and punitive aspects of the law fall disproportionately on poor families and parents and children of color.¹⁰⁷ The result is that structural inequalities, including those based on race and class, be-

that respects both the parent-child bond and the child's need for wider experiences as she matures. ACKERMAN, *supra* note 32, at 139–67. One of us, with Laura Rosenbury, has done significant work in considering how the law might address developmental considerations beyond the parent-child relationship. See Dailey & Rosenbury, *supra* note 28.

105. Alstott, *supra* note 21, at 30, 35.

106. See *id.* at 37–40.

107. See DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 223–25 (2002); KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 1–14 (2017).

come invisible to family law. Judges in custody cases, just to take one example, treat the status quo as the appropriate baseline. They apply the best interests test in light of the claimants' economic and social position, and they typically lack the power to alter the material circumstances of the family.¹⁰⁸ Legislators may—or may not—adopt social welfare initiatives that improve families' economic circumstances, but there is no constitutional mandate under present law requiring such measures. The result is that funding for welfare programs, employment laws, and childcare assistance is determined entirely by the currents of politics.

In contrast, the psychological parent principle urges judges and legislators to recognize and implement a lasting, positive commitment to provide parents with the resources and opportunities they need to provide close and continuous care. We are not, of course, the first to identify how present family laws and social policy compromise family life.¹⁰⁹ Our contribution here is to demonstrate how the psychological parent principle provides a unifying principle for reform in traditional family law doctrines like parentage and custody as well as reforms in social welfare programs, employment law, and childcare provision. Further, the focus on psychological parent relationships supports more specific directions for reform than a general call for progressive redistribution. Legal reforms should aim to redistribute money to families in need and should, in addition, focus on parents' financial stability, available time, and options for substitute care.

We begin our exposition with social welfare, employment, and childcare, rather than with traditional family law doctrines, to emphasize that (re)distribution should be front and center in family law—and not an afterthought. Law schools teach family law and social welfare as separate subjects, but that separation reflects the organization of the legal profession and not a normative distinction. When we center on principles of democracy, equality, and inclusion, we can clearly see that the distribution of economic resources and the structure of economic opportunities are foundational to family life—as foundational as, say, the laws that define parenthood and parental rights.

108. Even in the child welfare system, where federal law has long required authorities to make “reasonable efforts” to ensure that the child remains in or is returned to the home, this mandate has not been interpreted to require financial resources.

109. For two important examples, see HUNTINGTON, *supra* note 28, at 81–111, and EICHNER, *supra* note 28.

A. HOW CURRENT LAW BURDENS THE PSYCHOLOGICAL PARENT-CHILD BOND

The law sets the rules of the marketplace, and the law determines individuals' entitlements to social resources. To take just one example: many workers earn low wages, have no paid sick leave, and no job security. Those are not natural features of a neutral market. Rather, those outcomes reflect legal and policy decisions, including at-will employment, weak protections for unionization, and other rules intended to favor employers and minimize labor costs.

Today, the confluence of these laws leaves many parents in precarious circumstances. Social welfare programs supply minimal assistance to parents who do not or cannot hold paid jobs.¹¹⁰ Working parents who earn low wages receive slightly more generous public assistance via the Earned Income Tax Credit (EITC), but even with that assistance, many families with children fall short of the poverty level.¹¹¹ Ultimately, the U.S. ranks at the bottom of the developed world in income support for parents and children—and at the top in child poverty.¹¹²

U.S. employment laws compound the economic insecurity facing many parents and children. At-will employment, the decline of labor unions, and a low minimum wage leave parents working long hours for low wages.¹¹³ Parental time is also relatively scarce, particularly

110. The Temporary Assistance to Needy Families (TANF) program provides sub-poverty-level benefits for a limited time in most states, supplemented by the Supplemental Nutrition Assistance Program (SNAP) and limited public housing subsidies. See Aditi Shrivastava & Gina Azito Thompson, *TANF Cash Assistance Should Reach Millions More Families to Lessen Hardship: Access to TANF Hits Lowest Point Amid Precarious Economic Conditions*, CTR. ON BUDGET & POL'Y PRIORITIES (Feb. 2022), <https://www.cbpp.org/sites/default/files/atoms/files/6-16-15tanf.pdf> [https://perma.cc/UU2B-E5RV].

111. In 2018, the official poverty rate was 15.9% for all families with children under eighteen and 39.1% for single-mother families with children under eighteen. See U.S. CENSUS BUREAU, P60-266(RV), *INCOME AND POVERTY IN THE UNITED STATES: 2018* at 51 tbl.B-2 (2019); see also Anne L. Alstott, *Why the EITC Doesn't Make Work Pay*, 73 *LAW & CONTEMP. PROBS.* 285 (2010).

112. See *Public Spending on Family Benefits*, ORG. OF ECON. COOP. & DEV., at Chart PF1.1.A (2019), http://www.oecd.org/els/soc/PF1_1_Public_spending_on_family_benefits.pdf [https://perma.cc/8PK3-6KFF].

113. See Dean Baker, *If Worker Pay Had Kept Pace with Productivity Gains Since 1968, Today's Minimum Wage Would Be \$24 an Hour*, COMMON DREAMS (Jan. 21, 2020), <https://www.commondreams.org/views/2020/01/21/if-worker-pay-had-kept-pace-productivity-gains-1968-todays-minimum-wage-would-be-24> [https://perma.cc/7RJN-RAN8]; Heidi Shierholz, *Weakened Labor Movement Leads to Rising Economic Inequality*, ECON. POL'Y INST. (Jan. 27, 2020), <https://www.epi.org/blog/weakened-labor-movement-leads-to-rising-economic-inequality> [https://perma.cc/73W7-XYKK].

for low-wage workers.¹¹⁴ A large percentage of workers have no paid parental leave or sick leave and so risk their jobs when a child is born or falls ill.¹¹⁵ The Family and Medical Leave Act mandates only unpaid leave, and even that is not available to all workers.¹¹⁶ By international measures, the U.S. ranks at the bottom among developed countries in the generosity of its family leave benefits.¹¹⁷

The U.S. also provides minimal public support for childcare. The public school system occupies school-age children for roughly six hours a day, six months per year,¹¹⁸ leaving working parents to pay out of pocket for before- and after-school care and summer care for younger children. Private childcare, at all ages, tends to be expensive and, too often, of low quality.¹¹⁹ Once again, the country's international position is revealing: the U.S. spends less on childcare (as a percentage of GDP) than any other developed country except Ireland and Turkey.¹²⁰

These minimal legal protections for parents exist alongside forty years of worsening economic conditions for lower-paid workers. Real wages have fallen over time; the minimum wage has been eroded by inflation; and the costs of childcare, higher education, and housing have outpaced inflation.¹²¹ The COVID-19 pandemic amplified the

114. See *Employee Benefits Survey: What Data Does the BLS Publish on Family Leave?*, U.S. BUREAU OF LABOR STATISTICS 2 figs.2 & 3 (2021), <https://www.bls.gov/ncs/ebs/factsheet/family-leave-benefits-fact-sheet.pdf> [<https://perma.cc/J8U3-ZCBQ>].

115. *Id.*

116. *See id.*

117. See *Parental Leave Systems*, ORG. ECON. COOP. & DEV. 5 tbl.PF2.1.A (2019), https://www.oecd.org/els/soc/PF2_1_Parental_leave_systems.pdf [<https://perma.cc/3QNW-XSZE>]. Some states have acted to fill this void.

118. See, e.g., CONN. GEN. STAT. § 10-16 (2021) (requiring a minimum of 180 days of instruction and a total of 900 hours, or five hours per day).

119. See GANESH SITARAMAN & ANNE L. ALSTOTT, *THE PUBLIC OPTION: HOW TO EXPAND FREEDOM, INCREASE OPPORTUNITY, AND PROMOTE EQUALITY* 181–201 (2019); *The NICHD Study of Early Child Care and Youth Development*, NAT'L INST. OF CHILD HEALTH & HUMAN DEV. (2006), https://www.nichd.nih.gov/publications/pubs/documents/seccyd_06.pdf [<https://perma.cc/XSH5-YU4N>].

120. See *Public Spending on Childcare and Early Education*, ORG. OF ECON. COOP. & DEV. 2 Chart PF3.1.A (2019), http://www.oecd.org/els/soc/PF3_1_Public_spending_on_childcare_and_early_education.pdf [<https://perma.cc/XG28-WYSD>].

121. See *Trends in College Pricing 2019*, COLLEGEBOARD 19 (2019), <https://research.collegeboard.org/pdf/trends-college-pricing-2019-full-report.pdf> [<https://perma.cc/5E73-Z6EL>]; *Family Budget Burdens Squeezing Housing: Child Care Costs*, FREDDIE MAC (2019), <http://www.freddiemac.com/fmac-resources/research/pdf/201911-Insight-12.pdf> [<https://perma.cc/97K9-MFC2>]; *Historical Census of Housing Tables: Gross Rents*, U.S. CENSUS BUREAU (2000), <https://www.census.gov/data/>

struggles of families who lost jobs and childcare and whose children needed to be supervised at home with often inadequate technology and little support for remote learning.

The meagerness of parental support can undermine the psychological parent-child relationship. At one level, this is common sense. Parents with ample resources can provide consistent care, stable housing, and reliable substitute care to their children. Parents denied these resources must scramble for jobs and cobble together childcare; they must care for their children amidst the stresses of unemployment, punishing working conditions, and food and housing insecurity. Research has confirmed that economic adversity is associated with adverse outcomes for children.¹²² Family poverty is linked to poor health, worse educational outcomes, and earlier childbearing and unemployment.¹²³

Moreover, recent research has demonstrated that the role of income is causal: low income adversely affects child development, and parental care is a central pathway that links the two. Poverty creates direct stressors (for instance, food and housing insecurity) that affect both children and parents.¹²⁴ Poverty can compound toxic stress by undermining parental care, which is children's most important buffer. Parental depression, marital conflict, and stress-related harsh parenting practices can adversely affect child development.¹²⁵ The causal link between poverty and childhood toxic stress can also be framed in terms of instability. Poor families commonly experience greater stress due to interruption in employment, housing, and childcare, and this instability can hinder parental care.¹²⁶ When pov-

tables/time-series/dec/coh-grossrents.html [https://perma.cc/CLD3-GLWE]; Baker, *supra* note 113.

122. See Lawrence M. Berger, Christina Paxson & Jane Waldfogel, *Income and Child Development*, 31 CHILD. & YOUTH SERVS. REV. 978 (2009); Nicole L. Hair, Jamie L. Hanson, Barbara L. Wolfe & Seth D. Pollak, *Association of Child Poverty, Brain Development, and Academic Achievement*, 169 JAMA PEDIATRICS 822 (2015); John Holmes & Kathleen Kiernan, *Persistent Poverty and Children's Development in the Early Years of Childhood*, 41 POL'Y & POL. 19 (2013).

123. See sources cited *supra* note 122.

124. See Greg J. Duncan, Katherine Magnuson & Elizabeth Vtruba-Drzal, *Boosting Family Income to Promote Child Development*, 24 FUTURE CHILD. 99 (2014).

125. See Ross A. Thompson, *Stress and Child Development*, 24 FUTURE CHILD. 41 (2014).

126. See Heather Sandstrom & Sandra Huerta, *The Negative Effects of Instability on Child Development: A Research Synthesis*, URBAN INST. 5 (2013), <https://www.urban.org/sites/default/files/publication/32706/412899-The-Negative-Effects-of-Instability-on-Child-Development-A-Research-Synthesis.PDF> [https://perma.cc/6R6J-V8P7].

erty compromises parental care, the consequence is a cascade of developmental harm.¹²⁷

It follows that programs that raise family income or reduce instability due to poverty should improve the psychological parent-child relationship, and studies have confirmed the point. For instance, increases in income support for families improved maternal physical and mental health.¹²⁸ The introduction of paid family leave has been shown to improve caregiver mental and physical health.¹²⁹ High-quality childcare can buffer the impact of maternal stress and depression.¹³⁰ We turn next to consider how the psychological parent principle and the values that animate it would challenge existing arrangements and prompt efforts to affirmatively support parents and children.

B. EQUALITY, INCLUSION, AND THE ECONOMICS OF FAMILY LIFE

U.S. laws governing social welfare, employment, and childcare consistently fall short of the baseline efforts made by other countries to support children and their psychological parents. The result is that many families experience economic deprivation and instability. These stressors, in turn, tend to undermine parental care; the disruption in the parent-child bond leaves poor children far more vulnerable to the long-term adverse consequences of the toxic stresses of poverty itself as well as other sources of toxic stress (e.g., community violence). These features subvert the values of equality and inclusion by undermining parental care, especially for poor and minority children.

The deficient state of U.S. law is not, of course, unintended or accidental. The laws governing social welfare, employment, and childcare reflect the historic and ongoing racialization of poverty and,

127. John M. Pascoe, David L. Wood, James H. Duffee & Alice Kuo, *Mediators and Adverse Effects of Child Poverty in the United States*, 137 PEDIATRICS e1, e2–e3 (2016).

128. See, e.g., William N. Evans & Craig L. Garthwaite, *Giving Mom a Break: The Impact of Higher EITC Payments on Maternal Health*, 6 AM. ECON. J.: ECON. POL'Y 258 (2014); Kevin Milligan & Mark Stabile, *Do Child Tax Benefits Affect the Well-Being of Children? Evidence from Canadian Child Benefit Expansions*, 3 AM. ECON. J.: ECON. POL'Y 175 (2011); Pamela A. Morris & Lisa A. Gennetian, *Identifying the Effects of Income on Children's Development Using Experimental Data*, 65 J. MARRIAGE & FAM. 716 (2003).

129. See Maya Rossin-Slater & Lindsey Uniat, *Paid Family Leave Policies and Population Health*, HEALTH AFFS. (Mar. 28, 2019), <https://www.healthaffairs.org/doi/10.1377/hpb20190301.484936/full> [<https://perma.cc/QQC4-EFYU>].

130. See Hillel Goelman, Bozena Zdaniuk, W. Thomas Boyce, Jeffrey M. Armstrong & Marilyn J. Essex, *Maternal Mental Health, Child Care Quality, and Children's Behavior*, 35 J. APPLIED DEVELOPMENTAL PSYCH. 347 (2014).

more generally, the dominance of neoliberal values.¹³¹ Markets, on the neoliberal view, distribute resources and opportunities fairly and efficiently. Parents, on this account, should support their own children with their market earnings; parents who cannot support their children have no claim for state assistance.¹³² From this perspective, public income support is akin to charity—prompted by the generosity of the market’s winners and not mandated by principles of justice.

The facts on economic hardship and child development, standing alone, do not suffice to challenge these neoliberal premises, which reflect propositions about values. Neoliberalism focuses primarily on adults’ obligations to earn a living in the market and to provide for their children. On this view, children are largely invisible, except as the dependents of their parents, who are morally responsible for their own market success or failure. Developmental harm to children, on this account, is collateral damage, and the blame falls on parents, not society. Indeed, a common neoliberal claim is that income support programs subsidize adult irresponsibility and may harm children by undermining their moral training in the justice of the market and its outcomes.¹³³

The values that undergird the psychological parent principle provide a framework for identifying and challenging neoliberal values in U.S. law.¹³⁴ First, our accounts of equality and inclusion challenge the idea that “free” markets set fair wages, working conditions, and prices for childcare.¹³⁵ Market outcomes—including wages, working conditions, and the cost of living—are determined by laws that give priority to the interests of the wealthy and undermine the interests of poor and minority communities. As we have seen, it is

131. See Britton-Purdy et al., *supra* note 23, at 1787–88, 1808.

132. See Alstott, *supra* note 21, at 28.

133. See, e.g., Patrick Fagan & Robert Rector, *How Welfare Harms Kids*, HERITAGE FOUND. 1 (1996), <https://www.heritage.org/welfare/report/how-welfare-harms-kids> [<https://perma.cc/NQ82-5NLC>] (“Higher welfare payments do not help children; they increase dependence and illegitimacy, which have a devastating effect on children’s development.”); Paul Winfree, *How Welfare Spending Hurts the People It’s Supposed to Help*, DAILY SIGNAL (Aug. 1, 2015), <https://www.dailysignal.com/2015/08/01/how-welfare-spending-hurts-the-people-its-supposed-to-help> [<https://perma.cc/4L77-39YZ>] (“[T]he existing welfare system undermines work. By offering a generous system of entitlements to able-bodied adults without any obligation to work or prepare for work, welfare undermines the need and motivation for self-support.”).

134. In this work, we join the efforts of a growing number of scholars who have articulated visions of a just society in ways that resist neoliberal tendencies. See, e.g., Britton-Purdy et al., *supra* note 23.

135. See EICHNER, *supra* note 28, at 19–23.

the legal situation of parents that produces economic hardship, and it is the legal conditions of parenthood that harm parental care and children's development. In comparable economies, as Maxine Eichner has documented at length, parents fare far better, because the laws are better structured to support parental care.¹³⁶ Accordingly, we should treat with grave skepticism the idea that markets embody just outcomes such that parents ought to treat prevailing wages as the measure of their social worth.

Second, our accounts of equality and inclusion put children at the center, treating them as human beings of equal dignity and worth with a fair claim to the resources they need to thrive and develop. These ideals suggest that a just society must ensure that children receive developmental resources, including parental care, without conditioning them on parents' activities in the marketplace. Put another way, even if market outcomes were fair as to the adults involved (a claim we contest), the state should still expend resources to protect and preserve parental care as a matter of justice to children.

By contrast, the neoliberal view waters down "equality" to the notion that children deserve only the equal chance to live on whatever their parents can earn. And it excludes entirely the value we describe as inclusion. The neoliberal view fails to take notice of, for instance, the racial wealth gap or discrimination in wages and employment.

C. LEGAL REFORMS TO PROTECT AND IMPROVE THE PSYCHOLOGICAL PARENT-CHILD BOND

The psychological parent principle suggests a range of reforms in social welfare, employment, and childcare to improve the economic situation of families and reduce childhood poverty and adversity.¹³⁷ We recommend three concrete agendas, centering on financial security, parental time, and substitute care. These do not exhaust the implications of the psychological parent principle for social policy; a full agenda would add (at a minimum) health care, housing policy, disability policy, neighborhood and school integration, and environmental policy. But these three areas provide a starting point for illustrating the impact of the psychological parent principle in this sphere.

136. *See id.* at 19–28.

137. For other recent scholarly contributions in this vein, see HUNTINGTON, *supra* note 28, at 185–202; and EICHNER, *supra* note 28, at 197–212.

A first priority should be increasing financial security for low-income families with children, a measure shown to improve parental care and children's outcomes.¹³⁸ One route would be to expand the existing Earned Income Tax Credit (EITC) and the Child Tax Credit, although both programs have notable gaps in coverage that should be addressed.¹³⁹ The EITC assists only families with an employed parent, and it provides only minimal assistance to parents who work part-time or at low wages.¹⁴⁰ The Child Tax Credit provides modest support to families but is only partially refundable, a feature that denies the full credit to lower-income families.¹⁴¹ But the credit could be transformed into a functional children's allowance by increasing its size and providing for monthly payment and full refundability.¹⁴² Income support extended to all individuals, not just parents, would be more expensive (in budgetary terms) but would simplify eligibility. That is, a universal basic income (UBI) would provide a universal income supplement, and indeed UBI has been shown to improve children's and adults' physical and mental health.¹⁴³

Numerous sources contribute to parents' financial insecurity. Low-earning parents may find it difficult or impossible to save for an emergency or a spell of unemployment. Job loss, demotion to part-time hours, illness, or disability can be catastrophic. These interruptions are most common among lower-earning and minority workers,

138. See Kerris Cooper & Kitty Stewart, *Does Money Affect Children's Outcomes? An Update*, CTR. FOR ANALYSIS SOC. EXCLUSION (2017), <http://eprints.lse.ac.uk/103494/1/caspaper203.pdf> [<https://perma.cc/L48D-FE33>]; Rita Hamad & David H. Rehkopf, *Poverty and Child Development: A Longitudinal Study of the Impact of the Earned Income Tax Credit*, 183 AM. J. EPIDEMIOLOGY 775 (2016).

139. The Child Tax Credit was expanded (to \$3,000 per child and \$3,600 per child under age 6) for 2021, an important achievement that expired at the end of 2021. See I.R.C. § 24(i)(3).

140. See Alstott, *supra* note 111; Ariel Jurow Kleiman, *Low-End Regressivity*, 72 TAX L. REV. 1 (2018).

141. See *Can Poor Families Benefit from the Child Tax Credit?*, in *Briefing Book*, TAX POL'Y CTR. (2020), <https://www.taxpolicycenter.org/briefing-book/can-poor-families-benefit-child-tax-credit> [<https://perma.cc/3TH8-RPPH>].

142. H. Luke Schaefer, Sophie Collyer, Greg Duncan, Kathryn Edin, Irwin Garfinkel, David Harris, Timothy M. Smeeding, Jane Waldfogel, Christopher Wimer & Hirokazu Yoshikawa, *A Universal Child Allowance: A Plan to Reduce Poverty and Income Instability Among Children in the United States*, in 4 RSF: THE RUSSELL SAGE FOUND. J. SOC. SCI. 22 (2018); see also EICHNER, *supra* note 28, at 202–03.

143. See Arne Ruckert, Chau Huynh & Ronald Labonté, *Reducing Health Inequities: Is Universal Basic Income the Way Forward?*, 40 J. PUB. HEALTH 3 (2018).

and the stress of coping with these events takes its toll on parental care.¹⁴⁴

Given this range of issues, priorities for enhancing financial security should include higher wages and unemployment insurance. Higher wages can improve parental care in the way that income support policies can.¹⁴⁵ Debate over the minimum wage, which has been focused on potential effects on employment, should also take into account the positive impact on parental care: raising the minimum wage has been found to reduce child maltreatment, for example.¹⁴⁶

Unemployment insurance should also be reformed with attention to the situation of parents, particularly those in low-wage jobs. Low-wage workers are more likely to be unemployed in any period and tend to be hardest-hit in recessions. As the COVID-19 pandemic illustrated, unemployment insurance is critical, but it is full of gaps.¹⁴⁷ State-to-state variability leaves some covered workers with benefits so low that they cannot make ends meet.¹⁴⁸ And many states deny coverage to gig workers, part-time workers, and workers with limited or interrupted job histories.¹⁴⁹ Many states deny benefits entirely to parents who leave work to meet children's needs—deeming a sick child or inadequate childcare to be solely a parental responsibility.¹⁵⁰ All of these rules should be addressed to ensure that parents can count on unemployment insurance to weather unemployment,

144. Christine Percheski & Christina Gibson-Davis, *A Penny on the Dollar: Racial Inequalities in Wealth Among Households with Children*, 6 *SOCIUS* 1 (2020).

145. See Heather D. Hill & Jennifer Romich, *How Will Higher Minimum Wages Affect Family Life and Children's Well-Being?*, 12 *CHILD DEV. PERSP.* 109 (2017).

146. See Kerri M. Raissian & Lindsey Rose Bullinger, *Money Matters: Does the Minimum Wage Affect Child Maltreatment Rates?*, 72 *CHILD. & YOUTH SERVS. REV.* 60 (2017). For a review of the evidence on employment effects, see Hill & Romich, *supra* note 145. See also EICHNER, *supra* note 28, at 205.

147. See *Fact Sheet: Unemployment Insurance and Protections Are Vital for Women and Families*, NAT'L WOMEN'S L. CTR. (Dec. 2019), <https://nwlc.org/wp-content/uploads/2019/12/UI-Factsheet-2019.pdf> [<https://perma.cc/DW2D-3NLP>]; Emily Badger, Alicia Parlapiano & Quoc Trung Bui, *Why Black Workers Will Hurt the Most if Congress Doesn't Extend Jobless Benefits*, N.Y. TIMES (Aug. 7, 2020), <https://www.nytimes.com/2020/08/07/upshot/unemployment-benefits-racial-disparity.html> [<https://perma.cc/9XTK-R57A>].

148. *Significant Provisions of State Unemployment Insurance Laws Effective July 2020*, U.S. DEP'T LABOR (2020), <https://oui.doleta.gov/unemploy/content/sigpros/2020-2029/July2020.pdf> [<https://perma.cc/6ME3-2WBN>].

149. Benjamin Della Rocca, *Unemployment Insurance for the Gig Economy*, 131 *YALE L.J.F.* 799, 803–06 (2022).

150. See, e.g., GA. COMP. R. & REGS. 300-2-9.05 (2022) (limiting voluntary termination to acts that do not include leaving work due to inadequate childcare or to take care of sick children).

whether occasioned by a pandemic or general recession.

A second direction for reform concerns parental time.¹⁵¹ As any parent knows, children need parental time and attention, and their needs do not always mesh with job expectations and childcare availability. Paid parental leave and paid sick leave are minimal policies that should be available to all workers. Although these are standard in most developed countries, the U.S. provides only patchwork access. In recent years, some states have enacted paid leave programs, and the COVID-19 pandemic prompted Congress to enact a (partial and temporary) paid leave program at the federal level.¹⁵² Both provide footholds for the wider reform that is critical.

Third, the psychological parent principle also suggests directions for reform in the laws governing childcare. High-quality childcare can improve parental care and children's outcomes, both by reducing parental stress and by providing children with substitute care that is sensitive and attentive.¹⁵³

One barrier to access to high-quality childcare is its cost. The average cost of childcare has nearly doubled since 1985 (after inflation), and in most states, daycare for one infant costs more than public college.¹⁵⁴ Center-based care, which tends to be of higher quality than other alternatives, is expensive, particularly for infants, and is simply unaffordable for low-paid workers.¹⁵⁵ Another barrier to access lies in the nature of quality itself. Because the quality of childcare is a matter of sensitive teacher-child interactions, it can be difficult for parents of any income level to verify that a particular setting provides high-quality care.¹⁵⁶

151. See EICHNER, *supra* note 28, at 201–02.

152. See SARAH A. DONOVAN, CONG. RSCH. SERV., R44835, PAID FAMILY LEAVE IN THE UNITED STATES (2019); *Families First Coronavirus Response Act: Employee Paid Leave Rights*, U.S. DEP'T LABOR (2020), <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave> [<https://perma.cc/UB6V-FRUC>].

153. See Goelman et al., *supra* note 130. For one exploration of a landmark study on childcare, see Jeanne Brooks-Gunn, Wen-Jui Han & Jane Waldfogel, *First-Year Maternal Employment and Child Development in the First Seven Years*, 75 MONOGRAPHS SOC'Y RES. CHILD DEV. 7 (2010).

154. Elise Gould & Tanyell Cooke, *High Quality Child Care is Out of Reach for Working Families*, ECON. POL'Y INST. (2015), <https://files.epi.org/2015/child-care-is-out-of-reach.pdf> [<https://perma.cc/JS4A-D2D6>].

155. See *The US and the High Price of Child Care: An Examination of a Broken System*, CHILD CARE AWARE AMERICA (2019), <https://www.childcareaware.org/our-issues/research/the-us-and-the-high-price-of-child-care-2019> [<https://perma.cc/GV26-8VVW>]; Gould & Cooke, *supra* note 154.

156. See ROBERTA WEBER, UNDERSTANDING PARENTS' CHILD CARE DECISION-MAKING: A FOUNDATION FOR CHILD CARE POLICY MAKING (2011); Suzanne W. Helburn & Carollee

The COVID-19 pandemic laid bare the importance of childcare and schools to parents and to children.¹⁵⁷ Parents need reliable childcare in order to work, and children need a nurturing and stimulating environment. Accordingly, an agenda for childcare reform should address cost, quality, and staffing.

The issue of cost could be addressed by government subsidies that ensure that childcare is affordable even for low-paid workers; these subsidies could be delivered through grants to states, tax credits, or direct provision (i.e., publicly-run programs).¹⁵⁸ The seeds of all three approaches exist today, via the Child Care and Development Block Grant¹⁵⁹ (providing funds to states for childcare), the Dependent Care Tax Credit,¹⁶⁰ Head Start¹⁶¹ (the federal early childhood education, health, and parent services program for low-income families), and public preschool. None of these is comprehensive, however, and so each would require expansion and reform. The childcare tax credit provides only a small sum of money and is nonrefundable. The block grants to states are inadequate and leave many low-income parents on waiting lists, as do Head Start programs.

The issue of quality is critical but has proven difficult to enforce under existing law. Stronger state-level regulation and enforcement would require states to invest considerable resources in monitoring childcare providers. Although states purport to regulate childcare quality, enforcement is notably lax.¹⁶²

The final issue of staffing is closely related to quality. Caregivers can create a safe and stimulating environment only if they have training, reasonable child-to-staff ratios, and good working conditions. Today, many daycare workers and other childcare providers lack all of these. Relatively few staff have advanced training, child-to-

Howes, *Child Care Cost and Quality*, 6 FUTURE CHILD. 62 (1996).

157. Anne L. Alstott, *Mothering in a Pandemic*, BOS. REV. (May 10, 2020), <http://bostonreview.net/gender-sexuality/anne-l-alstott-mothering-pandemic> [<https://perma.cc/DT9L-DVXH>].

158. See EICHNER, *supra* note 28, at 204–05 (“[T]he state could either publicly provide . . . early education or subsidize high-quality private programs and regulate them for quality.”).

159. Child Care and Development Fund (CCDF) Program, 45 C.F.R. § 98 (2016).

160. Dependent Care Tax Credit, I.R.C. § 21.

161. Head Start Act, 42 U.S.C. §§ 9831–9852(c).

162. See Elizabeth U. Cascio, *Policy Proposal: Public Investments in Child Care*, HAMILTON PROJECT (2017), available at https://www.hamiltonproject.org/papers/public_investments_in_child_care [<https://perma.cc/EK5A-ZPUQ>] (recommending a new refundable tax credit for child care and great investment in quality rating systems, along with universal preschool for four-year-olds).

teacher ratios are often high, and wages are extremely low. The result is a dispirited work force and extremely high rates of turnover, which is itself harmful to young children, who benefit from continuity of care.

The subject of staff professionalization raises concerns with inequality. Today, many childcare providers have little education, such that higher educational requirements would deprive these providers of work, shunting them aside for teachers with college degrees. But innovative programs have shown that it is possible to improve staff education and permanency without privileging higher-income, more educated workers; these programs improve childcare quality while also improving the economic situation and working conditions of existing staff.¹⁶³

Universal public childcare is an ambitious pathway to lowering family costs, improving quality, and enhancing staff working conditions. On this model, quality would be assured by the structure of the programs: for instance, small teacher-to-child ratios and ample teacher training could be enforced in the context of a public, universal program. One approach would add universal childcare to the mission of public schools, making use of existing facilities and teacher-training standards, along with other quality measures and accountability systems.¹⁶⁴ Another direction, taking the military childcare system as its guide, would license a network of private providers that meet government standards.¹⁶⁵ Support for private providers could be focused on funding and training for home-based childcare in local communities.¹⁶⁶

Even as the federal government has lagged, states and localities have begun moving toward the universal childcare model. A number of jurisdictions have enacted free, universal pre-K programs for chil-

163. Abby Copeman Petig, Raul Chavez & Lea J.E. Austin, *Strengthening the Knowledge, Skills, and Professional Identity of Early Educators: The Impact of the California SEIU Early Educator Apprenticeship Program*, CTR. FOR STUDY CHILD CARE EMP. (2019), <https://cscce.berkeley.edu/wp-content/uploads/2019/12/FINAL-SEIU-Report.pdf> [<https://perma.cc/YC3J-7JHR>]; Bonnie O'Keefe, *Primetime for Coaching: Improving Instructional Coaching in Early Childhood Education*, BELLWETHER EDUC. PARTNERS (2017), https://bellwethereducation.org/sites/default/files/Bellwether_ECECoaching_GHS_Final.pdf [<https://perma.cc/NJN6-M4WH>].

164. See SITARAMAN & ALSTOTT, *supra* note 119.

165. See *Universal Child Care*, WARREN DEMOCRATS (Feb. 19, 2019), <https://elizabethwarren.com/plans/universal-child-care> [<https://perma.cc/S3A8-CZRK>].

166. For an example of a private, non-profit organization that could serve as a model for public support for local child care providers, see ALL OUR KIN, <https://allourkin.org> [<https://perma.cc/LH7V-VXBU>].

dren, and many provide subsidized before- and after-school care.¹⁶⁷ A universal childcare system might build on these initiatives to expand gradually the reach of public programs to infants and to school-age children.

In the preceding discussion, we showed that the psychological parent principle justifies large-scale reform of social welfare. These reforms, if adopted, could not only improve children's (and psychological parents') day-to-day lives but could divert many families away from the child welfare system and other systems of legal supervision (including the criminal justice system). Today, child welfare and law enforcement operate amidst the existing (mal)distributions of resources and opportunities. The result, too often, is that poverty becomes a basis for state intervention and the removal of children or psychological parents from the home.

IV. PROTECTING THE PSYCHOLOGICAL PARENT-CHILD RELATIONSHIP: PARENTAGE AND CUSTODY

If the reforms identified in Part III were adopted, many families struggling today would find themselves in a better position. They would avoid the kinds of stress, conflict, and crises that lead them to enter the courts and the child welfare system. Still, some families would experience ruptures, and children would still be harmed in ways that necessitate state intervention. Accordingly, even with greater material and institutional support for parents and children, traditional family law issues would continue to arise. This Part examines two of those issues, explaining how the psychological parent principle would structure doctrines of parentage and custody.

A. PARENTAGE

For purposes of parentage, the law should treat a child's psychological parents as her legal parents and should protect the child's relationship with them. Accordingly, the psychological parent principle supports a robust functional parenthood doctrine—that is, a doctrine

167. See Abbie Lieberman, *Policy Recommendations: Universal Pre-K*, NEW AMERICA FOUND., <https://www.newamerica.org/in-depth/care-report/policy-recommendations-universal-pre-k> [https://perma.cc/3JTD-UMS7]; Basmat Parsad & Laurie Lewis, *After-School Programs in Public Elementary Schools*, NAT'L CTR. FOR EDUC. STATS. (2009), <https://nces.ed.gov/pubs2009/2009043.pdf> [https://perma.cc/GBK3-XR37].

that bases parenthood on a person developing a parent-child bond and actually parenting the child.¹⁶⁸ Nonetheless, this baseline principle for parentage does not mean that law should always engage in case-by-case assessments of psychological parenthood. Rather, the law can rely on clear criteria for at-birth parentage determinations that identify the persons most likely to become children's psychological parents. Parentage determinations that occur later in a child's life, in contrast, would involve case-by-case assessments of the parent-child relationship.

As this Section shows, the psychological parent principle supplies a comprehensive framework that suggests concrete changes to state law and that makes sense of and strengthens emergent reforms. Based on the psychological parent principle, the law would continue to recognize as parents most individuals who receive legal recognition under current law—though it would do so for reasons that differ from current justifications. At the same time, the law would deny legal status to some individuals who are currently treated as legal parents based simply on formal criteria such as genetic connection. Most importantly, the law would extend parental status to many individuals excluded under current law.

1. How Present Parentage Law Undermines Parental Care

The psychological parent principle requires that in most circumstances the child's psychological parent should be treated as her legal parent.¹⁶⁹ As Part I demonstrated, the relationship between the child and her psychological parent develops out of the consistent emotional and physical interactions between parent and child. Yet too often the law takes no account of the child's actual relationships and instead grants legal rights to parents identified using formal, rigid, and exclusionary criteria focused on adult prerogatives rather than children's welfare.

In many states, courts and legislatures too often think of parentage as simply a biological determination. Individuals who lack a biological connection to a child they are raising may need to adopt the child to establish a legal relationship. Although biological connection

168. See Nejaime, *supra* note 16, at 320 ("The functional approach . . . prioritizes the act of raising a child and forming a parental bond with that child . . .").

169. We do not address all situations in which psychological parenthood might yield parental recognition, though our framework could be helpful in analyzing a range of challenging issues—for example, whether and when legal recognition should extend to paid caregivers or foster parents. Compare Nejaime, *supra* note 16, at 376–77, with Dailey & Rosenbury, *supra* note 28, at 1514.

and formal adoption may be sound proxies for psychological parenthood in many families, in others they can be tragically under-inclusive. A legal regime that grounds parenthood in biology and requires adoption for nonbiological parents, including those in non-marital families, leaves too many parent-child relationships unprotected and insecure. In such a regime, the biological parent wields tremendous power, including the power to sever the child's relationship with her psychological parent.

The plight of children being raised by same-sex couples illustrates this problem. With the lesbian baby boom of the 1980s and 1990s, many same-sex couples began raising children conceived through donor insemination. These couples could not marry at the time, and in many states, the nonbiological parent could not adopt. The law treated the nonbiological mother as a legal stranger to her child. If the couple dissolved their relationship, the biological mother could weaponize parental rights to deprive the child of a relationship with the nonbiological mother.¹⁷⁰

Consider the first state high court decision on the question—the 1991 *Alison D. v. Virginia M.* decision from New York.¹⁷¹ Virginia gave birth to a child conceived with donor sperm, and she and Alison raised the child together until their relationship ended more than two years later. Even then, they continued to share custody and parental responsibilities. Eventually, Virginia ended Alison's contact with the child.¹⁷² When Alison sought to establish her parental status, the courts rejected her claim, reasoning that despite her "close and loving relationship with the child, she is not a parent within the meaning of [the law]."¹⁷³ The New York court limited legal parenthood to biological and adoptive parents even though such a decision would deprive some children of protected relationships with their psychological parents. As Judge Kaye explained in dissent, "the impact of today's decision falls hardest on the children of [same-sex] relationships, limiting their opportunity to maintain bonds that may be crucial to their development."¹⁷⁴

Even as some states in recent years have extended parental recognition to nonbiological parents like Alison, others have not. In

170. See Douglas Nejaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1200-07 (2016).

171. *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991).

172. See *id.* at 28-29.

173. *Id.* at 28.

174. *Id.* at 30 (Kaye, J., dissenting).

Hawkins v. Grese, for example, an unmarried same-sex couple decided to have a child using donor sperm and then raised the child together.¹⁷⁵ The couple broke up when the child was seven.¹⁷⁶ While they initially shared custody without courts getting involved, the biological mother, Grese, eventually refused to allow the nonbiological mother, Hawkins, to see their son.¹⁷⁷ In 2018, the Virginia courts rebuffed Hawkins's attempt to claim parental status and to obtain custody or visitation.¹⁷⁸ Hawkins, the courts concluded, was not a legal parent because she had no biological connection to the child, had not adopted the child, and was not married to the biological mother.¹⁷⁹

The evidence at the trial court showed that Hawkins and the child formed a "parent-child bond" and that the child "would be harmed if that bond was severed."¹⁸⁰ The appellate court acknowledged that the child would suffer harm if deprived of a continuing relationship with Hawkins.¹⁸¹ Nonetheless, the court rejected any claim to expand "the term 'parent' to include someone not bound by blood or law."¹⁸² The court's reasoning in *Hawkins* is not uncommon.¹⁸³ Even though it is the child who has the most at stake, courts often neglect or discount children's relationships with their psychological parents and instead focus on the adults' rights or lack thereof.¹⁸⁴

The ruling in *Hawkins* turned not only on restrictive parentage principles in state family law but also on restrictive approaches to constitutional law.¹⁸⁵ The *Hawkins* court worried that recognition of the nonbiological mother would violate the parental rights of the biological mother.¹⁸⁶ By virtue of her biological tie, the biological moth-

175. *Hawkins v. Grese*, 809 S.E.2d 441 (Va. App. 2018).

176. *See id.* at 443.

177. *See id.*

178. *See id.*

179. *See id.*

180. *Id.* at 451–52.

181. *See id.* at 452.

182. *Id.* at 447.

183. For another recent example, see *Cook v. Sullivan*, No. 2020-C-01471, 2021 WL 4472559, at *7 (La. Sept. 30, 2021), in which the court states, "It is undisputed that [same-sex couple] Sharon and Billie never married, Sharon is the biological mother of the child, no father is listed on the child's birth certificate, and Billie has not adopted the child. Thus, there are no circumstances under which Billie can be viewed as a 'legal parent.'"

184. *See NeJaime, supra* note 16, at 265–69.

185. *See id.* at 266–67.

186. *See Hawkins*, 809 S.E.2d at 451–52.

er, in the court's view, possessed legal authority to make "child rearing decisions"—including the decision to cut a psychological parent out of the child's life.¹⁸⁷ Unlike the biological mother, the nonbiological mother, in the court's eyes, could not claim a parental interest of constitutional magnitude.¹⁸⁸

By rejecting a child-centered approach to parentage and instead hewing to a more formalistic and outmoded view, courts in cases like *Alison D.* and *Hawkins* sever children's relationships with their psychological parents.¹⁸⁹ The result, as Part I documents, is lasting harm to the children involved.¹⁹⁰ As we discuss there, mainstream expert bodies have called for more research on nonbiological and non-legal parent-child relationships.¹⁹¹ Still, a growing body of high-quality, peer-reviewed research "has shown that it is the quality of parent-child relationships, rather than having same- versus different-sex parents, that is critical for children's adjustment."¹⁹² Research not only on same-sex parenting but also on adoption and foster parenting demonstrates that a child's formation of a secure attachment does not depend on a biological or legal relationship with the parent¹⁹³—though the lack of a biological or legal connection may relate to increased stress for the parent.¹⁹⁴ Children suffer from the loss of the relationship regardless of the biological or legal status of the psy-

187. *See id.*

188. *See id.*

189. *See id.* at 452; *Alison D. v. Virginia M.*, 572 N.E.2d 27, 33 (N.Y. 1991).

190. *See supra* Part I.

191. *See* NAT'L ACADS. 2016, *supra* note 40, at 391.

192. NAT'L ACADS. 2019, *supra* note 39, at 256; *see also* ABBIE E. GOLDBERG, LESBIAN AND GAY PARENTS AND THEIR CHILDREN: RESEARCH ON THE FAMILY LIFE CYCLE 139 (Gregory M. Herek ed., 2010) ("[Studies] found that parents' sexual orientation was not associated with children's psychosocial adjustment Rather, process-level factors were associated with children's adjustment"); Ellen C. Perrin, Benjamin S. Siegal & Comm. on Psychosocial Aspects of Child and Fam. Health of the Am. Acad. of Pediatrics, *Technical Report: Promoting the Well-Being of Children Whose Parents are Gay or Lesbian*, 131 PEDIATRICS e1374, e1377 (2013) ("Many factors confer risk to children's healthy development . . . but the sexual orientation of their parents is not among them.").

193. *See* Brewaeys et al., *supra* note 66, at 1356 (observing that in lesbian couples raising children, "a strong mutual attachment had developed between social mother and child"); van den Dries et al., *supra* note 47, at 418–19 (concluding that adopted and foster children are as securely attached as children who are not adopted or in a foster family).

194. *See* NAT'L ACADS. 2016, *supra* note 40, at 328 ("Some studies have indicated that certain subsets of sexual minority parents (e.g., female partners of biological lesbian mothers) might have increased stress upon becoming parents, and it is important for programs to offer support to these groups in particular.").

chological parent.¹⁹⁵

The harm in these cases is often exacerbated because the child is left with only one legal parent, when in fact another individual is eager to accept parental responsibility. Children benefit psychologically as well as financially from having more than one legal parent.¹⁹⁶ This is especially true within the U.S. system, which, as we have seen, allows children's financial support to vary dramatically based on the resources of their parents.¹⁹⁷ In addition, children who lose one psychological parent may suffer from the actions of the remaining parent: living with a parent who has affirmatively shut out the child's psychological parent, the child may feel alone and mistrustful.¹⁹⁸

From the perspective of equality and inclusion, the state of current law is particularly problematic given that the law of parenthood does not systematically exclude nonbiological parents. U.S. law long has included the marital presumption of parentage, which recognizes a man as a legal father of any child to whom his wife gives birth during the marriage, even if he is not the biological father.¹⁹⁹ The result is that some nonbiological parents are privileged over others.

The marital presumption has governed in ways that reflect gender- and sexuality-based asymmetries.²⁰⁰ Traditionally, the presumption applied only to bestow parentage on men in different-sex couples.²⁰¹ Once same-sex couples attained the right to marry, courts

195. See Gauthier et al., *supra* note 66 (explaining that children suffer greatly when separated from non-biological parent figures); see also FIONA L. TASKER & SUSAN GOLOMBOK, *GROWING UP IN A LESBIAN FAMILY: EFFECTS ON CHILD DEVELOPMENT* 12 (1998) (“[R]emoving children whose biological mother has died from their sole surviving parent can cause extreme distress, as can the severance of bonds between children and their non-biological mother when the partners break up.”).

196. See Am. Acad. Pediatrics Comm. on Psychosocial Aspects Child & Family Health, *Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 *PEDIATRICS* 339, 339 (2002) (asserting that same-sex parents' rights should be recognized so that their children may “enjoy[] the psychologic[al] and legal security that comes from having 2 willing, capable, and loving parents”); cf. NAT'L RSCH. COUNCIL & INST. MED., *supra* note 40, at 275 (“One of the most consistent associations in developmental science is between economic hardship and compromised child development.”); NAT'L ACADS. 2016, *supra* note 40, at 390 (relating “optimal development outcomes” to “nurturing relationships” with both parents).

197. See *supra* notes 138–141 and accompanying text.

198. See WILLIAM F. HODGES, *INTERVENTIONS FOR CHILDREN OF DIVORCE: CUSTODY, ACCESS, AND PSYCHOTHERAPY* 8 (2d ed. 1991) (explaining that the child may question “whether he or she can count on the availability of any parent”).

199. See *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989); Nejaime, *supra* note 17, at 2272.

200. See Nejaime, *supra* note 17, at 2314–16.

201. See *id.* at 2272.

and legislatures began to apply the marital presumption of parentage to female same-sex couples, such that the woman married to the birth mother is treated as a legal parent.²⁰² Yet the presumption does not apply to male same-sex couples, since neither spouse gives birth.²⁰³ Adoption allows some nonbiological parents to become legal parents.²⁰⁴ But not all couples can afford legal adoption, and many do not even know it is necessary; too often, the problem of parentage surfaces only much later, when a relationship dissolves and one person discovers that they lack legal rights.²⁰⁵

Families formed by same-sex couples are not the only ones harmed by the law's emphasis on biological parenthood. The situation of LGBTQ parents raises a problem that affects any family in which the psychological parent is not a biological or adoptive parent and was not married to the birth parent at the time of the child's birth. Unmarried different-sex couples who have children through assisted reproduction with donor gametes struggle for parental recognition in many jurisdictions; the non-birth parent may need to adopt the child—if co-parent adoption is even available.²⁰⁶ In many states, too, psychological parents who enter the child's life after birth are not treated as legal parents unless they adopt the child.²⁰⁷ In these states, a stepparent who has not adopted the child would not be treated as a legal parent, even if the stepparent had raised the child from an early age and the child views the stepparent as her parent.²⁰⁸ The situation becomes even more challenging if the child already has two legal parents, given that most jurisdictions do not authorize a child to have more than two legal parents.²⁰⁹

202. See, e.g., *Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 354 (Iowa 2013). Even the U.S. Supreme Court, in its 2017 *Pavan v. Smith* decision, ordered Arkansas to issue birth certificates that list both women in a married same-sex couple as parents when one of them gives birth to a child conceived with donor sperm. 137 S. Ct. 2075, 2078–79 (2017).

203. See NeJaime, *supra* note 17, at 2315.

204. See, e.g., *In re Jacob*, 660 N.E.2d 397, 398 (N.Y. 1995).

205. See *Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E.3d 488, 498–99 (N.Y. 2016); Douglas NeJaime, *The Story of Brooke S.B. v. Elizabeth A.C.C.: Parental Recognition in the Age of LGBT Equality*, in *REPRODUCTIVE RIGHTS AND JUSTICE STORIES* 245, 245 (Melissa Murray, Katherine Shaw & Reva B. Siegel eds., 2019).

206. See NeJaime, *supra* note 17, at 2297, 2320.

207. See NeJaime, *supra* note 16, at 265.

208. See *id.* at 367–68.

209. See *id.* at 341.

2. Equality, Inclusion, and Parenthood

A parentage regime that emphasizes biological relations is inherently unequal. Different-sex and same-sex couples are differently situated with respect to biological connection to their children.²¹⁰ A genuinely inclusive approach requires more than the application of existing rules to LGBTQ parents. It requires breaking out of an outdated framework designed around the heterosexual family.²¹¹ A parentage regime animated by the values of equality and inclusion would endeavor to protect the relationships between children and their psychological parents, regardless of the circumstances of a child's birth or the gender, sexual orientation, or marital status of the parents.²¹²

These are the values articulated by the New York high court in 2016, when it repudiated its earlier decision in *Alison D.* and expressly acknowledged the relationship between nonbiological parentage and equality. In *Brooke S.B. v. Elizabeth A.C.C.*,²¹³ Brooke, the nonbiological mother, had become the child's primary caretaker. She and Elizabeth had been raising the child together and continued to co-parent after they broke up.²¹⁴ But, as in *Alison D.*, the biological mother, Elizabeth, eventually terminated the child's contact with his nonbiological mother.²¹⁵

The *Brooke S.B.* court confronted a world very different than the one that existed at the time of *Alison D.* Same-sex couples enjoyed the right to marry nationwide and protecting the parent-child relationships of LGBTQ individuals had supplied an important justification for marriage equality.²¹⁶ In the law of parent-child relations, courts and legislatures increasingly had acted to recognize nonbiological LGBTQ parents—including when they were not married to the biological parent.²¹⁷ Given this new reality, the court reasoned, "*Alison D.*'s foundational premise of heterosexual parenting and nonrecogni-

210. See NeJaime, *supra* note 17, at 2291.

211. See *id.* at 2323–31.

212. See Dailey, *supra* note 28, at 491 ("Unlike the traditional parental rights doctrine, a developmental approach does not define the class of caregivers by reference to biology, marriage, gender, or legal ties, but by reference to the concept of good-enough caregiving, where good-enough caregiving is defined in terms of a reciprocal affective bond necessary to the child's healthy psychological development.").

213. 61 N.E.3d 488 (N.Y. 2016).

214. See *id.*

215. See *id.*

216. See NeJaime, *supra* note 170, at 1236–40.

217. See NeJaime, *supra* note 16, at 319–40.

tion of same-sex couples is unsustainable.”²¹⁸ The premise of heterosexual parenting was biological connection, and that premise made outsiders of same-sex couples and their children.²¹⁹

The values of equality and inclusion thus counsel structural, rather than incremental, changes to existing parentage law. Equal treatment under existing rules is inadequate. It is not enough, for example, to simply expand the availability of adoption; doing so would retain the privileged position of biology in the law and unduly burden some families. As the *Brooke S.B.* court explained, “[u]nder the current legal framework, which emphasizes biology, it is impossible—without marriage or adoption—for both former partners of a same-sex couple to have standing, as only one can be biologically related to the child.”²²⁰

3. The Psychological Parent Principle Applied to Parentage Law

How exactly should we incorporate the psychological parent principle, guided by values of equality and inclusion, into the law of parental recognition? Parentage laws overall should seek to maintain and protect children’s relationships with their psychological parents. We recommend parentage laws that are crafted from a child-centered perspective but generally do not turn on individualized assessments of particular parents and children, like the kind invited by a best interests of the child standard.²²¹ Importantly, our approach embodies a strong commitment to equality and inclusion: the law of parentage should comprehensively protect nonbiological parent-child relationships in order to fully include groups that historically have been excluded. For example, we recommend gender-neutral parentage rules that open biological and nonbiological paths to parentage to individuals of all genders, whether in same-sex couples, dif-

218. *Brooke S.B.*, 61 N.E.3d at 498.

219. See NeJaime, *supra* note 205, at 253.

220. *Brooke S.B.*, 61 N.E.3d at 498.

221. For instance, we reject arguments of judges and scholars to make at least some initial parentage determinations turn on best interests. See, e.g., *Johnson v. Calvert*, 851 P.2d 776, 789 (Cal. 1993) (Kennard, J., dissenting) (“To determine who is the legal mother of a child born of a gestational surrogacy arrangement, I would apply the standard most protective of child welfare—the best interests of the child.”); James G. Dwyer, *The Child Protection Pretense: States’ Continued Consignment of Newborn Babies to Unfit Parents*, 93 MINN. L. REV. 407, 412 (2008) (“The state would place a child with those adults, from among all those who wish to serve as parents for that child, whose serving as parents would best promote the child’s welfare.”).

ferent-sex couples, single-parent households, or multi-parent families.²²²

Our approach builds on existing legal authority as well as insights from science.²²³ In some cases, we adopt well-established rules but for different reasons than those that have animated their embrace. We also endorse emerging trends in parentage law—best represented by the 2017 Uniform Parentage Act²²⁴—and offer a coherent and comprehensive principle to justify these reforms.

Even as the psychological parent principle emphasizes the importance of parental conduct, we recognize that parents, children, and the state share an interest in rules that assign parentage at birth and without judicial intervention. Because we prioritize stability and certainty for the child, parentage determinations should occur as early as possible in the child's life. Our approach uses predictive mechanisms at birth to identify those individuals most likely to become the child's psychological parents. We rely on traditional criteria, such as marriage and biological connection, not because such criteria are normatively superior, but because they provide a fair early proxy for psychological parenthood.²²⁵ We also adopt more expansive criteria in certain circumstances, such as family formation through assisted reproduction, where the intent of the parties should govern. And for situations in which at-birth determinations fail to protect the child's relationship with a psychological parent, we endorse a robust functional parenthood doctrine; that is, we support avenues for judicial intervention to ensure that the psychological parent is treated as a legal parent.

We acknowledge that our parentage criteria will continue to confer parental status on some adults who have not become their child's psychological parent. A biological parent, for instance, would typically be a legal parent in our regime, as under present law, even if she has not developed the close, nurturing relationship with her child that characterizes the psychological parent. This overbreadth arises because our approach places a high priority on certainty and eschews case-by-case, open-ended parentage determinations. This

222. See Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 YALE L.J.F. 589, 606–09 (2018). Gender-neutral presumptions would also protect transgender parents, including those who are biological parents. See *id.* For example, a transgender man could be recognized as a legal parent if he gave birth to the child or the child was conceived with his egg.

223. See *supra* Parts I.A, III.C.

224. UNIF. PARENTAGE ACT § 204 (UNIF. LAW COMM'N 2017).

225. See NeJaime, *supra* note 17, at 2235–36.

result does not imply, however, that all legal parents should have equal rights to the care and custody of the child. In the next Section, we propose reforms in custody law that would give greater protections to a child's psychological parent than to a legal but non-psychological parent.

a. Traditional Criteria: Biology and Marriage

In most cases, biological parents will become the child's psychological parents, and thus the law can reasonably use biological connection as a basis for parentage. Importantly, we do not ground parentage for biological parents on a natural entitlement. Rather, biological parents are ordinarily understood to have responsibilities for their children, and most act in conformity with that understanding. Accordingly, at least in situations where countervailing expectations and practices are not at issue, such as with the use of donor gametes in assisted reproduction, biological parenthood works reasonably well to assign parentage to those individuals most likely to become the child's psychological parent.

Marriage also serves as a reasonable predictor for the individuals most likely to become the child's psychological parents. For parties who are married at the time of the child's conception or birth, marriage usually provides an indication of the couple's shared intent to co-parent.²²⁶ Accordingly, we endorse the current application of the marital presumption, which generally treats a birth parent's spouse (regardless of gender) as a child's legal parent,²²⁷ even if the child was conceived with donor sperm.

b. Intent-Based Parentage for Assisted Reproduction

Our initial recommendations adopt the current rules that link parenthood to biology and to marriage because these criteria predict fairly well who will become a child's psychological parent. But we also urge broader recognition of psychological parents. The psychological parent principle aims to respect individuals' choices to form families and to raise children, recognizing that children benefit when legal recognition tracks the parental relationships that individuals willingly and deliberately form.

The first critical reform addresses assisted reproduction, where

226. See Susan F. Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 285–86 (2006); NeJaime, *supra* note 170, at 1241–42.

227. See NeJaime, *supra* note 17, at 2294–95.

only one parent (or perhaps neither parent) has a biological tie to the child. In these situations, the individuals who intend to be the child's parents—regardless of whether they are genetically connected to the child or married to each other—expect to become the child's psychological parents. Accordingly, we endorse an intent-based principle, at least in the context of assisted reproduction.²²⁸

The law in some states has moved in this direction. For example, Maine's parentage statute provides that "a person who consents to assisted reproduction by a woman . . . with the intent to be the parent of a resulting child is a parent of the resulting child."²²⁹ The justification, from our perspective, is not primarily respect for adults' autonomy in family formation, but instead protection of children's interests in legal connections to their psychological parents.

To make the intent standard transparent to families and practically useful, we support extending the acknowledgment process—the most common way that nonmarital children's parentage is established in the U.S.²³⁰—to nonbiological intended parents. Ten states now allow a birth parent and an intended parent to sign a voluntary acknowledgment of parentage, such that the child has two legal parents at or shortly after birth.²³¹ The nonbiological parent, just like a biological parent, need not go to court to establish parentage; instead, acknowledgments have the force of a judgment if not rescinded within a sixty-day period.²³² Gender-neutral acknowledgments that include nonbiological parents would help advance the equality and inclusion interests of families formed through assisted reproduction, including families formed by same-sex couples.²³³

Nonetheless, competing equality interests in the context of surrogacy arrangements might reasonably lead legislators to decide not to use acknowledgment-based parentage with respect to surrogacy and instead to rely on judicial oversight. Because surrogacy involves another person gestating the child and raises issues of gender equali-

228. See, e.g., NeJaime, *supra* note 17, 2345 ("[A]n unmarried partner . . . would derive parentage from intention"); Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1222–23 (2010) ("[S]tates should provide that any individual, regardless of gender, sexual orientation, or marital status, who consents to a woman's insemination with the intent to be a parent is a legal parent of the resulting child.").

229. ME. STAT. tit. 19-A, § 1923 (2016).

230. See NeJaime, *supra* note 17, at 2279.

231. See, e.g., CAL. FAM. CODE § 7570 (West 2020).

232. See UNIF. PARENTAGE ACT § 308 (UNIF. LAW COMM'N 2017).

233. See Joslin, *supra* note 222.

ty and reproductive autonomy, we approach it slightly differently than other forms of assisted reproduction.²³⁴ Applying the intent-based standard, the person serving as the surrogate would not be a legal parent; the intended parents would be legal parents upon the child's birth. Nonetheless, the law should address the potential for surrogacy arrangements to take advantage of power differentials based on gender, race, and class. Parentage in the context of surrogacy should ordinarily require compliance with requirements ensuring that the arrangement is voluntary and that all parties' interests are protected.²³⁵ As Courtney Joslin has documented, current law illustrates some possible approaches, such as recognizing the intended parents as the legal parents but requiring the parties to have independent legal representation in entering the agreement and protecting the health care decision-making authority of the person acting as the surrogate.²³⁶ Our approach aims to recognize the equality interests of both intended parents and individuals acting as surrogates.

We recognize that an intent-based approach, like parentage rules based on biology or marriage, may extend parentage to an individual who intends—but does not in fact—become the child's psychological parent. Yet an intent standard, also like biology and marriage, would in the vast majority of cases predict who will parent and would also provide families and the state with clarity and certainty. The intent standard would provide certainty at birth, thereby promoting children's interests in security and stability. Moreover, it has the critical advantage of extending parental status to LGBTQ parents and others who have been marginalized by traditional parentage principles.

c. Psychological Parentage

Although the predictive mechanisms outlined to this point would identify the great majority of children's psychological parents, it is still possible that they could fall short. For example, at-birth determinations may fail to capture the individual who eventually becomes the child's psychological parent, because, for example, the individual entered the child's life after birth. We suggest that the law cast a broader net to extend parentage to an adult who has become a

234. See Courtney G. Joslin, *(Not) Just Surrogacy*, 109 CALIF. L. REV. 401, 457–59 (2021).

235. See ANNE C. DAILEY, LAW AND THE UNCONSCIOUS: A PSYCHOANALYTIC PERSPECTIVE 128–53 (2017) (chapter on *Intimate Contracts*).

236. See Joslin, *supra* note 234, at 442–55.

child's psychological parent and is viewed by the child as a parent.²³⁷

Accordingly, we endorse a robust functional parenthood doctrine. Once again, we can build on existing law. Some state courts have invoked the common law or have exercised equitable authority to recognize individuals who have formed a parent-child relationship.²³⁸ While some courts explicitly use the term "psychological parent" to describe this category of parents,²³⁹ other courts capture psychological parenthood through concepts such as *de facto parent*²⁴⁰ and *in loco parentis*.²⁴¹

To enhance transparency and predictability, we recommend that psychological parenthood be codified in parentage rules. Delaware's law authorizes a court to find that an individual is a *de facto parent* if, in addition to other requirements, the individual "exercised parental responsibility for the child" and "acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature."²⁴² Other states have followed the 2017 Uniform Parentage Act, which authorizes a court to adjudicate parentage if the individual, among other requirements, shows that she has "engaged in consistent caretaking of the child," "resided with the child," and "established a bonded and dependent relationship with the child which is parental in nature."²⁴³

Some courts and commentators have expressed concerns that *de facto parent* recognition, whether through judicial decision or statutory enactment, violates the constitutional rights of the biological or legal parent.²⁴⁴ This constitutional objection is weak—and has

237. See Huntington & Scott, *supra* note 28, at 1425. While we recognize the possibility that relatives who assume caregiving roles may seek parental status, we anticipate the parentage inquiry to focus, as many state standards already do, on whether the relationship is *parental* in nature, including evidence of whether the person claiming parentage held the child out as her child and whether the child viewed the person as her parent. See *id.* Focusing the inquiry in this way will allow existing legal parents to turn to relatives and others for caregiving support without fear of legitimate parental claims.

238. See NeJaime, *supra* note 17, at 2370–72.

239. See *V.C. v. M.J.B.*, 748 A.2d 539, 546 n.3 (N.J. 2000); *In re Clifford K.*, 619 S.E.2d 138, 154 (W. Va. 2005).

240. See, e.g., *In re Parentage of L.B.*, 122 P.3d 161, 176 (Wash. 2005) (recognizing *de facto parent* doctrine).

241. See, e.g., *T.B. v. L.R.M.*, 786 A.2d 913, 914 (Pa. 2001) (using *in loco parentis* doctrine).

242. DEL. CODE ANN. tit. 13, § 8-201(c) (West 2013).

243. UNIF. PARENTAGE ACT § 609 (UNIF. LAW COMM'N 2017).

244. See Gregg Strauss, *What Role Remains for De Facto Parenthood?*, 46 FLA. ST. U. L. REV. 909, 912–13 (2019). Some legal authorities find that constitutional con-

been rejected by an overwhelming number of courts.²⁴⁵ First, the claim assumes its conclusion, proceeding from the premise that the nonbiological psychological parent is a *nonparent*.²⁴⁶ Once we question that assumption and entertain the idea that a nonbiological psychological parent is a *parent*, the claim dissolves, because parents do not have constitutional rights to exclude each other.²⁴⁷ In addition, the nonbiological psychological parent and the child also have constitutional interests at stake. As one of us has argued at length, the nonbiological parent may possess her own liberty interest in parental recognition—an interest that arises from the act of parenting.²⁴⁸ The child may also possess a liberty interest in continuing the relationship with her psychological parent.²⁴⁹ The constitutional objection to psychological parentage is overly centered on adults' rights—discounting or ignoring the child's perspective.

We have assumed here that the functional parent doctrine would treat the psychological parent as a legal parent—an assumption reflected in the 2017 Uniform Parentage Act's treatment of de facto parents.²⁵⁰ Importantly, though, in the absence of such an approach, the law should, at a minimum, preserve the relationship between the child and the psychological parent. This may occur through judicially-created doctrines that extend custodial rights, but not legal parentage, to functional parents.²⁵¹

These judge-made doctrines may have a special role to play in

cerns about the biological parent's rights are mitigated by a showing that the "natural or legal parent consented to and fostered the parent-like relationship" between the de facto parent and the child. *In re L.B.*, 122 P.3d at 177. Nonetheless, we do not view such a showing as constitutionally required.

245. See Courtney G. Joslin, *De Facto Parentage and the Modern Family*, 40 FAM. ADVOC. 31, 34 (2018) (explaining that "almost every court has concluded that" de facto parent recognition does not run afoul of the Constitution). See also *Conover v. Conover*, 146 A.3d 433, 445 (Md. 2016) ("[N]umerous courts have declined to treat [constitutional parental rights] as a bar to recognizing *de facto* parenthood or other designations used to describe third parties who have assumed a parental role.").

246. See *In re L.B.*, 122 P.3d at 177-79; Joanna L. Grossman, *Constitutional Parentage*, 32 CONST. COMMENT. 307, 335-37 (2017).

247. *In re L.B.*, 122 P.3d at 178.

248. See Nejaime, *supra* note 16, at 358-61; see also *In re L.B.*, 122 P.3d at 178, 177 n.27 (observing that the nonbiological mother "persuasively argue[d]" that she has "constitutionally protected rights to maintain the[] parent-child relationship").

249. See *In re L.B.*, 122 P.3d at 177 n.27; see also Anne C. Dailey, *Children's Constitutional Rights*, 95 MINN. L. REV. 2099, 2161-78 (2011) (arguing for children's rights to preserve relationships with caregivers).

250. See UNIF. PARENTAGE ACT § 609 (UNIF. LAW COMM'N 2017).

251. See Joslin, *supra* note 245, at 31-33.

the child welfare system. While we do not in this Article fully explore how best to approach the question of removal, parentage doctrines may matter when the biological or legal parent is subject to abuse or neglect proceedings, but the child has been raised by another individual, such as a stepparent, grandparent, or other relative. In many cases, that individual is the child's psychological parent.²⁵² Without legal status, that individual may not be entitled to reunification services from the state, and the child may be placed with strangers in foster care over placement with the psychological parent.²⁵³ Under our approach, the child's relationship with her psychological parent would be protected, as it is in some states, in ways that would limit the authority of the state to place the child elsewhere.²⁵⁴

Our doctrinal recommendations provide several pathways to parentage and would orient the law around psychological parent recognition. This framework could result in more than two parents for a child, a result that is consistent with the law in a growing number of jurisdictions.²⁵⁵ The psychological parent principle supports this result: when a child has formed multiple parental attachments, the law should preserve them. Although we recognize that developmental research into multi-parent households and non-nuclear families is ongoing, the existing literature supports the need to protect children's relationships with their psychological parents in diverse family forms.²⁵⁶

In endorsing a legal system that permits a child to have more than two parents, our primary interest is in protecting a child's relationship with her psychological parent(s). States that explicitly authorize multi-parent recognition require a judicial finding that recognizing the additional parent furthers the child's best interests or that failure to recognize the additional parent would be detrimental

252. See, e.g., *In re L.H.*, No. 17-0102, 2017 WL 5157367, at *2 (W. Va. Nov. 7, 2017).

253. See Courtney G. Joslin & Douglas NeJaime, *How Parenthood Functions*, 122 COLUM. L. REV. (forthcoming 2023) (manuscript at *59).

254. See, e.g., *In re Brandon L.E.*, 394 S.E.2d 515, 523 (W. Va. 1990) (recognizing grandmother as child's psychological parent entitled to custody over the biological parent's objection).

255. See UNIF. PARENTAGE ACT § 613 Alt. B (UNIF. LAW COMM'N 2017).

256. See NAT'L ACADS. 2019, *supra* note 39, at 241; NAT'L ACADS. 2016, *supra* note 40, at 3.

to the child.²⁵⁷ This requirement likely involves a determination of the quality of the relationship between the child and the individual seeking to be adjudicated a parent. Still, we would take a more straightforward and predictable approach, instructing the court to recognize the additional parent if that person is the child's psychological parent. This would mitigate concerns with bias. For example, a court would not have authority to deny recognition to a third parent based on moral objections to multi-partner families. Nor would a court have discretion to recognize a third parent simply based on a genetic connection. Our approach also mitigates concerns with numerosity. Because parent-child attachments require a significant developed relationship, most children will not have multiple psychological parents. Nonetheless, because we do not propose disestablishing parentage for legal parents who are not psychological parents, multi-parent recognition may be necessary to legally protect a child's relationship with her psychological parent.²⁵⁸ Our approach finds some support in existing law. Even when a child has two legal parents, courts in some states that do not expressly allow multi-parent recognition nonetheless extend custodial rights to a third person who the court determines to be a "psychological parent."²⁵⁹

B. CHILD CUSTODY

Our proposed parentage rules are important in large part because of the superior custodial rights of parents over non-parents.²⁶⁰ In disputes between individuals recognized as legal parents, current law in every jurisdiction directs courts to determine custody based on the best interests of the child. In this Section, we show how current custody law can compromise parental care. We argue that the psychological parent principle provides guidance for law reform and, in the absence of reform, for reinterpreting existing law in ways that

257. See, e.g., CAL. FAM. CODE § 7612(c) (West 2020) ("In an appropriate action, a court may find that more than two persons with a claim to parentage under this division are parents if the court finds that recognizing only two parents would be detrimental to the child.").

258. See NeJaime, *supra* note 16, at 368.

259. West Virginia case law on psychological parenthood illustrates. See, e.g., *Andra F. v. Anthony H.*, No. 15-0445, 2016 WL 700585 (W. Va. Feb. 16, 2016); see also Courtney G. Joslin & Douglas NeJaime, *Multi-Parent Families, Real and Imagined*, *FORDHAM L. REV.* (forthcoming 2022) (providing an in-depth review of West Virginia law on the matter).

260. We focus only on custody between legal parents and do not address questions of third-party standing, custody, or visitation—though we would support legal rules that allow children to maintain relationships with some nonparental figures.

support the psychological parent-child relationship. We recommend an approach that would move the law away from its current emphasis on the rights and wishes of legal parents and, guided by the values of equality and inclusion, toward a more child-centered perspective that, by protecting children's relationship with their psychological parents, focuses on children's present welfare and developmental needs. The psychological parent principle also makes room for the democratic value of listening to children's perspectives and wishes as they mature, particularly when they enter adolescence.

At the same time, our recommendations maintain an important continuity with one feature of present law that we view as consistent with the psychological parent principle. When parents come to a custodial arrangement on their own, the courts should endorse it unless the arrangement threatens harm to a child or an older child strenuously objects to the parental arrangement. In cases of contested custody, by contrast, we reject current law's open-ended best interests standard and instead recommend reforms that give primary weight to children's bonds with their psychological parents.

1. How Current Custody Law Can Compromise Parental Care

As an initial matter, terminology is important. Formally, custody has two components. A parent who holds legal custody (or decision-making custody) has the right to decide important matters relating to the child's education, health, and general welfare. A parent with physical custody (or residential custody) has the right to reside with a child and make decisions on a daily basis. A parent without physical custody may still have legal custody as well as visitation rights, which typically give parents access to a child on a specified schedule and under specified conditions (e.g., every other weekend for overnight visits). Parents who are living separately can share both decision-making custody and residential custody, an arrangement often referred to as joint custody or, more recently, shared parenting. Unless we specify otherwise, we use "custody" to mean both decision-making and residential custody.²⁶¹

The history of custody law reflects the primacy of parental

261. We utilize the terms custody and visitation cognizant of the fact that "parenting time" is increasingly used. We retain the older terms because they allow us to be clear about our suggested reforms where there is only one psychological parent, with primary residential custody going to that parent and liberal visitation to the other.

rights. Under the common law, married fathers by default had full custodial rights to their children.²⁶² By the turn of the twentieth century, women's role in the domestic realm led many courts to assign custody of young children to the mother as long as she was deemed fit to care for them, an approach termed the "tender years" presumption.²⁶³ In the late twentieth century, equality concerns led courts to reject this gendered approach in favor of the seemingly more egalitarian case-by-case "best interests of the child" determination.

In the custody context, the best interests standard gives courts broad discretion to determine, typically based on a set of prescribed factors, which arrangement will best serve the child's welfare.²⁶⁴ The Uniform Marriage and Divorce Act (UMDA), promulgated by the Uniform Law Commission in 1974, offered an early iteration of the pertinent list of factors: the wishes of the parents; the wishes of the child; the relationship of the child to the parents, siblings, and any other important persons; the child's adjustment to her home, school, and community; and the mental and physical health of all involved.²⁶⁵ Even though many states did not formally adopt the UMDA, its factor-based approach significantly shaped state law. This approach quickly became the norm, with states applying a broad best interests standard, although differing with respect to specific factors.²⁶⁶

Despite widescale criticism and efforts at reform, the best interests standard remains the dominant approach in custody law today,²⁶⁷ although its application varies across jurisdictions and among

262. See MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 235 (1985).

263. See *id.* at 253.

264. *E.g.*, *In re S.S.*, No. 16CA7, 2017 WL 2256777, at *25 (Ohio Ct. App. May 17, 2017) (citing factors codified in OHIO REV. CODE ANN. § 2151.414 (West 2021)).

265. See UNIF. MARRIAGE & DIVORCE ACT § 402, 9A U.L.A. 249 (UNIF. LAW COMM'N 1998).

266. Connecticut, for example, lists sixteen relevant factors that may be taken into account when determining the best interests of the child, and the court is free to consider any additional factors deemed relevant. In addition to the UMDA factors, Connecticut courts will consider, among other factors, the temperament and developmental needs of the child, any relevant or material information obtained from the child, the child's cultural background, the effect of prior domestic violence on the child, and whether the child or any sibling has been abused or neglected. See CONN. GEN. STAT. § 46b-56(c) (2021).

267. Elizabeth S. Scott & Robert E. Scott, *Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard*, 77 *LAW & CONTEMP. PROBS.* 69, 70-71 (2014).

judges.²⁶⁸ Joint custody exists in all states, but courts typically limit the arrangement to situations where the parents agree to it.²⁶⁹

The major exception to application of the best interests standard is private ordering.²⁷⁰ Most custody arrangements are arrived at by way of parental agreement.²⁷¹ If parents agree to a parenting plan on their own, courts typically accept it. Yet the prevalence of consensual parenting arrangements does not minimize the importance of the best interests standard. Most obviously, the legal standard governs judicial decisions in the minority of cases where parents disagree. Less obviously, the standard influences the contours of private bargaining by setting a default rule that establishes the parties' bargaining positions.²⁷²

Many scholars have criticized the best interests standard for the wide discretion it affords judges.²⁷³ In principle, discretion allows judges to make custody decisions based on the needs of the particular child, decisions that "are uncommonly complex and deal with some of the most emotion-laden and irrational parts of people's lives."²⁷⁴ At the same time, however, the best interests standard permits ad hoc decisions based on the judge's personal values and biases rather than objective factors.²⁷⁵ Contributing to these uncer-

268. A few state courts at one time endorsed a primary caretaker presumption, but that movement never caught on, perhaps in part because it amounted, in many cases, to a presumption of maternal care. Nadine A. Gartner, *Lesbian (M)Otherhood: Creating an Alternative Model for Settling Custody Disputes*, 16 L. & SEXUALITY 45, 55 (2007). Judicially-created primary caregiver presumptions were repealed by state legislatures. See *Pikula v. Pikula*, 374 N.W.2d 705 (Minn. 1985); *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981). Elizabeth Scott developed the "approximation standard," under which a court should try to replicate as closely as possible the caregiving arrangements during the marriage. See Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CALIF. L. REV. 615, 639 (1992). Although the American Law Institute endorsed the approximation standard, it was generally not adopted by legislatures. Katyal & Turner, *supra* note 12, at 1616.

269. See, e.g., CAL. FAM. CODE § 3080 (West 2022). It appears that only the District of Columbia currently has a presumption in favor of joint custody in the absence of parental agreement, which is rebuttable under certain circumstances. See D.C. CODE §16-914(a)(2) (2021).

270. Robert H. Mnookin, *Divorce Bargaining: The Limits on Private Ordering*, 18 U. MICH. J.L. REFORM 1015, 1015 (1985).

271. *Id.*

272. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 978 (1979).

273. See *supra* notes 4–14 and accompanying text.

274. Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2262 (1991).

275. See *supra* notes 4–5 and accompanying text.

tain outcomes, many states include a catch-all provision that authorizes judges to consider other factors not specifically enumerated.²⁷⁶ The best interests standard has also been criticized as harming children by promoting drawn-out and expensive litigation.²⁷⁷ And some worry that the best interests standard permits judges to abdicate their responsibility to court-appointed experts.²⁷⁸

Guided by the psychological parent principle, we see additional harm in the best interests standard, which gives judges discretion to undervalue the psychological parent-child bond. Only some best interests factors in a typical state relate to preserving a child's relationship with the parent(s) with whom she has developed a close, emotionally stable, consistent caregiving relationship.²⁷⁹ In some states, judges may weigh as many as sixteen factors, including "any other factor" a judge finds relevant.²⁸⁰ Some factors have little to do with the quality of the parent-child relationship.²⁸¹ Moreover, given that young children especially have little or no voice in custody proceedings, judges are naturally likely to focus on what parents want, including what a non-psychological parent wants—rather than on the child's interest in maintaining the psychological parent-child bond.

Ultimately, the prevailing best interests standard fails to recognize that—particularly for young children—the psychological parent bond *is* the primary interest in a child's life. As we described in Part I, disruption of that bond poses the threat of deep and long-lasting developmental harm.²⁸²

2. Equality, Inclusion, and Custody

The psychological parent principle suggests that custody law

276. See, e.g., MICH. COMP. LAWS § 722.23(3)(l) (2022).

277. See Robert A. Burt, *Experts, Custody Disputes, & Legal Fantasies*, 14 PSYCHIATRIC HOSP. 140, 141 (1983); Jon Elster, *Solomonic Judgments: Against the Best Interests of the Child*, 54 U. CHI. L. REV. 1, 24 (1987).

278. See Scott & Emery, *supra* note 82, at 91–93.

279. For example, the best interests standard permits use of personality, psychopathology, and intelligence testing, despite the fact that there is no clear evidence that these factors relate to the quality of the parent-child relationship. See James G. Byrne, Thomas G. O'Connor, Robert S. Marvin & William F. Whelan, *Practitioner Review: The Contribution of Attachment Theory to Child Custody Assessments*, 46 J. CHILD PSYCH. & PSYCHIATRY 115, 117 (2005).

280. See *supra* note 266 and accompanying text.

281. See, e.g., CONN. GEN. STAT. § 46b-56 (2021) (including factors such as "the child's cultural background" or the stability of the "existing or proposed residence").

282. See *supra* Part I.

should abandon the best interests standard for a more focused approach. Particularly for very young children, protecting the psychological parent relationship should be the primary factor in the court's determination of legal and physical custody. While values of equality and inclusion generally militate in favor of preserving a child's relationship to her psychological parents, competing concerns with children's emerging agency also shape our application of the psychological parent principle.

A concern for gender equality has long governed debates over custody law. In the 1970s, activists worked to overturn the "tender years" presumption and the gender-based stereotypes in which it was rooted.²⁸³ But eliminating the presumption did not erase gender-based disparities. Mothers were still generally expected to provide childcare, and the traditional division of labor in the home meant that most fathers did not engage in the day-to-day caretaking of children that would support a custody award.

Fathers' rights and feminist advocates forged an alliance in the late 1970s to promote joint custody arrangements, providing children with equal access to both parents.²⁸⁴ Developmental scientists joined the cause, advocating for fathers to be given the opportunity to become more involved in their children's lives.²⁸⁵ As time passed, however, joint custody proved problematic in cases with parental conflict, and many feminists objected to joint custody awards.²⁸⁶ Today, many courts are reluctant to order joint custody unless the parents agree.²⁸⁷

Other equality concerns have also permeated custody law. Despite a 1984 Supreme Court ruling rejecting a trial court's use of race in its custody decision, debate continues over what relevance, if any, race may have in determinations of a child's best interests.²⁸⁸ Today, courts continue to consider whether and how a parent's sexual orientation, gender identity, or (dis)ability are relevant to the best in-

283. Gerald W. Hardcastle, *Joint Custody: A Family Court Judge's Perspective*, 32 FAM. L.Q. 201, 203 (1998).

284. See Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 VA. L. REV. 79, 113-15 (2016).

285. See *id.* at 126-27.

286. See *infra* note 321 and accompanying text.

287. See NEJAIME ET AL., *supra* note 2, at 900-01.

288. See *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Holt v. Chenault*, 722 S.W.2d 897, 898 (Ky. 1987); Solangel Maldonado, *Bias in the Family: Race, Ethnicity, and Culture in Custody Disputes*, 55 FAM. CT. REV. 213, 214 (2017).

terests analysis.²⁸⁹ And courts routinely assess parents' economic circumstances and prospects as part of the best interests analysis.²⁹⁰

Values of equality and inclusion require that custody decisions not disadvantage parents or children based on race, class, gender, sexual orientation, gender identity, (dis)ability, or other factors irrelevant to parental fitness. For example, courts' assumptions about women's attachment to their children might reflect gender stereotypes or misimpressions of the caregiving behavior of certain racial groups.²⁹¹ Fathers—and particularly fathers of color—might suffer under stereotypes about their willingness to assume parental roles.²⁹² The law should strive to ensure that such biases do not enter custody proceedings. Moreover, because there is little research on the experience of separation in unmarried and same-sex couples, caution must be exercised in relying upon the results of this empirical research.²⁹³

The value of democratic self-determination also shapes the application of the psychological parent principle to cases involving older children. Some children are capable of forming and expressing their own views about what placement best fits their needs and desires. The legal system should aim to hear those preferences while protecting children against the developmentally harmful situation of forcing them to take sides in the parental battle. The psychological parent principle directs the focus of custody determinations away from *parents'* needs and wishes and toward the developmental needs and interests of *children*. We offer specific reforms below, but, as a general matter, determinations for older children should recognize children's increasing agency and experiential reach. The law might

289. See *Webb v. Webb*, 78 So.3d 933, 937 (Miss. Ct. App. 2012); *Cohen v. Cohen*, 114 N.Y.S.3d 458, 462 (N.Y. App. Div. 2019); Nancy D. Polikoff, *Custody Rights of Lesbian and Gay Parents Redux: The Irrelevance of Constitutional Principles*, 60 UCLA L. REV. DISCOURSE 226, 228 (2013); Powell, *supra* note 14.

290. See Neitz, *supra* note 8, at 140.

291. See *Jones v. Jones*, 542 N.W.2d 119, 123–24 (S.D. 1996); Courtney Megan Cahill, *The New Maternity*, 133 HARV. L. REV. 2221, 2253 n.217 (2020).

292. See NANCY E. DOWD, REDEFINING FATHERHOOD 182 (2000); Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 922–23, 943 n.110 (2005); Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 353 (2005).

293. See Laura Backen Jones, *Divorce and Separation: Commentary on Kline Pruett and McIntosh*, ENCYC. EARLY CHILDHOOD DEV. (Nov. 2011), <https://www.child-encyclopedia.com/pdf/expert/divorce-and-separation/according-experts/divorce-and-separation-commentary-kline-pruett-and-mcintosh> [https://perma.cc/A4UR-248Y].

deny or reduce custody to a psychological parent who is unwilling to meet a child's developmental needs—say, by restricting the child's access to needed medical care or to peers outside the home.²⁹⁴

These value-based considerations suggest that the simplest custody standard—which would order courts to protect the child's bond with her psychological parent, full stop—is incomplete. The law should give primary weight to parental care while also promoting equality and recognizing children's expanding agency. These complexities do not justify a full retreat to the best interests status quo. In what follows, we consider how the law might incorporate concerns about equality and self-determination while remaining anchored to protection of the psychological parent-child relationship.

3. The Psychological Parent Principle and Private Ordering

The psychological parent principle builds, in part, on the work of Goldstein, Freud, and Solnit, particularly as they addressed private ordering in child placement decisions.²⁹⁵ These scholars were concerned about the limited capacity of courts to detect children's best interests—and the potential for judges to do harm by undermining parental care.²⁹⁶ Even the most well-intentioned judge, informed by the best-trained clinicians, cannot forecast what is right for every child or how relationships will evolve over time. Moreover, the best interests standard can reward litigious and moneyed parents, who can indulge their emotions by taking a gamble in court at their child's expense.²⁹⁷

Guided by these insights, Goldstein, Freud, and Solnit rejected the best interests standard in favor of what they termed the "least detrimental alternative."²⁹⁸ They urged legal decisionmakers to recognize that any custody contest is harmful to the child and that courts cannot create a perfect family.²⁹⁹ In their view, the best courts can do is to minimize future harm to the child's development by protecting her relationship with her psychological parent.³⁰⁰ Building on these commitments, Goldstein, Freud, and Solnit preferred private ordering, which directs judges to approve the arrangements that

294. See Dailey & Rosenbury, *supra* note 28, at 1517–18.

295. See GOLDSTEIN ET AL., *supra* note 15, at 7–8.

296. See *id.* at 49–52.

297. See *supra* note 290 and accompanying text.

298. GOLDSTEIN ET AL., *supra* note 15.

299. *Id.* at 54–61.

300. See *id.* at 99–100.

parents work out without legal intervention.³⁰¹ This approach provides quick resolution and certainty. Compared to court-imposed orders, parents are more likely to abide by agreements they have freely chosen.

The psychological parent principle endorses this aspect of the Goldstein, Freud, and Solnit approach; private ordering can avoid the developmental harm of parental conflict and the developmental damage of protracted uncertainty about living arrangements and parental authority. Accordingly, we recommend that parents' custodial decision-making be respected as long as it does not pose a serious risk of harm to a child's emotional or physical health or interfere with older children's rights to participate in the decision-making process. We take seriously our predecessors' caution that the legal process should not be treated as an opportunity to make things right or to improve on parental arrangements, however imperfect.

To motivate families to take advantage of private ordering, we approve of approaches that encourage parents involved in a custody contest to settle if at all possible. Alternative dispute resolution provides an avenue for parents to devise their own parenting plan, although courts and mediators must be alert to the existence of coercion or domestic abuse.³⁰² In addition, the law should adopt measures (described below) that reward parental cooperation.

4. The Psychological Parent Principle and Contested Custody

When parents cannot agree on custody, and a legal decision must be made, the psychological parent principle supports a twofold recommendation. First, the law ideally would replace the best interests standard with a clear and predictable standard that gives primacy to the psychological parent-child relationship. Second, as long as the best interests standard remains in the law, we urge judges to apply it so as to give the heaviest possible weight to the psychological parent principle, consistent with the law's requirements.

Our approach suggests reforming the law to give special weight to preserving the child's relationship with her psychological parent(s). For example, with respect to young children, legislators might enact a presumption in favor of granting custody to a child's psycho-

301. *Id.* at 51. For a study of private ordering among unmarried parents, see June Carbone & Naomi Cahn, *Jane the Virgin and Other Stories of Unintentional Parenthood*, 7 U.C. IRVINE L. REV. 511, 513 n.10 (2017).

302. The complicated issue of private ordering in the context of domestic abuse is beyond the scope of this Article.

logical parents. The presumption would, as we explain below, operate to confer sole custody if there is only one psychological parent, and joint custody if there are two (or more). Any presumption should always be rebuttable, for example by clear and convincing evidence that an award of custody to the psychological parent would cause real and significant harm to the child. As children grow older, their views should also be taken into account and may operate to rebut the presumption, particularly for children entering adolescence. Children's emerging agency should be recognized and respected in the context of custody decision-making while being mindful that children might have divided loyalties.

Developmental researchers disagree on the question of whether presumptions or individualized decision-making should govern custody determinations.³⁰³ But as legal scholars, we give special weight to the destructive effects of long, drawn-out litigation on the child. We also appreciate that presumptions structure negotiations in ways that facilitate agreements about custody. Further, a presumption provides a more transparent legal standard than best interests by explicitly and publicly avowing the importance of the psychological parent-child bond.

A presumption of custody to the psychological parent(s) requires inquiry into the nature of the parent-child bond but also sets limits on the scope of that inquiry. The presumption may require a court to assess the emotional lives of the parties and to weigh expert testimony.³⁰⁴ A court would determine whether an individual is a psychological parent by evaluating whether the parent, "on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs . . ." ³⁰⁵

Courts are clearly capable of making this determination. In fact, in some contexts, such as custody claims arising under functional parent doctrines, courts already inquire as to whether an individual is a child's psychological parent. For example, in a recent custody dispute between an unmarried same-sex couple who raised a child together before breaking up, the Alaska Supreme Court affirmed the

303. See Marsha Kline Pruett & J. Herbie DiFonzo, *Closing the Gap: Research, Policy, Practice, and Shared Parenting*, 52 FAM. CT. REV. 152, 167-69 (2014).

304. Of course, the science of evaluating attachment relationships in any particular case raises its own concerns. See Robert E. Emery, Randy K. Otto & William T. O'Donohue, *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System*, 6 PSYCH. SCI. PUB. INT. 1, 7-12 (2005); see also Jones, *supra* note 293, at 4 (noting that "more valid and reliable measures" of attachment "are needed").

305. GOLDSTEIN ET AL., *supra* note 15, at 98.

trial court's conclusion that the nonbiological mother was the child's psychological parent.³⁰⁶ The court examined "the length of the relationship with the child, the age and opinion of the child, and whether there [was] a 'strong and heartfelt bond' between the adult and the child."³⁰⁷ The evidence showed that the nonbiological mother had been an important daily presence in the child's life and that the child considered her a parent.³⁰⁸ Importantly, a psychological parent is not a perfect parent. In the Alaska case, for example, the nonbiological mother's mental health issues did not undermine her claim to psychological parenthood.³⁰⁹ In any determination of psychological parenthood, what matters is whether the child feels a close sense of attachment arising from consistent and emotionally fulfilling daily or near-daily interactions with the parent.

While the factors that would demonstrate the existence of a psychological parent relationship may be contested, the scope for contesting psychological parent status is far more limited than the open battlefield created by the best interests standard.³¹⁰ Bearing in mind that this is a psychological determination, and not a totting-up of time spent, legal decisionmakers should commission careful evaluations of the child's relationship with the parents, and techniques should be sensitive to the child's age and the fact that evaluation is happening at a moment of family conflict. We recognize the potential harm to children if judges make erroneous determinations, but we believe that this possible harm is outweighed by the importance of stating a more determinate legal standard that gives preference to children's bonds with their psychological parents.

Psychological parenthood is not the same as the "primary caregiver" standard that some courts and commentators have endorsed and that relies on objective measures of caregiving.³¹¹ A psychologi-

306. See *Rosemarie P. v. Kelly B.*, No. S-17960, 2021 WL 4697719, at *4 (Alaska Oct. 8, 2021).

307. *Id.*

308. *Id.* at *6.

309. *Id.*

310. Custody determinations are "often based on practical considerations (e.g., work schedules of parents) and generic mental health and relationship assessments (e.g., parental illness or a history of abuse/neglectful care)." Byrne et al., *supra* note 279.

311. The primary caregiver presumption was adopted for a short time in West Virginia. See *Garska v. McCoy*, 278 S.E.2d 357, 358 (W. Va. 1981); John D. Athey, Note, *The Ramifications of West Virginia's Codified Child Custody Law: A Departure from Garska v. McCoy*, 106 W. VA. L. REV. 389, 390 (2004). The psychological parent principle also differs from the ALI's approximation standard, which seeks to approximate

cal parent is identified based on her emotional relationship with the child and not simply by the amount of time spent with the child.³¹² Imagine a two-parent family in which one parent does most of the childcare while the other parent works full-time. The working parent may well be a psychological parent. Additionally, while the “primary caregiver” determination envisions a single individual, the psychological parent principle recognizes that a child may, and often will, have more than one psychological parent. Psychological parenthood is, by its nature, a status grounded in the child’s point of view. If the child relies on both parents for security, stability, comfort, and guidance, then both are likely psychological parents.

We recognize that the psychological parent principle might be implemented in different ways. There are many acceptable ways to craft presumptions and standards for rebuttal, and we do not attempt to identify all issues. Still, it is useful to make a preliminary effort to consider some of the issues raised by a presumption of custody to a child’s psychological parent(s).

a. One psychological parent and the presumption of sole custody

A presumption in favor of psychological parents would reduce conflict (compared to the best interests standard) when there is clearly only one psychological parent in a child’s life. For example, when one parent has been absent from a young child’s life for a long period, our approach would foreclose any claim to custody over the psychological parent’s wishes, although we favor liberal visitation in the service of both the child’s developmental needs and the value of equality.

We recognize that litigious parents may simply shift their efforts from contesting best interests to contesting psychological

the prior caregiver arrangements regardless of emotional bonds. *See, e.g.*, PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, *supra* note 33. Elizabeth Scott first articulated the approximation standard, which influenced law reform projects like the ALI Principles more heavily than courts and legislatures. *See* Scott, *supra* note 268. While an important advance over the best interests standard, the approximation standard focuses on objective factors that may not reflect the emotional reality of the child’s relationships and, because it is oriented toward past caregiving relationships, does not emphasize the future development of psychological parent bonds with a non-custodial parent. *Id.* at 630.

312. *See, e.g.*, *Osterkamp v. Stiles*, 235 P.3d 178, 189 n.41 (Alaska 2010) (“We do not establish any minimum length of time for establishing psychological parent status, but we do agree with the ALI that ‘[t]he length of time that constitutes a significant period will depend on many circumstances, including the age of the child, the frequency of contact, and the intensity of the relationship.’”).

parenthood; a determined parent could, with sufficient financial resources, litigate the matter at length unless (as in the case of an absent parent) the matter is clear. Still, our approach is not a trivial advance over current doctrine. Today, the absent parent can litigate endlessly over best interests, basing her argument on factors like the relative financial stability of the parents or the spiritual upbringing of the child. Under our approach, the parent-child relationship is the focus of inquiry, with other factors coming in only to the extent they bear on the psychological parent bond.³¹³

A presumption in favor of custody to the psychological parent should be rebuttable if the psychological parent is incapable of caring for the child. But the legal formulation should guard against creating a backdoor for best interests, concerned that an open-ended rebuttal possibility would invite the kinds of litigation that the presumption should foreclose. One approach would be to create a strict standard that the presumption can be rebutted only by clear and convincing evidence that an award of custody to the psychological parent would cause real and significant harm to the child. A harm standard would protect the child's relationship with the psychological parent while maintaining a more focused inquiry than the best interests standard.

To be clear, the presumption we describe would deny custody (but not visitation) to legal parents who are not psychological parents because they have not developed the day-to-day, close, and consistent attachment that children need. The presumption would direct the court to award legal and residential custody to the psychological parent and would grant judicial discretion only as to visitation for the non-psychological parent. By contrast, best interests permits both psychological and non-psychological parents to assert viable claims to legal and residential custody and to litigate them at length.

Although one might reach a different conclusion, we would interpret the psychological parent principle to authorize liberal visita-

313. A recent case illustrates how the best interests standard fails to protect children's primary interest in maintaining a custodial relationship with their psychological parents. In *Weisberger v. Weisberger*, a mother lost custody of her children on the ground that she was not adhering to an agreement to raise the children in the Hasidic Jewish faith. 60 N.Y.S.3d 265 (N.Y. App. Div. 2017). The trial court considered a range of factors, including the "religious upbringing clause" in the parties' initial agreement. *Id.* at 272. The New York Court of Appeals reversed the trial court's decision to transfer residential custody to the father, reinstating custody rights in the mother, in part because the children's "emotional and intellectual development [was] closely tied to their relationship with her." *Id.* at 274. While giving important weight to the parent-child bond, the court nevertheless relied on the best interests standard to confer significant decision-making authority on the father. *Id.* at 275.

tion with the child's non-psychological parent, in the absence of clear and convincing evidence that visitation would cause real and significant harm to the child. Visitation can foster children's relationships with parents who are not psychological parents but have the potential to play an important part in children's lives. Visitation opens the door to parents who might not have been involved in their children's lives but have the capacity and desire to forge a meaningful relationship with their children. The developmental science supports the position that children fare better when, if they have two parents, both are a nurturing presence in their lives.³¹⁴ The views and wishes of children themselves should also be taken into account, particularly as children enter adolescence.

Our recommendation does not ignore the values of equality and inclusion. A psychological parent standard may operate to disadvantage some men with respect to their parent-child relationships at the same time that it places the burdens of childrearing on women. Men who fulfill gender-based expectations and take on primary responsibility for paid labor outside the home may thereby compromise their ability to become their child's psychological parent. Women who fulfill gender-based expectations and assume primary childcare responsibility may more readily satisfy the psychological parent standard. Custodial arrangements based on psychological parenthood may replicate gender-based roles in which women are expected to raise children and men are expected to earn money. Gender-based stereotypes of breadwinner/homemaker couples may also affect proceedings in court, regardless of the actual facts of a family's life. Racial inequality may intersect with gender inequality to compound disadvantages for Black fathers.³¹⁵ Absence due to military service and incarceration also disproportionately affect the fa-

314. See NAT'L ACADS. 2016, *supra* note 40, at 12 ("[T]here is evidence that when parents live apart, children generally benefit if they have supportive relationships with each parent, at least in those cases in which the parents do not have negative relationships with each other."). The research does not resolve debate over a noncustodial parent's overnight visitation with infants and toddlers. See, e.g., William V. Fabricius & Go Woon Suh, *Should Infants and Toddlers Have Frequent Overnight Parenting Time with Fathers? The Policy Debate and New Data*, 23 PSYCH. PUB. POL'Y, & L. 68, 78 (2017) (concluding that more overnight visits led to more secure relationships with both parents); Judith Solomon & Carol George, *The Effects on Attachment of Overnight Visitation in Divorced and Separated Families: A Longitudinal Follow-up*, in ATTACHMENT DISORGANIZATION 243 (Judith Solomon & Carol George eds., 1999) (highlighting the benefits of overnight stays).

315. See Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991, 993 (2006).

ther-child bond.³¹⁶

In our view, a liberal visitation standard is one way to address at least some of these equality concerns, permitting visitation by the non-psychological parent as long as it would not seriously impair the child's sense of security and relationship to her psychological parent. "Visitation" today is an elastic concept, encompassing anything from supervised, one-hour visits to overnight stays for half the week or several months in the summer.³¹⁷ Our proposed presumption would permit liberal visitation to the non-psychological parent, but visitation should not become de facto joint custody. The line between custody and visitation can blur, but the defining features of custody are greater parenting time and greater decision-making authority.³¹⁸ We do not offer a percentage above which visitation becomes joint residential custody; states might experiment with different ways to define shared parenting in light of the psychological parent principle and the age and developmental needs of the child.

An award of visitation should be guided by the court's prediction as to the probability that the non-psychological parent can become a vital part of the child's life without harming the established psychological parent relationship. We recognize that this prediction introduces uncertainty into the equation. But it does not backslide to "best interests," because it is limited to visitation and gives priority to the existing psychological parent-child relationship while permitting courts to foster a psychological bond with another legal parent. Modification of custody might be allowed when a non-custodial parent can establish psychological parenthood after some period of liberal visitation.

b. Two (or more) psychological parents and the presumption of joint custody

The developmental literature recognizes that children can have more than one psychological parent and that preserving these rela-

316. See, e.g., LOIS E. WRIGHT & CYNTHIA B. SEYMOUR, WORKING WITH CHILDREN AND FAMILIES SEPARATED BY INCARCERATION: A HANDBOOK FOR CHILD WELFARE AGENCIES (2000).

317. Compare *In re Marriage of Salmon*, 519 N.W.2d 94 (Iowa App. 1994) (permitting overnight visitation), with *McCammon v. McCammon*, 680 S.W.2d 196 (Mo. Ct. App. 1984) (affirming the trial court's decision to permit the father visitation for the summer period).

318. In our view, it should not be common for a non-psychological parent to be given decision-making authority, even if shared, although we do not rule out the possibility.

tionships is important to the child's development.³¹⁹ When a child has two psychological parents, our approach supports a presumption of joint custody, meaning shared decision-making custody, residential custody, or both. The allocation of time spent with each parent should turn on the factors discussed below.

A child can have more than two psychological parents, although this situation is likely to arise infrequently, given the amount of time required to develop and sustain a psychological parent-child bond. In cases in which the child has developed psychological parent bonds with a third (or even fourth) adult over time—for instance, with stepparents—courts will need to assess the quality of the bonds with all adults and award custody and visitation accordingly. For young children, courts will have to weigh children's need to sustain these relationships against any developmental burdens that arrangements facilitating multiple relationships may impose. If multiple relationships develop over time, the child may voice her own preferences for time spent with each psychological parent.

With respect to cases involving two psychological parents, consensus among developmental researchers appears to be coalescing around joint custody being important to children's developmental welfare, although we acknowledge that the literature is still mixed on the desirability of a presumptive rule, particularly for young children. In our view, the clear legal benefits of a presumption (less litigation, greater predictability) tip the scales in favor of a joint custody presumption (so long as parents are not in a high-conflict relationship, which we discuss below). The presumption would be strongest for younger children. As children grow, the presumption can be modified to take account of children's wishes and their changing developmental needs.

Thus, in cases where psychological parents contest custody, the court would fashion a shared custodial arrangement that serves the child's interest in maintaining relationships with both her psychological parents. The allocation of time should be made by taking into account a range of factors including: the distance between residences, the child's age, school location, the child's relationships with adults and peers outside the home, and the child's wishes, particularly as she grows older. While courts should weigh these factors, the analysis is focused upon children's age-appropriate need for sustaining re-

319. See, e.g., Richard A. Warshak, *Social Science and Parenting Plans for Young Children: A Consensus Report*, 20 PSYCH., PUB. POL'Y, & L. 46, 47 (2014) (highlighting literature that rejects the theory that infants only attach to one psychological parent).

lationships with their psychological parents and not a broad, open-ended best interests inquiry. Courts should ensure that bonds with both parents are maintained, consistent with the developmental stage of the child. Roughly speaking, younger children need more consistent and proximate interactions, so an arrangement that splits the week fifty-fifty between parents might be best.³²⁰ Older children and adolescents might be able to maintain these relationships with longer lapses in time. Unlike traditional joint custody approaches, which often seem oriented toward furthering parental rights and interests, our proposal requires courts to focus on what children need to sustain bonds with their psychological parents over time.

We note that feminists have lodged powerful critiques of laws favoring joint custody, largely based on the disconnect between the egalitarian aspirations embodied by joint custody and the gender-based social reality in which women continue to assume primary responsibility for children.³²¹ Accordingly, some worry that women's caretaking will be devalued, and men will obtain parental rights without having assumed parental responsibilities.³²² Of course, the dominant feminist critique does not capture the experiences of many women, including those who do not conform to the gendered division of labor more common in traditional, white, middle-class families. Moreover, the feminist critique undervalues the way in which joint custody may move law toward greater gender equality.³²³ More

320. For infants, a presumption may not work. Research on infants and custody has not yielded firm conclusions. See Marsha Kline Pruett, Rachel Ebling & Glendessa Insabella, *Critical Aspects of Parenting Plans for Young Children: Interjecting Data into the Debate About Overnights*, 42 FAM. CT. REV. 39, 40-41 (2004).

321. See 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, 309 (2001) (noting that some fathers "may use equal joint custody presumptions to get out of paying substantial child support"); Scott, *supra* note 33, at 627 (noting feminist arguments that "joint custody confers 'windfall' parental rights on fathers, requiring dissatisfied mothers to make financial concessions to obtain acceptable custody arrangements"). For an overview of the feminist critique, see Katharine T. Bartlett & Carol B. Stack, *Joint Custody, Feminism and the Dependency Dilemma*, 2 BERKELEY WOMEN'S L.J. 9, 11-15 (1986).

322. In addition to sources cited *supra* note 33, see Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1468 (1991) ("What is also wrong with joint custody is that it adds rights rather than responsibilities. And what many parents and children need are responsibilities rather than rights.").

323. See Bartlett & Stack, *supra* note 321, at 33 ("Only when it is expected that men as well as women will take a serious role in childrearing will tradition patterns in the division of childrearing responsibilities begin to be eliminated in practice as well as in theory.").

importantly, the psychological parent principle should mitigate most of these concerns, given that joint custody imposed by a court would require a finding that both parents are psychological parents, which is likely only when a parent has been closely involved in a child's life.³²⁴

Of course, presumptions are rebuttable. We recommend that the shared parenting presumption be rebuttable if there is clear and convincing evidence of harm to the child or where an older child strongly objects to joint custody. The presumption might be rebutted, for example, in cases involving risk of abuse, substance abuse, or other factors making a psychological parent unable to care for the child. Or the presumption could be rebutted where a child with two psychological parents has come out as LGBTQ and finds that only one parent is supportive; in such circumstances, shared legal and residential custody may be harmful to the child and a denial of their emerging autonomy. Children with special needs might also require an award of sole custody. The court's analysis should be directed specifically to ensuring that children's present welfare and developmental needs are not seriously compromised; a standard focused on harm and agency does not invite an open-ended inquiry into any factor bearing on children's wellbeing or parental wishes.

The psychological parent principle also suggests that the shared-parenting presumption can be rebutted when there are high levels of parental conflict. When parents have a conflictual relationship with each other, they may prolong litigation and undermine the child's secure attachments. The damage to the child is likely to be particularly great when one psychological parent attempts to destroy the child's relationship with the other. In such cases, court-mandated joint custody could exacerbate damaging conflict and extend hostilities indefinitely. Developmental researchers have traditionally agreed that joint custody is not desirable in high-conflict situations.³²⁵ While support for that position may be changing,³²⁶ we con-

324. Of course, a legal presumption of joint custody may give leverage to some men at dissolution and vest some men with continued authority over women after dissolution. To the extent we find the feminist critique compelling, we nonetheless prefer a clear legal rule calibrated to psychological parenthood than a return to a case-by-case best interest analysis. Like Bartlett and Stack, we appreciate the long-term equality benefits to a joint custody presumption. See Bartlett & Stack, *supra* note 321, at 39–40. But more importantly, we view the joint-custody presumption as best able to vindicate our primary goal—protecting children's psychological parent relationships.

325. See Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 509 n.55 (2001).

clude that—until research clearly shows that children do not suffer under a high-conflict joint custody arrangement—the better approach is to avoid joint custody when the parents simply cannot interact without open hostility. In such cases, the court should award custody to the parent who has the closest psychological bond to the child, taking into account the range of factors above related to parenting time, including the child's age, school location, the child's relationships with adults and peers outside the home, and the child's wishes, particularly as she grows older. If, because of parental conflict, one parent receives sole custody initially, measures should be taken to reduce conflict between the parents to the point where the child can be given greater access to the non-custodial parent. Importantly, we do not support visitation as a parental entitlement but rather as a way for children to develop or preserve important relationships.

In exploring these open issues, we might seem to be undermining our case and even showing the advantages of the best interests standard. After all, a best interests standard is so flexible that it generally allows a judge to take into account parental conflict and any other consideration. But this seeming advantage confirms that the best interests test lacks any consistent or predictable content. The standard permits but does not require judges to give primary weight to psychological parent-child relationships; it permits but does not require judges to be attentive to the developmental consequences of parental conflict. Our approach makes priorities more apparent and highlights the need to give substantive direction to judges based on sound developmental research. Rather than hand judges an abstract standard, unmoored from a clear overarching principle, that may produce different outcomes in similar cases, our approach offers an unambiguous principle that provides direction to judges at every stage of a custodial dispute. Our approach also aims to produce greater consistency, making it more likely that similar cases will produce similar outcomes—a feature that also empowers parents to reach agreements. By offering a clear set of guidelines, our approach injects a much-needed degree of stability and predictability into custody decision-making.

We are mindful that children's developmental needs do not begin and end with their psychological parents. Legal scholars have

326. See Pruett et al., *supra* note 320, at 53.

undertaken valuable work in considering innovations that, without undermining the psychological parent relationship, would recognize children's independent interests and increasing agency.³²⁷ Particularly as children reach school age and adolescence, their sense of time changes, permitting greater separation from psychological parents without damage.³²⁸ Recognition of children's developing agency matters to questions of legal and physical custody. For example, one might favor legal rules that protect older children's independent decision-making relating to certain medical decisions.³²⁹ Similarly, one might require courts to take into consideration children's residential preferences from, say, age twelve onward, thus endorsing a practice that judges often follow today, but without the unbounded best interests formulation. We view these approaches as an important step toward integrating developmentally-sound insights into legal standards for children's care and welfare.

CONCLUSION

Drawing from developmental science and guided by the values of democracy, equality, and inclusion, the psychological parent principle would lead the law to more explicitly, comprehensively, and forcefully support and protect the parent-child relationship. As we have shown, the psychological parent principle has important consequences for family law doctrine, including parentage and custody, and for a range of other legal and policy interventions that affect the family. We see promise in applying the principle to additional important areas relating to children and parents.

Consider how the psychological parent principle might matter to debates over child welfare. The stated objective of the child welfare system is to protect children from abuse and neglect, but many scholars have powerfully questioned whether the system is meeting this objective.³³⁰ On one hand, the state may over-intervene in the parent-child relationship by empowering officials to remove children for a wide range of vaguely-defined reasons.³³¹ Even when the state

327. See Dailey & Rosenbury, *supra* note 28, at 1453.

328. *Id.*

329. The ALI's draft Restatement, for instance, permits medical decision making by a mature minor. See RESTATEMENT OF CHILDREN AND THE LAW § 19.01 (A.L.I. 2019); see also Scott & Huntington, *supra* note 28, at 1440–44.

330. See, e.g., MICHAL RAZ, ABUSIVE POLICIES: HOW THE AMERICAN CHILD WELFARE SYSTEM LOST ITS WAY (2020).

331. Racial disproportionality in the child welfare system is well documented. See, e.g., *Racial Disproportionality and Disparity in Child Welfare*, CHILD WELFARE INFO.

does not remove children, it can subject families to long-term surveillance without clear procedures or criteria for exit—a situation that is stressful for parents and can compromise the parent-child relationship. On the other hand, the state under-intervenes by failing to provide the kind of support that poor parents need to care adequately for their children. In our neoliberal legal order, families are generally left to fend for themselves.

The psychological parent principle suggests the need to shift focus away from back-end remedies like removal and foster placement, and toward front-end approaches that affirmatively support families with greater resources.³³² Such approaches have been shown to work but require the devotion of resources to a larger population of families—not simply those who are reported to state officials for abuse or neglect.³³³ Because poverty and neglect are so intertwined, providing greater support to more families early on would reduce the perceived need for child welfare interventions.³³⁴

Even as the psychological parent principle urges greater focus on front-end interventions, it sheds some light on back-end issues like removal and placement. Disruption of the psychological parent-child bond can have devastating developmental consequences for children.³³⁵ Accordingly, the psychological parent principle would direct decisionmakers to prioritize a child's relationship to her psychological parent and thus would support a high bar to removal.³³⁶ If

GATEWAY (Nov. 2016), https://wayback.archive-it.org/5990/20210128005154/https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf [<https://perma.cc/E9KQ-FPFU>]; see also Andrea J. Sedlak, Karla McPherson & Barnali Das, *Supplementary Analyses of Race Differences in Child Maltreatment Rates in the NIS-4*, ADMIN. CHILD. & FAMS. (Mar. 2010), https://www.acf.hhs.gov/sites/default/files/documents/opre/nis4_supp_analysis_race_diff_mar2010.pdf [<https://perma.cc/9UWW-X22A>]. The causes of this disproportionality and the appropriate responses are hotly debated. Compare Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L. REV. 871 (2009), with Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171.

332. See EICHNER, *supra* note 28, at; HUNTINGTON, *supra* note 28, at 189; Huntington & Scott, *supra* note 28, at 1409. In calling for increasing government support for families, we recognize the critical need to guard against the discrimination and surveillance experienced particularly by parents of color and low-income parents when the state has intervened in family life. See HUNTINGTON, *supra* note 28, at xix.

333. See Huntington & Scott, *supra* note 28, at 1410.

334. See *id.*

335. See EICHNER, *supra* note 28, at 139.

336. See Dailey & Rosenbury, *supra* note 36, at 154–62; see also Roberts, *supra* note 331, at 173 (“[J]ust as we should pay attention to the risks of child maltreatment, we should not minimize the very real pain caused by separating children from

removal occurs, the psychological parent principle would direct decisionmakers to consider placements that would prioritize psychological parenthood. For example, a child may have a psychological parent relationship with another person with whom the child can be placed.³³⁷ In the absence of such a placement alternative, the government would, in most circumstances, prioritize family-based over institutional foster care.³³⁸ Where possible, efforts to maintain the child's relationship with her psychological parents and eventually to reunify parents and child should be the goal. Harsh systems requiring permanency planning without consideration of the child's psychological bonds are inconsistent with the psychological parent principle.

The debate about exactly how to reform the child welfare system is ongoing—implicating longstanding debates about family preservation and more recent conflict over abolition of the system. In this Article, we do not attempt to develop or to endorse specific prescriptions. Yet, we clearly see a role for the psychological parent principle in ongoing conversations about the child welfare system.

Ultimately, developmental science alone cannot provide answers to hard questions of family law, for the law does not live in the sterile environment of the laboratory but in a complex social and political world where competing values matter. The psychological parent principle provides a clear guideline for analyzing children's developmental needs in light of the broader legal values of democracy, equality, and inclusion that should inform and guide family law. This Article aims to spur further study of the principle's application to the wide range of laws regulating children's lives. Children's present and future welfare depends on ensuring that their bonds with close caregivers are nurtured and preserved.

their families. The damage caused by disrupting these ties may be far greater than the harm agencies are trying to avoid.”).

337. See *supra* note 259 and accompanying text.

338. See, e.g., Amir Sariaslan, Antti Kaariala, Joonas Pitkanen, Hanna Remes, Mikko Aaltonen, Heikki Hiilamo, Pekka Martikainen & Seena Fazel, *Long-Term Health and Social Outcomes in Children and Adolescents Placed in Out-of-Home Care*, 174 JAMA PEDIATRICS 1, 7 (2022) (“[C]hildren who were primarily placed in institutional care were around twice as likely as their siblings who were placed in foster care settings to experience [certain negative] long-term outcomes.”).