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## Beyond Eros: Relative Caregiving, Agape Parentage, and the Best Interests of Children

Sacha M. Coupet

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# BEYOND “EROS”: RELATIVE CAREGIVING, “AGAPE” PARENTAGE, AND THE BEST INTERESTS OF CHILDREN

SACHA M. COUPET\*

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## INTRODUCTION

In family law, as in many areas of law, the relationship between the rules devised to govern an individual’s behavior and the actual lived experiences of these same individuals is rarely, if ever, simple or straightforward. This symposium provides yet another example of this complicated relationship. It aims to explore the lingering remnants of “illegitimacy”—revisiting why parentage and parental status should *not* depend on marital status—utilizing a fairly simple and straightforward deductive argument<sup>1</sup> that would, if the

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\* Associate Professor of Law and Director of Research Civitas ChildLaw Center, Loyola University Chicago School of Law. My sincere thanks to Professor Nancy Polikoff for the invitation to participate in the American University Washington College of Law conference, “The New ‘Illegitimacy’: Revisiting Why Parentage Should Not Depend on Marriage,” and for all of her pioneering work aimed at validating and affirming the equal worth and dignity of *all* families. My thanks as well to the other participants of the conference for their useful comments and critique.

1. Two caveats: I am neither a philosopher nor a traditional family law scholar and delve into both domains in this Article with great caution. However, in grafting my work on kinship caregiving families onto the broader plane of family law writ large, I find the framework of deductive reasoning useful. I believe that deductive arguments allow for the observation of inconsistencies that should otherwise not exist given the truth of the premises upon which conclusions are based. For example, if the stigma of illegitimacy has been effectively eliminated under the law, then the continued emphasis on the marital status of adults for the purposes of protecting their relationships with children seems logically out of place. This should arguably hold true

relationship were as simple and straightforward as proposed, guarantee the truth of the conclusion that children are not penalized based upon their parents' marital status:

1. It is unconstitutional to penalize a child born to unmarried parents on the basis of his/her parents' non-marital status.<sup>2</sup>
2. Failure to legally protect a child's significant attachment relationship to an unmarried parent is a penalty.<sup>3</sup>
3. Accordingly, a child born to unmarried parents is unconstitutionally penalized when his or her primary attachment relationship to an unmarried parent is not legally protected.

As simple and straightforward as the conclusion *should* be, based on the truth of the premises that precede it, it is not. Indeed, as we learn from the work of Solangel Maldonado, children continue to suffer legal and social disadvantages, including discrimination under the law as well as social stigma, as a result of their parents' marital status.<sup>4</sup>

This Article, which specifically addresses the continued role of illegitimacy—as in de-legitimized, fraudulent, counterfeit or makeshift—in the context of relative caregiving, presents a normative thought experiment reliant upon a slight variation of the above deductive argument:

1. If illegitimacy distinctions are unconstitutional, eligibility for legal parental or co-parental status should not depend upon the presence or absence of a marital tie *between*, or a marital tie *to*, a biological parent.
2. Relative caregivers cannot establish a marital tie to a biological parent.
3. Therefore, relative caregivers' eligibility for parental or co-parental status should not necessarily depend upon the presence or absence of a marital tie to a biological parent.<sup>5</sup>

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for kinship caregiving families as much as "traditional" families typically contemplated in discussions about illegitimacy. In the most simplistic sense, deductive arguments are attempts to show that a conclusion necessarily follows from a set of premises. An example of deductive reasoning is: (1) all men are mortal; (2) Socrates is a man; therefore, (3) Socrates is mortal.

2. See *Caban v. Mohammed*, 441 U.S. 380, 391-94 (1979) (rejecting the distinction between married and unmarried parents because maternal and paternal roles are of equal importance).

3. See *Weber v. Aetna*, 406 U.S. 164, 175-76 (1972) (finding that children can form significant attachments to unmarried parents and could suffer from legal distinctions between married and unmarried parents).

4. Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 345 (2011).

5. Of course, while eligibility of relative caregivers for parental status can arguably depend on *other* factors, the focus of this Article is to explore how the role that marital status or *eligibility* to enter into marriage/sexual union functions to disqualify relative caregivers from parental status.

Many questions quite reasonably flow from the syllogism above. Chief among them is whether the ascription of parental or co-parental status to relative caregivers is in competition with, or in conjunction with, that accorded to biological parents? Essentially, would the deductive argument asserted above support granting parental status to a relative caregiver *in addition to* two biological parents, married or not, thus creating a multiple parentage scenario? I have elsewhere broached the topic of multiple parentage,<sup>6</sup> and leave to my colleagues who write significantly more on the multiple parentage question the opportunity to address this issue in richer detail and depth. Multiple parentage, while, in many instances, a natural conclusion that can be drawn from my argument, is neither the primary focus of this symposium nor this particular thought experiment. Rather, the question this thought experiment is intended to provoke is one concerning “relatedness” and, at the risk of appearing hopelessly sentimental, “love.” Moreover, I hope to touch on what—in the context of parentage—“relatedness” and “love” have to do with the best interests of children. The aim of this Article, consistent with the theme of this symposium, is to call into question the paradigmatic ways in which “intimate dyadism,” or *eros*, continues to define the boundaries of parentage and parental status—challenging the ways in which a particular form of relatedness through marriage continues to define the boundary between legitimate and illegitimate. In advancing an understanding of parental status and parentage that better comports with the experiences and needs of children, I also aim to explore how agape parentage can work in the best interests of children, particularly those being raised in relative-caregiver households.

#### I. BACKGROUND

To start, it is worth exploring why it is that some strenuously resist the reasoning presented in the second deductive construct regarding relative caregivers as parents or co-parents. Although courts and legislative bodies are increasingly extending standing to non-biological parents as either *de facto* parents, parents by estoppel, or some derivation thereof,<sup>7</sup> there is a strain of thought or justification in almost all of these cases that premises quasi-parental status upon the notion of “partner-hood” or “coupling”—with competing parental claims from parties who function as either an intact or, more likely, *former* romantically linked couple. The most recent ruling on this matter by the Delaware Supreme Court, *Smith v. Guest*,<sup>8</sup>

6. See, e.g., Sacha M. Coupet, *Ain't I a Parent?: The Exclusion of Kinship Caregivers from the Debate over Expansions of Parenthood*, 34 N.Y.U. REV. L. & SOC. CHANGE 595 (2010).

7. See, e.g., DEL. CODE ANN. tit. 13, § 8-201 (2011); *In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005).

8. *Smith v. Guest*, 16 A.3d 920 (Del. 2011).

serves as a reminder that *de facto* parent status is premised on a very particular type of relationship both with the child, and, most importantly, although not always explicitly noted, with the biological parent.<sup>9</sup> In *Smith*, the court, distinguishing the claims of Guest, a former romantic partner of a biological parent, from similar claims of grandparents of a biological parent in *Troxel v. Granville*,<sup>10</sup> noted that Guest was not just “any third party.”<sup>11</sup> Accordingly, the court intimates that grandparents and other relatives with strong attachment and caregiving relationships to relative minors are the quintessential “any” third parties on whom the restrictions addressed in *Troxel* should lie.<sup>12</sup> In contrast, former partners of biological parents are somehow less different from grandparents and other relatives. Partners of parents share a different kind of relatedness that, although not identical, is similar enough in form and function to marriage to qualify this particular class of third parties as legitimate *de facto* parents. Although the logical extension of *de facto* parent claims should include any person who has developed a supportive and nurturing relationship with a child sufficiently profound as to merit protection under the law, to date those claims have only protected adults who were at some point “partners” of biological parents in a marital or quasi-marital relationship.<sup>13</sup> Indeed, the degree to which an adult petitioning for parental recognition bears some resemblance to a married partner, the more likely the claim is to be legally upheld and the more socially acceptable the ascription of parental status.

Not surprisingly, and consistent with this assertion, last year’s debate over same-sex marriage in New York state was replete with instances in which the claims both for and against extending the right to marry to same sex couples was premised upon the importance of marriage for children.<sup>14</sup> Said one author, expressing a view that many believe compelled the New York legislature to ultimately pass the bill extending marriage to same-sex couples, “[m]arriage can protect children—legally, financially, socially—and same-sex marriage will give more parents more ways to protect more children.”<sup>15</sup> The premise of this Article is that were we truly *post-*

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9. *Id.* at 924-25.

10. 530 U.S. 57 (2000).

11. *Smith*, 16 A.3d at 931 (emphasis added).

12. *Id.* (citing *Troxel*, 530 U.S. at 67 (holding unconstitutional a “non-parent” visitation statute that allowed third parties to subject a parent’s right-of-visitiation decision to state court review)).

13. See, e.g., *C.M.G. v. L.M.S.*, CIV. No. 94 2331, 4102, 2010 WL 2696112, at \*15 (Del. Fam. Ct. Apr. 23, 2010) (considering the relationship of Guest with the biological parent in determining *de facto* parental status).

14. See, e.g., Lisa Belkin, *Let My Parents Marry*, N.Y. TIMES, June 16, 2011, <http://parenting.blogs.nytimes.com/2011/06/16/let-my-parents-marry/> (providing several findings and stories on the “effect” of same-sex marriage on children).

15. Amy Davidson, *Close Read: Gay Marriage: New York, not North Korea*, NEW

illegitimacy, distinctions between those protections available to children within marital households and those outside would not exist. And yet they do.

I suggest that resistance to the syllogism proposed, even among those who favor decoupling marriage and parenthood, stems from the way in which the discourse around parental status continues to favor individuals who are married, capable of marriage, or at least within the ambit of “prescribed mating”—a class that categorically excludes relative caregivers. The “New Illegitimacy,” under whose banner this collection of scholars have united to protest, is particularly pernicious because—accepting the guarantee of the conclusion in the deductive argument first presented—we assumed it was axiomatic that children would not suffer on the basis of the marital status of the persons who assisted in their creation. However, even if the gains new illegitimacy scholars seek are realized and children no longer bear any burden or disability related to the marital status of their progenitor parents, there are still children who will be so burdened within the broader definition of parent.<sup>16</sup> Children being raised or co-parented by relative caregivers will still find their significant attachment relationships *unprotected* and *delegitimized* on the basis of the absence of a marital or quasi-marital tie between the people who are raising them.

## II. KINSHIP CAREGIVING

Data on grandparent caregiving suggests that relative co-parenting is not an isolated phenomenon.<sup>17</sup> Indeed, far from a recent phenomenon, an increasing number of children are currently being “parented” in the homes of relatives by nonparent caregivers, often alongside and cooperatively

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YORKER BLOG, (June 15, 2011), <http://www.newyorker.com/online/blogs/closeread/2011/06/gay-marriage-new-york-not-north-korea.html>.

16. Indeed, it is a broader definition of parent, parentage, and parental status upon which my deductive argument is based. The focus of this Article, however, is not to elaborate upon a justification for broader definition of parenthood, but rather to address the ways in which even broad definitions of parenthood are narrowly made through the lens of romantic coupling, thus excluding families who are parenting without such ties. Indeed, it is well accepted that although “[p]arenthood has traditionally been connected to marital status, genetics, and legal presumptions, [i]n the past several decades, courts have been willing to entertain the idea that people who cannot qualify as parents through these tests might still be entitled to some sort of parental interests.” Linda Anderson, *Just Because You Don’t Want Kids Doesn’t Mean I Can’t Have Them: How Clarifying Definitions of “Parent” and “Procreate” Can Prevent The Indefinite Storage of Cryopreserved Embryos*, 49 U. LOUISVILLE L. REV. 231, 236 (2010); see also Deborah L. Foreman, *Same-Sex Partners: Strangers, Third Parties, or Parents? The Changing Legal Landscape and the Struggle for Parental Equality*, 40 FAM. L.Q. 23 (2006).

17. Howard Dubowitz, *Children in Kinship Care: How Do They Fare?*, 16 CHILD. & YOUTH SERVS. REV. 85, 85 (1994) (stating that kinship care is a recent trend with statistics indicating that in some regions approximately half of the children in out-of-home placements are in kinship care).

with a legal biological parent.<sup>18</sup> These caregivers are disproportionately persons of color, particularly black men and women.<sup>19</sup> I focus on grandparent caregiving, as opposed to all relative caregiving, as it represents the majority of relative caregiving situations.<sup>20</sup> Keep in mind, however, that aunts, uncles, siblings are also within the pool of relative caregivers this Article is meant to address.

The following figures capture the current profile of grandparent caregiving in the United States as of the most recent census:<sup>21</sup>

- 4.85 million children living with grandparents in grandparents' home;
- Of these, 823,000 live with grandparents and both of their biological parents;
- 2.14 million live with grandparents *and* a biological mother;
- 236,000 live with grandparents *and* a biological father; and
- 1.66 million live with grandparents without any biological parent in the home (so called "skipped generation" households as compared with "three generation" households noted above)

Solely to put these numbers in context, and to drive home the point that we are not talking about an obscure and insignificant population, it might help to compare the above figures to a population roughly similar in size. Compare, for example, the 2.14 million children residing in grandparent and bio parent households—perhaps in some form of co-parenting relationship—with a comparably sized population that generates much well deserved attention regarding rights, responsibilities and well-being; prisoners incarcerated in the United States. As of June 2009, there were approximately 2.3 million persons incarcerated in both federal and state prisons and jails throughout the United States.<sup>22</sup> Compare, as well, the 1.66 million children residing only with grandparent caregivers<sup>23</sup> with the 1.3 million persons incarcerated in state prisons across the United States as of

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18. See Jennifer Ehrle et al., *Kinship Foster Care: Custody, Hardships, and Services*, Snapshots of America's Fams. No. 14, Nov. 30, 2003, at 1, available at [http://www.urban.org/UploadedPDF/310893\\_snapshots3\\_no14.pdf](http://www.urban.org/UploadedPDF/310893_snapshots3_no14.pdf) (stating that many abused and neglected children are placed with relatives because there are substantial benefits to placing children with relatives rather than with unrelated foster parents).

19. See Dubowitz, *supra* note 17, at 87 (indicating that 90% of the 524 children in kinship care who participated in the study were of African-American descent).

20. See *id.* (reporting that 47% of the caregivers that participated in the study were the child's grandparent).

21. U.S. Census Bureau, *America's Families and Living Arrangements: 2010*, <http://www.census.gov/population/www/socdemo/hh-fam/cps2010.html> (last visited Nov. 6, 2011) (click on Table C.1: Household Relationship and Family Status of Children Under 18 Years, by Age and Sex: 2010).

22. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2009*, 2 tbl.1 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus09.pdf>.

23. U.S. Census Bureau, *supra* note 21, at tbl.C.1.

2009.<sup>24</sup>

Kinship caregiving practices are more prevalent in families of color and other marginalized communities coping with economic, social, and political pressures.<sup>25</sup> Along with the day-to-day burden of caregiving that inevitably accompanies the role of kinship caregiver, the ambiguity of the caregiver’s status vis-à-vis the child for whom they are caring is particularly problematic. Indeed, the ambiguity may arise from differing perceptions of caregivers and those who ascribe legal roles and grant legal protections. As the anthropologist Carol B. Stack observed in her seminal 1974 piece, “All Our Kin,” concerning the informal rules governing intergenerational rights over, and responsibilities to, children—essentially, parental status—within a poor black community, there is a complex web of informal rights and duties not to be confused with the formal, official or statutory rules that govern such relationships.<sup>26</sup> She cautioned, “Community members clearly operate within *two* different systems: the folk system and the legal system of the courts and welfare offices.”<sup>27</sup> She asserted that what was particularly wounding was when the legal system failed to recognize the folk system as it was not just the denial of much-needed support, but also the message that these kinship caregiving families are somehow “illegitimate.”<sup>28</sup>

So, what place is there in the new illegitimacy discourse for this population of families? Sadly, to date, not much. I believe, however, that the discourse on legitimate families could be more comprehensively enriched by focusing on the following critical questions: in the context of determining parental status, protecting parent-child relationships, and ascribing “legitimacy” within the community of families, *whose* relatedness matters and what *kind* of relatedness counts?

### III. WHOSE RELATEDNESS MATTERS?

In a system in which the best interest of the child are regarded as paramount, it should not be at all surprising to answer that query with the assertion that relatedness to the *child* matters most. The current “couple-

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24. BUREAU OF JUSTICE STATISTICS, *supra* note 22, at appx. tbl.2.

25. Approximately 6.5% of non-white children live in a household with no parent present, compared to 3.4% of white children. U.S. Census Bureau, *supra* note 21 (percentage calculated by author). Moreover, 8.2% of children living in a family below 100% of poverty live in a household with no parent present, compared to 2.4% of children living in a family at 200% of poverty and above. *Id.* (percentage calculated by author).

26. CAROL STACK, ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY 46 (1974).

27. *Id.*

28. *See id.* at 89 (finding that intervention by social agencies is interpreted as an attempt by the “larger society” to control their children).



centric” focus, however, is primarily on “begetting” adult couples, as if “begetting” were synonymous with “belonging to” and capable, in and of itself, of trumping all other forms of relatedness. One problem, among many, with the focus on begetting is that it conjures property allusions long disparaged in family law. Indeed, children are no longer the mere chattel of the progenitors who participate or consent to their creation. So, if legal recognition of parentage is not procreation driven, then what? A parent-child relational model, by contrast, appeals to those who seek to revisit why parental status should not depend on marriage, as it emphasizes the *quality* of this more significant relationship, over the distracting and peripheral adult ones. This model is inherently more inclusive because it does not categorically privilege or exclude adults on the basis of irrelevant criteria, like adult sexual conduct, and, so doing, opens the door to legal recognition of quasi-parental figures who play significant roles in the lives of children.

Thankfully, because “parenthood” is a social construct defined by law, it is highly adaptive and capable of accommodating the various circumstances in which parental status should run parallel with the underlying conduct and relationships that give rise to that role. As such, the construction of parenthood, with all the attendant rights and responsibilities, should rest upon an understanding of how adults relate to the child, not necessarily the manner in which they themselves are intimately connected, whether married or not, for that is an irrelevant consideration. Indeed, as family law, long critiqued for its reliance upon property concepts to define parental privileges,<sup>29</sup> adopts a more expansive vision of parenthood that is more functionally and relationally oriented, there is fertile ground for the claim that the quality of the relationships that children form with caregiving adults is the *sine qua non* of parentage. Challenges to new illegitimacy form a part of that ongoing reform.

#### IV. WHAT *KIND* OF RELATEDNESS MATTERS?

Just as the misplaced emphasis on adult-adult relationships over those that adults form with the children they are raising reifies the primacy of marriage, inevitably creating a class of legitimate and illegitimate families, so too does the misplaced emphasis on a specific kind of relatedness or love. In the Greek language, there are three words that are used to define the word “love”—*eros*, *philia*, and *agape*.<sup>30</sup> The first one, *eros*, represents sexual or romantic love;<sup>31</sup> from *eros* comes the word “erotica.” The second

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29. See, e.g., RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE’S PRINCIPLES 57 (Robin Fretwell Wilson ed., 2006).

30. See Alan Soble, *An Introduction to the Philosophy of Love*, in *EROS, AGAPE, AND PHILA: READINGS IN THE PHILOSOPHY OF LOVE* xi, xxii (Alan Soble ed., 1989).

31. See *id.* at xxiii (noting that Plato’s *eros* “is the manner in which humans

word, *philia*, generally refers to the non-sexual brotherly love or affection between friends.<sup>32</sup> From this word, we have, for example, Philadelphia, known as the “City of Brotherly Love” and philanthropy, or love for humanity. The last word, *agape*, refers to a type of love that stands in sharp contrast to that of the other two words, which are primarily motivated by self-interest, self-gratification, and self-protection.<sup>33</sup> *Agape*, which is more of a detached, spiritual love points to a completely self-sacrificing love, a love lacking in self-interest, self-gratification and self-preservation.<sup>34</sup> *Agape* love, in contrast particularly to *eros*, is motivated primarily by the interest and welfare of others.<sup>35</sup> Greek philosophers at the time of Plato and other ancient authors have used forms of the word to denote love of a spouse, family, or children in contrast to *philia*, which is more generally distributed among non-sexual affection, and *eros*, an affection inherently defined by sex.<sup>36</sup> While *agape*, and even *philia*, have both been used to describe the love between parents and children, the architecture of parentage itself, and specifically the rules that govern the ascription of parental status, reflect the centrality of *eros*.<sup>37</sup>

If marriage is the engine that drives the discourse on parenthood, sex or romantic coupling is the fuel that feeds it. Why is this? Parentage’s focus on adult intimate dyadism—read, *eros* or *sex*—can perhaps find an anthropological and historical basis in heterosexual mating as the only means of procreation. However, advances in reproductive technology have rendered heterosexual mating’s primacy nearly obsolete.<sup>38</sup> Couples can avail themselves of a number of reproductive techniques aimed at bringing a child into the world, none of which actually require an intimate act of coitus.<sup>39</sup> Nonetheless, *eros* shapes the discourse on parentage, as evident in the focus placed on the nature of the adult relationship within which decision-making regarding procreation takes place. Although

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necessarily love”).

32. See Alan Soble, *Classical Sources, in EROS, AGAPE, AND PHILA*, *supra* note 30, at 41, 43-44 (recognizing Aristotle’s *philia* as “ideal friendship”).

33. See Anders Nygren, *Agape And Eros, in EROS, AGAPE, AND PHILA*, *supra* note 30, at 85, 93 (defining *agape* as “unmotivated”).

34. See *id.* (describing *agape* as “unselfish” love).

35. *Id.*

36. See *id.* (contrasting the concepts).

37. See Lynn D. Wardle, *All You Need is Love?*, 14 S. CAL. REV. L. & WOMEN’S STUD. 51, 60 (2004) (noting that courts have recently begun recognizing the parties’ emotions when resolving family law cases).

38. See generally *Clinic Summary Report, SOC. ASSISTED REPRODUCTIVE TECH.*, [https://www.sartcorsonline.com/rptCSR\\_PublicMultiYear.aspx](https://www.sartcorsonline.com/rptCSR_PublicMultiYear.aspx) (last visited Nov. 9, 2011) (providing data about reproductive technologies).

39. See *Assisted Reproductive Technologies, SOC. ASSISTED REPRODUCTIVE TECH.*, <http://www.sart.org/detail.aspx?id=1908> (last visited Nov. 9, 2011) (listing techniques such as in vitro fertilization and embryo transfer).

technological advances have moved us beyond heterosexual mating as the touchstone of parental status, we have not moved beyond *eros*, looking still to romantically linked couples as the archetypal parents. The more and more we move away from “the sex act”—however defined, heterosexual or homosexual—as a defining feature of bringing a life into being, the less we ought to be reliant on sex, sexual intimacy or romantic coupling to define the “parental context.” The conflation of *eros* and parental status is particularly evident in debates over same-sex marriage, gay adoption bans, and expanded definitions of parenthood.<sup>40</sup> Same-sex marriage advocates focus on securing marriage rights as a means of securing parental claims reifies the notion that only romantically linked couples should form the core parental unit. Gay adoption bans, for example, that preclude lesbians and gays from adopting are supposedly justified on the notion that “deviant” adult sexual conduct has negative repercussions for children parented by these same gay and lesbian couples.<sup>41</sup> Even expanded definitions of parenthood limit such expansion to couples in relationships that bear a strong resemblance to marriage.

I am compelled to give a nod, albeit briefly, to concerns about practicality, particularly multiple parentage claims, as these concerns are typically among those I hear in response to my proposal advancing the parental claims of relative caregivers. I, and a growing number of family law scholars, do not doubt the capacity of the law to accommodate the claims of two, or three, or more legal parents, among whom rights and responsibilities are divided in a manner reflective of the ways in which ongoing care is delivered and significant relationships are formed.<sup>42</sup> Many families have already been organizing themselves in this way—by virtue of their “family-ness,” rather than their “married-ness”—they are no less deserving of legal protection.

#### CONCLUSION

Framing the new illegitimacy debate as solely about marriage, or the

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40. *But see* Lisa Belkin, *An End to Gay-Adoption Bans?*, N.Y. TIMES, July 28, 2010, <http://parenting.blogs.nytimes.com/2010/07/28/an-end-to-gay-adoption-bans/> (noting that it is the quality of parenting and not the sexual orientation of the parents that raises a healthy child).

41. *See* Debra Cassens Weiss, *Fla. Asserts Unstable Gay Homes Justify Adoption Ban*, A.B.A. J., Aug. 27, 2009, [http://www.abajournal.com/news/article/fla\\_asserts\\_unstable\\_gay\\_homes\\_justify\\_adoption\\_ban](http://www.abajournal.com/news/article/fla_asserts_unstable_gay_homes_justify_adoption_ban) (reporting an assertion by a Florida lawyer that homosexual couples have higher rates of domestic violence, psychiatric disorders, and breakups).

42. *See, e.g.*, Susan Frelich Appleton, *Illegitimacy and Sex, Old and New*, 20 AM. U. J. GENDER SOC. POL'Y & L. 347 (2012) (discussing that the choices the law makes about parentage are policy decisions and can shape the understanding of family through acknowledging connections).

lack thereof, limits the scope of creative options for parentage law reform to the exclusion of many meritorious parental claims. In keeping the focus on the presence or absence of marriage, the discourse is already profoundly shaped by marital referents. To the degree that the debate continues to revolve around marriage, those for whom it has no currency will remain irrelevant, or illegitimate, so to speak. That said, perhaps my proposal is premature. Perhaps the “new illegitimacy” struggle is one that should be marked instead by the incremental dismantling of traditional norms. However, in the attempt to decouple marriage from parenthood, should progressive family law scholars not critically reexamine the ways in which we continue to blindly frame the parenthood discourse with referents that resonate with marital themes? To the degree that the current discourse on parenthood retains remnants of the marital procreative unit, should progressive family law scholars not object? Until we dispense with the myopic focus on the *nature* of adult partnerships—or at least relegate it one of many relevant factors that can be considered in determining parental status—we will continue to circumscribe parenthood to only those parties we could conceivably regard as married or “married-like.” Until we cease to rely on the master’s tools in conceptualizing parenthood—valuing other forms of relatedness and love, other than romantic love—our resistance to the new illegitimacy will be marked by only limited gains, permitting only the narrowest measures of change.<sup>43</sup>

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43. Feminist thinker, Audre Lorde, originated the phrase “using the master’s tools.” Audre Lorde, *The Master’s Tools Will Never Dismantle the Master’s House*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 110-13 (1984). The term is meant to suggest that when we use the “master’s tools” (i.e., the tools of a dominant oppressive norm), we reify its authority and its ability to determine which tools are effective in the act of resistance. Each act of “dismantling,” while meant to be an act of resistance, therefore rebuilds the dominant power.