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Fathers and Feminism: The Case Against Genetic Entitlement

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This Article makes the case against a nascent consensus among feminist and other progressive scholars about men's parental rights. Most progressive proposals to reform parentage law focus on making it easier for men to assert parental rights, especially when they are not married to the mother of the child. These proposals may seek, for example, to require the state to make more extensive efforts to locate biological fathers, to require pregnant women to notify men of their impending paternity, or to require new mothers to give biological fathers access to infants.

These proposals disregard the mother's existing parental rights and transfer too much power from women to men. Although they directly affect only a particular class of legal disputes about genetic fathers and adoption, their implications stretch not only to other kinds of custody disputes but also to the law's treatment of sex and gender differences in reproduction more broadly. The principle of genetic entitlement that underlies these proposals is male-centered and therefore an undesirable basis for the law of reproduction and parentage.

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I. INTRODUCTION

This Article makes the case against a nascent consensus among feminist and other progressive scholars about men's parental rights. Consensus is forming around a superficial equality standard that declares mothers and fathers to be equal, and thus to have equal parental rights, at the time a child is born.[1] Accordingly, most progressive proposals to reform parentage law focus on making it easier for men to assert parental rights, especially when they are not

1. *See* sources cited *infra* note 65 (arguing that the procedural rights of genetic fathers should be strengthened); source cited *infra* note 77 (arguing that weak rights for unwed fathers also harm and denigrate unwed mothers); sources cited *infra* note 95 (arguing that current law imposes a reverse form of coverture on men); sources cited *infra* note 114 (advocating for theoretical approaches that aim to avoid associating women more strongly than men with parenthood); sources cited *infra* note 159 (advocating stronger parental rights for fathers in order to encourage male involvement with children).

Although many of the principles at play in this Article apply to situations involving children conceived through reproductive technology, as I have discussed in other work, *see* Jennifer S. Hendricks, *Essentially a Mother*, 13 WM. & MARY J. WOMEN & L. 429 (2007) [hereinafter Hendricks, *Essentially a Mother*]; Jennifer S. Hendricks, *Not of Woman Born: A Scientific Fantasy*, 62 CASE W. RES. L. REV. 399 (2011) [hereinafter Hendricks, *Not of Woman Born*], my focus here is on the "unwed father cases" and therefore on children conceived through sexual intercourse. Within this context, I use the term "birth mother," or often simply "mother," to refer to a person who gestates and gives birth to a child. I use "father," with various modifiers, to refer to the person who did not gestate the child but who contributed genetic material via sexual intercourse.

While recognizing that not all people who self-identify as women experience pregnancy and that some people who do not self-identify as women do, throughout this Article, I also refer to mothers as female and fathers as male, and to some extent I treat the rights of mothers as the rights of women and the rights of fathers as the rights of men. I do so in part for the sake of linguistic convenience but also because the potential for pregnancy is central to the legal construction of gender.

married to the mother of the child. These proposals may seek, for example, to require states to make more extensive efforts to locate biological fathers, to require pregnant women to notify men of their impending paternity, or to require new mothers to give biological fathers access to their infants.

These proposals directly affect a particular class of legal disputes about a genetic father's ability to block an adoption sought by the birth mother. However, their implications stretch not only to other kinds of custody disputes but also to the law's treatment of sex and gender differences in reproduction more broadly. They "raise fundamental questions about the meaning of parenthood [and] provide a rich landscape for examining the law's expressive functions."[2] In particular, proposals for strengthening the rights of biological fathers implicitly adopt a rule of genetic entitlement, by which I mean the principle of giving automatic, full parental rights to fathers based on genetics alone. The principle of genetic entitlement is closely related to genetic essentialism, which is an ideological commitment to genes and DNA as "the core, the most important constituent part of who we are as human beings."[3] My argument here is that both genetic essentialism and its corollary, genetic entitlement, are patriarchal and thus undesirable bases for the law of reproduction and parentage.

Part II summarizes the case law defining the constitutional rights of fathers and describes how states have implemented those rights. While states take a fairly uniform approach to married fathers, they have created a variety of different rules governing the rights of unwed fathers because each state is trying to reconcile two conflicting impulses: (1) a commitment to a genetic-essentialist definition of parenthood that is rooted in patriarchy[4] and (2) the impulse to

2. Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 294 (1988). For other critiques of genetic definitions of parenthood, see, e.g., Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209 (1995); Julie Shapiro, *A Lesbian Centered Critique of "Genetic Parenthood,"* 9 J. GENDER, RACE & JUST. 591 (2006).

3. Leslie Bender, *Genes, Parents, and Assisted Reproductive Technologies: ARTs, Mistakes, Sex, Race, & Law*, 12 COLUM. J. GENDER & L. 1, 4 (2003). Katharine Baker makes a similar argument; what I call "genetic entitlement," she calls "the DNA default." Katharine K. Baker, *The DNA Default and Its Discontents: Establishing Modern Parenthood*, 96 B.U. L. REV. 2037 (2016).

4. *Patriarchy* refers both to the systemic subordination of women and to the "law of the father" that defines identity and descent through the male line. BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY 34-41 (1989). *See generally* Mary L. Shanley, *Unwed Fathers' Rights, Adoption,*

streamline adoption of children born to unmarried mothers by limiting the rights of unmarried fathers. Broadly speaking, states have achieved this reconciliation by adopting a substantive rule of genetic entitlement but then making that entitlement procedurally difficult for low-income fathers to vindicate.

My concern is with the substantive law rather than the procedure, and in Part III I argue that genetic entitlement is inconsistent with U.S. Supreme Court precedent on parental rights and with the requirements of sex equality. Supreme Court precedent confers parental rights only when genetic parenthood is combined with a caretaking relationship with the child. Therefore, at the time of birth, the birth mother is the only "constitutional parent"[5]—the parent who already has an established relationship with the child and therefore has constitutionally protected parental rights. Part III proposes a doctrinal structure for weighing the mother's existing rights against other interests. I argue that a state wanting to give automatic genetic rights to fathers must justify overriding the mother's parental rights under constitutional standards.

Part IV then considers circumstances under which feminists sometimes support overriding the mother's rights with a genetic entitlement for the father. First, many commenters believe that strengthening men's parental rights would recognize men as caretakers and encourage their participation in child-rearing. Subpart IV.A argues that this hope—that stronger genetic entitlements will translate into greater parental commitments—is too amorphous to justify infringement of mothers' constitutional parental rights. Second, under some circumstances, stronger rights for fathers could help protect vulnerable parents from exploitation by the adoption system. Although it is a closer case, subpart IV.B argues that this goal would be better served directly, by reforming the adoption process, as well as by providing more social support for birth mothers. In all contexts, I argue that feminists should be skeptical of proposals claiming to fix deeply entrenched and complicated social problems with a simple rule change that transfers constitutional rights from

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and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy, 95 COLUM. L. REV. 60 (1995).

5. E. Gary Spitko, *The Constitutional Function of Biological Paternity: Evidence of the Biological Mother's Consent to the Biological Father's Co-Parenting of Her Child*, 48 ARIZ. L. REV. 97, 99 (2006).

women to men, especially when that rule change has deep roots in sexist, patriarchal theories of reproduction.

II. THE RIGHTS OF GENETIC FATHERS

When first faced with the issue of the parental rights of fathers, the Supreme Court took birth mothers' parental rights as given and developed a "biology-plus-relationship" test for the rights of genetic fathers.[6] This test meant that men did not acquire parental rights by virtue of biological fatherhood alone. Instead, biological fatherhood had to be joined with an established relationship of day-to-day caretaking of the child. While states could no longer disregard unmarried fathers or treat them as legal strangers to their children, neither did the Court elevate the genetic tie to the *sine qua non* of constitutional parenthood.

The states responded by, on the one hand, endowing the genetic tie with more importance than the Supreme Court had given it but, on the other hand, seeking to cut off the genetic father efficiently when doing so would facilitate adoption.[7] A key fault line in these responses is the role of the mother: whether she controls initial access to the child—and thus whether the father is able to satisfy the biology-plus-relationship test—or whether the father's genetic tie, standing alone, gives him enforceable rights against her. Variation in how states resolve this question has set the stage for jurisdictional and choice of law problems, which in turn produce manipulation by parties and calls for a national solution.

A. The Supreme Court and Unwed Fathers

The Supreme Court formulated the biology-plus-relationship test in a series of cases in the 1970s.[8] Rejecting the old system, in which

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6. *See infra* text accompanying notes 8-12.

7. *See infra* text accompanying notes 65-67.

8. The unwed father cases have been described and summarized many times. For my own more detailed analysis of the cases, see Hendricks, *Essentially a Mother*, *supra* note 1, at 434-36, analyzing Stanley v. Illinois, 405 U.S. 645 (1972); 437-38, analyzing Quilloin v. Walcott, 434 U.S. 246 (1978); 438-39, analyzing Caban v. Mohammed, 441 U.S. 380 (1979); and 439-41, analyzing Lehr v. Robertson, 463 U.S. 248 (1983).

The first use of the phrase "biology-plus-relationship" to describe this test appears to be by Elise Schlackman. Elise Schlackman, Note, *Unwed Fathers' Rights in New York: How Far Does the Protection Extend?*, 1 CARDOZO WOMEN'S L.J. 199, 199 (1993). The shorter term "biology plus" was used by Daniel C. Zinman. Daniel C. Zinman, Note, *Father Knows*

men could acquire parental status only through marriage or formal establishment of paternity, the Court held that the determinants of constitutional protection were biological parenthood *plus* a caretaking relationship with the child.[9] The biology-plus-relationship test recognized that a birth mother, by gestating and giving birth, satisfied both criteria, but that for fathers, biological parenthood did not automatically create a relationship that demanded full parental rights.[10] A man's status as a biological father was said to give him a unique "opportunity" to become a legal father, but to take advantage of that opportunity required affirmative steps on his part: he had to establish a concrete parental relationship with the child.[11] Once he did so, he became a full-fledged constitutional parent, on par with the mother.[12]

Because biological connection is easy to prove, the key questions about the biology-plus-relationship test pertain to the relationship prong. They are:

- What "counts" for establishing the relationship, and how much of it is needed? For example, can the father establish a relationship with the child vicariously, through the mother, by caring for her while she is pregnant? After birth, how involved must he be and for how long?
- What rights, if any, does he have before he meets that threshold for full-blown parental rights? In particular, is failure to

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Best: The Unwed Father's Right To Raise His Infant Surrendered for Adoption, 60 FORDHAM L. REV. 971, 972 (1992).

9. *See Quilloin*, 434 U.S. at 256 (describing the necessary relationship as one that involves "the daily supervision, education, protection, [and] care of the child").

10. *See* Hendricks, *Essentially a Mother*, *supra* note 1, at 443 ("[T]he Court . . . used motherhood as the model for crafting the biology-plus-relationship test to accommodate fathers' physical disadvantage. As the Court later explained, it makes sense to allow a man to acquire parental rights comparable to a mother's by creating a test 'in terms the male can fulfill.'" (quoting *Nguyen v. INS*, 533 U.S. 53, 67 (2001))).

11. *Lehr*, 463 U.S. at 262 ("The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship . . . . If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie."); *id.* at 259-60 (noting a "clear distinction between a mere biological relationship and an actual relationship of parental responsibility").

12. *Cf.* Spitko, *supra* note 5, at 99 (referring to the biological mother as the "initial constitutional parent"). Because this point is often misunderstood, it is worth noting here that gestation satisfies the biology-plus-relationship standard but does not give mothers an essential or enduring supremacy in parental rights. Once they meet that standard, all legal parents have equally protected constitutional rights.

> establish the relationship excused—and parental rights thereby awarded based on genes alone—if the mother denies him access to the child? Put another way, does the father's genetic tie to the child automatically entitle him to access to the child, or does he depend upon the mother's initial consent and cooperation?

This Article does not try to answer the first set of questions.[13] It focuses on the second set: the cases in which the relationship requirement, whatever it may be, has not been met. The question, then, is what entitlements arise from genetic parenthood standing alone. Most states and many feminist scholars have taken the view that a man has a genetic entitlement to establish a relationship with his biological child if he chooses to do so, even over the mother's objection, unless he is proven unfit.[14] This Article argues that this genetic entitlement is inconsistent with Supreme Court precedent and that a regime of genetic entitlement would be based on and would perpetuate patriarchy.

The starting point for the doctrinal analysis is *Lehr v. Robertson*.[15] Jonathan Lehr was the biological father of a baby whose mother, Lorraine Robertson, disappeared with the child shortly after

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13. Some preliminary thoughts: A purely child-centered definition of parenthood would give less weight to prebirth conduct; *Lehr* can be read to support this approach, since Lehr and Robertson's relationship appears to have remained intact until approximately the time of the birth. In addition, pregnancy can be a dangerous time for some women, and a hospital visit for giving birth may be the best available time for breaking off a destructive relationship. *See* A. Rachel Camp, *Coercing Pregnancy*, 21 WM. & MARY J. WOMEN & L. 275, 291-92 (2015) ("Women who experience abuse in their relationships routinely report that such abuse begins or intensifies during pregnancy or immediately following the birth of a child. Nearly one-third of women who experience domestic violence report that the first abusive incident occurred during pregnancy.... Violence during pregnancy is particularly prevalent when the pregnancy is unintended." (footnotes omitted)). On the other hand, in my view, adult heartbreak should matter too, and it is a stretch to say that a relationship requirement applied to a very young infant is protecting only the child's attachment. Moreover, to the extent that the biology-plus-relationship test serves as a substitute for marriage and as evidence that the mother consented to the man's becoming a part of the child's family, prebirth conduct should be considered. *See generally* Spitko, *supra* note 5, at 104-05 (arguing that marriage indicates the mother's prior consent to coparenting; a similar argument could be made with respect to coparenting plans made by an unmarried couple during pregnancy). I would be inclined to count prebirth conduct for the sake of protecting the father's emotional investment and attachment to the developing child. However, evidence of abusive behavior or the mother's lack of consent to coparenting at the time of birth should mitigate the weight given to that investment, regardless of the parents' marital status.

14. *See infra* subpart II.B.1.

15. *Lehr*, 463 U.S. 248.

the birth.[16] She married another man, and the new couple petitioned for a stepparent adoption when the child was just over two years old.[17] In the meantime, Lehr had been searching for the child. He hired private investigators, filed a petition for a declaration of paternity, and sought visitation rights.[18] Despite knowing of these efforts, the mother, stepfather, and judge finalized the adoption without giving Lehr notice of the proceeding.[19] At the time, the law did not allow a child to have more than two parents, so adoption by the stepfather necessarily terminated any claim Lehr might have had to the child.[20]

When he eventually appealed this decision to the Supreme Court, Lehr lost because he had never established an actual, day-to-day, family relationship with his genetic child.[21] Endorsing portions of a dissent from a prior case, the *Lehr* Court adopted the view that "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring."[22] Even though Lehr went to some lengths to try to establish a relationship with the child, the Court found his ultimate failure determinative. By dismissing Lehr's efforts, the Court raised the possibility that an unwed mother has the chance, immediately after birth, to exercise a de facto veto over the father's ability to establish parental rights.[23]

The *Lehr* Court, however, left an important ambiguity in its analysis, one that remains unresolved. The ambiguity goes to the heart of the question of what the Constitution protects when it protects parental rights: does the Constitution protect only *existing* relationships that go beyond genetics and constitute full-fledged

16. *Id.* at 269 (White, J., dissenting).

17. *Id.* at 250 (majority opinion).

18. *Id.* at 252, 268-69 (White, J., dissenting). The adoption petition may have been precipitated by Lehr's efforts to contact Robertson about the child. *Id.* at 269. These facts describing Lehr's efforts are drawn from the *Lehr* dissent and were largely ignored by the majority. The majority, however, was obligated to accept Lehr's version of the facts since the case had been decided in the state courts without any factual hearing. *Id.* at 253 (majority opinion) (stating that Lehr's petition was denied after "written and oral argument").

19. *Id.* at 250; *id.* at 268-69 (White, J., dissenting). This paragraph and the following one are drawn largely from my summary of *Lehr* in a prior article *See* Hendricks, *Essentially a Mother*, *supra* note 1, at 439-40.

20. *Lehr*, 463 U.S. at 270 (White, J., dissenting).

21. *Id.* at 260–62 (majority opinion).

22. Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting) (endorsed by the *Lehr* majority, 463 U.S. at 259-60).

23. *Id.* at 397 (suggesting that the mother could "place a limit" on the father's claim, a suggestion that was endorsed by the *Lehr* majority, 463 U.S. at 260 n.16).

parenting, or does the Constitution also protect a genetic father's *opportunity* to form such a relationship with the child?[24] This question has important implications for the dynamic between the mother and father. In one interpretation, the mother controls access to the child and can therefore decide whether a protected relationship with the father ever comes into existence. In the other interpretation, the state is constitutionally required to compel the mother to make the child available to the father.

The first interpretation finds support in the Court's clear focus, in *Lehr* and other cases, on the presence or absence of a caretaking relationship between the father and the child.[25] That focus is consistent with the modern, child-centered perspective on parental rights.[26] Moreover, based on the evidence described in the various opinions in *Lehr*, it is hard to say that Jonathan Lehr was at fault in any meaningful way for his failure to have a relationship with his genetic daughter.[27] Therefore, *Lehr* could stand for the proposition that the genetic fathers' rights depend solely on whether he has formed a sufficient relationship with the child, regardless of the reason why or why not.

On the other hand, some of the Court's language focuses on the father's personal culpability, and the Court managed to find fault even

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24. David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 758-69 (1999). *Lehr* strongly implies that the father's "opportunity interest" is protected by procedural due process, meaning that he is entitled to a fair chance to demonstrate that he has satisfied the biology-plus-relationship test. The question is whether genetic fatherhood alone establishes a substantive right, enforceable against the mother, to an opportunity to satisfy the relationship prong of the test.

25. *See id.* at 763-64 (discussing this interpretation of the cases).

26. *See generally* Scott A. Altman, *The Pursuit of Intimacy and Parental Rights*, *in* THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 305, 306 (Andrei Marmor ed., 2012) ("Parental rights are acknowledged, if at all, as derivative—usually as legal entitlements created to protect children's interests . . . or as bribes necessary to induce parents to care for children."); Mary Patricia Byrn & Jenni Vainik Ives, *Which Came First the Parent or the Child?*, 62 RUTGERS L. REV. 305, 329-42 (2010) (arguing that the state is obligated to define parentage according to the best interests of children). *But see* Barbara Bennett Woodhouse, *"Who Owns the Child?"* Meyer *and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992) (presenting a historical analysis that challenges family law's claim to prioritize children's interests); *id.* at 1001 ("Stamped on the reverse side of the coinage of family privacy and parental rights are the child's voicelessness, objectification, and isolation from the community.").

27. *See Lehr*, 463 U.S. at 269 (White, J., dissenting) (describing the mother's efforts to prevent Lehr from establishing a parental relationship, including concealing her whereabouts, rejecting offers of financial assistance, and threatening to have Lehr arrested if he tried to visit).

with Jonathan Lehr.[28] Despite his other efforts, Lehr failed to do the one thing that would have gained him at least some rights under state law: send a postcard to the state's "putative father" registry, asserting his paternity.[29] By highlighting this technical failure, the Court lent support to the position that a father's rights turn not on the existence or nonexistence of a relationship with the child but on whether he is *at fault* for the lack of relationship.[30] If he did all that he could to *try* to form a relationship, perhaps he can claim parental rights even if he failed. *Lehr* thus provides some support for the second, more expansive interpretation of genetic fathers' rights. In this view, the genetic relationship by itself creates a substantive entitlement to the child.

This second, broader reading of *Lehr*, which creates a genetic entitlement for fathers, should be rejected in favor of protecting actual, established relationships. Moreover, the mother's actual, established relationship at the time of birth should also be protected, meaning that the state should not impose an additional parent (genetic father or otherwise) without her consent.

While this Article argues against genetic entitlement primarily on feminist policy grounds, it is worth noting that the better reading of *Lehr* points in the same direction. The state law regime upheld in *Lehr* did not create a genetic entitlement to parental rights even for fathers who were completely without fault, even fault of the technical, procedural kind. Sending a postcard to the putative father registry would *not* have guaranteed full parental rights for Jonathan Lehr. Instead, he would have been entitled only to be heard at the hearing on whether the adoption was in the child's best interests.[31] By approving

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28. *See* Meyer, *supra* note 24, at 764-65 (noting passages in which the Court's language emphasizes fault).

29. *Lehr*, 463 U.S. at 250-51 (majority opinion). It is possible that rather than overlooking the putative father registry, Lehr intentionally failed to register, perhaps to avoid child support obligations. That motive, however, seems inconsistent with his other efforts to obtain legal paternity.

30. *See id.* at 264 ("[I]f qualification for notice [of adoption] were beyond the control of an interested putative father, [New York's adoption laws] might be thought procedurally inadequate. Yet, as all of the New York courts that reviewed this matter observed, the right to receive notice was completely within [Lehr's] control.").

31. *Id.* at 251 n.5 (quoting N.Y. DOM. REL. LAW § 111-a (McKinney (2016)). Elizabeth Buchanan writes that this statutory scheme "reflected a common assumption about *Stanley*," in that it assumed that *all* unwed fathers had the right to full procedural protections, even if they did not have an established, custodial relationship, but also that the claims of *all* unwed fathers could be evaluated under the best interests standard, rather than parental fitness. Elizabeth Buchanan, *The Constitutional Rights of Unwed Fathers Before and After*

this regime, the Court allowed the genetic father's rights to be significantly weaker than full parental rights.[32] The first, narrower interpretation of *Lehr* is thus the better reading of the case because it applies to full-blown parental rights: they do not attach until the father establishes a relationship with the child.[33] Before that point, the genetic father has an "inchoate interest" in his possible relationship with the child; that interest is entitled to the protections of procedural due process, but it does not appear to qualify as a "fundamental right" comparable to full-blown parental rights.[34] Accordingly, for the remainder of this Article, I will refer to the "*Lehr* regime" as a regime in which a genetic father has a right to fair procedures that would allow him to prove biology-plus-relationship but in which he has no automatic, genetic entitlement to access to the child.

To recap, the *Lehr* regime, as I have interpreted it, is as follows:

- *Full-blown parental rights.* An unwed, genetic father has full-blown parental rights to his child if and only if he has met the biology-plus-relationship test by establishing a caretaking relationship with the child. (How much caretaking is required to establish this relationship is unknown.)

Lehr v. Robertson, 45 OHIO ST. L.J. 313, 330 (1984). To the contrary, Buchanan points out "[i]t was his custody of the children, not his biological connection alone, that gave him a constitutional interest, but that interest was of the same stature as that of any other custodial parent." *Id.* The best interests interpretation of *Lehr* is supported by Justice Stevens's opinion in *Michael H. v. Gerald D.*, in which he reasoned that the rights of the "adulterous" father (in the plurality's phrasing) were adequately protected by the opportunity for a best interests hearing on the question of visitation. 491 U.S. 110, 135 (1989) (Stevens, J., concurring). Note, however, that when an unmarried father meets the biology-plus-relationship test, the appropriate standard under *Stanley* is unfitness, not best interests.

32. *Lehr*, 463 U.S. at 267-68 ("If one parent has an established custodial relationship with the child and the [o]ther parent has . . . never established a relationship, the Equal Protection Clause does not prevent a state from according the two parents different legal rights."). Note that this statement is limited to circumstances in which the child has an existing legal parent with an established relationship. If the child is otherwise parentless, the *Stanley* rule, imposing an unfitness standard, should usually apply even to a genetic father who has not yet met the biology-plus-relationship test.

33. *See also* Mark Strasser, *The Often Illusory Protections of "Biology Plus:" On the Supreme Court's Parental Rights Jurisprudence*, 13 TEX. J. ON C.L. & C.R. 31, 32 (2007) ("[T]he best understanding of the current jurisprudence is that the constitutional protections [for genetic fathers' rights] are much less robust than currently thought.").

34. *Lehr*, 463 U.S. at 265. If Jonathan Lehr did have a fundamental right in his potential relationship with his biological daughter, the state's regulations for invoking that right should have been subjected to at least some form of heightened scrutiny. *See* Troxel v. Granville, 530 U.S. 57, 65 (2000).

- *The inchoate interest.* A genetic father who has not met the standard for full-blown parental rights has an inchoate interest in his possible relationship with the child.[35] If he has made this interest known to the state, he may be entitled to notice of proceedings that affect the child's status and an opportunity to be heard on the child's best interests. This hearing is also his chance to present evidence that he has met the biology-plus-relationship test.

A final, important issue was left not only unresolved but virtually unaddressed in the Supreme Court's unwed father cases, and it has been similarly ignored in the state-level adjudication that has followed in their wake: If a state chooses to give the genetic father's claim more protection than the Constitution requires, how far can it go before it has impermissibly infringed on the mother's rights? The mother's claim to the child is established, with full constitutional protection, at the time of birth.[36] In Gary Spitko's apt words, she is the "initial constitutional parent."[37] According to the later decision in *Troxel v. Granville*, the state may not lightly overrule the child-rearing decisions of a fit parent; the parent's views must receive special weight.[38] It follows that awarding full parental rights to a genetic father may unconstitutionally invade the mother's preexisting rights. For example, the Supreme Court held that Jonathan Lehr did not have constitutionally protected parental rights to his genetic child. But suppose that the state law had given him parental rights anyway. Doing so would have entailed overriding the mother's parental rights, which were themselves constitutionally protected.

My interpretation of the *Lehr* regime gives substantially less weight than does current practice to the father's interest in his genetic offspring. While genetic connection is meaningful and important to many people,[39] it has been given too much weight in the law, at the expense of concrete caretaking relationships. As discussed below, courts not only have ignored the problem of the mother's rights but in

35. *Lehr*, 463 U.S. at 265.
36. *See* Hendricks, *Essentially a Mother*, *supra* note 1, at 443-44.
37. Spitko, *supra* note 5, at 99.
38. *Id.* at 68 ("special weight").
39. *See generally* June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1335-37 (2005) (discussing a child's interest in genetic forebears and arguing that "knowledge of genetic heritage is likely to play a role in shaping identity").

some states have imposed a duty on the mother to give the genetic father access to the child for the purpose of meeting the relationship requirement and acquiring parental rights.[40] Part III argues that such overrides of the mother's rights are subject to heightened scrutiny, and Part IV considers whether they can survive that scrutiny.

B. States' Responses

The biology-plus-relationship test had barely crystallized as precedent before it began to erode in the states. Two larger shifts in family formation put particular pressure on biology-plus-relationship as a definition of parenthood: (1) the popular and legal embrace of DNA technology as a prism for understanding both personal identity and family connections, a development I refer to as genetic essentialism,[41] and (2) an adoption crunch: decreasing supply, increasing demand, and a growing private adoption industry. These developments contributed to two opposing trends in states' responses to the unwed father decisions. On the one hand, the rise of genetic essentialism strengthened the perceived entitlements of fathers who have genetic but no other ties to their children.[42] On the other hand, when those fathers have low socioeconomic status and the children are sought for adoption, powerful forces push for effective means of cutting off fathers' rights.[43] These two forces, which push the law in opposite directions, have resulted in a patchwork of state approaches to the rights of unwed fathers, setting the stage for jurisdictional clashes when a woman becomes pregnant in one state but travels to another state to give birth and place the child for adoption. However, all of the states give more substantive rights to genetic fathers than

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40. *See infra* text accompanying notes 148-152.

41. This phrase refers to a phenomenon distinct from what is usually called "genetic determinism," meaning the belief that a person's fixed-at-birth genetic makeup determines important aspects of a person's fate. The related ideology of genetic essentialism is the belief that genetic makeup constitutes a person's true essence and thus that genetic connections are the most important determinants of family relationship. *Cf.* Bender, *supra* note 3. ("Genetic essentialism asserts that our genes and our DNA are the essence, the core, the most important constituent part of who we are as human beings; therefore genetics should overpower any other factor when defining biological parenthood. Genetic essentialism reduces human beings to the contents of our cells. It ignores the ways our cells and environments interrelate, the ways our physiological system functions as a whole organism, and the ways our minds and hearts affect our being. Additionally, genetic essentialism renders all our ways of nurturing and being nurtured by one another for naught.").

42. *See infra* subpart II.B.1.

43. *See infra* subpart II.B.2.

Supreme Court precedent requires. They do so at the expense of mothers' parental rights.

1. Genetic Essentialism and the Expansion of Fathers' Rights

The Supreme Court barely had refashioned the law of parentage to accommodate men's unique biology when the possible routes to biological and social parenthood themselves began to multiply. The Supreme Court's articulation of the biology-plus-relationship test overlapped with the beginnings of the reproductive technology industry in the United States: the first "test tube baby," conceived through in vitro fertilization, was born in 1978, just five years before *Lehr*.[44] The expansion of reproductive technology facilitated the commodification of each part of the reproductive process, including genes. Rather than diminishing the importance of genetic parenthood, however, commodification has been accompanied by an emphasis on genes as the essence of parenthood.[45] I refer to this conception of parenthood as genetic essentialism.[46]

The increasing cultural commitment to genetic essentialism may explain why every state gives more rights to genetic fathers than the

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44. Walter Sullivan, *First 'Test-Tube' Baby Born in U.S., Joining Successes Around World*, N.Y. TIMES, Dec. 29, 1981, at C1.

45. *See* Hendricks, *Essentially a Mother*, *supra* note 1, at 475-76. There is a seeming contradiction between social and legal acceptance of the commodification of gametes and judicial reliance on gametes as the default definition of parenthood. If your gametes define your parental status, why can you buy and sell them when you cannot buy or sell your child? One possibility is that the fact that gametes can be sold enhances rather than detracts from their perceived importance. Because they can be sold they can be owned, and our culture is highly respectful of people's rights concerning things they own. For example, in *Perry-Rogers v. Fasano*, 715 N.Y.S.2d 19, 21 (N.Y. App. Div. 2000), a fertility clinic had mistakenly implanted an embryo made from the Perry-Rogers's gametes into Donna Fasano, resulting in a pregnancy. In the ensuing custody fight, the court indicated that the fact that the genetic parents *did not* sell their gametes to Donna Fasano would cut against any custody claim by Fasano. *Id.* at 24. The gametes were transferred to Fasano's body, but somehow they remained the property of the Perry-Rogers's and had to be returned, even in their new form. This view of the process is also reflected in the language of surrogacy brokers, who speak of the surrogate as "giv[ing] the baby '*back*' to the [genetic] father, as if it came from him in the first place." ROTHMAN, *supra* note 4, at 34-41. Ownership of gametes translates into ownership of the resulting child.

As Katharine Baker points out, even the unwed father cases, despite their emphasis on relationships, relied on genes as an alternative to marriage for giving men a path to parenthood. *See* Katharine K. Baker, *Legitimate Families and Equal Protection*, 56 B.C. L. REV. 1647, 1649 (2015).

46. *See supra* note 41 (defining genetic essentialism).

Supreme Court has required.[47] All the Supreme Court has clearly demanded is that fathers be recognized as legal parents if they have established caretaking bonds with their genetic children. While all states must (in theory) honor parental rights in those cases, no state limits fathers' rights to only this scenario.

First, all states recognize some form of the marital presumption in which a husband receives automatic parental rights to his wife's child.[48] The only way the wife can prevent operation of the presumption is to prove genetic nonpaternity.[49] In effect, marriage to the child's mother automatically satisfies the "relationship" prong of the biology-plus-relationship test, regardless of the nature or even the existence of a relationship with the child.[50]

Second, outside of marriage, the mother can consent to the father's Voluntary Acknowledgement of Paternity, which has effects similar to the marital presumption.[51] If the mother does not consent, however, all states allow a man to petition to establish paternity and will grant the petition under most circumstances so long as genetic fatherhood is shown.[52] States also routinely impose legal paternity

47. Strasser, *supra* note 33, at 32, 59-75 (arguing that "constitutional protections [for unwed fathers] are much less robust than currently thought" and canvassing states' laws).

48. LESLIE JOAN HARRIS, JUNE CARBONE & LEE E. TEITELBAUM, FAMILY LAW 865 (5th ed. 2014) ("In all states a child born to a married woman is at least rebuttably presumed to be the child of her husband."). For example, the Uniform Parentage Act provides that a man is presumed to be the father of a child born during or within 300 days after his marriage to the mother. UNIF. PARENTAGE ACT § 204(a) (Nat'l Conference of Comm'rs of Unif. State Laws 2002).

49. UNIF. PARENTAGE ACT § 631(1) ("The paternity of a child having a presumed, acknowledged, or adjudicated father may be disproved only by admissible results of genetic testing excluding that man as the father of the child or identifying another man as the father of the child."). An exception is in Pennsylvania, where rebutting the marital presumption is even more difficult, requiring a showing of impotency, sterility, or nonaccess. Vargo v. Schwartz, 940 A.2d 459, 463 (Pa. Super. Ct. 2007).

50. *See* Quilloin v. Walcott, 434 U.S. 246, 256 (1978) (indicating that the mother's husband is presumed to satisfy the biology-plus-relationship test).

51. *See infra* notes 169-171 and accompanying text.

52. *See* ANN M. HARALAMBIE, 1 HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES § 3:7 n.27, Westlaw (database updated Dec. 2015) (collecting citations to state laws on the legal effect of genetic confirmation of paternity). The exception under the Uniform Parentage Act is that the genetic claim must be brought within the first two years after the birth and may be subject to a best interests determination if the child already has a presumed father. UNIF. PARENTAGE ACT §§ 606-08. Thus, again, the mother's only defense to a genetic father's claim is usually not her own parental rights, but those of an alternative father.

based solely on genetics, either at the behest of the mother or even on the state's own initiative over the mother's objection.[53]

Third, in the adoption context, many states give a known genetic father a veto over adoption regardless of whether he has a relationship with the child so long as he complies with various procedural requirements.[54] In states that require something more than a genetic tie to assert this veto right, the emphasis is overwhelmingly on financial support rather than on a caretaking relationship.[55]

Ordinarily, there is nothing wrong with states protecting rights more broadly than the federal Constitution requires. In doing so, however, they are not supposed to sacrifice *other* constitutionally protected rights.[56] Here, the other rights in question are the mother's parental rights.

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53. States frequently initiate paternity actions in order to seek reimbursement from the father of welfare benefits paid for the benefit of the child. The mother is required to assist with these efforts as a condition of receiving the benefits. *See generally* Deborah Harris, *Child Support for Welfare Families: Family Policy Trapped in Its Own Rhetoric*, 16 N.Y.U. REV. L. & SOC. CHANGE 619 (1987-1988) (arguing that the child support enforcement system is "fundamentally flawed"); Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029, 1043 (2007) (describing the welfare cost recovery system and arguing that it has a negative impact on family relationships and no significant benefit to the government).

54. *See* Ardis L. Campbell, Annotation, *Rights of Unwed Father To Obstruct Adoption of His Child by Withholding Consent*, 61 A.L.R.5th 151 (1998). This Annotation classifies cases based on the reason that the state relies on for denying the father's right to veto the adoption. For example, section 5 of the Annotation collects cases in which the state questioned the father's "degree of commitment." In these cases, commitment is overwhelmingly measured by legal filings and offers of financial support, rather than physical care of the child. Similarly, section 11 collects cases in which the mother allegedly interfered with the father's efforts to see the child or provide financial support, but the outcomes turn on the failure to meet formal, procedural deadlines rather than on an inquiry into the existence or nonexistence of a relationship with the child.

55. For example, Utah is regarded as among the states most hostile to unwed fathers' rights. *See* Brooke Adams, *Utah Dad Alleges 'Deceit,' Takes Fight for Son to Federal Court*, SALT LAKE TRIB. (Dec. 31, 2013, 6:11 PM), http://archive.sltrib.com/printfriendly.php?id=57332833&itype=cmsid (reporting claims of forum shopping by birth mothers and adoption lawyers). However, for infants under six months old, Utah law does not require any proof of a relationship with the child; in order to establish parental rights, an unmarried biological father must merely file an affidavit pledging financial support. UTAH CODE ANN. § 78B-6-121 (West 2016). While fathers have difficulty complying with the procedural requirement that the affidavit be filed before the mother relinquishes the child for adoption, the substance of the statute ignores the parent-child relationship in favor of the pocketbook definition of fatherhood. *See also* Campbell, *supra* note 54 (summarizing cases collected in A.L.R. Annotation).

56. *See generally* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (holding that allowing appellees to exercise state-protected rights of free expression was not infringement of appellant's property rights); Joy Milligan, *Religion and Race: On Duality*

State courts, however, have failed even to recognize that the mother has rights at stake, much less protect those rights. In one of the leading cases, *Adoption of Kelsey S.*, the California Supreme Court faced the question of whether the father's rights depend on the mother's willingness to give him access to the child.[57] As discussed above, the holding of *Lehr* strongly suggests that they do, but the Court's insistence on blaming Jonathan Lehr for his one procedural misstep obscured the issue.[58] Given this leeway, California took a different view, arguing that it would be "improper to make the father's rights contingent on the mother's wishes."[59] In this view, even in the context of infant adoption, a man's inchoate interest in his genetic child not only is protected from state interference but also grants him a legal entitlement against the child's mother. In effect, California held that a genetic father has automatic parental rights at the birth of a child, which he loses only if he abandons the child by willfully failing to establish a relationship. Under this approach, parental rights protect a form of genetic ownership rather than an existing relationship.

While all states have committed to genetic essentialism to some extent in their substantive law, not all states enforce this genetic entitlement to the same degree in the context of adoption. As discussed in the next subpart, proadoption policies compete with genetic essentialism and sometimes prevail in limiting the rights of genetic fathers.[60] Outside the adoption context, however, all states are willing to base legal paternity on genes alone, even if the unwed

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and Entrenchment, 87 N.Y.U. L. REV. 393, 445-48 (2012) (describing the Supreme Court's "benevolent neutrality" approach to the Religion Clauses, which allows "play in the joints" for states to create extra protections against the establishment of religion without necessarily violating the Free Exercise Clause or to give extra protection for the exercise of religion without necessarily violating the Establishment Clause). Although in both situations, expansions of the constitutional rights on one side do not necessarily violate the rights on the other side, the effect and potential diminishment must be considered.

57. Steven A. v. Rickie M. (Adoption of Kelsey S.), 823 P.2d 1216, 1220 (Cal. 1992). In *Adoption of Kelsey S.*, the genetic father tried to block his infant son's adoption. Under California's statutory scheme, an adoption could proceed on the mother's consent alone if the child lacked a "presumed father." Because acquiring presumed-father status required receiving the child into one's home—and the genetic father had not done so—the prospective adoptive parents argued that the adoption should proceed.

58. *See supra* text accompanying notes 15–30. *See generally* Meyer, *supra* note 24 (discussing the dilemma of the "faultless father" and the Supreme Court's failure to resolve that dilemma).

59. *Adoption of Kelsey S.*, 823 P.2d at 1229.

60. *See infra* subpart II.B.2.

mother objects.[61] Thus, while the unwed father cases could have established caretaking as the touchstone for parental rights, this approach largely failed to withstand the cultural commitment to genetic essentialism as the basis for abstract entitlements to children. States are not testing the boundaries of genetic fathers' rights, at least not by enforcing the relationship requirement. No state has made a relationship with the child a prerequisite for paternal rights. Instead, state courts assume that the father's inchoate interest in the child can legitimately overcome the mother's full-blown parental rights.[62]

The courts with the strongest commitment to men's genetic rights have also insisted that the only remedy for an adoption that violates the genetic father's constitutional rights *or* any additional statutory entitlements is to undo the adoption and place the child in the custody of the father.[63] This remedial strategy has resulted in public spectacles in which young children bear the traumatic costs of rulings that are almost certainly not compelled by the Constitution.[64] The children are treated as objects whose ownership by the competing adults is decided without reference to the children's interests or rights.

The last several decades have seen the commodification of reproduction and the rise of genetic essentialism. Both of these developments are marshaled in support of claims that mothers and fathers should have the same parental rights, even immediately after birth because they are biologically equal genetic parents.[65] In adhering to this view, the states have rejected the opportunity, offered by the unwed father cases, to protect concrete relationships rather than the abstract claims of genetics.

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61. As discussed below, a married mother has a better chance of success if she objects to sharing parental rights with a genetic father who is not her husband.

62. *See infra* text accompanying notes 148-152 (discussing courts' treatment of mothers' efforts to prevent genetic fathers from establishing relationships with children).

63. *See, e.g.*, *In re* Doe, 638 N.E.2d 181 (Ill. 1994) (ordering the removal of child from adoptive family because of improper termination of the genetic father's rights and holding that the best interests of the child were irrelevant to the decision); DeBoer v. Schmidt (*In re* Baby Girl Clausen), 502 N.W.2d 649 (Mich. 1993).

64. *See* Meyer, *supra* note 24, at 753 (describing, in heartbreaking detail, the removal of four-year-old "Baby Richard" from his adoptive family).

65. *But see infra* text accompanying notes 101-103 (discussing the fact that mothers make a greater biological contribution to the child, not only through gestation but also through a greater genetic contribution).

2. The Denigration of Low-Income Fathers and the Quest for Adoptable Infants

During the same period, however, an opposing trend has also emerged. Some state legislatures have cut back on the rights of genetic fathers, even pushing up against *Lehr*'s boundaries in some respects.[66] At least part of this pushback is attributable to the growth of the adoption industry and the relative scarcity of the healthy infants most sought by adoptive parents. To facilitate those adoptions, legislatures typically retain their ideological commitment to genetic parenthood in the substantive law but impose burdensome procedures that allow state courts, like the Supreme Court in *Lehr*, to blame unwed fathers themselves for losing their genetic entitlements by failing to follow the rules.[67]

Most of the Supreme Court's unwed father cases involved adoption, but the proposed adoptions in those cases were by the mothers' new husbands.[68] The consequences of a mistake regarding the genetic father's rights were therefore relatively minor. In *Lehr*, for example, the most likely consequence of reversal in the Supreme Court was that Lehr would have obtained visitation. Although the stepfather would have lost his status as a legal parent, the mother would still have had hers; practically speaking, the stepfather would have continued playing a role in the child's life. In contrast, undoing a third-party adoption is far more disruptive. In an adoption by legal strangers who will raise the child in place of the birth mother, the appearance of a genetic father after the fact is likely to result in heartache for all concerned.[69] This prospect puts pressure on the

66. Laura Oren, *Unmarried Fathers and Adoption: "Perfecting" or "Abandoning" an Opportunity Interest*, 36 CAP. U. L. REV. 253, 269-70 (2007) (noting states that passed stricter laws in response to high-profile adoption disruptions). In contrast, some of the highest profile subsequent cases in state courts have featured the birth mother and genetic father, on the same side, trying to undo a third-party adoption. *See* Strasser, *supra* note 33, at 58-75 (summarizing states' implementation of the unwed father cases); *infra* text accompanying notes 230-234.

67. *See infra* note 74 (discussing the role of state procedural requirements).

68. The exception is *Stanley*, in which the father sought custody of the children after the mother died. Stanley v. Illinois, 405 U.S. 645, 646 (1972).

69. Controversy exists over whether these disruptions cause substantial long-term harm to the children's development or happiness. *Compare In re* Doe, 638 N.E.2d 181, 186 (Ill. 1994) (McMorrow, J., concurring) ("No one would disagree with the view that children, especially those of tender years, should not be bantered about between biological and foster or adoptive parents. Delay damages the child, regardless of who is eventually awarded custody of the child. The parents, adoptive and biological, also suffer greatly and unnecessarily."), *with id.* at 368 (Heiple, J., denying rehearing) ("As for the child, age three,

system—from adopting parents and from agencies that serve them—to terminate the rights of genetic fathers efficiently and permanently.

That pressure is intensified by the low number of infants available for adoption. The Supreme Court began its revision of the rights of unwed fathers in 1972, just a year before *Roe v. Wade* provided more women with abortion as an alternative to adoption.[70] The contraceptive pill was widely available, and the stigma of unmarried motherhood declined rapidly, leading more women to conclude an accidental pregnancy with a child to rear rather than a child for adoption.[71] Despite misplaced rhetoric about the nobility of "saving" a child through adoption,[72] there is no question that adoption is a "seller's market." The rights of genetic fathers can be a substantial obstacle to maintaining supply in that market.

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it is to be expected that there would be an initial shock, even a longing for a time in the absence of the persons whom he had viewed as parents. This trauma will be overcome, however, as it is every day across this land by children who suddenly find their parents separated by divorce or lost to them through death. It will not be an insurmountable trauma for a three-year-old child to be returned, at last, to his natural parents who want to raise him as their own. It will work itself out in the fullness of time."). It is certainly plausible that most children are resilient enough to thrive in a loving home after a reversed adoption; certainly, children often do well after much worse. However, short-term effects also matter. To consider only long-term effects is to treat children as important only for the sake of the adults they will become, disregarding their experience *now* in a way that we do not when, say, calculating damages for an adult's emotional distress.

70. *Compare Stanley*, 405 U.S. at 658, *with* Roe v. Wade, 410 U.S. 113, 166-67 (1973).

71. George A. Akerlof & Janet L. Yellen, *An Analysis of Out-of-Wedlock Births in the United States*, BROOKINGS INST. (Aug. 1, 1996), www.brookings.edu/research/papers/1996/08/childrenfamilies-akerlof ("Before 1970, the stigma of unwed motherhood was so great that few women were willing to bear children outside of marriage.... Before the 1970s, unmarried mothers kept few of their babies. Today they put only a few up for adoption because the stigma of unwed motherhood has declined.").

72. *E.g.*, Erika Bachiochi, *Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights*, 34 HARV. J.L. & PUB. POL'Y 889, 925, 927 n.142 (2011) ("That adoption is not presently a compelling alternative for many women speaks far more to the ease with which liberal abortion laws enable women to dispense of their unborn children, thus enabling societal forces on the whole to neglect needed reforms to adoption laws, practices, and attitudes."); Lynn D. Wardle & Travis Robertson, *Adoption: Upside Down and Sideways? Some Causes of and Remedies for Declining Domestic and International Adoptions*, 26 REGENT U. L. REV. 209, 210 (2013) ("There are few government-regulated transactions that morally compare with the selfless, charitable, and compassionate act of responsible adults taking parentless children from foreign countries into their homes."). The Christian right promotes adoption as preferable not only to abortion but also to an unmarried woman keeping her child. *See* Kathryn Joyce, *Shotgun Adoption*, NATION (Aug. 26, 2009), https://www.thenation.com/article/shotgun-adoption (describing "a pattern and history of coercing women to relinquish their children").

For the most part, the measures that states use to overcome this obstacle work not by changing the underlying assumption of genetic entitlement; interestingly, even those who most seek to cut the father out of the process of newborn adoption do not question that he has rights to the child by virtue of genetics alone. Instead, they impose procedural requirements on a man's attempts to assert those rights; Lehr's misstep about the postcard is a case in point.[73] Other devices include short deadlines, constructive notice, and other legal technicalities unlikely to be fully understood or complied with by any but the most sophisticated or well-represented fathers.[74] The Uniform Parentage Act, for example, requires a man to register with the putative father registry within thirty days of the child's birth.[75] In this way, a substantive commitment to genetic entitlement can coexist with the imperative to sideline fathers in newborn adoptions: the substantive law enshrines genetic entitlement while arcane and burdensome procedures make it unlikely that young and/or low-income men will be able to claim that entitlement.[76]

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The cultural commitment to genetic essentialism entails viewing gametes, and thus children, as giving rise to an abstract entitlement that is weakly, if at all, grounded in caretaking relationships. This orientation pushes courts to recognize substantive entitlements for genetic fathers. On the other hand, valorization of adoption and the denigration of low-income fathers (and mothers) pushes legislatures to cut off fathers' rights efficiently in order to facilitate adoption. Broadly speaking, the states have reconciled these two impulses by adopting genetic entitlement as substantive law but creating

73. *See supra* note 29 and accompanying text (discussing *Lehr v. Robertson*, 463 U.S. 248 (1983)).

74. *See* Campbell, *supra* note 54, §§ 5-13 (collecting cases in which courts determined whether genetic fathers had complied with statutory requirements to entitle them to veto adoptions); *see also* Kevin Noble Maillard, *A Father's Struggle To Stop His Daughter's Adoption*, ATLANTIC (July 7, 2015), http://theatlantic.com/politics/archive/2015/07/paternity-registry/396044/ (stating that putative father registries "were designed primarily to protect adoptive couples and the children they bring home" and quoting a lawyer who says that the registry is "a 'check box' so the adoption can go ahead and get the pesky father out of the way").

75. UNIF. PARENTAGE ACT § 204(5) (Nat'l Conference of Comm'rs of Unif. State Laws 2002).

76. These mechanisms exist only to protect the future parental rights of adoptive parents; there are no similar mechanisms to protect a birth mother's exclusive parental rights because states do not acknowledge that a single woman can have such rights.

procedural mechanisms that cut off that entitlement in order to facilitate adoption.

The details, however, vary greatly by state, setting the stage for cross-jurisdictional conflicts. Adoption agencies are savvy about different states' laws and may advise birth mothers and prospective adopters to ensure that the birth takes place in a state with a narrow view of the rights of genetic fathers.[77] Agencies and lawyers also assist in avoiding or flouting the requirements of the Indian Child Welfare Act (ICWA), which governs jurisdiction and provides the substantive law for children who are eligible for tribal membership.[78] A few of the states with stronger protections for genetic fathers' rights have begun to push back, indicating their willingness to allow tort suits against agencies who place children for adoption across state lines.[79]

Cross-jurisdictional problems have led to some calls for a national system for determining the rights of genetic fathers, whether that be in the form of a national putative father registry or a national standard for the father's claim.[80] Most of the calls have rested on the premise that we need stronger protection for fathers' rights.[81] Reform of the system for establishing fatherhood, however, could also be an opportunity to reassert the importance of caretaking relationships and de-emphasize genetic entitlements. Whether state or national, the system should be founded on a robust theory of sex equality and parental rights, rather than the superficial equality and stealth patriarchy of genetic entitlement.

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77. *See* Adams, *supra* note 55 (describing reports of forum shopping by birth mothers and adoption lawyers).

78. Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963 (2012); *see* Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in* Adoptive Couple v. Baby Girl, 67 FLA. L. REV. 295, 304-05 (2015).

79. *See, e.g.*, Wyatt v. McDermott, 725 S.E.2d 555, 564 (Va. 2012) (recognizing a common law cause of action for tortious interference with parental rights against individuals, other than the mother, who facilitated adoption); *see* John A. Bluth, *Can an Unmarried Biological Father Recover His Child and Damages?*, 2002 UTAH L. REV. 577, 590-99.

80. *See* Strasser, *supra* note 33, at 82-83 (discussing proposals).

81. *See, e.g., id.* Adoption proponents also support a national registry. Megan Lestino & Erin Bayles, *NCFA's 2016 Policy Priorities and Adoption-Related Legislation*, ADOPTION ADVOC., Jan. 2016, at 1, 8-9 (detailing the NCFA's support for a "National Responsible Fatherhood Registry").

III. THE COST OF GENETIC ENTITLEMENT

"Stealth patriarchy?" Yes. Genetic essentialism masquerades as an ideology of sex equality in parenting. It does so by defining parenthood in male terms and acknowledging mothers as equal parents because, and only because, they meet the male-centered definition.[82] The historical antecedents of genetic essentialism were more explicit doctrines of male supremacy in reproduction, the echo of which appears in genetic essentialism's discounting of gestation. Genetic essentialism is the modern mask of a long-extant patriarchal ideology of reproduction.

For that reason, feminists should reject claims that sex equality requires a genetic definition of parenthood. As discussed in subpart III.A, the biology-plus-relationship test already accommodates men's unique biology to a greater extent than women have received any accommodation in the name of sex equality. The test therefore satisfies not only the anemic formal equality norm that governs most equal protection jurisprudence but also the substantive equality norms often championed by feminists.

Genetic essentialism is nonetheless attractive to many feminists for its superficial sex parity and for its policy potential. In recent years, feminist legal scholarship has taken a turn toward masculinities and the problems of men.[83] Although novel in its centering of masculinity, this scholarly turn is consistent with the history of sex equality litigation in the Supreme Court. Feminist litigators—most notably Ruth Bader Ginsburg—recognized early on that sexism could be perpetuated by laws that appeared on the surface to favor women.[84]

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82. *See infra* text accompanying notes 97-104.

83. *See, e.g.*, NANCY E. DOWD, THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE (2010); Jamie R. Abrams, *The Collateral Consequences of Masculinizing Violence*, 16 WM. & MARY J. WOMEN & L. 703 (2010); Richard Collier, *Masculinities, Law, and Personal Life: Towards a New Framework for Understanding Men, Law, and Gender*, 33 HARV. J.L. & GENDER 431 (2010); Martha Albertson Fineman, *Feminism, Masculinities, and Multiple Identities*, 13 NEV. L.J. 619 (2013); Ann C. McGinley & Frank Rudy Cooper, *Identities Cubed: Perspectives on Multidimensional Masculinities Theory*, 13 NEV. L.J. 326 (2013); Camille Gear Rich, *Angela Harris and the Racial Politics of Masculinity: Trayvon Martin, George Zimmerman, and the Dilemmas of Desiring Whiteness*, 102 CALIF. L. REV. 1027 (2014).

84. *See* Mary E. Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein & Tushnet's* Constitutional Law, 89 COLUM. L. REV. 264, 275 (1989) [hereinafter Becker, *Obscuring the Struggle*] ("Equal protection doctrine tends to regard discrimination against women and men as parallel (and equally troubling) events.... Like women, men may be constrained by stereotypes and social pressures.

In light of the role that ideologies of motherhood and fatherhood play in maintaining sex-based subordination, feminists are properly concerned with interrogating how the law treats fathers, and they are rightly troubled by legal regimes that discourage men from caring for children. In addition, many feminist family law scholars are rightly troubled by disproportionate regulation of low-income families, including the legal system's enthusiasm for removing children from poor families and placing them for adoption. To both of these problems, a regime of stronger legal rights for fathers sometimes appears as a possible remedy.

Feminists should be cautious, however, about invoking a patriarchal theory of parenthood in the service of feminist causes. Subpart III.B proposes a framework for evaluating the use of genetic entitlement to serve feminist ends. The key component of the framework is that it incorporates the *cost* of giving genetic entitlements to fathers. When state laws go beyond *Lehr* and *Stanley v. Illinois*[85] to protect genetic fathers' inchoate interests in children, they do so at the expense of mothers' established and fully constitutionally protected parental rights. The social interest in promoting male caretaking or protecting vulnerable families must be weighed against the infringement of women's parental rights.

A. Sex Equality (Expansively Considered)

First consider the question of what sex equality means in the context of conferring legal parenthood based on biological parenthood. The biology-plus-relationship test is manifestly consistent with even an expansive analysis under the formal, anticlassification approach that dominates equal protection doctrine.[86] Indeed, the test was designed to go beyond the requirements of formal equality and provide substantive equality for a man whose relationship with his genetic child approximated the caretaking

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Nevertheless, men tend to come out on top, which is not at all the same as being constrained and coming out on the bottom.").

85. 405 U.S. 645 (1972) (protecting the parental rights of an unwed father who had an established relationship with his children).

86. *See* Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 111-14 (1991) (describing the schism between the anticlassification (or "formalist") theory of equal protection and the antisubordination theory); *see also* Lauren Sudeall Lucas, *Identity as Proxy*, 115 COLUM. L. REV. 1605, 1612 (2015) (describing the anticlassification theory as the dominant doctrinal approach).

invested by a gestational mother.[87] Proponents of the rights of genetic fathers suggest, however, that the *Lehr* rule subordinates men to women, perhaps even amounting to a form of "male coverture," thereby invoking equal protection's other face, the antisubordination principle.[88] This subpart discusses each of these doctrinal issues in turn.

1. Does Formal or Substantive Equality Require Genetic Entitlement?

No. As a matter of formal sex equality, a genetic tie alone need not confer parental rights.[89] As the Supreme Court has held, the man with a merely genetic tie is not similarly situated to the woman who has given birth. He therefore need not be treated the same.[90]

Of course, the reason that question is so easy to answer is that the Supreme Court's sex equality jurisprudence is famously narrow, crabbed, and literal-minded in implementing the principle that like things be treated alike. Biological sex differences—usually construed as women's problematic deviations from the norm[91]—more often justify sex classifications than trigger scrutiny of them.[92] At a minimum, any purported sex classification that can be rephrased in formally sex-neutral terms—for example, "a 'parent' is a person who

87. *See* Hendricks, *Essentially a Mother*, *supra* note 1.

88. *See infra* text accompanying notes 113-130 (discussing the argument that the situation of unmarried men with respect to reproduction is analogous to coverture).

89. *But see* Mary E. Becker, *The Rights of Unwed Parents: Feminist Approaches*, 63 SOC. SERV. REV. 496, 501-03 (1989) [hereinafter Becker, *The Rights of Unwed Parents*] (arguing that formal equality can be manipulated to support either outcome).

90. Lehr v. Robertson, 463 U.S. 248, 259-60 (1983); Caban v. Mohammed, 441 U.S. 380, 392 (1979).

91. *See, e.g.*, Robert W. McGee, *Gender and the Ethics of Tax Evasion: An Empirical Study of 82 Countries* (April 14, 2014) (unpublished manuscript), http://ssrn.com/abstract=2424893 ("What makes women different from men? How are they different from men? Is female thinking becoming closer to male thinking as women gain equal rights and liberation?"). Note that in addition to serving as the norm, male thinking is assumed to be stable over time, unresponsive to social changes in gender relations.

92. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding male-only draft registration); Michael M. v. Superior Court of Sonoma Cty., 450 U.S. 464 (1981) (upholding statutory rape law that criminalized sex with an underage girl, but not sex with an underage boy); Dothard v. Rawlinson, 433 U.S. 321 (1977) (upholding the exclusion of women from certain jobs in prison); Geduldig v. Aiello, 417 U.S. 484 (1974) (upholding an employee benefits program that excluded disability coverage for pregnancy while covering almost all other medical conditions). *See generally* Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913 (1983) (identifying the "real differences" cases in which the Supreme Court perceived sex differences to arise from biology); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984) (same).

gestates and gives birth to a child"—should survive equal protection review.[93]

As I have previously pointed out, however, the Supreme Court adopted a more expansive approach to equal protection in the unwed father cases—conspicuously, the one area of law in which sex differences tend to accrue to women's advantage.[94] Through the biology-plus-relationship test, the Supreme Court has already accommodated men's biological limitations in producing children—i.e., their "difference"—creating the sort of accommodation that female plaintiffs have asked for but never received in a sex discrimination case.[95] In *Lehr* and its predecessors, the Court went out of its way to create a test for constitutional parenthood "in terms the male can fulfill."[96] The *Lehr* regime therefore satisfies not only the demands of formal equality (treating like things alike) but also those of substantive equality (giving comparable treatment to things that are comparable, even if not the same).

Some courts and scholars disagree, arguing that formal equality requires "equal rights" at birth for mothers and fathers, defined to be such by genetics without regard for the existence of a personal relationship with the child.[97] This argument implicitly adopts the purely genetic definition of parenthood, deeming mothers and fathers alike because they make equal genetic contributions to the child. It

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93. *Cf. Geduldig*, 417 U.S. at 496-97 n.20 (reasoning that a distinction between "pregnant women and nonpregnant persons" was not a sex classification under the Equal Protection Clause). If "pregnant person" is a gender-neutral category, then so is "gestational parent." Moreover, reports of *Geduldig*'s death have been greatly exaggerated. *Compare* Reva B. Siegel, *You've Come A Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in* Hibbs, 58 STAN. L. REV. 1871, 1891-97 (2006) (arguing that *Hibbs* requires *Geduldig* to be construed much more narrowly than it has traditionally been understood), *with* Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 551-56 (2009) (arguing that *Geduldig* and its statutory companion case, Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2012), influence interpretation of the Pregnancy Discrimination Act, bolstering judicial resistance to Congress's intent).

94. Hendricks, *Essentially a Mother*, *supra* note 1.

95. *Id.* at 441-44.

96. Nguyen v. INS, 533 U.S. 53, 67 (2001) (describing Congress's effort to allow male citizens to transmit citizenship to their foreign-born children).

97. *See, e.g.*, Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73 (2003); Michael J. Higdon, *Marginalized Fathers and Demonized Mothers: A Feminist Look at the Reproductive Freedom of Unmarried Men*, 66 Ala. L. Rev. 507, 532-34 (2015) (arguing that the situation of unmarried men with respect to reproduction is analogous to coverture); *see also* Becker, *The Rights of Unwed Parents*, *supra* note 89 (arguing that formal equality could be interpreted this way).

treats gestation and birth as irrelevant, except to the extent that gestation is evidence of genetic parenthood.[98]

Gestation is characteristically female,[99] and for that reason alone, feminists should be suspicious of arguments that discount it. Gestation is also, prima facie, a more substantial connection to a child than genetic makeup, and it has a far longer history as a basis for legal parenthood. In the vast majority of cases, the mother has gestated the child *in addition* to being one of the genetic parents. As Barbara Katz Rothman and others have demonstrated, disregarding gestation in the definition of parenthood is, literally, patriarchal; it is the "law of the father."[100]

Moreover, even assuming that the essence of parenthood entails the biological transmission of heritable traits, the claim that the mother's genetic parenthood is equal to the father's is factually incorrect. The woman who contributes the egg passes more DNA to the child than does the man who contributes the sperm because eggs contain both nuclear and mitochondrial DNA, while sperm contain only nuclear DNA.[101] In addition, heritable traits are transmitted not only by passing DNA through eggs and sperm but also by epigenetic changes to gene expression that occur during gestation (and after birth as a result of interactions with the environment).[102] Finally, the process of gestation also creates a two-way biological connection, not just one-way transmission, since cells pass between fetuses and their gestational mothers in both directions.[103] Gestation itself thus

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98. *See* ROTHMAN, *supra* note 4, at 36-37 ("Women do not gain their rights to their children [under patriarchy] as mothers, but as father equivalents, as equivalent sources of seed." (emphasis omitted)).

99. On the connections between sex, gender, and reproductive behavior, see *supra* note 1.

100. ROTHMAN, *supra* note 4, at 34-41.

101. *See* W. Nicholson Price II, Note, *Am I My Son? Human Clones and the Modern Family*, 11 COLUM. SCI. & TECH. L. REV. 119, 142-43 (2010) (discussing mitochondrial DNA and the common, incorrect belief that DNA exists only in the nucleus).

102. *See* Hendricks, *Not of Woman Born*, *supra* note 1, at 424 n.95.

103. *See* Gavin S. Dawe et al., *Cell Migration from Baby to Mother*, 1 CELL ADHESION & MIGRATION 19 (2007) ("Fetomaternal transfer probably occurs in all pregnancies and in humans the fetal cells can persist for decades.... Fetomaternal microchimerism may have important implications for the immune status of women, influencing autoimmunity and tolerance to transplants."); Nancy Shute, *Beyond Birth: A Child's Cells May Help or Harm the Mother Long After Delivery*, SCI. AMER. (Apr. 30, 2010), http://www.scientificamerican.com/article/fetal-cells-microchimerism/ ("Mother and child are engaged in a silent chemical conversation throughout pregnancy, with bits of genetic material and cells passing not only from mother to child but also from child to mother. Scientists increasingly think these silent signals from the fetus may influence a

intensifies the mother's greater genetic and biological relationship with the child.

I would not hang the legal definition of parenthood on the difference between nuclear and mitochondrial DNA. My point is that when proponents of parental "equality" at the time of birth seek to justify their position by reference to the science of DNA, they can do so only by systematically discounting not just gestation but any scientific information in support of the otherwise mundane observation that birth mothers make greater contributions to the creation of a child than do genetic fathers. The frequent rhetorical invocation of purported genetic equality between mothers and fathers is rooted in an ideology that is as impervious to fact as was the historical insistence on paternal superiority that has only recently and grudgingly given way.[104] The claim of equality between genetic fathers and gestational mothers at the time of birth is based on a male-centered definition of parenthood that is primarily ideological, only incidentally and selectively incorporating genetic science.

At the time of birth, genetic fathers are not similarly situated to gestational mothers. Formal equality therefore does not require that they be treated the same. Moreover, substantive equality has already been achieved by the biology-plus-relationship test, which allows genetic parents to acquire equal rights with gestational parents through means expressly tailored to men's biological limitations. Equality principles do not require paternal rights beyond those conferred by that test.

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mother's risk of cancer, rheumatoid arthritis and other diseases, even decades after she has given birth."). This phenomenon is the reason that scientists have been able to develop tests that use a blood draw from the mother, rather than amniocentisis, to diagnosis fetal genetic anomalies. *See* Jane E. Brody, *Breakthroughs in Prenatal Screening*, N.Y. TIMES: WELL (Oct. 7, 2013, 12:01 AM), http://well.blogs.nytimes.com/2013/10/07/breakthroughs-in-prenatal-screening ("[A]t around 10 weeks of gestation, about 10 to 12 percent of the DNA in a woman's blood will be fetal DNA from the placenta."). Conceivably, development of a fetus may also be affected by the presence, at the time of conception, of seminal fluid from a man other than the genetic father. *See* Angela J. Crean et al., *Seminal Fluid and Mate Choice: New Predictions*, 31 TRENDS IN ECOLOGY & EVOLUTION 253 (2016).

104. *See* ROTHMAN, *supra* note 4, at 36 ("When forced to acknowledge that a woman's genetic contribution is equal to a man's, Western patriarchy was in trouble. But the central concept of patriarchy, the importance of the seed, was retained by extending the concept to women." (emphasis omitted)); Hendricks, *Not of Woman Born*, *supra* note 1, at 418–26 (tracing the patriarchal ideology of reproduction from Aristotle to nineteenth-century preformationism to modern genetic essentialism).

2. Do Antisubordination Principles Require Genetic Entitlement?

Equal protection analysis is more than just a technical exercise in analyzing classifications, levels of scrutiny, and state interests; there remains a need to identify at least some element of class-based oppression in order to make a strong case that the principle of equality has been violated.[105] That is, the anticlassification theory and the antisubordination theory of equal protection continue to coexist. Moreover, despite the narrowness of existing doctrine, a feminist case can be made that the doctrine should be more expansive and should prohibit subordinating legal rules *even if* they satisfy both formal equality and some fact-specific version of substantive equality. Thus, this section discusses the question, posed by a few scholars, of whether the refusal to give men a genetic entitlement to their biological children wrongly subordinates men to women—whether it constitutes an unjust distribution of power.

Arguably, this question is not even a properly framed question in equal protection jurisprudence. The antisubordination theory of the Equal Protection Clause requires attention to historical context and lived reality; it does not ask whether particular doctrines prioritize one group or another in the abstract or in a particular decision.[106] The correct question is not "Does this law disfavor Group X in this particular decision?" but "Does this law contribute to the overall subordination of Group X in society?" The claim that men are subordinated to women in society overall is not plausible, which arguably ought to end any equal protection argument on this basis.[107]

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105. For example, in the litigation over same-sex marriage that ultimately led to *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), courts largely ignored or rejected the argument that bans on same-sex marriage were sex classifications that triggered heightened scrutiny on that basis, despite the fact that the bans quite clearly classified on the basis of sex. This failure was likely because the courts failed to see the connection between the marriage bans and the subordination of women. *See* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Andrew Koppelman, *Why the Sex Discrimination Argument Failed in California*, BALKINIZATION (May 23, 2008), http://balkin.blogspot.com/2008/05/why-sex-discrimination-argument-failed.html.

106. *See* West, *supra* note 86, at 112-13 (describing the antisubordination approach).

107. *See* Becker, *Obscuring the Struggle*, *supra* note 84, at 275 ("Sex discrimination subordinates women to men on a systemic basis in our society, but not vice versa."). One could also ask whether *Lehr* subordinates women to men by reinforcing stereotypes about gender roles in parenting. Subpart IV.A discusses this possibility by asking whether genetic fathers' rights should be expanded in order to combat those entrenched roles.

In addition, when one group has historically subordinated another, it is easy to confuse the loss of unjustly held power with "reverse discrimination." Indeed, many of the grievances articulated in the discourse about men's parental rights are readily identifiable as resentment about the loss of male power over women. This theme is most apparent in the literature of the self-described "men's rights movement," which is explicitly misogynist.[108] Even mainstream writing, however, uses rhetoric that connotes gendered anxiety about men's loss of power. For example, one scholarly argument for genetic entitlement to children is titled *Systematically Screwing Dads.*[109] In this construction, men who "lose" custody of children they have never met are "screw[ed]"—metaphorically fucked as if they were women.[110] A similar sense of sexual anxiety is conveyed by an article offering practice tips for lawyers in Alabama. The article is titled *The Putative Father Registry: Behold Now the Behemoth*, and it opens with this quotation:

> Look at the behemoth.
> What strength he has in his loins,
> What power in the muscles of his belly!
> Under the lotus plant he lies,
> Hidden among the reeds in the marsh.[111]

Here, the putative father registry itself is personified as a virile male who lies in wait threatening to cut off the genetic father's . . . well, let's just say his rights.[112]

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108. *See* Kelly Alison Behre, *Digging Beneath the Equality Language: The Influence of the Fathers' Rights Movement on Intimate Partner Violence Public Policy Debates and Family Law Reform*, 21 WM. & MARY J. WOMEN & L. 525, 542-43 (2015) (reporting that the Southern Poverty Law Center has classified several fathers' rights groups as misogynistic hate groups); Bethany M. Coston & Michael Kimmel, *White Men as the New Victims: Reverse Discrimination Cases and the Men's Rights Movement*, 13 NEV. L.J. 368, 373 (2013) ("[T]he Men's Rights movement has become a movement of re-appropriating power at all costs.").

109. Jeffrey A. Parness, *Systematically Screwing Dads: Out of Control Paternity Schemes*, 54 WAYNE L. REV. 641 (2008).

110. *See* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 4, 4 n.2 (1989) (stating that feminism analyzes the "relations . . . in which some fuck and others get fucked" and arguing that "[t]he lack of an active verb meaning 'to act sexually' that envisions a woman's action is a linguistic expression of the realities of male dominance").

111. Shirley D. Howell, *The Putative Father Registry: Behold Now the Behemoth*, 64 ALA. LAW. 237 (2003) (quoting *Job* 40:15, 16, 21).

112. *See, e.g.*, Mary A. Totz, Comment, *What's Good for the Goose Is Good for the Gander: Toward Recognition of Men's Reproductive Rights*, 15 N. ILL. U. L. REV. 141, 142 (1994) (analogizing a wife having an abortion to Lorena Bobbit cutting off her husband's penis with a kitchen knife). Note that the title of this piece suggests a retributive tit for tat in

These framings of men's grievances do not connote the loss of an emotional tie with a loved child. They connote anxiety about the diminishment of masculine power. They thus belie the claim that the *Lehr* regime—which not only satisfies the demands of formal equality but goes further, affirmatively accommodating men's biological disadvantage—violates an equality norm.

While the resonance of fathers' rights claims with explicitly antifeminist agendas is reason for caution, separate lines of argument may support expanding paternal rights from a feminist perspective. At least two feminist scholars, Martha Davis and Michael Higdon, have argued that the current rules for establishing fatherhood are a form of coverture, analogous to the legal nonpersonhood of married women at common law.[113] Their work expresses two kinds of feminist concern for fathers' rights.

First, feminists worry that the narrow scope for fathers' rights at birth is a reflection of gender stereotypes.[114] A woman, after giving birth, is automatically a legal mother; if fatherhood remains optional or even nonautomatic, the implication is that children are women's responsibility.[115] Many feminists fear that the legal system not only reflects that stereotype but further entrenches it by discouraging or even preventing men from engaging in caretaking.[116] In subpart IV.A, I discuss this concern and argue that giving men greater legal power vis-à-vis their female intimate partners is not the optimal feminist response to this fear.

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which women should be made to share what they have wrongly hoarded from men, or live by rules from which they have been inexplicably exempt.

113. Davis, *supra* note 97; Higdon, *supra* note 97, at 532-34.

114. *See* Higdon, *supra* note 97, at 535-38.

115. *See, e.g.*, Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415 (1991) (expressing this interpretation of the law).

116. This concern arises in a larger context of feminist concern about the rise of neomaternalism, referring to a cultural and political phenomenon that "invokes an image of women [as mothers] who seek to extend their domestic concerns into the public realm." Naomi Mezey & Cornelia T.L. Pillard, *Against the New Maternalism*, 18 MICH. J. GENDER & L. 229, 243 (2012); *see also* Melanie B. Jacobs, *Parental Parity: Intentional Parenthood's Promise*, 64 BUFF. L. REV. 465 (2016) (arguing that intent-based definitions of parenthood would promote greater parity not only with respect to gender but also with respect to class, sexual orientation, and marital status); Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 FLA. ST. U. L. REV. 645, 688-92 (2014) (discussing feminist concerns about the new maternalism in the context of an argument for a labor and intent theory of parental rights).

Second, Higdon argues that parentage law is an instance of "governance feminism" in the sense criticized by Janet Halley.[117] Briefly stated, the relevant aspect of the critique is that feminism has won some of its legal battles, gained power in the legal establishment, and in due course abused that power at times.[118] This critique overlaps somewhat with intersectional concerns that feminist power may be used, in particular, to the detriment of men who have relatively less social power, due to identity characteristics, feminist-inspired legal rules, or other factors.[119]

The historical development of parentage laws raises some doubt that Halley's narrative of governance feminism applies to the law as it now exists. The cases in point for the governance feminism critique are the fields of law in which feminism has united with the forces of the carceral state (rape and domestic violence)[120] or the sex panic of puritanical institutions (Title IX enforcement).[121] In contrast, the unwed father cases remain a backwater of legal doctrine and have not been prominent on any feminist law reform agenda.[122] This is not plainly a field in which feminists have gained enough power to be at risk of abusing it or of having feminist reforms co-opted in the service of other agendas.[123] The law of unwed fathers' rights has not been a

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117. Higdon, *supra* note 97, at 531-38 (discussing JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM (2006)).

118. *See* HALLEY, *supra* note 117, at 20-22 ("If you look around the United States, Canada, the European Union, the human rights establishment, even the World Bank, you see plenty of places where feminism, far from operating from underground, is running things.").

119. *See* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 599-601 (1990) ("[F]or black people, male and female, 'rape' signified the terrorism of black men by white men, aided and abetted . . . by white women.").

120. *See* Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581 (2009); Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741 (2007).

121. Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. FORUM 103 (2015).

122. There is no identifiable feminist movement focused on protecting women's parental rights in the way that there are legal and political movements to combat domestic violence and sexual assault. "Today, the unwed father cases are a mere footnote to the story of the constitutional equality revolution." Serena Mayeri, *Foundling Fathers: (Non-) Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292 (2016). Feminists did not participate significantly in the early unwed father litigation (in part because of dissension within the ACLU over how the cases would affect women), and "[t]he Court's discussions bore the ideological imprint of the divorced fathers' rights and traditional family values movements more than of feminism." *Id.* at 2338-40, 2378-81.

123. This is not to say that rape, domestic violence, sexual harassment, and sexual assault are not serious problems in need of continuing feminist intervention. It is possible for all three of the following statements to be true simultaneously: feminists sometimes abuse

target of feminist reform and exists largely in its unreconstructed, prefeminist state. To the extent that feminist ideals have influenced the current regime, it has been in the direction of expanding fathers' rights: sex equality principles are what led the Supreme Court to insist that unmarried parents who both care for their children are equally situated regardless of sex.[124] Similar (though, I would argue, misguided) equality principles have influenced states to go even further, in the direction of genetic entitlement.[125] To the extent that the current system arguably favors women over men, that bias is more likely attributable to old-fashioned gender norms than to feminist reforms.

My argument here, however, is more vulnerable to the governance feminism critique. I support a narrow version of the *Lehr* regime, as I have described it, which would be a substantial contraction of fathers' rights when compared to the genetic entitlement that has taken hold in the states over the last fifty years. It is a strong claim of female prerogative over reproduction. In addition, because marriage is increasingly concentrated in the upper classes, any contractions of unwed fathers' rights under *Lehr* will generally fall on low-income men.[126]

I might offer the rejoinder that the question here is the allocation of power between mothers and fathers, such that any loss experienced by low-income men is a gain to low-income women. This is partly true. But as Bethany Berger has compellingly argued, current limits on fathers' rights are part of a system of rules that denigrate low-income fathers *and* mothers, largely but not exclusively in favor of the interests of adoptive parents.[127] My deeper response, set out in subpart IV.B, is that expanding fathers' rights is not the best solution to this problem. After all, low-income men are often denied the patriarchal privilege of genetic entitlement by means of procedural and financial

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power; feminism is sometimes co-opted; and old-fashioned, rape-and-pillage sexism still exists.

124. Caban v. Mohammed, 441 U.S. 380, 388-89 (1979).

125. *See* Steven A. v. Rickie M. (Adoption of Kelsey S.), 823 P.2d 1216 (Cal. 1992); *see also supra* subpart II.B.1 (discussing states' commitment to genetic entitlement).

126. The regime discussed here is applicable primarily to unmarried parents; for married couples, the law generally presumes that the mother's husband is the father, and he acquires rights at birth. Marriage thus continues to serve as the approved legal mechanism for connecting men to children. The Supreme Court, however, has suggested that the biology-plus-relationship may apply to all fathers; married fathers are simply presumed to have satisfied it. Quilloin v. Walcott, 434 U.S. 246, 256 (1978).

127. Berger, *supra* note 78, at 343–50.

barriers; strong substantive rights hardly matter if those rights can rarely be exercised.[128] Instead, the law could protect birth mothers from genetic claims to the same extent that some states now protect adoptive parents, and it could do much more to eliminate undue pressure on birth mothers to place their children for adoption.[129] Ultimately, my argument here is that any proposal for expansive fathers' rights must reckon with the *cost* of that expansion, which is a decrease in mothers' rights. That cost may in some circumstances be worth paying, but it should not be ignored, least of all by feminists.

In Halley's terms, then, this Article is feminist in that it posits an *m/f* divide, opposes a legal regime that sets *m>f*, and carries a brief for *f*.[130] The brief, in this case, is that a false, superficial theory of equality in parenthood is serving to obscure the sacrifice of gestational mothers' rights in the service of other goals, both feminist and otherwise. As discussed in the next section, that sacrifice must be justified, just like any other sacrifice of individual rights for the advancement of social interests.

B. Accounting for the Cost of Genetic Entitlement

A woman who has just given birth has full-blown parental rights protected by the Constitution. Moreover, unless and until the genetic father meets the biology-plus-relationship test,[131] she is the *only* person who has such rights regarding that child. If the state seeks to grant custodial or other parental rights to another person, against her will, it must justify its disregard for her parental decision under constitutional standards. In this respect, she stands in the same position as the single mother whose rights the Supreme Court upheld in *Troxel v. Granville*, the Court's most recent foray into the scope of

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128. Indeed, many proposals that seek to strengthen fathers' rights focus on procedural bars. *See, e.g.*, Strasser, *supra* note 33 (proposing a national registry and DNA tracking, as well as expanded substantive rights).

129. *See, e.g.*, Maya Manian, *Minors, Parents, and Minor Parents*, 81 MO. L. REV. 127 (2016) (arguing that the laws of abortion and adoption, as applied to pregnant minors, function to punish girls' sexuality and enforce a traditional gender script); Elizabeth J. Samuels, *Time to Decide? The Laws Governing Mothers' Consents to the Adoption of Their Newborn Infants*, 72 TENN. L. REV. 509 (2005); Malinda L. Seymore, *Sixteen and Pregnant: Minors' Consent in Abortion and Adoption*, 25 YALE J.L. & FEMINISM 99 (2013).

130. *See* HALLEY, *supra* note 117, at 17-20 (setting out a definition of feminism that culminates in "[c]arrying a [b]rief for f").

131. Recall that the biology-plus-relationship test is effectively satisfied if the parents are married. *See Quilloin*, 434 U.S. at 256.

parental rights.[132] *Troxel* therefore provides the appropriate framework for evaluating state laws that give genetic entitlements to fathers who have not met the biology-plus-relationship test.

Jenifer and Gary Troxel had a son named Brad. Brad married and had two daughters. When he separated from his wife, Tommie, he moved in with his parents, so Jenifer and Gary saw their two granddaughters frequently during weekend visitation. Two years after the separation, Brad committed suicide. At first, Tommie kept bringing the girls to see the Troxels frequently, but eventually she told them she was going to cut back to monthly visits, apparently because she was marrying a man who also had children from a prior marriage and she wanted the girls to spend more time with the new family.[133]

The Troxels sued for a visitation order. They asked for two weekends per month and two weeks in the summer. Tommie offered one day a month. The judge thought it was good for the kids to spend time with their grandparents, that the girls would benefit from seeing their cousins more, and that they should have access to some unspecified musical opportunities at the Troxels' house. Applying the "best interests" standard, he ordered one weekend a month, one week in the summer, plus the grandparents' birthdays.[134]

The U.S. Supreme Court struck down that order, holding that the judge had gone too far in second-guessing Tommie's decisions.[135] The views of the parent, said the Court, must receive "special weight" in a dispute over custodial arrangements.[136] Although the trial court had applied the familiar "best interest of the child" standard, that standard properly applies only in disputes between adults who each have equal claim to the child (such as custody disputes between legal parents).[137] A stronger constraint applies when the government intervenes in an existing family over the objection of the parent, even when it intervenes on behalf of the grandparents.[138] The state cannot overrule the parent based solely on a disagreement about the child's best

132. 530 U.S. 57 (2000).
133. *Id.* at 60-61.
134. *Id.* at 61.
135. That majority consisted of a four-justice plurality, with Justices Souter and Thomas concurring in the judgment.
136. *Troxel*, 530 U.S. at 69-70.
137. *Id.* at 69.
138. *Id.* at 69-70.

interests. It must, under *Troxel*, give special weight to the parent's decisions about her family.[139]

A postpartum woman and her infant are an existing family, and an unmarried woman who has just given birth is in a position similar to Tommie Granville's. She has fully protected parental rights, which she shares with no one. She is, in Gary Spitko's phrasing, "the initial constitutional parent."[140] The genetic father, on the other hand, is similar in some ways to a grandparent: He is a person the law recognizes as special with respect to the child, but he does not yet have constitutionally protected parental rights.[141] His access to the child is subject to the discretion of the existing legal parent. If the state wishes to override that discretion, it can do so only after overcoming the special weight owed to the parent's decision.[142]

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139. *Id.*

140. Spitko, *supra* note 5, at 99.

141. One difference is that the father's special status comes from the Constitution while the grandparent's is conferred by statute, so that grandparents do not have the same procedural rights, for example, to be notified before a newborn adoption. (There need not be a putative grandparent registry.)

Other people may also stand in this liminal space of being special with respect to the child and potentially eligible for full or partial parental rights. *See, e.g.*, LaShanda Taylor Adams, *(Re-)Grasping the Opportunity Interest:* Lehr v. Robertson *and the Terminated Parent*, 25 KAN. J.L. & PUB. POL'Y 31 (2015) (arguing that a parent whose rights have been terminated should be able to reestablish parental rights via the *Lehr* regime, when the child is still in foster care). Also, the law may well shift toward unbundling parental rights in ways that would allow for recognition of multiple degrees of relationship. *See, e.g.*, Pamela Laufer-Ukeles, *The Relational Rights of Children*, 48 CONN. L. REV. 741, 795-806 (2016) (proposing a three-tier system of formal primary parents, functional parents and secondary custodians, and tertiary kin relations, each with their own set of rights and responsibilities). *See generally* Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984) (arguing for legal recognition of familial relationships that children develop with caretakers outside the nuclear family); James B. Boskey, *The Swamps of Home: A Reconstruction of the Parent-Child Relationship*, 26 U. TOL. L. REV. 805 (1995) (proposing an unbundled system of rights); Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children To Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358 (1994) (discussing de facto parent-child relationships from a children's rights perspective).

142. The principle that the child can acquire an additional constitutional parent only with the cooperation of the existing parent is well-established in de facto parent doctrine, which recognizes that adding a parent necessarily compromises the rights of existing parents and therefore requires their cooperation. *See generally* William C. Duncan, *The Legal Fiction of De Facto Parenthood*, 36 J. LEGIS. 263, 264 (2010) (describing the rule that de facto parenthood requires consent of existing parents); Emily B. Gelmann, *What About Susan? Three's Company, Not A Crowd: The Importance of Allowing Third Parent Adoptions When Both Legal Parents Consent*, 30 WIS. J.L. GENDER & SOC'Y 57, 62 (2015) (describing the current legal status of de facto parenthood); Robin Fretwell Wilson, *Limiting the Prerogatives of Legal Parents: Judicial Skepticism of the American Law Institute's*

When a birth mother objects to a genetic father's request to establish parental rights, rather than give her objection this special weight, many courts turn the tables and treat the objecting mother as an unjust obstacle to the father's rights.[143] They take a fill-in-the-blanks approach to parentage,[144] which contemplates a child's birth certificate as having two blank spaces, one for "mother" and one for "father," which can be filled independently of each other. For example, in a case involving a dispute over a surrogacy contract, the California Supreme Court asserted that recognizing any rights in the surrogate would unfairly "diminish" the other woman's role as mother.[145] This focus is telling. At no point did the court express concern that the surrogate's claim could diminish the father's status; only the mother was seen as affected. Similarly, in several of the unwed father cases, the Supreme Court perceived a contest between two potential fathers—the genetic father and the stepfather—rather than, more properly, one between the genetic father and the birth mother.[146] Courts have since become more accustomed to same-gender pairs of parents, but they still seem to think of parents as coming in pairs. Even though *Troxel* itself protected the rights of a

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Treatment of De Facto Parents, 25 J. AM. ACAD. MATRIM. LAW. 477 (2013) (noting judicial skepticism towards ALI recommendations); Robin Fretwell Wilson, *Trusting Mothers: A Critique of the American Law Institute's Treatment of De Facto Parents*, 38 HOFSTRA L. REV. 1103 (2010) (criticizing the ALI's recommendations for de facto parenthood for lack of deference to mothers). Similarly, a birth mother's consent should be a precondition to anyone else, including the genetic father, acquiring rights to the child. Her consent is required both because she is the person charged with making decisions for and about the child and because legal recognition of another parent will diminish her ability to do so.

143. *See infra* text accompanying notes 148-152.

144. *Cf.* Fiona Kelly, *Autonomous Motherhood and the Law: Exploring the Narratives of Canada's Single Mothers by Choice*, 28 CANADIAN J. FAM. L. 63, 73 (2012) ("Adding a 'father' to [a single mother by choice] family is not understood as an intrusion because the family is perceived as having an inherent 'gap': the lack of a second parent."); Susan Frelich Appleton, *Parents By the Numbers*, 37 HOFSTRA L. REV. 11 (2008) ("Family law, as part of the larger prevailing culture, has enshrined the number two.") (focusing on whether children could have more than two legal parents).

145. Johnson v. Calvert, 851 P.2d 776, 781 n.8 (Cal. 1993) ("To recognize parental rights in a third party with whom the Calvert family has had little contact since shortly after the child's birth would diminish Crispina's role as mother."). *But see* Kristine Renee H. v. Lisa Ann R., 16 Cal. Rptr. 3d 123, 136 (Cal. Ct. App. 2004), *rev'd*, 117 P.3d 690 (Cal. 2005) ("The court's comment, however, was based on its belief that interjecting a third party would upset the child's stable, intact, and nurturing home. The *Johnson* court did not foreclose the possibility, in an appropriate case, of finding two parents of the same sex where only two parties are attempting to establish legal parentage.").

146. *See* Mayeri, *supra* note 122, at 2300-01, 2371.

single parent, courts rarely note any inherent problem with forcing a genetic father into a mother and child's life.[147]

Because of this preference for parents to come in twos, courts have largely been blind to the inherent diminishment of the unmarried mother's rights that is entailed in granting parental rights to the genetic father over her objection. When courts treat the child of a single mother as inherently in need of a second parent regardless of the mother's consent, they elevate the biological father's genetic connection to the child to such a degree that the diminishment of the mother's existing constitutional rights is not merely accepted but unacknowledged and unseen.

Far from respecting the decisions of the child's only constitutional parent, many courts are harshly critical of women who decline to share their pregnancies and children with genetic fathers. When Mary Burbach and Mary Ann Lamanna analyzed how courts talk about unwed mothers and fathers' rights, the most common theme they identified was "Lie/Deception" by the mother.[148] The second most common theme was "Rejected/Thwarted," referring to the mother's rejection of the father's efforts to establish a relationship with the child.[149] Burbach and Lamanna summarized the rhetoric of the opinions they studied as follows:

> The [Lie/Deception] cases all have something in common: explicit or implicit criticism of a biological mother's lying or other deception. While in these cases the biological fathers' lack of initial interaction with or interest in their children is legally significant, blame is often placed on the biological mother as well. The perception or reality that she had lied or deceived is addressed in these opinions, and it is not condoned.[150]

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147. Indeed, outcomes like *Lehr* can be explained by the fact that Robertson was not merely trying to exclude Lehr from the child's life but was offering a stepfather in his place. In that sense, commenters are correct to observe that the biology-plus-relationship test may serve as a mask for a traditional marriage-oriented theory of parenthood, even if traditional gender roles are not explicitly part of the test. *See* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 85 (1995) [hereinafter FINEMAN, THE NEUTERED MOTHER]; *cf.* Hendricks, *Essentially a Mother*, *supra* note 1, at 445-50 (arguing that the biology-plus-relationship test can and should be interpreted to promote sex equality, not traditional roles within marriage).

148. Mary Burbach & Mary Ann Lamanna, *The Moral Mother: Motherhood Discourse in Biological Father and Third Party Cases*, 2 J.L. & FAM. STUD. 153, 164 (2000).

149. *Id.* at 164, 171. The third most common was "Mother's Legal Status," which refers to a court's mentioning the fact that the mother's legal rights are established by the birth.

150. *Id.* at 171.

Similarly, in one of the Rejected/Thwarted cases, the court wrote that requiring a relationship with the child before awarding rights to the father would "make an unwed father's right to withhold his consent to adoption dependent upon the whim of the unwed mother."[151] As Burbach and Lamanna note, "It appears that the justices in this case find the unwed mother who rejects an unwed father just as objectionable as an unwed father who does not do his utmost to fulfill his parental duties."[152]

In their criticisms of deceptive or rejecting mothers, courts fail to examine their implicit assumption that the pregnant woman owes a duty to her former lover with regard to her pregnancy. Where could such a duty come from? Any claim of parental rights—even inchoate ones—is necessarily premised on the Fourteenth Amendment, or possibly the First.[153] But either amendment constrains only the state. Nothing in the Constitution compels a fit, constitutionally protected parent to give anyone else access to her child.[154] As the Idaho Supreme Court, seemingly alone among the states, has recognized:

> The fleeting opportunity may pass ungrasped through no fault of the unwed father or perhaps due to the interference of some private third party; nevertheless, once passed the unwed father is left without an interest cognizable under the Fourteenth Amendment. No violation of the Fourteenth Amendment lies unless "state action," not merely the actions of private persons, thwarts the unwed father's "grasp."[155]

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151. Burbach & Lamanna, *supra* note 148, at 172 (quoting Abernathy v. Baby Boy, 437 S.E.2d 25, 29 (S.C. 1993)). This passage is reminiscent of Justice White's dissent in *Doe v. Bolton*, 410 U.S. 179, 221 (1973) (White, J., dissenting), in which he objected to allowing abortion at "the convenience, whim, or caprice of the pregnant woman." The two passages share their readiness to assume that women make major life decisions about their families on the basis of irrational whim.

152. Burbach & Lamanna, *supra* note 148, at 172.

153. Although state law defines parenthood as an initial matter, after the *Lehr* line of cases, the boundaries of that definition are matters of federal constitutional law under both the Equal Protection and Due Process Clauses.

154. While other sources of law can give rise to additional duties, the very question here is whether the law may impose duties on the holder of a constitutional right that infringe on that right. Interestingly, there is a similar pattern in the context of abortion, in which those who disagree with public law outcomes (the legality of abortion and the relationships requirement as a firm prerequisite to parental rights) turn to private law, in an effort to establish a duty in tort that would reverse the public law outcome (by limiting access to abortion or by holding the mother liable for failing to provide access to the child). *See* Maya Manian, *Privatizing Bans on Abortion: Eviscerating Constitutional Rights Through Tort Remedies*, 80 TEMP. L. REV. 123 (2007).

155. Steve B.D. v. Swan (*In re* Steve B.D.), 730 P.2d 942, 945 (Idaho 1986) (citations omitted) (citing Buchanan, *supra* note 31).

The Idaho court's opinion correctly applied the state action rule to hold that a birth mother, exercising her constitutionally protected parental rights, cannot conceivably violate any Fourteenth Amendment rights of the genetic father. The father acquires similar rights only if he establishes a relationship with the child and doing so will ordinarily require the consent of the existing legal parent.[156]

In the absence of that consent, *Troxel* establishes that the state needs a stronger reason than its own view of best interests to interfere with the parent's decisions. The *Troxel* framework should extend to cover an unwed father's desire to establish a relationship with his genetic child. If the child's mother objects, the state may overrule her objection only in accordance with *Troxel*, by giving at least special weight to her view.

Of course, adopting the *Troxel* framework does not predetermine any outcomes, especially since *Troxel* itself suggested that special weight may turn out to be a lenient standard for state intervention.[157] A few current practices, however, are clearly inconsistent with the birth mother's *Troxel* rights. A court should not give automatic parental rights to the father based solely on a genetic entitlement. In addition, a court should not award parental rights to the father based solely on the court's own determination of the child's best interests. As in *Troxel*, the existing legal parent is charged with determining the child's best interests, and her determination is entitled to, at least, special weight; on some readings of *Troxel*, her determination can only be abrogated on a showing of harm to the child. A detailed articulation of the *Troxel* standard is beyond the scope of this Article; I argue only for something more than the current rule, which is that the mother's objection to the genetic claim counts for nothing.[158]

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156. The importance of the mother's consent to the child's acquisition of a new parent also explains why fathers may acquire parental rights through the marital presumption or through a Voluntary Acknowledgement of Paternity, even before they have established a relationship with the child. As Gary Spitko has explained, marriage is at least evidence of the mother's consent to coparent. Spitko, *supra* note 5, at 114. Similarly, a Voluntary Acknowledgement of Paterntiy signed at the time of birth requires the mother's consent.

157. *See* Emily Buss, *Adrift in the Middle: Parental Rights After* Troxel v. Granville, 2000 SUP. CT. REV. 279, 279-80 ("The central problem with the Court's decision in *Troxel* is not that it affords parents too much protection, as some have argued, or that it affords parents too little protection, as others have argued, but that it tries to have it both ways.").

158. Also beyond the scope of this Article is a full discussion of the role of genetic fathers in a legal regime that unbundles parenthood by acknowledging intermediate status between parent and legal stranger. For example, Pamela Laufer-Ukeles has proposed a three-tiered regime consisting of formal, primary parents with custodial and other traditional rights and responsibilities; secondary, functional parents or secondary custodians; and tertiary kin.

The deference that a *Troxel* standard would afford a single mother is similar to the deference that courts already give to married mothers by way of the marital presumption. When the mother is married and her husband is willing to claim the child as his own, courts will sometimes refuse even to consider genetic evidence from another man; the Supreme Court has upheld this practice even when the genetic claimant had previously lived with and cared for the child.[159] This disparity—an unmarried woman who objects to a man's genetic claims is characterized as fickle and deceitful, while a married couple who closes ranks against the wife's lover receives the law's protection—reveals that the current system's commitment is to the patriarchal family rather than to protection of parent-child relationships.

Application of the *Troxel* standard would better protect existing parent-child relationships, but my discussion so far has assumed that the standard would be applied case by case. Yet many scholars, courts, and legislators believe that two parents are better than one, and/or that children ought to have male parents involved in their lives, and/or that genetic relationships are extremely important.[160] Thus, lawmakers may be inclined to find that it is always harmful to a child to lack a relationship with her genetic father, even giving special weight to the mother's contrary view. They may therefore seek to make across-the-board determinations that would effectively reinstate genetic entitlement. In particular, many feminists argue for increased rights for genetic fathers in the service of feminist goals. My argument so far does not necessarily foreclose that possibility. This Article does not aim to establish that fathers should *never* receive legal recognition based on genes but to point out that there is a cost—paid in the currency of women's autonomy and their right to make decisions for their children—when the law gives an automatic genetic entitlement to men. In Part IV, I explore how that cost should be reckoned when set against the feminist goals of involving men in child-rearing and protecting poor families from exploitation.

Laufer-Ukeles, *supra* note 141, at 797-806. The discussion in the text assumes, without endorsing, that a genetic father claiming parental rights must be awarded either full parental status or nothing. *See supra* text accompanying note 141.

159. Michael H. v. Gerald D., 491 U.S. 110 (1989).

160. *See* sources cited *supra* note 144.

IV. FATHERS' RIGHTS AND FEMINIST AGENDAS

The remainder of this Article considers how feminist concerns about men and masculinity intersect with rules for fathers' rights. It assumes the framework described above: (1) If the genetic father has not met the biology-plus-relationship test, the gestational mother is the constitutional parent. (2) Under *Troxel*, the state should not be able to force her to share custody or accept another legal parent, including the genetic father, absent some heightened showing of the state's need or the child's welfare.[161] Setting aside how the child's interests might be evaluated case by case, this Part focuses on other state interests that feminists might wish to advance by giving men parental rights across the board on the basis of genetics alone.

Subpart IV.A discusses the possibility that we should strengthen men's parentage rights, even at the expense of women's autonomy, in order to promote equality in child-rearing. Subpart IV.B discusses the use of fathers' rights as a tool to protect low-income fathers and mothers from pressure to relinquish children for adoption. In both cases, I argue that there are other, better means to achieve feminist goals.

A. Stalled Revolution: Should Men Have Rights To Encourage Them To Nurture?

Family law scholars generally agree that men should be encouraged to participate in childcare more than they do. Increased male caretaking, it is thought, would promote sex equality as well as provide better, more stable environments for the children themselves.[162] I agree with both goals and agree that they would be

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161. This discussion avoids the term "compelling state interest" and other formalities of substantive due process doctrine because that doctrinal structure is at best in flux and more likely defunct. *See* Jennifer S. Hendricks, *Schrödinger's Child: Non-Identity and Probabilities in Reproductive Decision-Making*, 69 STUD. L. POL. & SOC'Y 221, 229-31 (2016) (describing in detail the Supreme Court's departure from the traditional substantive due process framework, especially in reproductive and family law cases, beginning with *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and ending with *Troxel v. Granville*, 530 U.S. 57 (2000); the trend has since continued with *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)).

162. Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 168 (2015) ("[T]he state should help unmarried parents become effective co-parents, especially after their relationship ends, so they can provide children with the healthy relationships crucial to child development."); Laurie S. Kohn, *Engaging Men as Fathers: The Courts, the Law, and Father-Absence in Low-Income Families*, 35 CARDOZO L. REV. 511 (2013) (arguing that the legal system inadvertently

served by more male caretaking, but I question whether overriding the mother's parental rights in the name of encouraging fatherhood is an effective strategy or worth the cost.[163]

1. Feminist Concern for Fathers' Rights

The recent feminist turn to men and masculinity[164] has been needed and important for two reasons. First, if a goal of feminism is to expose and dismantle gender-based systems of power, then at some point it needed to examine the other side of gender. Second, the antiessentialist critique of feminist theory contained within it the need to consider men. For example, Angela Harris's landmark critique of dominance and difference feminism pointed out that most feminist work to reform rape law came from a white perspective that assumed an otherwise unproblematic relationship with law enforcement.[165]

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exacerbates father absence and proposing reforms to encourage greater involvement); Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers To Parent*, 153 U. PA. L. REV. 921 (2005). *See generally* Czapanskiy, *supra* note 115, at 1472 (arguing that the law should adopt fifty–fifty parenting as its expressive ideal); Davis, *supra* note 97, at 76 (arguing that the law should recognize "fathers' potentials as caregivers and parents" by eliminating sex distinctions in parentage law). In arguing for two-parent families, scholars and policymakers often invoke correlations between number of parents in the home and various indicia of the child's later success. *See, e.g.*, Huntington, *supra* (passage quoted). The causal arrows, however, may run in many directions; for example, poverty may cause both single parent households and difficulties for the child. *See* Maldonado, *supra*, at 949-62 (describing some of the negative outcomes for children often attributed to the absence of an involved father and analyzing the likelihood of causation as opposed to mere correlation). Feminist analyses consider not just the quality control issues in the production of the child but also the burden on the single parent and overall effects on sex equality. *See, e.g.*, MAXINE EICHNER, THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS 104-10 (2010) (arguing for marriage as a support for adult-to-adult caretaking but also insisting that support for marriage should not divert resources from nonmarital families that may have greater need); Czapanskiy, *supra* note 115 (framing parental contributions to child-rearing as a sex equality issue); Davis, *supra* note 97, at 75 (arguing that limitations on men's parental rights "legitimize a range of formal policies and informal practices that link women's reproductive capacities with special parental responsibilities").

163. For one perspective on the relationship between women's autonomy and the family structures promoted or tolerated by law, see June Carbone & Naomi Cahn, *The Triple System of Family Law*, 2013 MICH. ST. L. REV. 1185, 1191-92 ("In the [working class], the largely invisible fight is one to set the terms for families where women are increasingly the more reliable breadwinners and homemakers without the ability to lock in understandings that would reflect their greater assumption of family responsibilities. Development of the laws in this third system accordingly requires recognition that the critical choice is whether to accept women's greater authority within the family or accelerate the move away from committed relationships altogether." (footnotes omitted)).

164. *See* sources cited *supra* note 83.

165. Harris, *supra* note 119, at 598-601.

Although the focus of Harris's analysis was that not all women experience gender in the same way, implicit is the point that not all men are similarly situated with respect to gender either. The study of masculinities is thus part of feminism's increasingly ambitious scope, in which the predominant aim of scholars and activists is to theorize and fight against interlocking systems of subordination, perhaps even to the point that feminism as such disappears.[166] Instead of seeking universality by ascribing to all women a core, essential experience of gender, feminism now aspires to universality through multifacetedness and intersectionality.

One result of the turn to men is the increase in feminist attention to men as fathers, partly for their own sake and partly in the hope of restarting the "stalled revolution." This term refers to the observation that liberal feminism has been more successful in transforming the workplace than in transforming the home.[167] The revolution of sex equality is seen as stuck at a halfway point. Formal equality at work (though arguably on male terms) is the law of the land and the accepted norm. Equality at home—in housework, childcare, and general willingness to sacrifice individual priorities for family ones—has been more elusive. The inequality at home in turn makes actual equality at work harder to achieve.

Broadly speaking, feminists have pursued two strategies to try to restart the liberal feminist revolution. One set of strategies involves further reform of the workplace: If the workplace rules are more "family-friendly," then perhaps women will be more able to succeed despite the inequality at home, and perhaps men will be willing to do more at home if they are safe from losing out at work; everyone will "have it all." The second set of strategies target the home directly by encouraging men to be active fathers.

The feminist case for genetic entitlements is that they are strategies of the second sort. The idea is that granting automatic parental rights to genetic fathers has expressive value, letting men

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166. *See* Marc Spindelman, *Feminism Without Feminism*, ISSUES IN LEGAL SCHOLARSHIP, Dec. 2011, at 1.

167. ARLIE HOCHSCHILD, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME 12 (1989) (originating the term "stalled revolution"); *see also* Czapanskiy, *supra* note 115, at 1415 ("Women's entry into the paid workforce has been aided by legal changes promoting equal treatment of male and female workers. No equivalent legal movement has promoted men's entry into the unpaid workforce of the home. In fact, . . . family law actively promotes a gendered allocation of household labor." (footnotes omitted)).

(and women) know that the law sees fathers as real, legal parents.[168] This message will encourage men to take the steps necessary to meet the biology-plus-relationship test, and it will force women to allow them to do so. It follows, hopefully, that men will establish more permanent and close relationships with children.

2. Many Ways To Support Fatherhood

Although there are good reasons to encourage men to identify more strongly as fathers and to support them in fulfilling an expanded, care-oriented vision of that role, there are also many ways to provide that encouragement and support. Genetic entitlements need not necessarily play a role in this effort and may actually impede it, since they eliminate caretaking from the definition of male parenthood.

In many cases, at the time of birth, the mother wants the genetic father to participate in caring for the child. In such a case, a Voluntary Acknowledgement of Paternity (VAP) allows unmarried parents to make a documented commitment to coparenting at the time of birth.[169] Importantly, the adjective "voluntary" here refers to voluntariness on the part of both the mother and the father; a man cannot use a VAP to become a father unless the mother consents.[170] The VAP process thus substitutes for marriage by allowing for the creation of a coparenting relationship by mutual consent.

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168. Nancy E. Dowd, *Parentage at Birth: Birthfathers and Social Fatherhood*, 14 WM. & MARY BILL RTS. J. 909, 925 (2006) ("Presuming fatherhood at birth based on genetic connection honors the reproductive rights of fathers and reinforces a norm of care, to the benefit of children."); Jean Strout, *Dads and Dicta: The Values of Acknowledging Fathers' Interests*, 21 CARDOZO J.L. & GENDER 135, 167 (2014) (arguing for the expressive value of acknowledging fathers' rights arguments because "men . . . have fewer constitutionally protected reproductive rights than women").

169. *See* Baker, *supra* note 45, at 1686 (noting that voluntary acknowledgements are the second most common way, after the marital presumption, in which a parent besides the birth mother becomes legally recognized). *See generally* Leslie Joan Harris, *Reforming Paternity Law to Eliminate Gender, Status, and Class Inequality*, 2013 MICH. ST. L. REV. 1295 (discussing the role of voluntary acknowledgements and the continuing judicial preference for marriage).

170. *See* 45 C.F.R. § 303.5(g)(4) (2015) ("The State must require that a voluntary acknowledgment be signed by both parents . . . ."). While this regulation applies only to a subset of births outside of marriage, it shapes the acknowledgement procedures that states adopt and then apply to all cases. Of course, if the mother refuses to sign the acknowledgement, the father can usually establish paternity through other means based on genetic connection alone. *See supra* notes 49-53 and accompanying text.

In fact, it is safe to say that the determination of legal coparentage—through marriage or a VAP—is something of a high point for sex equality in American family policy.[171] Although the law increasingly recognizes the need to mediate family and other responsibilities for all parents, the United States notoriously lags behind the rest of the industrialized world on this issue. Moreover, there is still a lot more that could be done outside the workplace. Too many parenting plans have a mother as a primary caretaker and treat the father's visitation as his right, but not his obligation.[172] The one-parent doctrine in child welfare law treats fathers as not just irrelevant but nonexistent.[173] Slight progress has been made in preserving incarcerated women's relationships with children, but even less has been done to preserve relationships in the face of the mass incarceration of fathers.[174] In light of all that society could be doing to reshape and support fatherhood in ways that would also support mothers and children, it is premature to reach for genetic entitlement, a tool that shifts power from women to men and defines fatherhood in the narrowest possible terms.

I realize that in a few sentences I have offered, as an alternative to genetic entitlement for fathers, a sketch of sweeping social reforms,

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171. Both methods of establishing parentage are also easily adaptable to same-sex couples. *See* Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227 (2006); Leslie Joan Harris, *Voluntary Acknowledgements of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 467 (2012).

172. *See* Czapanskiy, *supra* note 115, at 1442-51 (describing the ways in which a custody statute enforces visitation rights while saying nothing of visitation duties); Kohn, *supra* note 162, at 512 n.5 (collecting cases in which courts refused to require fathers to exercise visitation rights); Daniel Pollack & Susan Mason, *Mandatory Visitation*, 42 FAM. CT. REV. 74, 78-79 (2004) (making a limited case for enforcing visitation as a duty owed to the child while also showing why the assumptions embedded in the American legal system make courts reluctant to do so).

173. *See infra* note 185 and accompanying text.

174. *See generally* William Wesley Patton, *Mommy's Gone, Daddy's in Prison, Now What About Me?: Family Reunification for Children of Single Custodial Fathers in Prison—Will the Sins of Incarcerated Fathers Be Inherited by Their Children?*, 75 N.D. L. REV. 179 (1999) (describing prison systems' treatment of single parents, especially fathers); Elise Zealand, *Protecting the Ties that Bind from Behind Bars: A Call for Equal Opportunities for Incarcerated Fathers and Their Children To Maintain the Parent–Child Relationship*, 31 COLUM. J.L. & SOC. PROBS. 247 (1998) (arguing that incarcerated fathers are underserved in the current system and need more opportunities to maintain a parent-child bond). My criticism here is directed at criminal justice policies that damage parent-child relations; a danger in addressing the problem is that rather than reforming the penal system, we will use the family courts to increase the burden on mothers by making them responsible for maintenance of children's relationships with incarcerated fathers.

each of which would face immense political barriers. In other words, I have offered pie in the sky as an alternative to a relatively easy rule change.[175] My point is that the cost of the rule change falls on mothers, while the cost of more comprehensive efforts to support families (and fathers) and promote equality falls on society. That disparity in cost bearing is a hallmark of impermissible infringements on constitutional rights;[176] it is a taking of individual rights for a social purpose. It must therefore be justified by more than ordinary expediency.

It is also not clear, moreover, why automatic rights should be expected to encourage greater involvement by fathers. That is not the way we usually think of incentives: one does not give the reward first in the hope that it will somehow induce the desired behavior. In fact, we have already seen the results when this cart precedes this horse. The same argument for equal rights for fathers has been the basis for "equalizing" custody laws to presume joint custody or otherwise disregard the strength of existing caretaking relationships when determining child custody. The "result[] is a legal system that empower[ed] fathers" by giving them extra leverage in divorce litigation.[177] Women who have been primary caretakers and may thus be deeply attached to their children are told that this connection counts for nothing, putting them in a position to bargain away

175. For more modest proposals that would both express society's commitment to involved fatherhood and provide practical support to fathers engaged in caretaking, see Holning Lau, *Shaping Expectations About Dads as Caregivers: Toward an Ecological Approach*, 45 HOFSTRA L. REV. 183 (discussing access to diaper-changing tables in public restrooms, government funding of "Mommy and Me" classes for small children, and the representation of fathers in the federal government's Fatherhood Initiative). In California—the state whose supreme court dismissed out-of-hand the notion that mothers should have a say in parental claims to their children—the governor recently vetoed legislation that would have required equal access to diaper-changing facilities in public places. *California Governor Rejects Bills To Help Men Change Diapers*, REUTERS (Sept. 20, 2014, 4:45 AM), http://www.reuters.com/article/us-usa-diaper-california-idUSKBN0HF05M20140920.

176. *Cf.* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 345-46 (1992) ("If one considers the variety of methods the state has at its disposal to promote the welfare of the unborn, it is easier to appreciate the substantial role that judgments about women play in defining the incidence and structure of fetal-protective regulation. . . . [S]ome strategies of fetal-protection impose the costs of protecting unborn life solely on women, while others distribute them across the community as a whole . . . .").

177. FINEMAN, THE NEUTERED MOTHER, *supra* note 147, at 82-83; *see also* JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY (2014) (discussing how upper-class and upper-middle-class men benefit from formal equality in custody determinations).

property and support rights in order to keep their children.[178] Moreover, demands for equal *rights* in parenting—rather than equal *commitment* to parenting—can effectively hold mothers responsible not only for raising the children but also for supporting, facilitating, and ensuring the success of the father-child relationship.[179]

In the genetic entitlement cases, we see the duty to facilitate fatherhood imposed on women even while they are still pregnant. In both judicial decisions and scholarly discussions, pregnant women are described as lying or deceitful when they refuse a man's wish to maintain a relationship during the pregnancy.[180] Although it is true that the women in these cases often have told lies, the implication of the descriptions is that a pregnant woman has a legal duty to invite the genetic father to "participate" in the pregnancy. Despite the formal nonexistence of such a duty, the courts have criticized pregnant women for failing to alert men of the fact of pregnancy or keep them apprised of their fetus's whereabouts.[181] They have worried that if women have no such duty, men will be "forced" to stalk their ex-lovers in order to keep tabs on their reproductive property.[182] This canard is based on the assumption that a man who has sex with a woman has thereby acquired a legal and moral right to the child she may bear, an assumption the law should reject, not encourage with statutory entitlements that award parental rights automatically based on genes.

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178. Margaret F. Brinig, *Penalty Defaults in Family Law: The Case of Child Custody*, 33 FLA. ST. U. L. REV. 779, 803, 807 (2006) ("The effect of this legislation [joint custody legislation in Oregon] was to strengthen the power of noncustodial parents, since denial of access to the children would give the right to terminate spousal or child support, change the parenting plan, or obtain an award for 'makeup' visitation. . . . As far as the correlations and regressions show, there was statistically significantly lower child support.").

179. *See* Margaret K. Dore, *The "Friendly Parent" Concept: A Flawed Factor for Child Custody*, 6 LOY. J. PUB. INT. L. 41, 44 (2004) (describing the application of the friendly parent doctrine to a case in which the mother was deemed the "unfriendly" parent for insisting that the father spend time with the child during visitation).

180. *See supra* text accompanying notes 148-152 (discussing the Burbach & Lamanna study).

181. This rhetoric leads to cases like *Plotnick v. DeLuccia*, 85 A.3d 1039 (N.J. Super. Ct. Ch. Div. 2013), in which a putative father (unsuccessfully) sought an injunction ordering the mother to notify him when she went in to labor and to allow him to be present for the delivery.

182. *See, e.g.*, Robert O. v. Russell K. (*In re* Robert O.), 604 N.E.2d 99, 106 (N.Y. 1992) (Titone, J., concurring).

3. Genetic Duties and Genetic Rights

Related to the question of automatic rights is a question of automatic duties, a question Scott Altman has explored, arguing that the *right* to care for a particular child follows from the *duty* to care for that child.[183] If we believe that a genetic parent has a moral duty to his genetic child, Altman argues, then society has a duty to allow the parent the opportunity to perform that duty. Going further, one could argue that by denying this right and opportunity specifically to men, the law discourages men from fulfilling their duty and sends an antifeminist message about their role as parents. It follows, goes the argument, that men should have a right of access to their genetic children, in order to give them the chance to form the relationships on which full-blown parental rights depend.

This conclusion, however, that men have a right of access to their genetic children, brings us back to the question: a right against whom? There is a difference between a man's right against state interference with a parental relationship—or even with a potential parental relationship—and his right to compel another individual to form a relationship with him.[184] The state interferes with men's chances to form relationships with children in multiple ways, even when the children's mothers welcome the fathers' participation. For example, under the one-parent doctrine, states routinely strip both parents of parental rights if the mother is found to be neglectful; usually the father is not even a party to the proceeding.[185] The United States also incarcerates massive numbers of fathers with little to no regard for their relationships with their children, and despite some

183. Altman, *supra* note 26, at 306-10. This article is contained in a volume, THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW, *supra* note 26, which has forty contributors, of whom thirty-six are men.

184. *See* Steve B.D. v. Swan (*In re* Steve B.D.), 730 P.2d 942, 945 (Idaho 1986) (applying the state action doctrine to distinguish between state and private interference with the father's ability to establish a relationship with his genetic child).

185. Vivek S. Sankaran, Parens Patriae *Run Amuck: The Child Welfare System's Disregard for the Constitutional Rights of Nonoffending Parents*, 82 TEMP. L. REV. 55, 70–77 (2009) (describing two versions of the doctrine, one in which the second parent's rights are automatically terminated and one in which the court retains legal custody but the nonoffending parent may be allowed to have physical custody). The one-parent doctrine can also be used to strip mothers of rights without due process, but the most common scenario is that the mother is accused of neglect and the father is the marginal, ignored parent. A trend has recently begun to emerge recognizing the unconstitutionality of the one-parent doctrine. *See* Josh Gupta-Kagan, In re Sanders *and the Resurrection of* Stanley v. Illinois, 5 CALIF. L. REV. CIRCUIT 383 (2014) (discussing a Michigan case); Sankaran, *supra* at 76-77 (describing developments in Maryland and Pennsylvania).

progress, the state maintains a social structure that favors traditional breadwinner/homemaker arrangements over other family forms.[186] These state actions interfere with parent-child relationships, and specifically father-child relationships, on a vastly greater scale than could be remedied by rights of genetic entitlement against mothers.

Another aspect of the "duty, hence rights" argument—not pressed by Altman but common elsewhere—is the symmetry argument, which focuses on legal rather than moral duties toward children: many commenters believe it would be unfair if genetic fathers could be automatically liable for child support but not, symmetrically, automatically entitled to parental rights.[187] And indeed, when law gets involved, the goal of promoting fatherhood tends to devolve into a familiar emphasis on financial support.[188] Many argue that a regime that imposes child support duties on genetics alone must also accord rights on the same basis.[189]

This argument is a variant of the complaint that reproductive rights are unfair because they give women "all the power."[190] The

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186. For examples of policies that a state would adopt if it were friendly to dual parenting, see EICHNER, *supra* note 162 (discussing policy proposals to fit the needs of one-, two-, or three-or-more-parent families); Deborah A. Widiss, *Reconfiguring Sex, Gender, and the Law of Marriage*, 50 FAM. CT. REV. 205, 207-09 (2012) (discussing ways in which the law and social norms encourage gender-based specialization within marriage).

187. *See, e.g.*, Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology 'Plus' Defines Relationships; Biology Alone Safeguards the Public Fisc*, 11 WM. & MARY J. WOMEN & L. 47 (2004). For a contrary view, see Scott Altman, *A Theory of Child Support*, 17 INT'L J.L. POL'Y & FAM. 173 (2003) (arguing for greater public support for children but also that private child support obligations might be imposed as a form of penalty for, inter alia, "failing to establish a loving relationship with the child's other parent").

188. *See supra* note 53 and accompanying text.

189. *See, e.g.*, Oren, *supra* note 187.

190. Bachiochi, *supra* note 72, at 944; *see also* Lisa Lucile Owens, *Coerced Parenthood as Family Policy: Feminism, the Moral Agency of Women, and Men's "Right to Choose,"* 5 ALA. C.R. & C.L. L. REV. 1 (2013). Bachiochi's article purports to adopt and build on the relational feminist framework that I set out in Jennifer S. Hendricks, *Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion*, 45 HARV. C.R.-C.L. L. REV. 329 (2010) [hereinafter Hendricks, *Body and Soul*]. It uses my article both as a source of several purported concessions from prochoice feminists—which the author treats as a monolithic group—and as one of several straw women to rebut. The first, theoretical section of the article claims to be grounded in relational feminism but instead advocates for separate spheres. The characterization of Robin West's work is so inaccurate that it is difficult to explain other than as intentional. Bachiochi, *supra* note 72, at 930-31. The article also makes historical claims about the genesis of sex inequality. Bachiochi claims that sex inequality is *caused* by legal and cultural acceptance of abortion and other denials of women's inherent fertility. *Id.* at 893 (stating that prochoice feminism cannot promote equality because it "requires women to deny their fertility and reject their children"). Before 1973, apparently, all women were regarded as mother-goddesses and lived happily on their pedestals.

pregnant woman gets to decide whether to have an abortion, and if she instead decides to bear a child, she gets to decide whether to exclude the genetic father or to allow or even require him to participate. Any chain of reasoning that begins with the assertion that pregnant women are favored because they "get" to decide whether to abort or carry to term should raise red flags for feminists. The abortion decision is a right, yes, but it is also a responsibility, and under any guise it is not to be envied. Women "get" to make these decisions for the same reason that they "get" to become pregnant. The blessing and the curse are not severable.[191]

In addition, the alleged symmetry is false. Women do not have the option of forcing men to be involved in parenting.[192] The most they can do is obtain an order for financial support of the child, and the false equivalency between paying child support and raising a child is the core problem with symmetry arguments for men's rights.[193]

Finally, biological difference has a legitimate role to play in the law of parental rights. As I have argued elsewhere, it is sometimes appropriate to reason, carefully, from the body.[194] We do not have to use sex-correlated physical characteristics (like capacity to gestate) as foundations for spinning out an elaborate system of social roles. But we also should not ignore that people live in bodies. Birth creates a biologically unique relationship between mother and child. Women should have greater decision-making authority over certain

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The second, doctrinal section proceeds to adopt arguments that are directly at odds with the earlier theoretical claims, fiercely embracing the reductionist formal equality of *Geduldig v. Aiello*, 417 U.S. 484 (1974). Bachiochi's vision is not relational feminism's *valuing* of bodies and activities that are culturally associated with the feminine. It is a vision of separate spheres, in which living according to those values is mandatory for women. Although in her theoretical sections she claims these values can be experienced by men as well, her doctrinal arguments are ruthless in severing women from the public sphere and men from the family.

The animating spark of the article is not to theorize embodied equality, as the title claims, but to rationalize the conclusion that "government may compel childbearing to protect fetal life." Bachiochi, *supra* note 72, at 927. Rhetoric about women's equality serves as window dressing for a theory that would give lip service to equal respect for men's and women's separate spheres but rigidly reinforce the barrier between them.

191. *See generally* Hendricks, *Body and Soul*, *supra* note 190 (arguing that the right to abortion is indivisible).

192. *See* Czapanskiy, *supra* note 115 (arguing that courts view fathers as volunteers and mothers as draftees); Pollack & Mason, *supra* note 172, at 78-79 (describing reasons that courts fail to require noncustodial parents to use their visitation time).

193. For further discussion of this false symmetry, see Jennifer S. Hendricks, *The Rape Survivors Child Custody Act: Wages of Genetic Entitlement* (forthcoming) (on file with author).

194. Hendricks, *Body and Soul*, *supra* note 190, at 366.

reproductive decisions because that authority is a necessary correlate of their greater burden. It is not a matter of tit for tat, or payment for services, but a matter of acknowledging the entanglement of bodies and souls that inheres in pregnancy and birth.[195] Without denigrating the "deep and proper concern" that a man may have in a pregnancy, he is not situated to make initial decisions over whether a new being should be brought into the world, and if so into what family.[196]

Genetic entitlement to children supports patriarchal rights over women's bodies without requiring a shift toward more male caretaking for children. Given the myriad ways that society might promote and support involved fatherhood, feminists should not give priority to a strategy that has questionable efficacy, costs society little, diminishes individual women's autonomy, and symbolically embraces a patriarchal theory of the family.

B. Pressured Adoption and Vulnerable Parents: Baby Girl *as the Modern* Lehr

The second major reason why unwed fathers' rights have gained feminist support is as a means for countering abuses in the adoption industry, abuses which may harm birth fathers, birth mothers, and children. Both historically and in the present, adoption abuses have fallen most heavily on low-income and nonwhite families. As discussed above, restrictions on unwed fathers' rights often serve the interest of adopting parents more than they serve birth parents or children. Stronger rights for unwed fathers are thus an attractive tool for strengthening the overall position of birth parents relative to the adoption industry.

For several reasons, the best legal context in which to consider the merits of using fathers' rights in this way is the context of adoptions governed by the Indian Child Welfare Act (ICWA).[197] First, the historic abuse of adoption to remove children from Native families is well documented and broadly accepted by courts and other legal actors.[198] Second, this history led Congress to enact ICWA, which provides extra procedural and substantive protection for both parents

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195. *See generally id.* (arguing that a feminist theory of reproduction must consider women's physiological experience of pregnancy).

196. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 69 (1976) (striking down a law requiring a wife to have her husband's consent in order to obtain an abortion).

197. Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (2012).

198. *See infra* text accompanying notes 204-208.

and tribes when Indian children are removed from their birth families, whether the removal is for adoption with a parent's consent or based on allegations of child abuse or neglect.[199] Unlike with other vulnerable communities, which are subject to more recent legislation against "race-matching" and in favor of quick adoptions,[200] Congress has recognized social and individual value in keeping Indian children in Indian homes. Finally, the Supreme Court has interpreted ICWA on two occasions, most recently in a case, *Adoptive Couple v. Baby Girl*,[201] that provides a set of facts for evaluating the merits of fathers' rights as a tool for serving the ends of ICWA.

In *Baby Girl*, a father with no established relationship with his child sought to block her adoption by an unrelated couple, an adoption that the birth mother had sought. Under the reading of *Lehr* set out above, he did not have parental rights because of the lack of relationship.[202] Congress, however, had arguably granted him greater rights, under ICWA, to block the adoption in order to promote the goal of keeping Indian children in Indian families. Although the Supreme Court ultimately construed ICWA more narrowly as not providing rights for this particular father, that holding seems plainly at odds with the intent of the statute and at least somewhat likely to be narrowed in the future.[203] Alternatively, Congress might ultimately overrule the Court on this point by passing a law that more explicitly gives a genetic entitlement to the genetic father of an Indian child.

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199. *See* 25 U.S.C. §§ 1911-1923 (ICWA provisions for child custody proceedings). An "Indian child" under ICWA is any child who either is a tribal member or is eligible for tribal membership and has a biological parent who is a tribal member. *Id.* § 1903 (4). Classification as an Indian child is thus distinct from both tribal membership and Native ancestry.

200. 42 U.S.C. § 1996b (restricting the use of race in matching children to adoptive parents); Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified in scattered sections of 42 U.S.C.) (imposing deadlines in child welfare cases to promote adoption by new parents over family reunification).

201. 133 S. Ct. 2552 (2013).

202. The Supreme Court did not consider whether the biology-plus-relationship test was satisfied because the father made a statutory claim under ICWA rather than a constitutional claim. It did, however, construe the father's prebirth conduct as abandonment and conclude that he had no right under ICWA to block the adoption because he had never had custody of the child. *Id.* at 2557. This holding could indicate that the Court would take a strict view of the biology-plus-relationship test—requiring postbirth custody for some period of time—but the focus on custody is more likely due to the specific language of ICWA. *See id.* at 2560 (highlighting § 1912(f) of ICWA, which refers to "continued custody").

203. *See* Berger, *supra* note 78, at 311-19 (analyzing the statute and the Court's interpretation of it, concluding that that the Court "[did] violence to ICWA's statutory text and purpose").

The question, then, for this Article, is whether that grant of rights—and the diminishment of the mother's existing rights that is entailed—is justified by the aims of ICWA. As in subpart IV.A, I argue here that the costs of such a grant—the symbolic endorsement of patriarchy and the power it removes from individual women—are substantial. In this case, however, there is also better reason to think that fathers' rights could have a direct, practical effect that would be positive overall. Nonetheless, other strategies would better address the problem without the cost to mothers' rights.

1. ICWA and Beyond: Adoption as a Tool of Subordination

ICWA arose from Congress's recognition that the United States had long used removal of Native children from their families as a tool of genocide.[204] In the nineteenth century, the U.S. Army established boarding schools for Native children, who were removed from their homes en masse.[205] Under the mantra of "killing the Indian to save the man," the directors of the school prohibited any expression of indigenous culture or language in the children's speech, dress, or religious practices.[206] They were often abused in other ways as well.[207] The goal was to assimilate Native children into white culture so that Native cultures would cease to exist.[208] While this goal could be achieved by raising the children in institutions cut off from their communities, it could also be facilitated by having white families adopt Native children.

It is this history that stands in the background of any adoption proceeding involving an Indian child. Moreover, histories of abuse

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204. Congress did not put it quite that way. *See* 25 U.S.C. § 1901 (finding that "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and . . . that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families"); *see also* Manuel P. Guerrero, *Indian Child Welfare Act of 1978: A Response to the Threat to Indian Culture Caused by Foster and Adoptive Placements of Indian Children*, 7 AM. INDIAN L. REV. 51 (1979).

205. *See* STEVE HENDRICKS, THE UNQUIET GRAVE: THE FBI AND THE STRUGGLE FOR THE SOUL OF INDIAN COUNTRY 30-31 (2006) [hereinafter HENDRICKS, THE UNQUIET GRAVE]; Berger, *supra* note 78, at 350-51.

206. HENDRICKS, THE UNQUIET GRAVE, *supra* note 205, at 31.

207. *Id.*

208. Berger, *supra* note 78, at 351 ("Indian children would be taught to be non-Indians.").

pervade the adoption experiences of many communities. The white "child-saving" movement of the early twentieth century was based on a similar theory that children from undesirable families could be saved by being raised in institutions or in "better" homes.[209] Although African American children were not until recently considered adoptable by white families, they nonetheless were targeted for removal for other reasons, and the disproportionate removal of poor children and children of color continues today.[210]

Even with ICWA in place, some participants in the child welfare system appear to have little regard either for the statute's aims or for its procedural requirements. For example, the Oglala and Rosebud Sioux recently won a summary judgment order against a South Dakota judge and other state officials for egregious procedural abuses in removal proceedings.[211] The following is a sampling of the violations:

[*ex parte communication, no notice of allegations*:]

> The defendants acknowledge Seventh Circuit judges receive an ICWA affidavit prior to the 48-hour hearing, but the affidavit is not marked as a hearing exhibit. . . .
>
> . . . In a number of transcripts there are specific exchanges with a judge in which an Indian parent asked about the allegations against them or why their children were removed. . . . In none of these hearings did a Deputy States Attorney, DSS representative or the judge contradict the statements of the Indian parents or counsel or recess the proceedings to allow the parties to receive and review the ICWA affidavit and petition for temporary custody.[212]

[*denial of the right to counsel and the right to present evidence*:]

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209. *Cf.* Dorothy E. Roberts, *Black Club Women and Child Welfare: Lessons for Modern Reform*, 32 FLA. ST. U. L. REV. 957 (2005) (describing the contemporaneous but differently structured child-saving efforts of African American women, which emphasized supporting mothers more than removing children). *See generally* J. Herbie DiFonzo, *Deprived of "Fatal Liberty": The Rhetoric of Child Saving and the Reality of Juvenile Incarceration*, 26 U. TOL. L. REV. 855 (1995) (discussing the child-saving movement); Kari E. Hong, *Parens Patri[archy]: Adoption, Eugenics, and Same-Sex Couples*, 40 CAL. W. L. REV. 1, 11-31 (2003) (providing a historical overview of adoption in the United States).

210. *See generally* DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002) (analyzing disproportionate impact of child protective services on African American families).

211. Oglala Sioux Tribe v. Van Hunnik, 100 F. Supp. 3d 749 (D.S.D. 2015).

212. *Id.* at 758 (citations omitted).

> Judge Davis advised Indian parents there was no need for an attorney because of the option to work informally with DSS for 60 days. . . .
>
> Judge Davis and the other Seventh Circuit judges presiding over 48–hour hearings (all jointly referred to as the "Seventh Circuit judges") never advised any Indian parent or custodian they had a right to contest the state's petition for temporary custody during the 48-hour hearing. The Seventh Circuit judges never advised Indian parents they had a right to call witnesses at the 48-hour hearing. . . .
>
> . . . .
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> . . . Every time the Seventh Circuit judges agreed during a 48-hour hearing to appoint counsel for indigent parents, the judges delayed the appointment of counsel until after granting DSS custody.[213]

[*falsification of factual findings*:]

> The Seventh Circuit judges never required the State to present sworn testimony from a live witness.
>
> . . . .
>
> The Seventh Circuit judges used a standardized temporary custody order which functioned as a checklist. Following 48-hour hearings in which no witness testified and no documents were offered or received as evidence, the Seventh Circuit judges placed checkmarks next to findings of fact without providing any explanation regarding the basis for their findings. The Seventh Circuit judges signed temporary custody orders detailing findings of fact that had never been described on the record or explained to the Indian parents present at the 48-hour hearing.[214]

These procedures, used to remove children from parents, even when they had lawyers present in the courtroom, were not only violations of ICWA; under no stretch of the imagination did they come even close to minimally acceptable due process. While the summary judgment from the federal court may augur changes in this particular court, it took a year of class action litigation to reach that point.

The facts in *Adoptive Couple v. Baby Girl* illustrate some of the less egregious, but likely more common, resistance to ICWA in state court proceedings. The adopting couple and their representatives took several steps to manipulate the "facts on the ground" with respect to the child's custody before taking belated steps to comply with

213. *Id.* at 760-61 (citations omitted).
214. *Id.* at 761 (citations omitted).

ICWA.[215] For example, when they gave notice to the Cherokee Nation of the pending adoption, they misspelled the father's name and listed the wrong date of his birth.[216] While these errors may merely have been clerical mistakes, critics have good reason to distrust and instead infer bad faith. Even if not intentional, the mistakes are the sort of shoddy compliance with procedure that suggests lack of regard for the law's aims.[217]

The Supreme Court's ultimate decision in *Baby Girl* suggested that the Court, too, had failed to embrace ICWA's goals. Couching its decision in vague—and unfounded—suggestions that ICWA's definition of "Indian child" might be an unconstitutional racial classification, the majority seized on the allegation that Baby Girl was only "3/256 Cherokee."[218] This figure probably understates Baby Girl's Native ancestry, but regardless of its accuracy the figure is irrelevant.[219] To be an "Indian child" is a political classification that refers to eligibility for tribal membership. Baby Girl is 100% Cherokee in the same sense that Barack Obama and Ted Cruz are 100% American. The circumstances of their birth entitle them to citizenship in the nation.[220] In Cruz's case, as with Baby Girl, that birthright derived not from the place of birth but by inheritance from his citizen parent; like tribal membership, most systems for determining citizenship depend at least in part on the parent's political status. As Bethany Berger has discussed, the *Baby Girl* majority ignored the political character of tribal membership and instead tried to characterize ICWA as a race-specific statute, the application of which should be "limited to a small and racially defined group."[221]

Berger also explains how the Court's narrative fits into a historical pattern of "expectation and insistence on the absorption and

215. Berger, *supra* note 78, at 305.

216. *Id.* at 302-05.

217. This lack of regard may emanate from the birth mother, if she wants to avoid the genetic father's participation, as well as from other actors in the system.

218. Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2559 (2013).

219. *See* Berger, *supra* note 78, at 327-29 (explaining that the Dawes Rolls, on which the figure is based, understate Native ancestry for various reasons and reporting that Baby Girl's mother may also have had Cherokee ancestry that was not included in the 3/256).

220. *See* Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L. REV. 1041 (2012). To the extent that political entities define citizenship in terms of genetic descent, that definition may be problematically patriarchal in ways that are similar to the criticisms I have made of the genetic definition of parenthood. Different considerations, however, are at play, and a discussion of the meaning of citizenship and its transmission is beyond the scope of this Article.

221. Berger, *supra* note 78, at 330.

disappearance of indigenous peoples."[222] By rejecting "[t]he possibility that a child could remain politically Indian after generations of intermarriage," the majority's decision promoted "the assumption that Indian tribes would eventually disappear."[223]

In sum, there is not merely a long history of wrongful removals of children that ended when ICWA became law. That history continues to this day, for Native families as well as other communities vulnerable to abuses in both the adoption industry and the child welfare system.

As compared to the "stalled revolution" argument, this historical pattern is more concrete and has more discretely identifiable harms. Subpart IV.A considered the possibility of enhancing the rights of genetic fathers mostly in the hope that doing so would harness the expressive power of the law, proclaiming that fathers are inherently connected with children in the hope that cultural change would somehow trickle down from the law's proclamation. The fuzziness of this aspiration is part of why it does not strike me as worth the sacrifice of mothers' autonomy. In contrast, the particularized harm of a long history of wrongful removals makes a stronger case for adopting a remedy, even at the cost of trimming some other constitutional rights. Nonetheless, it is worth noting those costs and evaluating their sacrifice with skepticism. A system of genetic entitlement still has serious flaws, and other, better solutions to the wrongful removal of children are available.

2. Genetic Entitlement: Flaws in the Approach

Given the history described above, any legal tool that impedes the adoption process may appear desirable. While the goal may not be to eliminate all adoptions of children with fit parents, slowing

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222. *Id.* at 330.

223. *Id.* at 332. There is an additional rhetorical effect to the repeated invocation of blood quantum to suggest that Baby Girl was "really white." Emphasizing her whiteness as a reason not to apply ICWA is more than just a question of statutory interpretation. It appeals to the intuition that a white child is *harmed* by being treated as an Indian child. In this way, the *Baby Girl* opinion was similar to the lower court opinions that were reversed by an earlier Supreme Court in *Palmore v. Sidoti*. In that case, the state courts had removed a child from her mother and transferred custody to the father because the mother had married a black man. The harm to the child that justified this transfer was that she would be taunted or scorned by the white community—in other words, that she would experience racism. *Palmore v. Sidoti*, 466 U.S. 429 (1984). Both cases thus illustrate that courts see the loss of white privilege as a substantial harm, if inflicted on a child they perceive as white. In *Baby Girl*, the adopting parents and their upper-middle-class status represented the white privilege that was at stake.

down the process and requiring adoption agencies to clear more legal hurdles is likely to eliminate some cases of abuse.

Those extra hurdles, however, need not consist of entitlements for genetic fathers. As an initial matter, the concern about adoption abuse is only partly a concern about the harm to individual parents and children. The critique of aggressive adoption policies is rooted in commitments to pluralism, and the objection is to the appropriation of children from subordinated social groups by the dominant group. From a pluralistic perspective, strong protections for birth mothers—such as those discussed in the next section—should be sufficient protection. In fact, strong rights for mothers is more pluralistic than a regime that relies on fathers' rights to slow down adoption, since mothers would remain freer to choose nonnuclear or nonheterosexual family forms.

To strengthen fathers' rights instead of mothers' arguably serves pluralism only when the mother is committed to placing the child for adoption, which usually entails moving the child from a minority or low-income community to a white, middle-class or wealthy community. When the father objects, giving him a veto over the adoption based on genetics alone will keep the child in the original community, arguably serving pluralist ends (although only arguably, since the outcome also reinforces the heterosexual family).

This result is obtained by giving the father power over the mother, power that, like power in the adoption process, can be abused. For example, some of the facts of *Baby Girl* suggest that the father initially tried to use the child to retain control over the mother. Baby Girl's mother texted the father shortly after the birth asking him whether he would prefer to pay child support or to give up his parental rights. He responded that he would give up his rights.[224] In court, he testified that he only said this to try to get the mother to marry him.[225] It is unclear to me why anyone thinks this motivation casts him in a favorable light. What it suggests to me is that his interest at that time was not in the child herself but in reacquiring his ex-girlfriend. The fact that he may have wanted a package deal of wife and child together does not make this motivation one we should support through legal entitlements.

224. Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2558 (2013).
225. Berger, *supra* note 78, at 301.

Similarly, the father in *Baby Girl* also testified that he relinquished his parental rights on the assumption that the mother was going to keep and raise the child, stating that he would not have signed the papers if he had known of the adoption plan.[226] Again, many observers seem to think that his insistence on the mother raising his genetic child is somehow praiseworthy. As noted above, I agree with those who condemn the procedural shenanigans involved in this deception, but I fail to see why we should sympathize with the father's apparent goal of coercing his ex-girlfriend to marry and raise a child with him. For some men, possibly including this father, refusing consent to the adoption is a way not of making or preserving a connection to the child but of maintaining control over the mother.[227]

This possibility of manipulation is one of the reasons why "do anything that reduces adoptions" is not an appropriate response to the pluralistic concern about adoption abuse. There is a difference between the systemic problems played out through the adoption system and the choices made by individuals. While pressuring or coercing a birth mother to place a child for adoption is always wrong, a freely chosen adoption is not, even when the word *freely* must come with substantial caveats. There are many circumstances that may lead a woman to place a child for adoption; some of them—poverty being the most common—are unjust and lead to a woman choosing adoption when she would rather be in different circumstances and keep the child. Eliminating those unjust circumstances is an urgent priority of reproductive justice, but overruling a woman's decision about how to cope with them in the here and now will not further that cause. It will only exacerbate the injustice.

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226. *Baby Girl*, 133 S. Ct. at 2558.

227. When Baby Girl's father sought to undo the adoption, the state court required him to show not only a legal defect in the proceeding but also that she would not be harmed by being removed from her adoptive parents and that a transfer of custody was in her best interests; this occurred when she was two years old. Adoptive Couple v. Baby Girl, 731 S.E.2d 550 (S.C. 2012), *rev'd* 133 S. Ct. 2552 (2013). By the time the Supreme Court rendered its decision, Baby Girl was four years old and had lived with her biological father and his wife for eighteen months. *Baby Girl*, 133 S. Ct. at 2559. The state courts then ordered that the father's rights be terminated and the adoption finalized without any consideration of the current facts of Baby Girl's life. Adoptive Couple v. Baby Girl, 746 S.E.2d 51 (S.C. 2013), *aff'd*, 746 S.E.2d 346 (S.C. 2013).

3. Other Solutions: Protections for Birth Mothers

To protect vulnerable families from losing children, we should reform the systems that remove children from their homes rather than give genetic entitlements to fathers. That means making changes to both the adoption and the child welfare systems. These reforms would serve the goals of pluralism at least as well as genetic entitlements for fathers to veto adoptions.

Regarding adoption, the hard, long-term reforms that are needed include the panoply of social changes that would prevent putting women in the position of giving up a child because of poverty or other unjust circumstances. That means ensuring that women can choose when to become pregnant and give birth, as well as supporting all parents with the social resources they need to raise their children. More immediately, and more directly in the province of family law, are reforms of the adoption process to protect birth mothers from pressure to relinquish children: providing birth mothers with appropriate counseling advice, clear and accurate information about the consequences of the adoption, a reasonable amount of time to make a final decision, and special protections for underage mothers.[228] On the question of time alone, the United States is an outlier in the pressure that birth mothers experience to make a final decision about adoption. In most European countries and in Australia, consent to adoption does not become final until approximately six months after the birth, but in the United States it can become irrevocable in as little as a few days.[229]

Moreover, some portion of unwed father litigation could be avoided if birth mothers received stronger protection in the adoption process. Many of the unwed father cases litigated in state courts in

228. *See* Samuels, *supra* note 129; Seymore, *supra* note 129. In addition to protecting the birth mother's autonomy regarding the adoption decision itself, greater procedural protections can also help strengthen the birth mother's position regarding the terms of the adoption; birth mothers increasingly choose adoptive parents for their infants and negotiate various levels of postadoption contact with the new family. *See generally* Carol Sanger, *Bargaining for Motherhood: Postadoption Visitation Agreements*, 41 HOFSTRA L. REV. 309, 314-15 (2012) (discussing the social changes that led to birth mothers having greater bargaining power, which they used to gain control over the selection of adoptive parents and to negotiate for postadoption contact).

229. Samuels, *supra* note 129, at 513 ("In approximately half the U.S. states, however, irrevocable consent can be established in as short a period as less than four days after birth; in approximately ten percent of the states, it can be established in less than seven days after birth; and in approximately fifteen percent of the states, it can be established in less than two weeks after birth.").

fact involve the birth mother as well as the genetic father seeking to reclaim the child. For example, in the high-profile "Baby Jessica" case, state law required that a birth mother's release of parental rights for adoption must be signed more than three days after the birth.[230] The mother signed the papers too soon and then sought to revoke her consent to the adoption; she also claimed that her consent was procured through fraud or coercion.[231] Adding to her legal ammunition, the mother enlisted the biological father, whose rights had not been properly terminated under state law (which provided a genetic entitlement despite the lack of caretaking relationship). Even though the mother had a plausible claim in her own right, it was mired in procedural questions about jurisdiction and waiver.[232] The courts therefore resolved the case, in favor of the birth parents, on the basis of the father's claim.[233] The category of "unwed fathers" appears to include some substantial number of similar cases, in which the claim was actually initiated by the mother, relying on the father's genetic entitlement because her own rights were relinquished or lost.[234] Reforms to adoption procedures like those discussed above would help prevent these cases from occurring because the birth mother's rights would be better protected.

Although the question of father's rights arises most frequently in the context of adoption, the greater risk to vulnerable families—the mechanism by which the largest numbers of children are removed from poor and minority communities—is not voluntary infant adoption but removal by child protective services. This Article has focused on the unwed father adoption cases because those cases are a primary battleground in the symbolic struggle over the meaning of

230. *In re* B.G.C., 496 N.W.2d 239, 242 (Iowa 1992).

231. *Id.*

232. *See id.* at 241.

233. *Id.* at 246-47.

234. The number of such cases is unknown. When Burbach and Lamanna analyzed the rhetoric of unwed father decisions, they identified five of their twenty-seven cases as "Reconciliation" cases. Burbach & Lamanna, *supra* note 148, at 163. The purpose of their study, however, was not to determine the proportion of cases that would fall in this category, and their sample may not be representative or large enough for this purpose. Most importantly, their selection criteria required that the opinion include some "characterization or evaluation of the biological mother," a criterion that might be met by some types of cases more than others. *Id.* at 162. In addition, a court may not necessarily mention the mother's presence in the background of the case (most that do mention it do so only in passing) because she has no legal standing. Anecdotally, the presence of the birth mother in support of the father's claim strikes me as a frequent feature of litigation premised on the rights of the father alone, although not in the majority of cases.

parenthood: whether it will be defined in terms of relationships or instead as a genetic entitlement, which I have argued is patriarchy in modern guise. The privileges of patriarchy, however, are linked not just to gender but to race and class, and disparities in those privileges are evident in the child welfare context as they are in adoption. As discussed above, states have adopted the substantive rule of genetic entitlement, which symbolically maintains patriarchy, while using procedural barriers to limit some men's ability to exercise this privilege.[235] Similarly, the child welfare system's one-parent doctrine, also discussed above, unfairly excludes men from parenthood.[236] The doctrine is unfair in at least two ways. First, it ignores the biology-plus-relationship test and so violates the Supreme Court's one clear holding from the unwed father cases, that a father with an established relationship with the child has the same parental rights as the mother.[237] Second, even if the father does not meet the biology-plus-relationship test, his inchoate interest in the child outweighs any claim that the state has to the child. All of the arguments in this Article for restricting genetic claims apply only to claims *against the mother*. If the mother has died or been found guilty of abuse, then the father's claim is not against the mother but against the state, which dramatically shifts what is at stake. It is ironic—and, in my view, an indication of its grounding in patriarchy rather than the interests of children—that genetic entitlement is at its strongest when the father seeks to overrule the mother's decisions but at its weakest when he competes with the state.

Reforms of the adoption and child welfare systems are urgently needed to protect vulnerable communities and families from losing children. Systemic reforms would do so without the need for genetic entitlements that give men automatic access to children and control over their mothers.

V. CONCLUSION

Our systems for protecting child welfare are riddled with injustice, and there is scant basis for optimism about any imminent reform. Compared to the complex and daunting challenges posed by real reform, a more immediate fix in the form of genetic entitlements

235. *See supra* subpart II.B.

236. *See supra* note 185 and accompanying text.

237. Stanley v. Illinois, 405 U.S. 645 (1972); *see* Gupta-Kagan, *supra* note 185 (arguing for the application of *Stanley* to strike down the one-parent doctrine).

has some appeal. The fix, however, is superficial, and as in the case of using rights to encourage caretaking, it tries to solve a social problem that mostly harms women by giving more rights and power to their male partners. Moreover, it does so using a male-centered definition of parenthood that ignores real-life relationships in favor of abstract genetic entitlements. Rather than promote the superficial theory of equality that drives the genetic definition of parenthood, feminists should seek to restore and strengthen the focus on caretaking, working for reforms that protect existing parent-child relationships instead of patriarchal demands for authority over women and children.