I. INTRODUCTION

If the players of the National Football League (NFL) are any indicator of what might be in the best interests of children, some sports experts seem to think that fatherless quarterbacks have more challenges to their NFL success than those who had the benefit of both a father and a mother while growing up.¹ Robert Griffin III (also known as RGIII) is a prime example.² “Decades of research have now documented the tremendous challenges children face when they grow up without their fathers,”³ and indeed father absence⁴ and the father wound⁵ are serious concerns in America today.⁶

¹ See Chris Conger, Cam Newton—Colin Cowherd and Fathers in Sports, NFL NEWS DESK (Dec. 7, 2012, 2:20 AM), http://nflnewsdesk.com/cam-newton-colin-cowherd-and-fathers-in-sports/ (discussing Cowherd’s assessment, which contrasts successful rookie quarterbacks, such as Robert Griffin III, Russell Wilson, and Andrew Luck, who had the benefit of having an involved father (and a mother) while growing up, with talented but struggling quarterbacks such as Cam Newton, who did not have the benefit of being raised with a father at home).


(continued)
In contrast, others argue, “[T]here is no conclusive evidence that, absent those conditions [of poverty and instability], the pure, pared-down state of single motherhood is itself dangerous to children.” A recent survey of current studies on parenting that mitigated family structure variables indicated that “[s]trengths typically associated with married mother-father families appear to the same extent in families with [two] mothers and potentially in those with [two] fathers.” In fact, a recent survey of studies concluded that “[a]verage differences favor women over men” in parenting, but that “parenting skills are not dichotomous or exclusive,” noting that “[t]he gender of parents correlates in novel ways with parent-child relationships but has minor significance for children’s psychological adjustment and social success.” Another study contended that successful parenting is not gender specific at all—that children do not need either a mother or a father, but rather, that any gender configuration of adults is able to parent well.

Id.; see also Russell Simmons Presents Def Poetry Jam—Knock Knock, YOUTUBE (May 8, 2009), http://www.youtube.com/watch?v=8E0DMcZ23kE.

6 Committed Father, supra note 4.


9 Id.

Constitutionally, parental rights are fundamentally protected, but what parental situation is authentically in the child’s best interests? Arguments for genderless parenting suggest that “[t]he gender of parents only matters in ways that [do not] matter.” However, in 1987, Supreme Court Justice William Brennan argued, in *Bowen v. Gilliard*, that “the optimal situation for the child is to have both an involved mother and an involved father.”

New York’s highest court ruled:

> The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like.

Cambridge Professor Michael Lamb, whose expert testimony was relied upon against California’s Proposition 8 (a referendum defining marriage as between one man and one woman, passed by a majority of Californians), wrote that both “mothers and fathers play crucial and qualitatively different roles in the socialization of the child.”

The research presented here seeks to obtain the child’s perspective. Adult children of varied parenting configurations are now entering the dialogue. Speaking now as a bisexual parent and a child who was raised by two mothers, California State Northridge Professor Robert Lopez

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11 Pierce v. Soc’y of Sisters, 268 U.S. 510, 534 (1925) (holding that parents have an inalienable right to direct the upbringing of their children); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (same).

12 Erickson, *supra* note 3; see also Biblarz & Stacey, *supra* note 8, at 3.


14 *Id.* at 614 (citing Henry Biller, *Paternal Deprivation: Family, School, Sexuality, and Society* 10 (1974)).


asserts that what parents do matters, and that he and other bisexual parents “have no choice but to take responsibility for what we do as parents” and “[w]hen you are a parent, ethical questions revolve around your children and you put away your self-interest . . . forever.” 18 Journalist and researcher Alana Newman, speaking as a child of sperm donation who was raised without a father at home, states, “I am the daughter of a sperm donor. For a long time I [did not] understand how this had negatively impacted my life . . . I am convinced that I am not alone in my struggles being donor-conceived.” 19 Political lobbyist Doug Mainwaring, a homosexual father of two teenage boys, recently spoke publicly “of his personal experience as a gay man who came to realize that his own children need both a mother and a father.” 20

Parents affect children. Rethinking whether a child needs a mom and a dad is no straightforward task. By exploring conflicts and issues that arise when determining the best interests of a child in a number of different parental contexts, this Article considers rethinking the best interests of a child in having a parent of each gender, namely a father and a mother. 21 Focusing on child rearing and adoption from many angles, such as fatherlessness, 22 same-gender parenting, 23 motherlessness, 24 parental incarceration, 25 and children resulting from assisted reproductive


20 Napp Nazworth, Kids Need Both Mom and Dad, Says Gay Man Opposed to Gay Marriage, CP POLITICS (Jan. 28, 2013, 6:39 PM), http://www.christianpost.com/news/kids-need-both-mom-and-dad-says-gay-man-opposed-to-gay-marriage-89018/#RF0rHvKbI3Mk7EXR.99. Doug Mainwaring is “now living with his ex-wife so they can co-parent their two teenaged sons.” Id.

21 See infra Part II.

22 See infra Part II.A.

23 See infra Part II.B.

24 See infra Part II.B.

25 See infra Part II.B.
technologies, this Article discusses whether dual-gendered parenting holds more or less weight in a best interest of the child analysis. If it does not matter whether a child has an opportunity to have a relationship with both a father and a mother, why is that the case? And, if dual-gendered parenting better fosters a child’s best interests, why is that so? Can any state law require dual-gendered parenting within parental rights and equal protection guidelines? For that matter, should gender of the parent ever be a relevant consideration in the adoption of a child? This Article considers state statutory codes defining what is in the best interests of a child and pediatric medicine, social science, constitutional requirements, and federal law and policy in determining if it is truly in a child’s best interests to have both a mom and a dad. It concludes with a discussion of dual-gendered parenting imperatives, while offering innovative resolutions to the best interests of children missing one or the other.

Part I discusses various studies and scenarios of parenting, perspectives on each, and their results on children. It confronts the problem of fatherlessness, the need for mothering, and the significance of a marriage context for children. Part II examines statutory parameters on the best interests of children regarding parental preference in state codes, analyzing these factors, and considering whether and how they are directed by pediatric medicine or evidence from social science. It then compares these facts with federal law on equal protection and federal

26 See infra Part IV.A.
27 See infra Part III.D.
28 See infra Part III.A.
29 See infra Part III.B.
30 See infra Part III.C.
31 See infra Part III.D.
32 See infra Part III.E.
33 See infra Part III.A.
34 See infra Part IV.B.
35 See infra Part II.
36 See infra Part II.A.
37 See infra Part II.B.
38 See infra Part II.C.
39 See infra Part III.A.
40 See infra Part III.B.
41 See infra Part III.C.
family policy. Part III brings all of these angles together in a discussion of a child’s interests in his or her own parents. It sets forth how the law and the evidence find it imperative that a child have an opportunity to enjoy a relationship with a father and a mother whenever possible, while offering innovative resolutions to provide a father or a mother for a child that has been deprived of one or the other.

A child’s best interests, though required by state family law code, are not always the driving factor in parental decisions. Rethinking the best interests of a child leads to a legal duty to allow a child every opportunity to have one parent of each gender—a mother and a father—whenever possible.

II. MULTIPLE PERSPECTIVES

Various studies and scenarios of parenting offer a variety of perspectives, and their results on children reveal many viewpoints regarding what children need in parents. The problem of fatherlessness, the need for mothering, and the significance of a marriage context for children are the focus of most of those perspectives.

A. Father Absence

Facts and studies of father absence reveal an interesting perspective on what children need in parents. In 2010, the U.S. Census Bureau found that 24 million children live in homes absent their biological father. These numbers reflect that the number of children living without their biological fathers has tripled nationally since the 1960s. Not only do these children not live with their biological father, but two out of five of all children living in fatherless homes see their biological fathers less than once a

42 See infra Part III.D–E.
43 See infra Part IV.
44 See infra Part IV.B.
45 See infra Part III.A.
46 See infra Part V.
47 See infra Part III.C.
48 See infra Part II.A.
49 See infra Part II.B.
50 See infra Part II.C.
52 Committed Father, supra note 4.
Father absence is not an ebbing trend, but is a growing problem facing many children. The National Fatherhood Initiative (NFI), a leading national nonprofit organization studying and working to improve the issue of fatherlessness in American households, has studied this increasing fatherlessness trend since 1994. The NFI found that fatherlessness affects children in terms of poverty, emotional and behavioral problems, child health, crime, teen pregnancy, early sexual debut, child abuse, drug and alcohol abuse, childhood obesity, and education. Research in all of these areas indicates a strong correlation between father absence and incidents of these problems in children. Father absence generally results in detriment and disadvantage for children.

The statistics on child poverty for children in father-absent homes are stunning. Poverty rates for American households in 2008 were 13.2%, but 28.7% for children in female-headed households. Children in father-absent homes are nearly four times as likely to be poor as children with a dad at home. In 2011, 13% of children in married-couple families were living in poverty, compared to 44% of children in mother-only families. Father absence means serious detriment to a child economically, and yet there are studies that have revealed substantial numbers of children born to younger mothers have never had a biological father residing in the home at all. Despite these facts, some argue that fathers are not necessary, but...
that the quality of the second parent, not his or her gender, is what is at stake.63 The facts on child poverty alone scream loudly otherwise.

Father absence apparently contributes to child abuse and juvenile delinquency.64 In many cases, the absence of a biological father at home contributes to an increased risk of child maltreatment, in that the presence of a “social father” or mother’s live-in boyfriend correlates highly to a child’s risk of abuse or neglect.55 When children have contact with their dad, they are less likely to be victimized66 and less likely to lean toward delinquent behavior.67 As one study revealed, frequent communication and higher social encounters, even with nonresident biological fathers, decreased adolescent delinquency in low-income minority adolescents between the ages of ten and fourteen.68

Using Cam Newton (starting quarterback for the Carolina Panthers) as an example, contrasted with Robert Griffin III (starting quarterback for the Washington Redskins), Russell Wilson (starting quarterback for the Seattle Seahawks), and Andrew Luck (starting quarterback for the Indianapolis Colts), ESPN Radio sports analyst Colin Cowherd discussed the role that a father plays in how an athlete “turns out in life both on and off the field.”69 Arguing from a purely pragmatic viewpoint in the context of professional football, Cowherd suggests that having a dad at home made the difference in each player’s quality, not only as an athlete, but more importantly, as a man and a leader in his personal life.70 Even further, President Barack

their father were more likely to live in a father-figure-free home. This primarily reflects their lower likelihood of being in a reconstituted family and not any significantly greater likelihood of not having contact with their biological father.”).


65 Id. (finding justification in child protective services data).

66 Id. at 3.


68 See id. at 132–45.

69 Conger, supra note 1 (distinguishing Cam Newton from other quarterbacks by saying that he lacked “a quality role model” and did not have anyone to “teach him right and wrong”).

70 Id. (“[F]athers play a key role in all children’s lives and they help shape who people become.”).
Obama has plainly stated that fathers are critical to their children’s lives: “They are teachers and coaches. They are mentors and role models. They are examples of success and the men who constantly push us toward it.”

One of the factors that keep fathers engaged in their families and connected with their children is marriage, but that stability is slipping away from middle-class American children. Studies show that fathers matter for every child, regardless of economic class. Father absence is not in the best interests of the average child; but, neither is living with only a dad.

**B. Mothering**

Although mothers and fathers may parent in similar ways, there is evidence of critical differences that highlight the importance and necessity for a maternal relationship. Canadian researcher Professor Andrea Doucet performed extensive longitudinal research on more than 100 male caregivers who are breaking the traditional mold and parenting alone. Her research examined the fatherly ability to encourage problem solving in children, play with children, encourage them to take risks, try new things, and their nurturing capacity to “let go.” To conclude, the research exposed the need for a mother. Doucet ends her report by sharing a key moment of her research, during which she asked a group of sole-custody dads what resources they would like to have in an ideal world. One of

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72 See infra Part III.C.
73 Cheryl Wetzstein, Marriage Culture Called Key to Stable Middle Class, WASH. TIMES, Dec. 17, 2012, at A8.
74 Id. (citing to statements made by Elizabeth Marquardt, a family law scholar who suggests that, while it is important for children to have a father in their lives, single-parent households are never ideal).
75 See ANDREA DOUCET, DO MEN MOTHER?: FATHERING, CARE, AND DOMESTIC RESPONSIBILITY 246 (2006) (researching the lives of 118 male primary caregivers, including stay-at-home dads).
76 Id. at 135.
77 Id.
78 Id.; see also Paul, supra note 63, at 62 (noting that single mothers also have less difficulty monitoring children in whereabouts, friendships, and school progress, that they exhibit better standardized test scores and higher grades, and that teenagers of single moms are actually less likely to engage in delinquent behavior or substance abuse than those of single fathers).
79 DOUCET, supra note 75, at 215; see also Erickson, supra note 3.
those fathers, to the nodding agreement of all the others, replied, “An ideal world would be one with a father and a mother. [We would] be lying if we pretended that [was not] true.”80 Nonmaternal care of babies and preschool children has been linked to behavioral problems at older ages.81 Research indicates that maternal deprivation may have long-term negative physical consequences on the development of infants and young children.82 Children need moms.

In contrast, the two strongest indicators against mother-only families are correlative poverty and instability.83 Differences in poverty rates by household types reveal that those headed by a single female have relatively high poverty rates.84 Government efforts to assist single mothers with a safety net have not been effective in reducing poverty or protecting against child poverty; rather, declines in the effectiveness of those programs have essentially worked to push the remaining poor deeper into poverty, and chief among those families are female-headed households.85 Furthermore, there is generally poor stability for a child in a single-mother household.86

80 Erickson, supra note 3 (“Although many [of these fathers] had . . . bitter experiences of separation and divorce, they could[ not] help but acknowledge the inherent connectedness of mothering and fathering—and the profound deficit experienced when one or the other is not there.”).
81 Jay Belsky et al., Are There Long-Term Effects of Early Child Care?, 78 CHILD DEV. 681, 681 (2007).
82 Aase Gruda Skard, Maternal Deprivation: The Research and Its Implications, 27 J. MARRIAGE & FAM. 333, 338–43 (1965) (discussing the impact of a distant mother at different stages of child development); see also Lawrence Casler, Maternal Deprivation: A Critical Review of the Literature, 26 MONOGRAPHS SOC’Y FOR RES. CHILD DEV. 1, 49 (1961) (discussing, in part, the impacts felt by children raised through institutional care).
One study found that living in a single-mother household was equivalent to experiencing more than five partnership transitions.87 Yet, according to other studies, single moms tend to illustrate higher parenting quality, as they are “more involved, set more rules, communicate better, and feel closer to their children than single dads.”88 Many attribute this to the formidability of the lesbian mother, arguing that, on average, lesbian parents spend more time with their children than fathers do, “rate disputes with their children as less frequent than do hetero couples, and describe co-parenting more compatibly and with greater satisfaction.”89 This teamed lesbian impact seems to provide a double dose of a middle-class feminine approach to parenting, leading researchers to argue that “two women parent better on average than a women and a man . . . .”90 This study was important, but its participants were a small nonrandom group of parents interested in the study’s outcome.91 In fact, there are very few scientifically rigorous studies on the effect of same-sex parenting.92 Another longitudinal study of self-reporting participants revealed that seventeen-year-olds conceived through donor insemination with lesbian mothers had high grade point averages and strong relationships with their moms whom they considered strong role models.93 The latest study on children and family structure—from 2012—challenges unscientific methodologies by using large, random samples from the general population.94 The study found that children suffer when

87 Id.
88 Paul, supra note 63, at 62.
89 Id. (citing Biblarz, supra note 8, at 8, 13) (noting that children of lesbian parents perceive their parents to be more available and dependable than do the children of heterosexual parents; they discuss more emotional issues with their parents, and have fewer behavioral problems, showing more interest in school and trying harder there as well).
90 Id. (quoting Biblarz, supra note 8, at 17). Paul concludes her article on lesbian research with this: “The bad news for Dad is that despite common perception, there’s nothing objectively essential about his contribution. The good news is, we[ have] gotten used to him.” Id. at 2.
91 Id.
93 Nanette Gartrell et al., Adolescents with Lesbian Mothers Describe Their Own Lives, 59 J. HOMOSEXUALITY 1211, 1222 (2012).
they are deprived of either a father or a mother, revealing increased incidences of substance abuse, child abuse, early sexual debut, a high degree of instability, and even increased levels of juvenile crime.95 “[A] recent Australian study of primary school students contrasted four groups: boys living with their father, girls with their father, boys with their mother, and girls with their mother.”96 The outcomes were interesting—they revealed the need for mothers. Boys living with their mothers scored significantly higher in scholastic, athletic, and physical domains, although “[t]here were no differences in performance of the four groups in the social and behavioural domains, or in self-esteem.”97

In reading and spelling, girls living with their mother outperformed both girls and boys living with their father. In spelling, boys living with their mother outperformed both girls and boys living with their father. In other words, boys and girls raised by their father did not perform as well in academic areas as did the boys and girls from mother-resident families.98

Generally, children who live without their mother or with only their mother tend to struggle.99 While not always perfect, marriage seems to be what keeps mom and dad together and what maintains a healthy stable environment for children.

95 Id. at 754 (discussing outcomes of the longitudinal study).
97 Id.; see also Pike, supra note 96, at 44.
98 Moyer, supra note 96, at 34; see also Pike, supra note 96, at 44 (“[I]n terms of their individual academic achievement, as findings from this study indicate that both boys and girls resident with their fathers are not performing as well as their matches from two-parent families or single-parent children resident with their mothers.”).
C. Marriage

Marriage remains a key aspect of family life and parenthood, as 86% of young adults expect to marry, expect to have that marriage last a lifetime, and plan to have children together. “[A] stable marriage is more suited to human nature than a relationship associated with solubility, such as divorce, remarriage, or cohabitation,” reports family law professor Helen Alvaré in her work on the anthropology of the family. Furthermore, “children’s well-being is so strongly and intimately affected by couples’ choices of relationship.” Marriage of two biological parents in a low-conflict marriage is the ideal family structure for children. “Not only are children’s educational and emotional outcomes diminished if they are reared outside of marriage, it appears their sense of happiness is affected too.” Researchers assert that a good marriage between a man and a woman provides a resource for successful parenting, likely because of its commitment stability. A Harvard study found this to be true:

If we were asked to design a system for making sure that children’s basic needs were met, we would probably come up with something quite similar to the two-parent family ideal... While we recognize that two-parent families frequently do not live up to this ideal in all respects, nevertheless we would expect children who grow up in

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100 Most Young Adults Expect Marriage to Last a Lifetime, N.Y. DAILY NEWS (Aug. 13, 2012, 11:06 AM), http://www.nydailynews.com/life-style/young-adults-expect-marriage-lifetime-article-1.1135222?print (discussing this fact despite the obvious divorce rate that most of those young adults will participate in).

101 Id.


103 Id. at 508 (discussing the effects of different adult sexual relationships on children and society).


105 Alvaré, supra note 102, at 510 (citing Paul R. Amato & Juliana M. Sobolewski, The Effects of Divorce and Marital Discord on Adult Children’s Psychological Well-Being, 66 AM. SOC. REV. 900, 900–01 (2001)).

two-parent families to be doing better, on average, than children who grow up with only one parent. 107

Most obviously, marriage affects child poverty:

Parents who forgo marriage increase the likelihood that their children will experience some aspect of poverty. A child raised outside of marriage is six times more likely to experience poverty than a child who grows up in an intact family, and 71[%] of poor families with children are headed by single parents. By contrast, 73[%] of all non-poor families with children are headed by married couples. 108

Marriage is a great antidote to child poverty, and that is especially true of at-risk youth. 109 Marriage works to free children of economic hardship. 110

Marriage also works to provide a model of coworking for children in many areas of life while providing a loving, committed, and stable environment for children. 111 A recent British study revealed that the same traits and skills that make someone a good romantic partner and spouse

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make one a better parent too, as nurturing and caregiving qualities help forge strong family relationships.112

America is experiencing, however, an ever-increasing nonmarital birth rate, and an ever-decreasing marriage rate,113 and this is inevitably affecting children.114 In 2010, nearly 41% of all births were to unmarried mothers, and that figure rises to 53% for Hispanics and 73% for African-Americans.115 Children of illegitimate birth, raised in single parent homes, fare worse than children raised by married parents over a range of academic and emotional outcomes, from adolescent delinquency to dropping out of school.116

I know of few other bodies of data in which the weight of evidence is so decisively on one side of the issue: on the whole, for children, two-parent families are preferable . . . .

If our prevailing views on family structure hinged solely on scholarly evidence, the current debate would never have arisen in the first place.117

Though marriage is becoming less and less the norm in American culture,118 some suggest that same-sex marriage efforts have brought a


114 The Wall Street Journal published a feature on marriage, religion, and economic status, discussing how marriage as an ideal of American life is fading in the working class, but remaining strong in the upper class, cleaving America into two statuses—essentially, those who are married and wealthier, and those who are unmarried and less economically stable—the results of which were also supported as educational levels and religiosity increased. Charles Murray, The New American Divide, WALL ST. J., Jan. 21, 2012, at C1.


116 Id. (“Nearly 71% of poor families lack married parents. And children brought up in poverty tend to be poor themselves.”).

resurgence of marriage as a positive social status.\textsuperscript{119} Children, however, are not benefiting from that resurgence in numbers worth citing.\textsuperscript{120} In fact, a group of family law scholars have proposed a national agenda to reverse the decline of marriage in America based on research that tracks the decline of marriage among nearly 60\% of Americans who have high school, but not college, educations.\textsuperscript{121} Fifty-three percent of children born to women under thirty years of age occur outside of marriage,\textsuperscript{122} and one-fourth of all children in America live in single-parent families,\textsuperscript{123} creating a class structure of families that does not afford equal opportunities for children.\textsuperscript{124} The disappearance of marriage in middle-class America apparently tracks with the disappearance of middle-class communities, as without marriage, poverty seems to take over.\textsuperscript{125} “All this has profoundly

\begin{itemize}
\item \textsuperscript{118} Peter Wehner, America’s Exodus from Marriage, COMMENTARY (Jan. 17, 2013, 12:10 PM), http://www.commentarymagazine.com/2013/01/17/americas-exodus-from-marriage/.
\item \textsuperscript{119} See, e.g., Janet Halley, Behind the Law of Marriage (I): From Status/Contract to the Marriage System, 6 UNBOUND: HARV. J. LEGAL LEFT 1, 6–8 (2010) (discussing the social image of marriage in light of cases, such as Goodridge v. Dep’t of Public Health, 798 N.E.2d 941 (Mass. 2003), and stating that “the multiplication of legally recognized alternatives to marriage” really amounts to “[s]tatus.”).
\item \textsuperscript{120} Id.
\item \textsuperscript{122} Wehner, supra note 118.
\item \textsuperscript{123} Id.
\item \textsuperscript{124} Isabel V. Sawhill, Family Structure: The Growing Importance of Class, BROOKINGS (Jan./Feb. 2013), http://www.brookings.edu/research/articles/2013/01/family-structure-class-sawhill (“The well-educated and upper-middle-class parents who are still forming two-parent families are able to invest time and resources in their children—time and resources that lower- and working-class single mothers, however impressive their efforts to be both good parents and good breadwinners, simply do not have.”).
\item \textsuperscript{125} See Cheryl Wetzstein, Marriage Culture Called Key to Stable Middle Class, WASH. TIMES, Dec. 17, 2012, at A8 (“As a result, middle-American families are beginning to (continued)
negative implications—for the emotional and mental well-being of children . . . .”

Middle-class America is losing its place of stability for children because it is choosing against marriage.

Marriage matters because children do best when raised in a stable environment with two committed parents, exceptions notwithstanding.

. . . .

. . . [T]o ignore the marriage deficit among America’s middle class is essentially to be complicit in perpetuating a society of winners and losers. Those [children] born to married, well-educated parents are more likely to prosper, while those born to fragmented families are more likely to repeat the patterns of their parents.

When nations consider the incidents of marriage as a place to conceive and raise children, citizens seem to have a profound viewpoint change on the issue of marriage expansion. France provides a timely international example. Police in Paris estimated that a crowd of 340,000, the largest demonstration there since 1984, gathered to protest the French president’s plan to legalize same-sex marriage, which would allow couples to adopt and conceive children. Protestors stated that they “ha[d] nothing against different ways of living, but [they thought] that a child must grow up with a mother and a father.”

This debate reflects a “deep and abiding moral resemblance the ‘fragile families’ led by high school dropouts, where economic stress, partner conflict, single parenting and troubling outcomes for children are not uncommon.”

126 Wehner, supra note 118.


129 Id. (“French civil unions, allowed since 1999, are at least as popular among heterosexuals as among gay and lesbian couples. But that law has no provisions for adoption or assisted reproduction, which are at the heart of the latest debate.” Further, “52% of French favor legalizing gay marriage, according to a survey released Sunday, down from as high as 65% in August.”). But see Steven Erlanger, At Once Catholic and Secular, France Debates Gay Marriage, N.Y. TIMES, Jan. 10, 2013, at A5 (discussing demonstrations that support gay rights other than the right to marriage and parenting and proposed “marriage for all” legislation).
and ideological divide in France.\textsuperscript{130} Colombia’s position on same-sex marriage and parenting is being challenged in a lawsuit over recognition of the now-nonexistent parental rights of a nonbiological partner.\textsuperscript{131} The Supreme Court of Puerto Rico recently upheld a law banning same-sex couples from adopting children in a best interests analysis.\textsuperscript{132} Further, same-sex marriage expansion was recently the subject of Supreme Court decisions,\textsuperscript{133} though neither case before the high court was directly about

\textsuperscript{130} Robert Zaretsky, Égalité Meets Gay Marriage, N.Y. TIMES (Feb. 8, 2013), http://www.nytimes.com/2013/02/09/opinion/global/the-gay-marriage-debate-in-france.html?r=0. Zaretsky opined that the heart of the matter is not over gay marriage, but over gay parenting. \textit{Id.} He quoted Sylvian Agacinsky:

\begin{quote}
If we truly sought what is most universal in our lives, we could go no further than the fact that “a child can only issue from a father and mother, that is to say a man and a woman.” We ignore this “fundamental value” only at our own and society’s peril, Agacinsky warns. Most alarming, in her eyes, is the burgeoning market in surrogate mothers, women engaged in what she calls “a commerce in human beings.”
\end{quote}

\textit{Id.}

\textsuperscript{131} Leiderman (the biological and gestational mother of a son and a daughter) and Botoero (her partner) are litigating the matter. See Juan Forero, \textit{Colombia Same-Sex Case Could Have Regional Impact}, WASH. POST, Aug. 12, 2012, at A10 (highlighting the legal victories homosexual parenting communities have achieved in socially conservative Latin America and discussing the women’s desire for recognition).


\textsuperscript{133} United States v. Windsor, 133 S. Ct. 2675 (2013) (considering the constitutionality of the federal Defense of Marriage Act’s definition of marriage as being between one man and one woman); Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (considering the constitutional merits of California’s voter-approved referendum, Proposition 8, which defined marriage as between one man and one woman). For an academic approach to each, see Brief for Amici Curiae the Coalition of African American Pastors USA et al. in Support of Petitioners and Supporting Reversal, Hollingsworth, 133 S. Ct. 2652 (No. 12-144), http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-144_pet_reversal_caapusa-etal.authcheckdam.pdf; see also Brief for Amici Curiae Law Professors in Support of Respondent Bipartisan Legal Advisory Group of the United States House of Representatives Addressing the Merits and Supporting Reversal, Windsor, 133 S. Ct. 2675 (No. 12-307), http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-307_resp_amcu_merits_rev_lp-etal.authcheckdam.pdf.
parenting choices and children, but rather rights recognition for the adults.\textsuperscript{134} Others suggest that same-sex marriage has restricted parental rights and human rights in Canada, now ten years since making same-sex marriage the national law.\textsuperscript{135}

A study of self-selected participants on the well-being of children with polyamorous parents in group marriages, or “consensual non-monogamy,” revealed the benefits and drawbacks of those contexts to children.\textsuperscript{136} Benefits to the children included more individualized time with multiple parental figures, less time in day care due to that benefit, and a greater diversity of interests available from multiple adult figures to help children “foster a wider variety of hobbies and skills.”\textsuperscript{137} Drawbacks for children to polyamorous households included the fluidity of adult attachments in and out of their lives.\textsuperscript{138} Regardless of family structure, the United States outranks all other Western nations in terms of relationship instability,\textsuperscript{139} giving children grave insecurity issues that negatively impact their well-being.\textsuperscript{140} Other voices argue that children do not necessarily need a mother and a father, but what matters most is the family process, rather than the

\textsuperscript{134} Windsor, 133 S. Ct. at 2675; Hollingsworth, 133 S. Ct. at 2660.

\textsuperscript{135} See, e.g., Bradley Miller, Same-Sex Marriage Ten Years On: Lessons from Canada, PUB. DISCOURSE (Nov. 5, 2012), http://www.thepublicdiscourse.com/2012/11/6758/ (regarding the reality that opposition to same-sex marriage has created a new orthodoxy that limits freedom of expression as a human right, and discussing the limited parental rights in public education resulting from the institutionalization of same-sex marriage in curriculum, which does not allow a parent to object to that information as not being the best education for his or her children).

\textsuperscript{136} Bella DePaulo, Is Polyamory Bad for the Children?: The Benefits and Drawbacks of Polyamory on Kids, PSYCHOL. TODAY (Jan. 8, 2013), http://www.psychologytoday.com/blog/living-single/201301/is-polyamory-bad-the-children.

\textsuperscript{137} Id.

\textsuperscript{138} Id. (citing Terri D. Conley et al., A Critical Examination of Popular Assumptions About the Benefits and Outcomes of Monogamous Relationships, 17 PERSONALITY & SOC. PSYCHOL. REV. 124, 130–31 (2012)).

\textsuperscript{139} Id. (citing Andrew J. Cherlin, The Marriage-Go-Round 19 (2009) (noting that family life in the United States involves more transitions than anywhere else—from marriage to divorce and lone parents to repartnering, as well as shorter cohabiting relationships and more movement in and out of marriages and cohabiting relationship than other nations)).

\textsuperscript{140} Cherlin, supra note 139, at 11 (“[T]he well-being of children of lone parents may be improved not by urging their parents to quickly bring a stepparent into the household but rather by urging them to search longer and more carefully for a partner, or to remain single if they choose.”).
family structure to provide for a child’s well-being. They further argue that family structure does not automatically guarantee a good outcome for children.

Assisted reproduction will enhance same-sex unions by providing the opportunity for family building. One child of assisted reproduction, Alana Newman, opines that some underestimate the impact same-sex marriage progeny will have on fatherlessness, as “same-sex marriage will increase the demand for sperm and egg donors—inherently denying children access to one or both of their natural parents.”

Donor-conception, unlike adoption, is a market where new humans are created to fulfill the demands of the adults that want them. “Commercially conceived” persons are deliberately denied a relationship with one or both of our biological parents. The tragic, primal wound ubiquitous in adoption literature is woven into every commercially conceived person’s life story.

Newman goes so far as to argue that being raised by one’s biological parents is not only ideal according to social science but, according to the United Nations Convention on the Rights of the Child, a human right.

Professor Helen Alvaré suggests that attempts to redefine marriage and parenting in the twentieth century, from divorce, to marriage expansion, to assisted reproduction, have essentially minimized children’s needs.

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142 Id.
143 Newman, supra note 19 (questioning whether “gay parenthood” can ever be in the best interests of children).
144 Id.
145 Id. (“My biggest fear is that the redefinition of marriage to include same-sex couples will strip children of the right to be raised by their natural parents, because law and culture will demand that we celebrate all the means by which same-sex couples become parents.”). This culture that Newman speaks of is already manifesting itself, according to reports that male couples entering marriage experience a sense of validity or pressure in questions regarding their plans for parenthood. See, e.g., Rachel L. Swarns, Male Couples Face Pressure to Fill Cradles, N.Y. TIMES, Aug. 10, 2012, at A1 (discussing the parenthood prospects for homosexual couples).
showing a greater interest in adult concerns over divorce, policy makers had little
discussion on children’s interests in an intact family at the time of 
divorce reform.\textsuperscript{147} She further suggests that children’s interests have been
neglected in assisted reproductive technologies,\textsuperscript{148} and that it appears, once
again, adults are first in arguments for marriage expansion and same-sex
parenting.\textsuperscript{149} Marriage matters for children.

Fathering, mothering, and marriage all appear to jointly provide for the
best interests of children from a social perspective according to solid
sociological research. This research is considerable and significant. “Just
as it did in earlier cultures, the marital family provides the basis for a
settled pattern of reproduction and education that a large, modern,
democratic society still surely needs.”\textsuperscript{150} Looking to the law on what is in
the best interests of a child is necessary to discern whether there are
statutory mandates to consider a mom and dad in determining the best
interests of the child.

III. THE LAW AND SCIENCE OF THE BEST INTERESTS OF THE CHILD

The best interests of the child doctrine is the legal standard by which
all judicial decisions regarding children must be made, and it is codified in
some statutory form in all fifty states of the United States.\textsuperscript{151} This
standard, “so central to American family law, is of critical
importance, . . . [yet it is] surrounded by a muddled legal haze of judicial
confusion over just how to determine what ‘the best’ [for any child] really
is.”\textsuperscript{152} Uniquely American in its development, its adoption by the United

\textsuperscript{147} Id. at 143–44 (noting that there appeared to be a “will” that divorce would benefit
children).

\textsuperscript{148} Id. at 158.

\textsuperscript{149} See id. at 171 (noting same-sex marriage case law has dismissed states’ asserted
interests in maintaining the link between marriage, procreation, and childrearing—without
allowing legislatures to explore fully the ultimate effects on children and families of those
decisions).

\textsuperscript{150} Marriage and the Public Good: Ten Principles, WITHERSPOON INST. 4 (Aug. 2008),
principles to summarize the value of married life and the families built upon marriage and
why society should support marriage as an endeavor for the common good).

\textsuperscript{151} Lynne Marie Kohm, Tracing the Foundations of the Best Interest of the Child

\textsuperscript{152} Id. at 337. Some disagree that the best interests standard should be applied to
children not yet in existence. See I. Glenn Cohen, Beyond Best Interests, 96 MINN. L. REV.
(continued)
Nations has resulted in an American legacy of global family law.\textsuperscript{153} Though the standard is most often used in custody and visitation decisions, it is also used in adoption decisions\textsuperscript{154} and is critical to an understanding of the parental requirements that fulfill what is in the best interests of a child.

\textit{A. Comparative Summary of Best Interests Factors}

All fifty states have adopted some form of the best interests of the child standard.\textsuperscript{155} While this standard may seem amorphous, a study of the statutory language for each state will reveal either codified factors or common law factors that a court may take into consideration when determining the best interests of the child. As further guidance for courts, many states have language similar to California, which states:

\begin{quote}
The Legislature finds and declares that it is the public policy of this state to assure that children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy . . . .\textsuperscript{156}
\end{quote}

In addition to public policy supporting continuing contact with both parents, father and mother, many states, like Arizona, cite one parent’s commitment to maintaining continuing contact between the child and the other parent as a factor in determining best interests of the child.\textsuperscript{157} Arizona’s best interest factor calls for a judicial analysis of “[w]hich parent is more likely to allow the child frequent and meaningful continuing contact with the other parent.”\textsuperscript{158} These public policy decisions, as well as specific factors that encourage continuing contact between a child and both

\begin{footnotes}
\footnotetext[153]{Kohm, \textit{supra} note 151, at 339, 351.}
\footnotetext[154]{The best interests of the child are also rooted in American adoption law jurisprudence. \textit{See id.} at 347–48.}
\footnotetext[155]{Joshua K. Baker & William C. Duncan, \textit{Marital Preferences in Adoption Law: A 50 State Review}, \textsc{iMAPP.Org} 1 (2005), \url{http://www.marriagedebate.com/pdfs/iMAPPMarriage.adoption.pdf}.}
\footnotetext[156]{\textsc{Cal. Fam. Code} § 3020(b) (2004).}
\footnotetext[158]{\textit{Id.}}
\end{footnotes}
the child’s mother and father, are important legislative recognition that a child does best with a relationship with both parents.

Gender is not an acceptable standard by which a court may award custody, as Delaware’s code typifies:

The court shall not presume that a parent, because of his or her sex, is better qualified than the other parent to act as joint or sole legal custodian for a child or as the child’s primary residential parent, nor shall it consider conduct of a proposed sole or joint custodian or primary residential parent that does not affect his or her relationship with the child.159

Likewise, gender bias in awarding custody is not favored.160 States no longer adhere to the tender years doctrine that this statutory language is meant to discourage.161 The out-of-favor tender years doctrine, however, is not the same as a court recognizing the importance of both a mother and father in awarding custody.

Case law reveals how the best interests of a child are applied to actual facts, but it also reveals how, too often, parental interests take priority over the child’s interests. When states start to tinker with their laws of parentage, the best interests of the child are affected. Consider the California case in which three individuals were presumed to be parents with legal obligations to the child—the biological mother’s ex-wife was found to be the child’s presumed mother, the biological father was found to be the child’s presumed father, and the child was placed in the care of the maternal grandparents.162 The trial court determined that the child, M.C., had three parents because she was conceived as a result of a premarital relationship between one of the women and the father (who asserted his parental responsibility), but was born during the later marriage of the two women who separated under an abusive relationship thereafter.163 An appellate court held that the biological mother was clearly a parent, the

160 Id.
161 See Kohm, supra note 151, at 368–69. The lack of authority for the tender years doctrine also does not mean judges have in their minds that a younger child needs a particular parent; this example highlights the conflict inherent within judicial discretion and application of best interests standards. See id. at 370–71.
162 In re M.C., 123 Cal. Rptr. 3d 856, 866 (2011).
163 See id. at 861. The abuse occurred between the two women and between the man and the women. Id. at 861–62. The child was placed in a shelter. Id. at 862.
biological mother’s ex-wife satisfied the statutory requirements to be a presumed mother, and the biological father was a quasi-presumed father, but the trial court was required to reconcile competing presumptions of parenthood to avoid the result of three parents for the child.\textsuperscript{164} After lengthy discussion over California’s statutory parental presumptions, the “need to recognize and accommodate novel parenting relationships,” the “complex practical, political and social matters,” and a complicated pattern of “human relations and changing familiar patterns,”\textsuperscript{165} the court determined that the matter really concerned which parent would be best for the child once it was determined who had legal status as a parent.\textsuperscript{166} Despite how much any state or court might wish to provide for novel parental relationships, the appellate court ruled there was no “‘family relationship’ to preserve here,”\textsuperscript{167} and the court remanded accordingly.\textsuperscript{168}

Only in a partially concurring and dissenting opinion did the tribunal recognize that parental separation (of M.C. from her father) and “continuing delays do not benefit” the child.\textsuperscript{169} Otherwise, the court did not discuss other factors of what was in the best interests of M.C. Rather, the rights of those asserting a parentage interest took center stage over what would have been best for the child.\textsuperscript{170}

This focus on adults rather than on children is not uncommon despite the fact that children’s welfare is at the center of the drama. The Kansas Supreme Court recently ruled that a coparenting agreement between a biological and nonbiological mother afforded parentage rights to both women—one as biological and the other as presumptive—and awarded the couple joint legal custody.\textsuperscript{171} The court called the children “third party beneficiaries” to the agreement and stated: “They would have a reliance

\textsuperscript{164} Id. at 871–73, 876. Although the California Supreme Court has yet to decide “whether there exists an overriding legislative policy limiting a child to two parents . . . [t]o date, the [California] Supreme Court has rejected the concept of dual paternity or maternity where such recognition would result in three parents . . . .” Id. at 870.

\textsuperscript{165} Id. at 869–70.

\textsuperscript{166} Id. at 876. The court found that the biological mother “has never been capable of providing her daughter a stable home[,] . . . [t]he presumed mother likely developed a superficial attachment, at best, to [the child,] . . . .” and the presumed father seemed the most stable. Id. at 870–71.

\textsuperscript{167} Id. at 871.

\textsuperscript{168} Id. at 878.

\textsuperscript{169} Id. at 880 (Rothschild, J., concurring in part and dissenting in part).

\textsuperscript{170} Id. at 870–71.

\textsuperscript{171} Frazier v. Goudschaal, 295 P.3d 542, 558 (Kan. 2013).
interest in maintaining the inherent benefits of having two parents, and severing an attachment relationship formed under that contract would not only risk emotional and psychological harm . . . but also void the benefits to the children that prompted the agreement in the first instance.”\textsuperscript{172} The court in that case began with a best interests analysis to determine parentage, though it remanded the case to determine what the best interests of the children actually were.\textsuperscript{173} In direct contrast to that Kansas decision, a Nevada court recently considered outright the best interests of the child as central to a lesbian parental rights case over a coparenting agreement in assisted reproduction when the two women are no longer in a relationship together.\textsuperscript{174} Before the Nevada Supreme Court heard the case, the respondent argued, in a brief to the court, that “[t]here is no provision in Nevada law for same-sex co-parenting agreements, especially for unmarried persons or persons who have not entered into valid domestic partnership arrangements,” finding that a surrogate parent partner had no parental rights.\textsuperscript{175} The trial court did not seem to consider a best interests analysis, but instead based its ruling purely on statutory parentage rules.\textsuperscript{176}

States that have moved to a de facto parent model to allow parental rights for third parties without a biological tie to a child in custody and visitation petitions are numerous, and they also do so without a best interest analysis.\textsuperscript{177} However, adoption itself is statutorily based on requiring adoptive adults to meet codified parental requirements, which is then followed by an analysis of the best interests of the child.\textsuperscript{178} Throughout the United States

\textsuperscript{172} Id. at 557.
\textsuperscript{173} Id.; see also Cynthia Miley, Kansas High Court Rules Non-Biological Same-Sex Parent Can Have Parental Rights, JURIST (Feb. 24, 2013, 1:54 PM), http://jurist.org/paper chase/2013/02/kansas-high-court-rules-non-biological-same-sex-parent-can-have-parental-rights.php.
\textsuperscript{175} Respondent’s Answering Brief, St. Mary, 309 P.3d 1027 (No. 58315), 2012 WL 9298061, at *10.
\textsuperscript{176} Id.
\textsuperscript{178} See Kohm, supra note 151, at 363 (discussing the common law origins of the best interests of the child standard); see also WALTER WADLINGTON & RAYMOND C. O’BRIEN, FAMILY LAW IN PERSPECTIVE 198 (2001) (discussing the statutory origins of adoption law).
today, adoption law is generally child-centered, rather than adult-centered, in statutory mandates; but, because these codes are ambiguous as to whether same-sex parents can adopt, the decision is left to judicial discretion. Case law has worked a unique jurisprudence in some jurisdictions to consider the child’s best interests in having two parents over other parental qualifications that might be in a child’s best interest, including a consideration of the gender of the adoptive parents. The Uniform Adoption Act of 1994 contains provisions that allow for any person to adopt, regardless of sexual orientation, and thereby, ostensibly, regardless of gender. These applications of law have effectively disregarded whether a child’s best interests would be best served by having a mother and a father, effectively working to deprive a child of a father or a mother. On the other hand, a handful of states have statutory prohibitions on adoption of children by same-sex couples, apparently designed to protect a child’s best interests, based on a strict application of the state adoption statute. The statistics on adoption indicate that married parents adopt nearly 65% of children adopted with state agency involvement. The number of single parents and cohabitating couples adopting children, however, is growing at a faster rate than the number of married couples adopting. Whether the facts and codes could work to intentionally deprive a child of a father or a mother, and whether that is in the child’s best interests, has not received much judicial attention.

B. Pediatric Medicine

Practitioners of pediatric medicine seem to be in dispute over whether children need a father and a mother. In a 2002 study, the American

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179 See WADLINGTON & O’BRIEN, supra note 178, at 198.
182 Id. at 251–52.
183 Id. at 258.
185 Id.
Academy of Pediatrics recommended that pediatricians advocate for initiatives that establish permanency through coparent and second-parent adoptions for children of same-sex partners. The academy also offered strong support for same-sex parenting in *Windsor v. United States*, but without any clear discussion of the best interests of children.

Conversely, the American College of Pediatricians (a group of some 200 dissenting physicians who broke away from the American Academy of Pediatrics, in part over the larger group’s support for extending the status of legal parent to same-sex partners) asserts, in opposition, that the availability of both a mother and a father for a child is irreplaceable for that child’s development. The group of children’s doctors filed an amicus brief arguing that the trial court judge was “mistaken to so cavalierly discount the child-related interests served by marriage that amply justify the definition of marriage retained by DOMA for purposes of federal law.” These pediatricians are concerned that the clear medical and social scientific evidence that revealed a need for a parent of each gender is being ignored to the detriment of children. “There is also important evidence suggesting children derive substantial benefits from the unique contributions of both men and women, mothers and fathers, as opposed to just any two adults.” The doctors assert, as their first argument, a strong maxim: “Existing research on child outcomes for children raised by same-sex couples as compared to married husband-wife couples is significantly


187 *Windsor*, 699 F.3d 169, 201 n.6 (2d Cir. 2012) (Straub, J., dissenting).

188 Brief of the American Psychological Association et al. as Amici Curiae in Support of Plaintiff-Appellee and in Support of Affirmance, *Windsor*, 699 F.3d 169 (Nos. 12-2335-cv(L), 12-2435(Con)).


190 Brief of Amicus Curiae, American College of Pediatricians, in Support of Intervenor-Appellant Bipartisan Legal Advisory Group of the United States House of Representatives at 3, *Windsor*, 699 F.3d 169 (2d Cir. 2012) (Nos. 12-2335-cv(L), 12-2435(Con)).

191 *Id.*

192 *Id.*

193 *Id.*
limited and actually suggests differences that do not bode well for children.”

The amicus brief was quick to state that none of this is to say that same-sex couples are not capable of being good parents. The question for them, however, seems not to be “who can be a good parent?”, but “what is in the best interests of a child?” Medical professionals, at least in terms of the evidence cited in amicus briefs submitted in the Windsor case, have differences of opinion on the matter.

Other medical and psychological research seems to indicate that father absence for girls in their first five years of life is significant, in that girls from father-absent homes tend to experience early puberty, while good or bad father interaction works to delay puberty in girls. This factor becomes significant because early sexual maturation leads to earlier sexual activity and reproduction and can create major life direction issues for girls.

C. A Review of the Social Science Research

Social science and psychological research on gender difference in parenting reveals some critical factors in child development that point to unique parenting contributions of both men and women. Social science research is generally provisional in its outcomes, rather than possessed with great certainty. There is, however, important evidence suggesting that children derive substantial and different benefits from a mother than

194 Id. at 4.
195 Brief of American College of Pediatricians, supra note 190, at 4.
196 Compare id. at 3 (“The court . . . was mistaken to . . . discount the child-related interests [of] marriage . . . [in] DOMA . . . . [C]hildren derive substantial benefits from the unique contributions of both men and women, mothers and fathers, as opposed to just any two adults.”), with Brief of the American Psychological Association, supra note 188, at 12–14 (discussing factors associated with healthy adjustment among children and indicating that those factors can be present in same-sex and opposite-sex homes).
198 Id. at 947.
199 See ANOL BHATTACHERJEE, SOCIAL SCIENCE RESEARCH: PRINCIPLES, METHODS & PRACTICES 23 (2d ed. 2012), available at http://scholarecommons.usf.edu/cgi/viewcontent.cgi?article=1002&context=oa_textbooks (noting that a final research report should contain the theories, constructs, measures, research, and sampling used in that research because, for example, social science research outcomes are uncertain and depend on many factors).
they do from a father, and from a father than they do from a mother, which deserves review.

“[E]mpirical literature on [children] suggests that the two sexes bring different talents to the parenting enterprise . . . .” For example, fathers are more likely than mothers to allow children to explore and take risks in play because fathers play with kids, while also supervising their kids’ play rather than intervening. Mothers play with their children differently, emphasizing interaction, joint problem solving, and predictability. While mothers usually help their children develop empathy and language and communication skills better than fathers, fathers help children develop their own sense of independence from the family by imparting to them his trust and a sense that the child can be relied upon. Mothers discipline their children with more frequency, but also with greater flexibility than do fathers. When fathers provide discipline, however, they do so with less frequency, but greater predictability, and children seem more likely to comply with fathers’ requests. Moreover, a father seems to have the greater impact on the delinquency and sexual behavior of children than does a mother. Boys who grew up without

200 Marriage and the Public Good, supra note 150, at 8.
204 ROSS D. PARKE, FATHERHOOD 7 (1996).
206 MACCOBY, supra note 202, at 273.
208 MACCOBY, supra note 202, at 275.
fathers seemed to have difficulties with sex-role and gender identity
development, school performance, psychosocial adjustment, and even
aggression control.\footnote{Michael E. Lamb & Catherine S. Tamis-Lemonda, The Role of the Father: An
Introduction, in The Role of the Father in Child Development 1, 6–7 (Michael E. Lamb
ed., 4th ed. 2004).} One study found that children in father-absent
families perceived themselves to be less cognitively competent and less
physically competent than children in father-present families.\footnote{Susan Golombok et al., Children Raised in Fatherless Families from Infancy:
Family Relationships and the Socioemotional Development of Children of Lesbian and
Single Heterosexual Mothers, 38 J. Child Psychol. & Psychiatry 783, 788 (1997).} Clearly,
children benefit from a relationship with a father and a mother.

The scholarship and testimony of Dr. Michael Lamb, a Cambridge
University developmental psychologist, have been somewhat inconsistent.
On one hand, he has asserted that fathers make a tremendous difference in
the lives of their children.\footnote{See Lamb & Tamis-Lemonda, supra note 210, at 6–7 (discussing the developmental
impact a father has on his child).} Dr. Lamb has stated that men and women are
not completely interchangeable with respect to parenting skill and abilities
because the data suggests that “the differences between maternal and
paternal behavior are more strongly related to either the parents’ biological
gender or sex roles than to either their degree of involvement in infant care
or their attitudes regarding the desirability of parental involvement in
infant care.”\footnote{Michael E. Lamb et al., Effect of Gender and Caretaking Role on Parent-Infant
Interaction, in The Development of Attachment and Affiliative Systems 109, 117
(Robert N. Emde & Robert J. Harmon eds., 1982).} Currently, however, as a proponent of same-sex marriage,
Dr. Lamb has also recently asserted that children of same-sex couples are
just as well adjusted as children with two heterosexual parents.\footnote{Maura Dolan, Children Thrive Equally with Same-Sex, Heterosexual Parents,
testified in federal court in Perry v. Hollingsworth,\footnote{704 F. Supp. 2d 921 (N.D. Cal. 2010).} the battle over
California’s Proposition 8 that defined marriage as between one man and
one woman,\footnote{Id. at 927.} citing studies that show that same-sex parents have very
much the same relationship with their children as do heterosexual
Lamb’s testimony concluded with a statement that studies indicate that children are better off and more properly adjusted when they have two parents actively involved in their lives. Adhering to both conclusions seems incongruent.

Some of this incongruity may be due to methodological shortcomings in the analyzed research, as discussed earlier, or political pressure. The politics involved in marriage and child development are serious and can entail potential censure and serious reproach. Some argue that “logical, secular argument[s] against same-sex parenting based on experience, broad research, and international law” are met with disdain when “[b]oth left and right are allied in a complete blackout of dissent from LGBT orthodoxy.” The politics of this issue may work to the detriment of children when they are being deprived of fathers or mothers in the future. Furthermore, social science research is validly performed when using large, random, general population samples. Much of the research on same-sex parenting contains methodological shortcomings due to factors such as the use of self-selected samples, which analyze participants

217 Dolan, supra note 214. In that testimony, Lamb did note that children of same-sex partners are more likely to be teased about their parents, but also indicated that studies show that they are no more likely to be teased than children with heterosexual parents. Id.
218 Id.
220 Robert Oscar Lopez, Four Tiers of Failure: How the LGBT Lobby Dominates, AM. THINKER (Mar. 1, 2013), http://www.americanthinker.com/2013/03/m-four_tiers_of_failure _how_the_lgbt_lobby_dominates.html (discussing how the academy, media, two-party American political system, and judiciary have worked together to deny proper information on what is in the best interests of children regarding gay parenting by remaining silent on “children . . . being deprived of fathers or mothers in the future”).
221 Id. (pointing out that, by being silent on “children . . . being deprived of fathers or mothers in the future,” the media, academy, two-party system and judiciary are almost complicit in this deprivation to children).
who have a staked interest in the study’s outcome, the use of nonprobability samples, and the use of convenience samples. Claims about any population based on a group that is not necessarily representative of it will be distorted, particularly when the sample is less diverse than would be a representative sample. While researchers themselves commonly note these important limitations, those facts are often entirely lost in the translation and transmission of findings by the media to the public.

The most current research to date on children raised by same-sex couples assesses outcomes using a large, random, national sample of adult children. Statistically significant differences were reported by children whose mothers had been in same-sex relationships, revealing greater instability for the child due to certain factors such as cohabitation, receipt of welfare while growing up, current receipt of public

223 Regnerus, supra note 94, at 753 (discussing sampling concerns in previous surveys).
224 See, e.g., AMANDA K. BAUMLE ET AL., SAME-SEX PARTNERS: THE DEMOGRAPHY OF SEXUAL ORIENTATION (2009) (providing a study that used convenience samples of lesbian parents with higher levels of education than most lesbians in the general population).
225 Regnerus, supra note 94, at 753. This study gives a thorough review of past research findings, as well as methodological shortcomings, and traces how studies have worked with methodological flaws to show that lesbian parenting is better than the intact marital family. See id. at 752–54.

Suffice it to say that the pace at which the overall academic discourse surrounding gay and lesbian parents’ comparative competence has shifted—from slightly-less adept to virtually identical to more adept—is notable, and rapid. . . . This ought to give social scientists studying gay parenting outcomes pause, especially in light of concerns noted above about small sample sizes and the absence of a comparable recent, documented improvement in outcomes from youth in adopted families and stepfamilies.

See id. at 754–55.

226 See id. at 755 (using a large random national sample of 3,000 adult children respondents, 175 of whom were raised by a mother who had been in a same-sex relationship and 73 by a father who had been in a same-sex relationship). This study was most unique because it surveyed the adult children of same-sex identified parents, rather than the parents themselves. Id.
227 Id. at 761 tbl.2. This outcome was experienced by 9% of children from intact biological families and by 24% of children of lesbian mothers. Id.
228 Id. Seventeen percent of children from intact biological families received welfare, compared with 69% of the children of lesbian mothers. Id.
assistance, current unemployment, and negative sexual experiences. Other data indicated that children with mothers who had been in same-sex relationships had significantly greater experience with marijuana use, smoking, arrests, and numerous sexual partners than those children with married biological parents. That study, however, admitted that it “cannot answer political questions about same-sex relationships and their legal legitimacy.”

Another recent study revealed poorer math assessment by children raised by same-sex couples. Though instability is never in a child’s best interests, this difference was insignificant when instability in household structure was removed. A 2011 study found a higher incidence of alcohol and marijuana use in children of same-sex parents and higher use of hallucinogen use by boys from same-sex households. A 2010 study found adolescent girls raised by female couples “were significantly more likely to have had sexual contact with other girls, more likely to have used

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229 Id. Ten percent of children from intact biological families received public assistance, and 38% of children raised by lesbian mothers received public assistance. Id.

230 Id. Eight percent of children from intact biological families were currently unemployed, while 28% of children of lesbian mothers were currently unemployed. Id.

231 See id. Two percent of children from intact biological families reported having been touched sexually by a parent or other adult, compared with 23% of children of lesbian mothers; 8% of children from intact biological families reported being forced to have sex against their will, while 31% of children of lesbian mothers reported being forced to have sex against their will. Id.

232 Id. at 762 tbl.4. Another much earlier study found that women with lesbian mothers were more likely to be involved in promiscuous sex before marriage. See FIONA L. TASKER & SUSAN GOLOMBOK, A LESBIAN FAMILY: EFFECTS ON CHILD DEVELOPMENT 133 (1997).

233 Regnerus, supra note 94, at 755. However, the study also stated:

Nevertheless, social science is a resource that offers insight to political and legal decision-makers, and there have been enough competing claims about “what the data says” about the children of same-sex partners—including legal depositions of social scientists in important cases—that a study with the methodological strengths of this one deserves scholarly attention and scrutiny.

Id.

234 Daniel Potter, Same-Sex Parent Families and Children’s Academic Achievement, 74 J. MARRIAGE & FAM. 556, 564–65 (2012).

235 See id. at 565.

emergency contraception, and less likely to have used other forms of contraception” than girls raised in dual-gender households.237

There are studies, by contrast, on children raised by same-sex parents that have indicated no significant differences,238 and there are studies that proclaim children do best when raised by two biological parents, but the latter are not well supported by data and are more focused on fulfilling policy objectives.239 The influential 2010 study by Biblarz and Stacey critiqued studies that have found heterosexual parenting to be best for children and went a step further than saying there were no differences in outcomes for children of same-sex parents.240 Their findings essentially demonstrate that strengths typically associated with married mother-father families appear to the same extent in families with two mothers, and potentially with those with two fathers, arguing that men and women step into stereotypical “father” or “mother” roles when family structure requires it.241 By the completion of their work, Biblarz and Stacey argued that their research appeared to prove that lesbian parenting was better for children.242

238 See, e.g., Jennifer L. Wainright et al., Psychosocial Adjustment, School Outcomes, and Romantic Relationships of Adolescents with Same-Sex Parents, 75 CHILD DEV. 1886, 1893 (2004) (showing that same-sex families show no notable differences compared to biological families); see also Michael J. Rosenfeld, Nontraditional Families and Childhood Progress Through School, 47 DEMOGRAPHY 755, 770–72 (2010) (showing that once socioeconomic status is controlled in the study, there is no statistically significant difference in progress through school between children of same-sex couples compared with heterosexual married couples, and giving policy arguments for same-sex parenting).
239 See, e.g., Moore, supra note 104, at 1–2, 5–7 (showing that the general assertion that two biological parents is best for children, and largely criticizing a lack of government strategy to promote healthy family structure to promote child well-being).
240 Biblarz, supra note 8, at 5–6, 16–17. It should be noted that this study begins with a fairly political overview of the politics and case law against same-sex parents. See id. at 3–4.
241 See id. at 10–13 (discussing findings distinguished by when two women parent and when two men parent).
242 See id. at 8 tbl.1 (showing that child outcomes were better for children with lesbian coparents); id. at 11 (detailing the many instances in which two mothers are better than one). “Gender seemed to predict successful, involved parenting better than marriage or genetic parentage did.” Id. In contrast, however, the authors noted that “[c]omparable research on intentional gay fatherhood, on the other hand, has scarcely commenced.” Id. at 10. This research denied any substantial problem of fatherlessness. Id. at 13–14. “Our (continued)
When researching whether sexual orientation of a parent matters to a child’s healthy development, academic scholars, including Biblarz and Stacey, admit the high political stakes in such a discussion and suggest that those who are “sympathetic to lesbigay parenting seem hesitant to theorize,” tending to downplay the significance of findings of differences.243

Of fifty-nine studies referenced in a 2005 American Psychological Association report, however, not one compares a large, random sample of lesbian or gay parents and their children with a large, random, representative sample of married parents and their children.244 Studies of insufficient sample size, relying on volunteers interested in the outcome of the study, or using other self-selected samples that purport to show no difference between children raised by same-sex parents and those raised by married mothers and fathers, are significantly flawed.245 Notably, there is a near total absence of studies on children raised by two men rather than two women.246 Yet, there was one study that focused on gay fathers, which found their adult daughters were less able to trust others, were significantly less comfortable with closeness and intimacy, and experienced more anxiety in relationships than women with heterosexual fathers.247 Another study in 2006, however, found that children raised by same-sex couples were more likely to become drunk, go on a drinking binge, use marijuana,
engage in sexual behavior while intoxicated, and be involved in delinquent behavior than children raised by opposite-sex couples.248

Social science evidence has limitations, both humanely and theoretically, and outcomes can be multifactored, political, and complex, as the science generally lacks the quality of controlled experimentation—it can be useful, but should be relied upon with great caution.249

D. Equal Protection: For Mom, Dad, or Child?

Equal protection requires that those similarly situated must be treated the same.250 Does rethinking whether a child needs a mother and a father violate equal protection requirements? A recent claim by two mothers of an equal protection violation reveals that adult rights have often taken center stage, pushing to the backdrop a child’s best interests.251 A case in Iowa focused on the parental designations on the death certificate of a stillborn child, finding a violation of equal protection in the removal of the name of one of the lesbian mothers from the document that only provided for designations of “mother” and “father.”252 The child’s death certificate became a fight about the rights of the parents.

Gender-based classifications are generally a violation of the equal protection of the laws.253 Some have previously alleged that denying same-sex parents the right to jointly adopt children may be a violation of

250 U.S. CONST. amend. XIV, § 1.
251 See Alvaré, supra note 146, at 136, 143–44, 158, 171.
252 Buntemeyer v. Iowa Dep’t of Pub. Health, No. CV 9041 (Iowa Dist. Ct. 2012), available at http://www.lambdalegal.org/sites/default/files/buntemeyer_ia_20121217_polk-cty-dct-ct-ruling.pdf. The department argued that its document designations were “based on the biological fact that a woman cannot be a father of a child.” Id. at 3. To do so would result in inaccurate data “for purposes of public health programming, statistics, and research.” Id. The court ruled, however, that the definition of a father does not violate or misinterpret the law regarding “mother” and “father” designations as permissible (but Iowa’s gender-neutral spousal presumption of parentage requires the department to modify its certificate designations) and is not substantially related to an important government interest. Id. at 11, 19.
253 For a good review of the legal history behind this notion, see Cynthia A. McNeely, Lagging Behind the Times: Parenthood, Custody and Gender Bias in the Family Court, 25 FLA. ST. U. L. REV. 891, 923–27 (1998).
their parental rights, while others charged that it might be an equal protection violation of the children’s rights. However, in at least one case, “denying parentage of a minor child to a transsexual male did not violate the minor child’s right to equal protection of the laws.” In another case, an equal protection violation did occur when a law afforded parental rights to a biological father, but denied those rights to a biological mother whose female partner carried and gave birth to the child. Furthermore, equal protection violations are difficult to prove because courts do not generally express that they are making a certain decision based on gender preferences or stereotypes. Nevertheless, “[c]ourt decisions that consider the gender and sexuality of the parents and child have threatening constitutional implications.”

The Supreme Court of the United States has said that laws based on gender stereotypes violate the Equal Protection Clause of the Constitution, unless they can pass intermediate scrutiny. Professor Carlos Ball discusses gendered parenting as a violation of equal protection, arguing that the state shall not perpetuate traditional gender roles generationally or among children. “The idea that women (in this case mothers) are better

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255 See Stewart, supra note 180, at 367–68 (arguing that children of homosexual parents are being treated differently than children of heterosexual parents without valid justification).
258 See McNeely, supra note 253, at 941–42.
259 Christina M. Tenuta, Note, Can You Really Be a Good Role Model to Your Child if You Can’t Braid Her Hair? The Unconstitutionality of Factoring Gender and Sexuality into Custody Determinations, 14 CUNY L. REV. 351, 351 (2011).
260 See Craig v. Boren, 429 U.S. 190, 197, 210 (1976) (holding that a law prohibiting the sale of beer to males under twenty-one, while allowing females to do so if over eighteen, violated equal protection requirements of the Fourteenth Amendment, and ruling that the gender classifications could only survive constitutional scrutiny if they served “important governmental objectives and [were] substantially related to achievement of those objectives”). “In summary, after Craig, the state may not inculcate traditional gender roles for either men or women, unless the sex or gender classification can pass intermediate scrutiny.” Tenuta, supra note 259, at 382; see also United States v. Virginia, 518 U.S. 515 (1996) (holding that a state college cannot restrict students to males only and that laws based on gender stereotypes violate equal protection).
able to provide children with certain benefits and that men (in this case fathers) are better able to provide distinct benefits is exactly the kind of impermissible reliance on traditional gender stereotypes that the Supreme Court . . . has rejected.” Professor Lynn Wardle disagrees, arguing that the loss of dual-gendered parenting may have negative effects on the child’s well-being. An analysis of the child’s best interests should be made within the constitutional framework.

The equal protection concern is rendered clearer, however, in a discussion by Professor Alvaré on the adults-first focus of marriage and parenting in current issues that involve family expansion; she describes the counter-intuitive nature of same-sex marriages, discussing homosexual relationships and how they are fundamentally unlike heterosexual marriages. Diving deeply into her concerns for children not raised in married mother-father families, she illustrates the problem: “Children are the most visible symbol of how homosexual relationships are fundamentally ‘unlike’ heterosexual marriages”; they are not focused on the children themselves, but sought for a means of “adult happiness and community affirmation.” The equal protection concern is wiped away by the natural state of the differences between a family of a mom and a dad and the family that must be contrived for same-sex parents. Being so unalike, they are not similarly situated.

The essence of this equal protection concern regarding children is even more compelling when applied to children. Conspicuously absent from civil rights arguments for same-sex unions is an appreciation for children’s interests. The law encourages marriage to ensure that children are raised as much as possible by both their father and mother. The state privileges marriage not primarily to nurture adults who love each other, but to nurture children who come from that relationship. The best interests of children must be considered in any equal protection argument, as they are the most uniquely situated to feel dissimilar treatment. To deprive some children of a mother or a father is to treat children differently—a clear violation of

262 Id. at 732.
264 Alvaré, supra note 146, at 171 (“[F]or, so long as the public associates marriage with childbearing, same-sex marriage is rendered counterintuitive.”).
265 Id. at 171, 176.
266 See, e.g., Windsor v. United States, 699 F.3d 169, 188 (2d Cir. 2012).
267 Erickson, supra note 92.
equal protection principles.\textsuperscript{268} When children are allowed to have a mother and a father, rather than being intentionally deprived of that possibility, all children are treated the same.

The concerns for children in dual-gendered parenting are reflected in federal policies on child well-being and shed some light on the importance of a child having a mother and, more particularly, a father.

\textit{E. Federal Policy on Mom and Dad}

Strengthening families has become a major federal policy concern, particularly in light of father absence. The federal government has taken an active role in working toward strengthening families through fatherhood. An example of this includes the Promoting Responsible Fatherhood program, a subsidiary of the United States Department of Health and Human Services.\textsuperscript{269} Promoting Responsible Fatherhood has several areas it sees as important to the fatherhood issue.\textsuperscript{270} First, it gives out Responsible Fatherhood Grants.\textsuperscript{271} The Claims Resolution Act of 2010\textsuperscript{272} gives $150 million per year to promote healthy marriage and fatherhood; of that $150 million, $75 million is available for funding programs to foster fatherhood through counseling, mentoring, marriage education, and parenting skills.\textsuperscript{273} Second, Promoting Responsible Fatherhood sees the importance and connection of healthy marriages, effective parenting tools, and economic stability with active fathers.\textsuperscript{274} In this vein, the program also provides the states (because all of family law is state controlled) with assistance in developing programs that assist in visitation, paternity issues, child support collection, and even reunification processes with incarcerated fathers.\textsuperscript{275} The third main component of this federal program is research, evaluation, and program development.\textsuperscript{276} To carry out this component, the federal government partners with many

\begin{itemize}
\item \textsuperscript{268} Id. (noting this argument was made in the French debate on same-sex parenting rights).
\item \textsuperscript{270} See id.
\item \textsuperscript{271} Id.
\item \textsuperscript{273} Promoting Responsible Fatherhood, supra note 269.
\item \textsuperscript{274} Id.
\item \textsuperscript{275} Id.
\item \textsuperscript{276} Id.
\end{itemize}
nonprofit organizations, faith-based organizations, community groups, and state programs.277

As a nation, the federal law and policy of the United States demonstrates that having families made up of both a mother and a father is in the best interests of children, the best interests of society, and, therefore, the common good.278 What this means for the future of the law on parenting and the prospects for rethinking a child’s need for, or interests in, having both a mother and a father is less clear.

IV. WHERE IS PARENTING HEADED? OR DOES A CHILD HAVE A LIBERTY INTEREST IN HAVING A MOTHER AND A FATHER?

Children have interests in the continuing involvement of both parents in children’s lives.279 The Washington Post Magazine recently published an issue dedicated to the question of the future of parenting,280 discussing issues such as shared parenting in child-rearing responsibilities,281 child discipline,282 child time management and video viewing,283 and issues surrounding mothers, fathers, daughters, and sons,284 all highlighting that these matters are on the collective American mind.

A. Children of Assisted Reproductive Techniques

Children resulting from assisted reproductive techniques (ART) are extremely vulnerable,285 having no other party to rely upon to protect their

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277 Id.
278 Id.
283 Molly Knight Raskin, Watching What They Watch, WASH. POST MAG., Jan. 6, 2013, at 17.
284 Amy Joyce, Of Mothers and Daughters, WASH. POST MAG., Jan. 6, 2013, at 19.

Reproductive technology has led to a place that can be extremely frightening for the children who result from ART. Consider the circumstances of two children—each raised by lesbians who conceived by donor insemination—who grew up to be a man and woman (continued)
interests but the parents who put their conception into motion. When that protection is not forthcoming from the child’s parents, the child can be irreparably harmed. Children have no rights as against their parents per se in any of the fifty states or federally, but, one court recently ruled that they do have a liberty interest in knowing their own parents. L.F. v. Breit involved concerns associated with the best interests of a child caught in the middle of her unmarried parents’ assisted reproduction parentage dispute. There, the Supreme Court of Virginia ruled that a child has a liberty interest in knowing her father, as well as her mother, as a child should not be deprived of a parent, her father, when her other parent, her mother, argued that the father was simply a sperm donor rather than an intended parent. In that case, the court saw that a child was being deprived forever of one of her intended parents and ruled that doing so was

who met in college, fell in love, married, had two children, and later decided to find out the identity of their sperm donors. Emily Yoffe, My Wife Is My Sister, SLATE.COM (Feb. 19, 2013, 6:15 AM), http://www.slate.com/articles/life/dear_prudence/2013/02/dear_prudence_my_wife_and_i_came_from_the_same_sperm_donor.html. They found, to their great shock, that their sperm donors were the same man, making them biological half siblings.

[C]ases suggest that the interests of children conceived by means of collaborative reproduction should form a significant part of any analysis of the rights of parents to undertake collaborative reproduction processes. But the effects on children born through collaborative reproduction are, at best, unknown because so few studies have addressed the topic. It is unknown, for example, whether children suffer physical effects from the technological processes of collaborative reproduction or emotional effects of not knowing their biological identities . . . . A growing number of anecdotes about children searching for donor parents indicate feelings of loss as a result of conception from an unknown donor, but again, this is little studied.


Id. at 715–16.

Id. at 723.
certainly not in her best interests. The injustice apparent in this scenario indicates that there is a solid rationale that all children have an interest in knowing their parents and that such interest should be protected by federal constitutional law and state law. This is apparent because the best interests of all children are supported by the opportunity to have both a father and a mother involved in their lives, and it is the duty of the state to protect those interests when parents do not. The Supreme Court of Virginia recognized that children need a mother and a father and should be able to know and have a relationship with both parents, placing the duty to provide accordingly as incumbent on courts.

We reject the notion that children have a purported right or interest in not having a father. To the contrary, Virginia case law makes clear that it is in a child’s best interests to have the support and involvement of both a mother and a father, even if they are unmarried. . . .

Although our analysis in this case rests on [the sperm donor’s] constitutionally protected rights as a parent, we recognize that children also have a liberty interest in establishing relationships with their parents. Consequently, it is incumbent on courts to see that the best interests of a child prevail, particularly when one parent intends to deprive the child of a relationship with the other parent.

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292 McGlone, supra note 291.
293 Id.
294 Breit, 736 S.E.2d at 723 (citation omitted). The court continued by stating that it could not uphold the deprivation of a father to a child:

The preservation of the family, and in particular the parent-child relationship, is an important goal for not only the parents but also government itself. . . . Statutes terminating the legal relationship between [a] parent and child should be interpreted consistently with the governmental objective of preserving, when possible, the parent-child relationship. Here, L.F. faces a potential loss of liberty in the form of deprivation of a relationship with her biological father, solely because she was conceived through assisted conception by unmarried parents.

(continued)
This case is most significant because it is the first time that any court has recognized a child’s interest in knowing and having a relationship with her parents. It is particularly important because this interest is recognized not in a rights framework, but in a best interests framework. Parents have a duty to protect the best interests of their children, and that includes not depriving them of a parent of the opposing gender. These types of decisions make a tremendous difference in the life of a child—here, restoring a little girl’s relationship to her father, as well as to her mother, thereby constitutionally guaranteeing her both parents.

Another court made a different decision that left little room for the child’s best interests. A recent ruling from the New Jersey Supreme Court upheld an appellate court ruling that an intended mother’s name cannot appear on a birth certificate when the child is delivered by a surrogate mother, and the court urged that the matter be addressed legislatively. Common and legislative responses to issues of parentage that arise when children are born of assisted or artificial reproductive techniques need a framework that protects the best interests of the child. There are major concerns for children of ART, not only from large population groups, as we see occurring over politics in France, but by children of assisted reproduction themselves. Here is one example: "I am the daughter of a sperm donor... I am convinced I am not alone in my struggles being donor-conceived..., but same-sex marriage will increase the demand for Virginia’s marital preference in assisted conception protects an intact family from intervention from third-party strangers, but it was not intended to deprive a child of a responsible, involved parent.

Id. (alteration in original) (citations omitted) (internal quotation marks omitted).

295 Id.
296 Id.
297 Id.
298 See Kate Zernike, Court’s Split Helps Provide Little Clarity on Surrogacy, N.Y. TIMES, Oct. 25, 2012, at A22; see also MaryAnn Spoto, Court: A Woman with No Genetic Connection to Baby Is Not the Mother Unless She Adopts, NJ.COM (Oct. 24, 2012, 10:49 AM), http://www.nj.com/politics/index.ssf/2012/10/court_a_woman_cant_be_consider.html.
299 See Tim R. Schlesinger, Assisted Human Reproduction: Unsolved Issues in Parentage, Child Custody and Support, 61 J. MO. B. 22, 23, 25–26, 28 (2005) (explaining an overview of proposals); see also Cohen, supra note 152, at 1189–90, 1214, 1216 (stating that a best interests analysis is inappropriate to apply in ART because the best interests of the resulting child, or BIRC, is an inappropriate framework for issue resolution).
300 Hinnant, supra note 128, at A11.
sperm and egg donors—inherently denying children access to one or both of their natural parents.” These cases illustrate that children ought not be deprived of the liberty interest they have in knowing and having a relationship with a father and a mother.

Second, in addition to a child’s liberty interest in knowing and having a relationship with both a mother and a father, of fundamental importance to children is their sense of identity. The role of parents extends beyond the love they feel for their child. The Chief Rabbi of France, Gilles Bernheim, has spoken of this in the current debate on parenting in France:

To reduce the parental bond, to its affective and educative aspects is to overlook the fact that the parent-child bond is a psychological vector of fundamental importance for the child’s sense of identity. All the affection in the world will not suffice to produce the basic psychological structures that address the child’s need to know where he comes from. . . .

Father and mother represent a genealogy for the child. The child needs a clear and coherent genealogy in order to find his place as an individual.

To identify a child’s parentage is to situate the child in a generational chain, which in turn guarantees each individual a place in the world in which the person lives; this gives the child a way to know where the child came from. To abandon the father-mother distinction is to reduce parenting to the exercise of certain functions, essentially overlooking “the fact that, even in the case of adopted children,” as Bernheim states, “to be a parent is not only to educate the child but also to recreate lines of paternity

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301 Newman, supra note 19 (discussing her struggles in light of her support of the movement toward ART for same-sex marriage).


304 Id. I had the opportunity to examine this at a previous Wells Conference. See Lynne Marie Kohm, What’s My Place in This World?, 35 CAP. U. L. REV. 563, 565–66 (2007) (discussing the identity concerns for a child of ART).
and maternity.”

Therefore, it is necessary to strongly affirm “that to be a father or a mother is not merely an affective, cultural, or social function; the term ‘parent’ is not neutral; it involves sexual difference.”

These two things—a child’s protected liberty interest in knowing and having a relationship with both a father and a mother and a child’s sense of identity—require that a mother and a father be provided in order to protect the best interests of every child. Because this is not always possible, alternatives deserve exploration.

B. Innovative Resolutions for Best Interests of Children Missing a Mom or a Dad

The dynamics of mother or father presence, or mother or father absence, in a child’s life are unique and significant. When it is not possible for a child to be born into an intact family, having a mother and a father, there may be ways and remedies that can provide for the still-necessary interests of the child nonetheless, if not for the “best” interests of the child.

1. The Father Substitute

The dynamics of father presence or father absence in a child’s life are important. Father absence is generally not in the best interests of

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305 Bernheim, supra note 303.

306 Id. Bernheim examines the difficulty a child has in navigating the several proposed substitute terms for “parent,” which would include “stepparent, co-parent, homo-parent, mother to another, biological parent, legal parent, social parent, [and] second parent.” Id. He also discusses the proposals for France by that nation’s Association of Gay and Lesbian Parents and Future Parents. Id. Bernheim continues his examination of the French proposal by pointing out that there is no “right to a child” held by adults who wish to have one, and he continues by discussing the need for adopted children to have a mother and a father even more than other children so that they may adequately handle the simultaneous traumas inherent in adoption: abandonment and the family’s double identity. Id. His article is thoughtful and insightful without being insensitive to the wishes of parents.

307 A discussion of “a child’s interests” versus “a child’s best interests” might be appropriate here, but others have done so already. See, e.g., Wardle, supra note 263, at 843, 857–58, 860–61 (discussing the difference between what could be “good” enough for a child and what is “best” for a child, and noting the duty of the law not to settle for the former).

308 See H. J. Sants, Genealogical Bewilderment in Children with Substitute Parents, 37 BRITISH J. MED. PSYCHOL. 133, 133, 135–36, 139 (1964) (studying both absence and substitution of father or mother in a child’s life and discussing the child’s related challenges).
children.309 “Fortunately, many men have experienced a relationship with a father who was a strong, firm, reliable and trustworthy and was a protector of their emotional and spiritual lives.”310 One study has shown that large proportions of children in homes lacking the biological father have potentially no significant contact with absent fathers or new father figures.311 Actual contact with a father figure can bridge the gap of father absence, and “traditionally used statistics on father presence or absence may substantially misrepresent the reality of meaningful father or father-figure contact, particularly for black children.”312 Male figures in a role of authority and influence in a child’s life can have a very positive impact on a child and on a child’s capacity for future relationships, including parenting.313

The power of attention and impartation cannot be underestimated. A recent study revealed that fathers are the key to education for children.314 “[W]hat we find lacking in almost every debate about education reform is the role of families—especially fathers—and the support they can and should provide to ensure children’s educational success.”315 A father substitute can help a child succeed by helping with school work, showing up at school or in the classroom, reading to children, or enhancing a child’s educational experience in much needed ways.316

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309 See supra Part III.A.
310 See Knights of Columbus, supra note 5.
311 Mott, supra note 62, at 511.
312 Id. at 514. That author discussed racial distinctions in father absence and potential father figures and noted that “[b]iological (paternal) ties probably are of much greater significance for black children in father-absent households, whereas sociological ties apparently dominate for their white counterparts.” Id.
315 Id.
316 Id. (suggesting that schools need to work to create a more father-friendly environment to improve student success).
2. The Mother Substitute

It is extremely challenging to find a substitute for a child’s missing mother, but maternal care is possible through avenues such as kinship care, foster care, and grandparenting. Attachment theory has garnered a great deal of attention in social data and, though some have argued that attachment therapy is a better way to handle the deprivation of a mother to a child, both emphasize the importance of keeping the best interests of the child as paramount. The notion of mothering has spawned significant feminist legal scholarship that has tended to trumpet not only motherhood, but the possibilities of relational substitutes as well, despite biological and legal frameworks or limitations.

Maternal deprivation is not in the best interests of children, but filling that role properly is nonetheless challenging. Research has


318 See id. at 55; David Pitcher, Placement with Grandparents: The Issues for Grandparents Who Care for Their Grandchildren, 26 ADOPTION & FOSTERING J. 6, 6 (2002) (discussing the challenges of child care for grandparents).


321 See id. at 72; see also Bretherton, supra note 319, at 760.


323 The greatest amount of research on maternal deprivation has been done through the work of John Bowlby. See generally JOHN BOWLBY, WORLD HEALTH ORG., MATERNAL CARE AND MENTAL HEALTH (1952); Bretherton, supra note 319. Others, however, have contrasting opinions and assert that attachment therapy is the better way to handle maternal deprivation. See Wootton, supra note 320, at 63–64 (indicating the effects of maternal deprivation as more de minimis).
suggested that “being a stepparent is more difficult than raising one’s own biological children, especially for stepmothers, and that stepmothers may compete with the child for the father’s time and attention.”

Adolescents in single-father families report the highest level of delinquency, followed by those in father-stepmother and single-mother families.

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. . . [T]he gender of the single parent is significant; adolescents from single-father families are more delinquent than are those from single-mother families. . . . [S]ingle-father families are characterized by somewhat lower levels of direct and indirect parental controls than are single-mother families.

Though perplexing, the need for a mother substitute or maternal figure is clear, significant, and necessary for a child’s best interests when otherwise deprived of a mother.

C. Adoption

Building a family through adoption by married parents provides a child with a mother and a father. Adoption affords the closest remedy to a missing parent(s) by establishing a new framework—one that provides for the best interests of the child without a father or mother—with parents who can fulfill those responsibilities. The work of Professor Cynthia Mabry significantly highlights those objectives and how they fulfill the best interests of a child. Apparent globally, other nations understand the significance of adoption. For example, thousands in Russia expressed outrage over a law that prevented American adoption of Russian children,

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which was instituted in late 2012 by President Vladimir Putin and Russia’s parliament.\textsuperscript{327} The Russian parliament overwhelmingly voted for the law, as “[o]pponents of the adoption ban argue it victimizes children to make a political point.”\textsuperscript{328} Adoption is a valid and viable solution for a child that does not enjoy a relationship with both a mother and a father.

Indeed, wanting what is in the best interests of the child is precisely why many single parents chose adoption. The NFL’s Colin Kaepernick, quarterback for the San Francisco 49ers, was put up for adoption by his birth mother when she knew that his biological father had no interest in supporting him.\textsuperscript{329} Not an easy decision for natural parents, the choice for adoption is done with the best interests of the child in mind. The distinction between mother and father has real implications for a child’s best interests, and nowhere does that become more obvious than the context of adoption. To maintain the primacy of the best interests of the adoptive child “whose natural mother and father are unable or unwilling to fulfill their parental responsibilities,” legislation can be proposed to provide for child welfare in adoption that preferences a mother and a father for a child through marriage.\textsuperscript{330} Adoption is a solution that holds the best interests of the child as supreme.

V. CONCLUSION

Parents significantly affect children. Rethinking whether a child needs a mom and a dad is more of a straightforward task than originally expected. Conflicts and issues that arise when determining the best interests of a child in a number of different parental contexts reveal that rethinking the best interests of a child ultimately requires the opportunity for every child to be raised by two parents of opposite gender, namely, a

\textsuperscript{327} Lynn Berry, Thousands March to Protest Russia’s Adoption Ban, ASSOCIATED PRESS (Jan. 13, 2013), http://bigstory.ap.org/article/thousands-gather-protest-russias-adoption-ban.

\textsuperscript{328} Id.


father and a mother.331 From fatherlessness, to motherlessness, to children of assisted reproduction, dual-gendered parenting holds more weight in an analysis of the best interests of the child.332 Dual-gendered parenting better fosters a child’s best interests because children need role models and caregivers that are male and female.333 Parental rights and equal protection cannot be used to deny a child’s best interests.334 Gender of a parent should always be relevant to a child’s best interests in adoption, in custody, and in parentage. Even federal family policy reveals these factors and supports the position that a child’s best interests are served by having both a mom and a dad.335 When that is not possible, there are innovative solutions for the best interests of children missing one or the other, which include substitute parenting, kinship parenting, and adoption—all of which seek to ensure that a child is never deprived of the opportunity to enjoy a relationship with a father and a mother whenever possible.

A child’s best interests are not always the driving factor in parental decisions—but they are required to be so in the law. Rethinking the best interests of a child requires the creation of a legal duty that finds it imperative to allow a child every opportunity to have one parent of each gender—a mother and a father—whenever possible.

331 See supra Part II.C.
332 See supra Part III.A.
333 See supra Part III.C.
334 See supra Part III.D.
335 See supra Part III.E.